



NON-TIDAL WETLAND COMPENSATION FUND – FISCAL YEAR 2019 –

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Prepared for

The Maryland General Assembly
Annapolis, MD

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**NONTIDAL WETLAND COMPENSATION FUND
ANNUAL REPORT FOR FISCAL YEAR 2019**

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NONTIDAL WETLAND COMPENSATION FUND

REQUIREMENT

Section 5-909 (c) (5) of the Environment Article, Annotated Code of Maryland, states that at the end of the fiscal year, the Maryland Department of the Environment (Department or MDE) shall prepare an annual report on the Nontidal Wetland Compensation Fund (Comp Fund) that includes an accounting of all financial receipts and expenditures to and from the Comp Fund, and shall provide a copy of the report to the General Assembly as provided under §2-1246 of the State Government Article. This report covers Fiscal Year 2019.

FUND USE

The use of the Nontidal Wetland Compensation Fund is established under Section 5-909 (c) (3) and (4) of the Environment Article, Annotated Code of Maryland, which states:

- (3) Funds in the Nontidal Wetland Compensation Fund may be used only for the creation, restoration, or enhancement of nontidal wetlands, including:
 - (i) Acquisition of land;
 - (ii) Acquisition of easements;
 - (iii) Maintenance of mitigation sites;
 - (iv) Purchase of credits in mitigation banks; and
 - (v) Contractual services necessary to accomplish the intent of this paragraph.
- (4) Funds credited and any interest accrued to the Comp Fund:
 - (i) Shall remain available until expended; and
 - (ii) May not be reverted to the General Fund under any other provision of law.

BACKGROUND

Maryland's nontidal wetlands are inland freshwater areas not subject to tidal influence. They typically have water-saturated soils or periodic high groundwater levels and vegetation adapted to wet conditions and periodic flooding. Nontidal wetlands are commonly known as marshes, swamps, bogs, wet meadows, and bottomland forests. There are between 440,000 and 460,000 acres of vegetated nontidal wetlands in Maryland, comprising 7 to 7.4 percent of the State's land mass.

Nontidal wetlands help protect the Chesapeake Bay, the Coastal Bays, and streams by filtering phosphorus, nitrogen and other pollutants from upland runoff. They form natural flood retention areas able to store floodwaters and slowly release them downstream, reducing flood damages. Wetland vegetation helps stabilize streambanks and reduce streambank erosion. Nontidal wetlands provide organic material for the food chain and habitat for fish and wildlife, some of which are endangered. Wetlands are also the exclusive home to many rare plants. They are areas of scenic beauty and provide recreational opportunities for many Marylanders.

Nontidal Wetlands Protection Act

The 1987 Chesapeake Bay Agreement included a commitment to increase the protection of nontidal wetlands. To honor its commitment, Maryland created a special task force to develop a comprehensive wetland protection policy. Due to continued wetland losses and an existing inefficient federal regulatory framework, the task force recommended a new State law. In 1989, the Maryland General Assembly endorsed the task force recommendation by enacting the Nontidal Wetlands Protection Act.

The law was one of the first state laws in the Country to declare a goal of "no net loss" of wetland acreage and function and to strive for a net gain in wetlands over time. Additional legislative goals included:

- Protection of waters of the State;
- Prevention of further degradation and losses of nontidal wetlands due to human activity by regulating all activities that may impact a nontidal wetland;
- Mitigation or compensation for authorized nontidal wetland losses; and
- Expedient project reviews by instituting a coordinated application review process and imposing strict application review deadlines.

Since the beginning of Maryland's regulatory program on January 1, 1991 through June 30, 2019, authorized nontidal wetland losses have averaged approximately 40 acres per year. More importantly, however, Maryland has been able to achieve a net gain in nontidal wetland acreage through compensatory mitigation permit requirements, voluntary efforts of private landowners, and other State initiatives.

Regulatory Program

The Department's wetlands and waterways regulatory program provides State government with an opportunity to promote environmentally sensitive development. Through its permit application review process, MDE attempts to prevent wetland loss by requiring an applicant to evaluate project designs that will avoid wetland impacts. Based on this evaluation of alternatives, if MDE finds that impacts are unavoidable, the applicant is required to utilize the project design that will minimize the wetland impacts, and provide appropriate mitigation for those impacts.

Mitigation, required for all unavoidable impacts that are authorized by MDE, means that the applicant must replace lost wetland acreage, function and value. This is usually accomplished by requiring the creation of new wetlands, restoration of relic wetlands, enhancement of degraded wetlands, or some acceptable combination. The Department may also accept monetary compensation if it is determined that mitigation for nontidal wetland losses is not a feasible alternative. The payment is deposited into the State's Nontidal Wetlands Compensation Fund and used by the State to construct nontidal wetlands throughout Maryland.

Mitigation Program

Maryland achieves its "no net loss" goal through a variety of mechanisms including voluntary efforts of private landowners, State initiatives, and the regulatory program. Success often requires consideration of wetland types and values. In the regulatory process, wetland types and values can

dictate the extent of avoidance and minimization prior to consideration of compensatory mitigation. The regulatory program achieves "no net loss" through two types of mitigation efforts designed to replace lost wetland acreage and function:

- Permittee mitigation requires a permittee to create, restore, or enhance nontidal wetlands. In instances where a permittee demonstrates that it is impractical to mitigate for wetland losses associated with a project, a permittee may be allowed to pay a specified amount into the State Nontidal Wetland Compensation Fund.
- Programmatic mitigation is performed by the State for nontidal wetland losses generally less than 5,000 square feet or for permittees who have paid into the Nontidal Wetland Compensation Fund.

This report summarizes the use of the Nontidal Wetland Compensation Fund for mitigation activities undertaken by MDE during Fiscal Year 2019.

Monitoring Program

The State is constantly striving to improve its mitigation program. Prior to implementation of Maryland's program, failure of mitigation projects was largely due to insufficient monitoring for hydrology, poor design, and the lack of follow-up by regulatory agencies. The State has analyzed these factors to ensure enhanced success of mitigation projects. To address these issues, the State requires the following:

- Monitoring hydrology to determine suitability of site;
- Design review;
- Five (5) years of post-construction monitoring to confirm 85% success rate on vegetative cover, presence of wetland hydrology, and establishment of active hydric soil conditions;
- A surety bond or other financial assurance payable to the State and conditioned upon the successful completion of the mitigation project according to an approved mitigation plan; and
- Long-term protection mechanisms for the site.

The Department completed a comprehensive evaluation of its compensatory mitigation program in 2007. The Department has also expanded a formal assessment protocol to evaluate and document success of mitigation sites, including functional gains. In 2011, the Department updated the Maryland Nontidal Wetland Mitigation Guidance document to clarify policies on wetland mitigation.

Mitigation Banking

Another tool available to offset wetland losses is mitigation banking. Mitigation banking is the restoration, creation or enhancement of wetlands undertaken expressly for the purpose of providing compensation credits for wetland losses from future activities. In 1993, the General Assembly enacted legislation to develop standards and adopt regulations for the establishment and operation of nontidal wetland mitigation banks. During the 2016 legislative session, revisions were made to the mitigation banking section of the State's Nontidal Wetlands statute to further encourage

banking. While there are still only a few mitigation banks in Maryland, the number of proposed and approved mitigation banks has been increasing.

Proposed Regulation Changes

MDE is working to revise the State's nontidal wetland mitigation regulations, including those related to mitigation banking and the in-lieu fee program. These regulation changes are intended to reflect the 2016 mitigation banking statute revisions, provide consistency with the 2008 Federal Compensatory Mitigation Rule, and provide clarity on the use of the Nontidal Wetland Compensation Fund. The Department acknowledges that increases in the in-lieu fee rates will be needed in order to get the in-lieu fee program approved by the U.S. Army Corps of Engineers and encourage mitigation banking; any increases to in-lieu fee rates would be included as part of revisions to the nontidal wetland mitigation regulations. To get feedback on these proposed revisions, MDE has been meeting with stakeholders and the public as part of an outreach effort on the proposed revisions.

FEDERAL COMPENSATORY MITIGATION RULE

On April 10, 2008, the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA) published a new Compensatory Mitigation Rule (Mitigation Rule) clarifying how to provide compensatory mitigation for unavoidable impacts to the nation's wetlands and streams. The premise is that the rule will promote greater consistency, predictability, and ecological success of mitigation projects under the Clean Water Act. According to EPA, the primary goals of the Mitigation Rule are to:

- Implement environmentally effective standards for compensatory mitigation that are based on best available science and incorporate key National Research Council recommendations for improving the success of compensatory mitigation;
- Create a "level playing field" among the three compensatory mitigation mechanisms through equivalent standards and greater accountability, so that providers of timely, high-quality mitigation are preferred, because there is greater assurance that the compensatory mitigation will be successful;
- Increase the efficiency and predictability of the process of proposing compensatory mitigation and approving new mitigation banks and in-lieu fee programs; and
- Enhance public participation in compensatory mitigation decision-making.

The most significant change required by the Mitigation Rule is that projects provided by all three compensation mechanisms (i.e., permittee-responsible compensatory mitigation, mitigation banks, and in-lieu fee mitigation) must have mitigation plans which include the same 12 fundamental components: objectives; site selection criteria; site protection instruments (e.g., conservation easements); baseline information (for impact and compensation sites); credit determination methodology; mitigation work plan; maintenance plan; ecological performance standards; monitoring requirements; long-term management plan; adaptive management plan; and financial assurances. In addition, the Mitigation Rule requires a watershed approach to locating mitigation. The Mitigation Rule also changes the hierarchy of acceptable mitigation projects. The most preferred option is mitigation bank credits, which are usually in place before the activity is permitted. In-lieu fee program credits are second in the preference hierarchy, because they may

involve larger, more ecologically valuable compensatory mitigation projects as compared to permittee-responsible mitigation. Permittee-responsible mitigation is the third option.

The Mitigation Rule became effective on June 9, 2008. According to EPA, the Mitigation Rule revises the requirements for in-lieu fee (ILF) programs in order to address concerns regarding their past performance and equivalency with the standards imposed on mitigation banks and permittee-responsible mitigation. The reforms to improve accountability and performance include:

- An advance planning requirement;
- A cap on the number of advance credits that can be released for sale before an ILF project site is secured and a mitigation plan is approved;
- Improved financial accounting requirements; and
- The same interagency/public review and ecological/administrative requirements as mitigation banks.

While the Mitigation Rule sets strict requirements for all mitigation options, it has additional requirements for mitigation banks and ILF programs. Among other things, an Interagency Review Team (IRT) must review the financial assurances, credit release schedule, service areas, long-term management plan, and reporting information. In-lieu fee programs must include a comprehensive planning framework to be used when selecting mitigation sites. To meet this requirement, MDE utilizes its mitigation prioritization documents and a GIS-based Watershed Resource Registry developed by an interagency workgroup, which included MDE.

The Department's nontidal wetlands ILF Program, which is funded through the Nontidal Wetland Compensation Fund, has been operating since 1991 and is both well-established and successful. Historically, the majority of projects permitted by MDE authorized minor wetland impacts, which required small mitigation projects. The purpose of the ILF Program is to accept monetary payments from permittees with small mitigation requirements so that MDE can construct larger, more environmentally sustainable projects. Since the Mitigation Rule attempts to transform the ILF Program into a mitigation bank, and the State does not currently operate its program as a bank, Maryland has been evaluating its existing ILF Program for compliance with the federal Mitigation Rule.

The IRT, comprised of the USACE, EPA, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the Maryland Department of Natural Resources, continues to evaluate MDE's ILF Program. The results of this review will require MDE to modify its regulations to address a myriad of new federal requirements. Another consequence is that expenditures from the Nontidal Wetlands Compensation Fund have been significantly reduced while MDE revises the ILF Program to meet the requirements of the Mitigation Rule.

In order to get the ILF Program approved under the Mitigation Rule, the Department is required to submit a Draft Prospectus and Final Prospectus (concept plans), followed by a Draft Instrument and Final Instrument, which all are reviewed and approved by the IRT. The Department submitted a Draft Prospectus, followed by the Final Prospectus to the IRT, which was put on public notice in the fall of 2015. The Department also submitted a preliminary Draft Instrument to the IRT, which provides greater detail on the ILF Program's operation, incorporating the IRT comments, in May 2017. The Department received IRT comments on this document. Some of the revisions

proposed to the nontidal wetland mitigation regulations, including the proposed in-lieu fee rates, would significantly affect the ILF Program's operations. Therefore, until the regulation revisions move forward, the Department cannot proceed with revisions to the Draft Instrument. After the ILF Instrument is approved by the IRT, MDE can begin accepting payments for compensatory mitigation projects in accordance with the ILF Instrument, the Mitigation Rule requirements, and the State's revised regulations.

SUMMARY

The Nontidal Wetland Compensation Fund is a special revenue fund, which was created by the action of the 1989 General Assembly. The Compensation Fund began receiving revenue in 1991, when the Nontidal Wetlands Regulatory Program went into effect.

Nontidal Wetland Compensation Fund revenues are derived primarily from contributions made to the Compensation Fund for permitted nontidal wetland losses for which MDE has determined that mitigation is not a feasible alternative for a Permittee.

FISCAL YEAR 2018 PROGRAMMATIC MITIGATION PROJECTS

Memorandum of Understanding with Chesapeake Bay Trust

The Department signed a Memorandum of Understanding (MOU) with Chesapeake Bay Trust (CBT) for \$1,000,000 in December 2013 to develop a Request for Proposal (RFP) to solicit wetland restoration, creation, and enhancement projects. Selected projects will use Nontidal Wetland Compensation Fund revenues to provide wetland mitigation to meet the Department's "no net loss" goal, while also meeting Mitigation Rule requirements. The FY 2014 RFP was advertised in the spring of 2014, but no projects were selected by a peer review team. As a result of this RFP, some worthwhile proposals were submitted to the Department, but the projects exceeded the \$1,000,000 RFP cap. To accommodate the potential for these larger projects, the Department signed another MOU with CBT in FY 2015 for an additional \$800,000 and an MOU in FY 2017 for an additional \$700,000. The Department and CBT advertised revised RFPs in late 2014, late 2015, and early 2017.

The Department awarded funds for two wetland mitigation projects during the FY 2015 RFP: 1) ten acres of wetland restoration on the Beltsville Agricultural Research Center (BARC), within the Anacostia watershed of Prince Georges County; and 2) approximately seventy acres wetland restoration/enhancement within the Nassawango watershed of Wicomico County. Design for both projects occurred in FY 2016. Construction for the Nassawango project ran from FY 2016 through FY 2017. The majority of construction for the BARC site was completed in FY 2017, with the remainder completed in FY 2018. Monitoring was required for two years after completion of construction, with some funding being held until successful completion of monitoring, which should finish in FY 2020. The Department awarded funds for two additional wetland mitigation projects in the FY 2016 RFP, but the landowners for both projects have withdrawn their proposals.

The Department awarded funds in the FY 2017 RFP for two projects that will be constructed in FY 2020: 1) A thirteen acre wetland restoration in the Miles River watershed of Talbot County;

and 2) a ten acre wetland restoration in the Isle of Wight watershed of Worchester County. Both of these projects are currently in the design phase.

FISCAL YEAR 2019 FINANCIAL DATA

STATEMENT OF REVENUES AND EXPENDITURES NONTIDAL WETLAND COMPENSATION FUND FISCAL YEAR 2019 July 1, 2018 - June 30, 2019	
REVENUES	
Adjusted Fund Balance as of June, 2018	\$2,311,842.58
Fiscal Year 2019 Revenue	148,644.00
Fiscal Year 2019 Earned Interest	0.00
Fiscal Year 2019 Accrued Revenues	0.00
Total Fiscal Year 2019 Revenues	\$148,644.00
Total Revenue and Adjusted Fund Balance	\$2,460,486.58
EXPENDITURES	
Total Fiscal Year 2019 Expenditures	\$0.00

**NONTIDAL WETLAND COMPENSATION FUND
BALANCE AS OF JUNE 30, 2019**

\$2,460,486.58