



Maryland
Department of
the Environment

**NONTIDAL WETLAND
COMPENSATION FUND
– FY21 –**

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Prepared for:

The Maryland General Assembly
Annapolis, MD

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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 FY21.

FUND USE

The use of the Comp 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 Compensation 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 7.0% to 7.4% of the state's land mass.

Nontidal wetlands protect the Chesapeake Bay, 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 stream banks 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 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.

Regulatory Program

The Department's wetlands and waterways regulatory program provides the state 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, and with mitigation ratios that ensure gains over loss. 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 Comp 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. This can be achieved through purchase of credit from a mitigation bank or completion of their own mitigation project. 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.
- 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 Comp Fund.

This report summarizes the use of the Comp Fund for mitigation activities undertaken by MDE during FY21.

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 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 December 2019 and January 2020, the Department developed three guidance documents to help applicants get through the mitigation process and to complete more successful mitigation sites. These documents focused on: 1) the permittee-responsible mitigation approval process, 2) the mitigation bank approval process, and 3) components of a mitigation plan.

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, legislation was enacted to develop standards and adopt regulations for the establishment and operation of nontidal wetland mitigation banks. During the 2016 session, revisions were made to the mitigation banking section of the state's Nontidal Wetlands statute to further encourage banking.

There are four approved single-user and four approved multi-user banks in Maryland. However, the number of proposed mitigation banks has been increasing significantly, with twelve additional multi-user banks currently proposed.

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 (ILF) program. These regulation changes are intended to reflect the 2016 mitigation banking statute revisions, provide consistency with the 2008 federal Compensatory Mitigation Rule (Mitigation Rule), and provide clarity on the use of the Comp Fund. The Department acknowledges that increases in the ILF rates will be needed to get the ILF program approved by the U.S. Army Corps of Engineers (USACE) and encourage mitigation banking; any increases to ILF rates would be included as part of revisions to the nontidal wetland mitigation regulations. To get feedback on these proposed revisions, MDE met extensively with stakeholders and the public as part of an outreach effort on the proposed revisions.

FEDERAL COMPENSATORY MITIGATION RULE

On April 10, 2008, the USACE and the U.S Environmental Protection Agency (EPA) published a new Mitigation Rule clarifying how to provide compensatory mitigation for unavoidable impacts to the nation's wetlands and streams. The premise is that the Mitigation 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 ILF 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 ILF 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.

ILF 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 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. ILF 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 Comp 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 Comp 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 fall 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 from the Final Prospectus, in May 2017. The Department received IRT comments on this Draft Instrument. Some of the revisions proposed to the nontidal wetland mitigation regulations, including the proposed ILF 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 Comp Fund is a special revenue fund, which was created by the action of the 1989 General Assembly. The Comp Fund began receiving revenue in 1991, when the Nontidal Wetlands Regulatory Program went into effect.

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

FY21 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 million in December 2013 to develop a Request for Proposal (RFP) to solicit wetland restoration, creation, and enhancement projects. Selected projects will use Comp Fund revenues to provide wetland mitigation to meet the Department's "no net loss" goal, while also meeting Mitigation Rule requirements. The FY14 RFP was advertised in spring 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 million RFP cap. To accommodate the potential for these larger projects, the Department signed another MOU with CBT in FY15 for an additional \$800,000, and an MOU in FY17 for an additional \$700,000. The Department is planning to develop another MOU for \$800,000 for FY22. 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 FY15 RFP: 1) 10 acres of wetland restoration on the Beltsville Agricultural Research Center (BARC), within the Anacostia watershed of Prince George's County; and 2) approximately 24 acres wetland enhancement within the Nassawango watershed of Wicomico County. Design for both projects occurred in FY16. Construction for the Nassawango project ran from FY16 through FY17. Most of the construction for the BARC site was completed in FY17, with the remainder completed in FY18. Monitoring was required for two years after completion of construction, with some funding held until successful completion of monitoring and submission of the final site protection mechanism. Monitoring of the Nassawango project was completed in FY20. Monitoring of the BARC site finished in FY21, and the site protection mechanism will be submitted in FY22. The Department awarded funds for two additional wetland mitigation projects in the FY16 RFP, but the landowners for both projects have withdrawn their proposals.

The Department awarded funds in the FY17 RFP for two projects that started construction in FY20: 1) A 13-acre wetland restoration in the Miles River watershed of Talbot County; and 2) a 10-acre wetland restoration in the Isle of Wight watershed of Worcester County. The Talbot County project was completed in FY20. Grading for the Worcester County project started in FY20, with construction completed in FY21. Both projects are currently being monitored, with the monitoring requirement lasting for two years.

FY21 FINANCIAL DATA

STATEMENT OF REVENUES AND EXPENDITURES NONTIDAL WETLANDS COMPENSATION FUND FY21 July 1, 2020 - June 30, 2021	
REVENUES	
Fund Balance as of June, 2020	\$1,886,004.86
FY21 Revenue	110,598.00
FY21 Earned Interest	0.00
FY21 Accrued Revenues	0.00
Total FY21 Revenues	\$1,996,602.86
EXPENDITURES	
Total FY21 Expenditures	550,732.59
NONTIDAL WETLANDS COMPENSATION FUND BALANCE AS OF JUNE 30, 2021	\$1,445,870.27