GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of the Environment

Water Quality Division

Interim Policy on Wetlands in the District

1. Purpose of this Policy

The District of Columbia, District Department of the Environment (DDOE) is hereby providing its Interim Policy on Wetlands to provide clarity to the regulated community of how the District interprets its obligations to protect the limited natural resource, wetlands, under the District's Water Pollution Control Act, D.C. Official Code §§ 8-103.01, *et seq*. (the Act), and the Federal Water Pollution Control Act, (the Clean Water Act) 33 U.S.C. §§ 1251, *et seq*. Additionally, the District has committed to the preservation and enhancement of the District wetlands in numerous documents, including the Chesapeake 2000 Agreement (http://www.chesapeakebay.net/pubs/chesapeake2000agreement.pdf). This Interim Policy will be published in the D.C. Register, and on the District Department of the Environment's website. The District also intends to promulgate regulations to implement its Interim Policy. This Policy is intended as guidance only[1].

2. Objectives and Goals

As the city is located at a confluence of two big rivers (Anacostia and Potomac Rivers), it was full of lowland swamps that supported rich biodiversity[2]. The drainage system in the District is now totally different from what it was in the 1700s. For example, a stream called Tiber Creek once flowed between the White House and the Capitol, where Constitution Avenue runs today. Tiber Creek emptied into the Potomac River through a lowland swamp that later became the site of the Washington Monument[3].

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[1] The Water Pollution Control Act provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on the District of Columbia and the USACE, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and the District, and/or the USACE will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

[2] O'Conner, J.V. 1985. The District of Columbia: The Men Who Most Influenced the Development of the Capital of the U.S/ Used Geologic Features to Shape the City. Earth Science, Fall 1985. pp. 11-15.

[3] Williams, G.P. 1977. Washington D.C.'s Vanishing Springs and Waterways. U.S. Geological Survey Circular 752. 19 pages.

Given the historic magnitude of wetland losses in the District of Columbia[4], and the recognized benefits of wetlands on natural habitats, water quality improvements, and flood and erosion control, the District Department of the Environment (DDOE) is committed to the protection, restoration and enhancement of the remaining streams and wetlands still in existence in the District. It is therefore the District's policy to ensure: (1) no net loss of wetland and/or stream area and function within the District; and (2) a net gain of wetland and/or stream area and enhancement of functions of these waters within the District.

3. Jurisdictions Over Wetlands

The principal regulatory authority governing the protection of wetlands is the federal Clean Water Act §404 Program, administered by the U.S. Army Corp of Engineers (UCACE) and the U.S. Environmental Protection Agency. Under the Clean Water Act, states have the authority to enact their own regulatory programs for wetlands and can adopt more stringent limitations than those adopted by the federal programs, 33 U.S.C. § 1251(b). The District enacted the Water Pollution Control Act of 1984, D.C. Official Code § 8-103.01 *et seq.* which prohibits the discharge of pollutants to the waters of the District of Columbia, unless permitted, D.C. Official Code § 8-103.06. The Act does not use the word "wetland" as a water body, rather the Act defines the "Waters of the District" in the definition of "Waters of the District" as meaning "flowing and still bodies of water, whether artificial or natural, whether underground or on land, so long as in the District of Columbia, but excludes water on private property prevented from reaching underground or land watercourses, and also excludes water in closed collection or distribution systems", D.C. Official Code § 8-103.01(26). DDOE also interprets the phrase "Waters of the District" to include wetlands, including isolated wetlands, unless the water bodies are physically prevented from reaching underground or land watercourses, as in the case of swimming pools. Unlike the federal Clean Water Act, the District's "Waters of the District" is not limited to navigable water bodies. In 2006, the Supreme Court's decision in the consolidated cases *Rapanos v. United States and Carabell v. United States*[5] addressed the federal programs jurisdiction over waters of the United States under the Clean Water Act. The Supreme Court found that certain "waters" that were previously addressed under the CWA § 404 program were no longer under federal jurisdiction and it was the states' responsibility to protect them. The District's authority to act under District law is not affected by the Supreme Court's decision.

Accordingly, the District regulates discharges of pollutants to a wetland by: (1) issuing a state certification under Section 401 of the Clean Water Act for activities requiring a U.S. Army Corps of Engineers (USACE) Section 404 permit, or (2) issuing a DDOE letter of authorization for activities in a wetland that are not under USACE jurisdiction, pursuant to D.C. Official Code §§ 8-103.06 and 8-103.13. The identification and location of D.C. jurisdictional waters are physically determined through a process known as jurisdictional determination (JD). The method of performing a JD employs a multi-parameter approach as defined in the Wetlands Research Program Technical Report Y-87-1, Corps of Engineers Wetlands Delineation Manual, dated January 1987 and supplemental guidance (http://www.usace.army.mil/cw/cecwo/reg/reg_supp.htm). The process generally requires positive evidence of hydrophytic vegetation, hydric soils, and wetlands hydrology for a

[4] O'Conner, J.V. 1985. The District of Columbia: The Men Who Most Influenced the Development of the Capital of the U.S/ Used Geologic Features to Shape the City. Earth Science, Fall 1985. pp. 11-15.
[5] 126 S. Ct. 2208 (2006).

determination that an area is a wetland, as set forth in the U.S. Army Corps of Engineers Wetlands Delineation Manual. A map of known District of Columbia wetlands is available at http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/wetland.map.pdf). However, there are many wetlands that are not listed on this map (primarily due to scale limitations), including the open waters of the Potomac and Anacostia Rivers.

If the USACE determines that wetlands on a site are under its jurisdiction, the USACE's shall provide a copy of the application, the jurisdictional determination, and the proposed permit to DDOE (or direct the applicant/permittee to so) for certification that the activity will not violate the District's law. If the USACE determines that wetlands on a site are not under its jurisdiction, the applicant must submit the copy of the application made to the USACE, and its jurisdictional determination to DDOE for authorization to discharge pollutants to the wetland, including isolated wetlands. Discharge of pollutants means, in pertinent part, any "releasing, pumping, pouring, emitting, emptying or dumping of any pollutant" to the District's waters. Pollutants mean, in part, "any substance which may alter or interfere with the restoration or maintenance of the chemical, physical, radiological, and biological integrity of the waters of the District". DDOE will not regulate artificial wetlands (i.e., wetlands only supported by an artificial water supply). Additionally, wetlands that are less than 400 square feet may not be regulated if (1) the small size of the wetland makes it difficult to manage and maintain as a wetland, (2) DDOE determines that there may be minimal individual and cumulative adverse effects on the aquatic environment, and (3) staffing constraints require setting a higher regulatory priority to discharges in larger wetlands than those wetlands less than 400 square feet with minimal adverse impacts. However, DDOE shall regulate a wetland or a stream of any size which forms the head waters of a stream or water body or which provides special aquatic ecosystem benefits, as determined by DDOE.

Wetlands determined to be under the jurisdiction of the District of Columbia shall not be dredged, filled, drained or otherwise adversely impacted without express, written authorization from the Department. Wetlands are designated for the beneficial use of the protection and propagation of fish, shellfish and wildlife, and the protection of human health related to consumption of fish and shellfish, 21 DCMR § 1102.2. The District requires that the water quality numerical and narrative criteria (standards) be applied to the column of water above the wetland. The regulations also require that wetlands with rooted vascular aquatic vegetation, except those specifically constructed or created as waste water treatment devices, must be protected from significant adverse hydrologic modifications, excessive sedimentation, deposition of toxic substances in toxic amounts, nutrient imbalances, and other adverse anthropogenic impacts, 21 DCMR § 1103. Activities may be permitted on wetlands only when aquatic animal and plant habitat remains preserved; or damage to or destruction of the habitat is mitigated, D.C. Official Code § 8-103.06(a)(3).

DDOE has adopted the USACE's regulations for determining whether wetland impacts are unavoidable and necessary.[6] An applicant must take all necessary steps to ensure environmental impacts to aquatic resources are avoided or minimized as much as possible, including demonstrating that either the project is water-dependent and requires access to a wetland as a central element of its basic function, or has no practicable alternative to locating on a site

[6] 40 CFR part 230.10(a)(2) –(3)

containing a wetland and impacting the wetland. No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

Where the activity associated with a discharge which is proposed for a special aquatic site does not require access or proximity to or sitting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

If the applicant demonstrates to DDOE's satisfaction that wetland impacts are unavoidable and necessary, DDOE shall require the applicant to develop and implement mitigation practices consistent with the District's and the federal goal of "no net loss of wetlands".

Options of Mitigation Sequence (in order of preference):

1. **AVOID:** Modification of the scope of the proposed activity or construction to completely avoid the potential impacts to the wetland.

2. **MINIMIZE:** Reduction of the necessary impacting activity to the greatest extent practicable.

3. **COMPENSATORY MITIGATION: C**ompensatory mitigation within the same watershed in the District of Columbia, to offset environmental losses resulting from unavoidable impacts to waters of the District authorized by USACE or DDOE permits or authorizations.

4. Mitigation

The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the District authorized by USACE and DDOE permits or authorizations. Compensatory mitigation will be based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. DDOE assesses the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and its significance within the watershed, and the costs of the compensatory mitigation project. DDOE generally utilizes a loss ratio of 3:1 due to (1) the scarcity of wetlands as a resource; (2) the need to increase total wetland acreage; and (3) the need to account for the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic

resource and the compensation site. The ratio was established to offset mitigation losses from the incremental establishment of wetlands functions, since the wetlands are not fully functional at their inception and for a number of years.

4.1. On-Site Mitigation Option

In the District, the mitigation for wetland impacts must be in-kind, and generally, shall be on-site where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. If, after considering opportunities for on-site, in-kind compensatory mitigation DDOE determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative, practicable off-site mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, DDOE will consider this alternative compensatory mitigation.

Generally, standards for compensatory mitigation for losses of wetlands shall be done in accordance with (i) the procedures listed below; (ii) regulations issued by the USACE and the Environmental Protection Agency (EPA) as published in the April 10, 2008 Federal Register, Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (Vol. 73, No. 70) (http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf), and (iii) USACE regulatory guidance letters (http://www.usace.army.mil/cw/cecwo/reg/citizen.htm). A mitigation work plan shall be developed and submitted to DDOE for review, comment and approval.

4.2. Mitigation Banking Option

The 1995 federal guidance on mitigation banking defines it as “wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial."[7]

Restored, created, enhanced, and preserved wetlands generate “credits” which may subsequently be withdrawn to offset “debits” incurred at a number of project development sites. Ideally, mitigation banks are constructed and functioning in advance of development impacts, and are seen as a way of reducing ecological uncertainty by demonstrating achievement of successful performance standards in advance of credit withdrawals. Typically, a public agency, organization, or private entrepreneur establishes a large mitigation site (mitigation bank). Credits from the bank are then withdrawn to compensate for a number of smaller impacts to wetlands in the future.

Because mitigation banks are developed in advance of the majority of impacts for which they compensate, this ensures that the banks are ecologically successful before being used to offset

[7] Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605-58614, November 28, 1995)

such impacts. Properly developed mitigation banks offer improved functions, lower mitigation costs to permit applicants, and a more streamlined permit process for projects using the bank.

As beneficial as mitigation banks are in larger states, they are not feasible and will not be used within the District. The limited land area and no public agency, organization or private entrepreneur to run the creation and management of the mitigation bank make it unworkable for the moment.

4.3. In-Lieu-Fee Option

In the District of Columbia, a permittee may be allowed to join the in-lieu-fee (ILF) program if the permittee can demonstrate to the satisfaction of DDOE, that on-site mitigation or use of a mitigation bank is not available, not practicable, or is determined to be less environmentally desirable. Federal guidance defines in-lieu-fee mitigation as mitigation that "occurs in circumstances where a permittee provides funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank approved under the Banking Guidance." For the full text of the Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, see:
http://www.epa.gov/owow/wetlands/regs/inlieufee.pdf

Under the in-lieu-fee program, allowed by D.C. Official Code § 8-103.09(d)(1)[8], permit recipients, rather than implement “project-specific” mitigation themselves, typically at the site of permitted impacts (on-site mitigation), contribute mitigation fees to natural resource management entities that DDOE and the USACE have authorized to receive and use the fees to implement required compensation. These entities spend fee contributions from multiple permit recipients on consolidated mitigation projects conducted “off-site” from the areas of the permitted impacts.

In this approach, a permittee pays a fee to a third party in lieu of conducting project-specific mitigation or buying credits from a mitigation bank. ILF mitigation is normally used to compensate for impacts to wetlands when the other mitigation approaches are not available, practicable, or when the use of an ILF is in the best interest of the environment.

[8] The D.C. Official Code § 8-103.09(d)(1) states that “The District of Columbia Wetland and Stream Mitigation Trust Fund ("Wetland Fund") is hereby established as a nonlapsing, revolving fund pursuant to an act of Congress, to be administered by the Mayor and used for restoration, creation, and enhancement of wetlands and the waters of the District. Excluding monies collected in the current year, any money deposited in the Wetland Fund in the year prior to the current year and the interest earned on that money remaining in the Fund after the payment of the costs accrued in the prior year, less 10% of the remainder amount that shall be retained as a reserve operating balance, shall be transferred or revert to the General Fund of the District of Columbia.”

The 2000 Federal Guidance on the use of in-lieu fee arrangements[9] clarifies how in-lieu fee mitigation "may serve as an effective and useful approach to satisfy compensatory mitigation requirements and meet the Agency's goal of no overall net loss of wetlands."

An ILF represents the expected costs to a third party of replacing the wetland functions lost or degraded as a result of the permittee's project. ILFs are typically held in trust until they can be combined with other ILFs to finance a mitigation project. The entity operating the trust is typically a nonprofit organization such as a local land trust, private conservation group, or government agency with demonstrated competence in natural resource management.

4.4. Comparing In-Lieu Fee and Mitigation Banking

ILF mitigation and mitigation banking share many features. Both allow permittee to meet mitigation requirements by paying a fee to a third party who accepts responsibility for successfully implementing and maintain the required compensatory mitigation. Both must also comply fully with federal mitigation guidance and policy, including a requirement for a written implementing agreement. The agreement normally includes construction plans, performance standards, monitoring and reporting provisions, a long-term management plan, financial assurances, a protective real-estate agreement (e.g., conservation easement), and other measures to ensure the ecological success of a project.

Mitigation Banking	In Lieu Fee
Mitigation is done in *advance* of the impacts, hence very likely to succeed.	Mitigation is normally conducted *afterwards* hence not very sure of the success.
Ecological benefits and the financial costs of mitigation are *known*, so an appropriate fee for credits is easily established.	The ecological benefits and financial costs often must be *estimated*, so determining appropriate fees is more difficult
Because of their advantages over ILF, the agencies generally prefer the use of mitigation banks.	While specific ILF-funded mitigation projects may not always be identified in advance of project impacts, spending ILFs quickly to fund mitigation projects is generally a high priority. The agencies may adjust the amount of the ILF to compensate for expected delays in spending them

[9] Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (65 FR 66914-66917, November 7, 2000).