

**Appendix F:**  
**Regulatory Framework**



## **APPENDIX F REGULATORY FRAMEWORK**

In addition to NEPA and FHWA guidance on NEPA implementation, there are many federal executive orders and other federal, state, and local laws and regulations that are considered and implemented in conjunction with NEPA. Regulations, orders, and laws that are pertinent to a resource impact analysis and that guided how the analysis was conducted are listed within each resource section of the environmental consequences and are briefly summarized below.

### **Permits**

The U.S. Army Corps of Engineers (USACE) definition of waters of the U.S. includes all interstate waters and lakes, as well as rivers, streams, mudflats, sandflats, sloughs, prairie potholes, wet meadows, and other wetland communities. Klingle Creek is included under the USACE definition of “waters of the U.S.” Section 404 of the Clean Water Act regulates the discharge of dredge or fill into wetlands or other waters of the U.S. and requires sequencing for proposed impacts and replacement of unavoidable losses. Any rehabilitation of Klingle Creek would require consultation with the USACE and a Section 404 permit.

### **Legislation**

Several laws pertain to resource protection and legislative mandates within the study area:

#### **Noise Control Act of 1972 (NCA)**

The Noise Control Act of 1972 gives the USEPA the primary role for controlling environmental noise. Under the authorities, the USEPA has the responsibility for coordinating all Federal programs in noise research and control. The USEPA must be consulted by other Federal agencies prior to publishing new regulations on noise. If the agency feels that any proposed new or existing Federal regulations do not adequately protect the public health and welfare, it can call for public review of them. Citizen suits are also authorized. USEPA also has the authority to set standards for any product or class of products which have been identified as a major source of noise. They would be based on criteria that USEPA is required to develop before proposing any standards. Categories of equipment covered by the legislation include construction, transportation (including recreational vehicles), motors or engines, and electrical and electronic.

The FHWA, the USEPA, and OSHA have all developed standards to minimize the effects of noise associated with the construction and operation of transportation facilities. The standards protect, among others, workers involved in the construction of the transportation facilities, near-by residents that may be affected by the operational transportation facilities, and the general public that may be subjected to noise from the transportation facility.

### **Clean Air Act (42 U.S.C. 85)**

As described in the Affected Environment, the Clean Air Act of 1970 (CAA) controls the emission of pollutants into the atmosphere. The CAA seeks to reduce or eliminate the creation of pollutants at their source, and designates this responsibility to State and local governments. Under the CAA, the EPA has established national air quality standards. These standards, which express concentrations of designated pollutants, are called the National Ambient Air Quality Standards (NAAQS). The NAAQS are to be achieved by the States through State Implementation Plans (SIP), which provide limitations, schedules, and timetables for compliance with NAAQS for stationary sources and transportation control plans for mobile sources.

A 1990 Amendment to the CAA provides that “No department, agency, or instrumentality of the Federal government shall engage in, support in any way, or provide financial assistance for, license or permit, or approve any activity which does not conform to an implementation plan, ‘...approved or promulgated. The assurance of conformity...’ shall be an affirmative responsibility of the head of such department, agency, or instrumentality.” Conformity to an implementation plan means conformity to an implementation plan’s purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards. Conformity with a SIP requires the government to conduct activities so that the activities would not cause or contribute to any new violation of any standard in any area, or delay timely attainment of any standard of any required interim emission reductions or other milestones in any area. Regulations regarding determining conformity of general Federal actions to implementations plans appear in 40 CFR 51 and 93.

### **Clean Water Act (33 U.S.C. 26)**

Since major amendments in 1977, the Federal Water Pollution Control Act has been known as the Clean Water Act (CWA). This statute seeks to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. The CWA identifies certain pollutants and sets required treatment levels for those pollutants. The CWA regulates both point source and non-point source discharges. Point sources are distinct entities that discharge into rivers, lakes, estuaries, or others waters of the U.S. through discrete conveyances such as pipes, ditches, or canals. Nonpoint sources are those that do not discharge wastewater from a discrete conveyance (e.g., most agricultural lands, certain construction sites, parking lots, and streets).

Section 401 of the CWA addresses water quality certification and authorizes the review and conditioning, approval, or denial of Federal permits or licenses that might result in discharges to waters of the U.S.

Section 402 of the CWA established the National Pollutant Discharge Elimination System (NPDES) program. Pursuant to the NPDES permits are required for all point source discharges to waters of the U.S., including discharges of stormwater runoff associated with industrial activities.

Section 404 of the CWA contains provisions for protection of wetlands and establishes a permitting process for activities having potential effects in the wetlands by the U.S. Army Corps of Engineers (USACE). Wetlands, riverine, and open water systems are

considered waters of the USACE. The USACE's definition of waters of the U.S. includes all interstate waters and lakes, as well as rivers, streams, mudflats, and sandflats, sloughs, prairie potholes, wet meadows, and other wetland communities. Section 404 regulates the discharge of dredge or fill into wetlands, or other waters of the U.S., and requires sequencing for proposed impacts and replacement of unavoidable losses. All development activities that might involve impacts on wetlands, through dredging and filling require consultation with the USACE. If a given wetland is determined to meet the regulatory definition, a nationwide permit is issued or an individual permit application is required, depending in the development proposal for fill or land disturbance activities.

### **Endangered Species Act (16 U.S.C. 35)**

Under the Endangered Species Act of 1973 (ESA), Federal agencies are required to conserve plant or animal species that have been Federally listed as endangered or threatened. Federal agencies should consult as necessary with the U.S. Fish and Wildlife Service (USFWS) to ensure that any actions authorized, funded, or carried out by the Federal agencies are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction of or substantial damage to critical habitat. This consultation, deriving from Section 7 of the ESA, is often referred to as the Section 7 consultation process. While this consultation is in progress, an agency must not make an irretrievable commitment of resources to its project. A consultation typically leads to the USFWS's suggestion of alternatives or mitigating measures that can be incorporated into the project, thereby allowing its completion. In connection with this proposed project, coordination with the USFWS is being undertaken to ensure consideration of potential effects on endangered and threatened species present.

### **National Historic Preservation Act, as amended through 2000 (16 U.S.C. 470)**

The National Historic Preservation Act of 1966, as amended through 2000 (NHPA) protects buildings, sites, districts, structures, and objects that have significant scientific, historic, or cultural value. The Act established affirmative responsibilities of Federal agencies to preserve historic and prehistoric resources. Effects on properties that are listed in or eligible for the National Register of Historic Places (NRHP) must be taken into account in planning and operations. Any property that may qualify for listing in the NRHP must not be inadvertently transferred, sold, demolished, substantially altered, or allowed to deteriorate.

Section 106 of the National Historic Preservation Act, as amended (36 CFR 800), requires federal agencies to consider the affects of projects they fund, permit, or license on historic properties that are listed or eligible for listing in the NRHP. Compliance with Section 106 requires agencies to initiate consultation during the project's early planning stages with appropriate parties, including the pertinent State and/or Tribal Historic Preservation Officer(s); identify historic properties within the project's area of potential effect; and determine what impact, if any, the project will have on those resources. Section 106 consultations and NEPA are two separate, distinct processes. They can and should occur simultaneously, and documents can be combined, but one is not a substitute for the other. They should, however, be coordinated to avoid duplication of public involvement or other requirements. The information and mitigation gathered as part of

the 106 review must be included in the NEPA document, and the 106 process must be completed before the official record of decision (ROD) can be signed on a proposal that affects historic properties.

### **National Highway System (NHS) Designation Act (23 U.S.C. 109) (November 1995)**

Section 304 of the National Highway System (NHS) Designation Act (23 U.S.C. 109) (November 1995). Which states a design for new construction, reconstruction, resurfacing (except for maintenance resurfacing), restoration, or rehabilitation of a highway on the National Highway System (other than a highway also on the Interstate System) may take into account, the constructed and natural environment of the area; the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; and access for other modes of transportation.

### **The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. CERCLA:

- established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- provided for liability of persons responsible for releases of hazardous waste at these sites; and
- established a trust fund to provide for cleanup when no responsible party could be identified.

The law authorizes two kinds of response actions:

- Short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response.
- Long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. These actions can be conducted only at sites listed on EPA's National Priorities List (NPL).

CERCLA also enabled the revision of the National Contingency Plan (NCP). The NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. The NCP also established the NPL.

CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA) on October 17, 1986.

### **The Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 82)**

The RCRA was enacted to address the huge volumes of municipal and industrial solid wastes generated in the U.S. After several amendments, the RCRA now regulates

hazardous and solid waste activities and underground storage tanks (USTs). The Act controls the generation, transportation, treatment, storage, and disposal of hazardous wastes. RCRA has also set forth a framework for the management of non-hazardous wastes.

#### **Section 4(f)**

Section 4(f) has been part of Federal law since 1966. It was enacted as Section 4(f) of the Department of Transportation (DOT) Act of 1966 and set forth in Title 49 United States Code (U.S.C.), Section 1653(f). 4(f) provisions have been amended over time and currently 4(f) policy is held in 49 USC 303.

Section 4(f), as amended and codified in 49 U.S.C. Section 303 reads as follows:

(a) It is the policy of the United States Government that special effort be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Developments, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation areas or wildlife and waterfowl refuge, or land of an historic site of national, State, or local significance (as determined by the Federal State, or local officials having jurisdiction over the park, recreation areas refuge, or site) only if,

(1) There is no prudent and feasible alternative to using land; and

(2) The program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuges or historic site resulting from the use.

#### **National Park Service Organic Act and Rock Creek Enabling Legislation**

The National Park Service Organic Act (16 U.S.C. 1 2 3, and 4), consists of the Act of August 25 1916 (39 Stat. 535) and amendments, established the creation of the National

Park Service within the Department of the Interior on August 25, 1916. This Act defines the mission of the NPS as

...to promote and regulate the use of the...national parks...which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

This is the mission of all National Park Service units, including Rock Creek Park. The 1890 enabling legislation for Rock Creek states that Rock Creek is to be “perpetually dedicated and set aside as a public park or pleasure ground for the benefit and enjoyment of the people of the United States.” The legislation goes on to say that Rock Creek Park is to “provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park and their retention in their natural condition as nearly as possible.” In addition, the legislation directs NPS managers to provide for public recreation, specifically to “lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footpaths for pedestrians.”

#### **National Highway System (NHS) Designation Act (23 U. S. C. 109) (November 1995)**

The Act provides for that “a design for new construction, reconstruction, resurfacing...restoration, or rehabilitation of highway on the National Highway System (other than a highway also on the Interstate System) may take into account...[in addition to safety, durability and economy of maintenance]...

- A. the constructed and natural environment of the area;
- B. the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; and
- C. access for other modes of transportation.”

#### **Executive Orders and Executive Memorandum**

The following executive orders (E.O.) and Executive Memoranda (E.M.) address topics relevant to the reconstruction of Klinge Road.

#### **Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations (February 11, 1994)**

This E.O. requires Federal agencies to make environmental justice part of its mission, by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. Under this executive order Federal agencies shall conduct their programs, policies, and activities that substantially affect human health or the environment in a manner that ensures such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of

their race, color, or national origin. The essential purpose of the executive order is to ensure the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no groups of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of any negative environmental consequences resulting from Federal actions or policies. On February 11, 1994, President Clinton also issued a memorandum for heads of all departments and agencies, to analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by NEPA.

### **FHWA Order 6640.23**

The FHWA has developed FHWA Order 6640.23 (December 2, 1998) to establish policies and procedures for complying with Executive Order 12898.

### **Executive Order 11514, Protection of Enhancement of Environmental Quality (March 5, 1970)**

This E.O. requires agencies to monitor, evaluate, and control activities so as to protect and enhance the quality of the environment for the purpose of sustaining and enriching human life.

### **Executive Order 11990, Protection of Wetlands (May 24, 1977)**

This E.O. requires Federal agencies to take action to minimize the destruction, loss, or degradation of wetlands and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agencies' responsibilities for managing and disposing of Federal lands and facilities.

### **Executive Order 11988, Floodplain Management (May 24, 1977)**

This E.O. requires Federal agencies to take action to reduce the risk of flood loss, to minimize the impacts of floods on human safety, health and welfare, and to restore and preserve the national and beneficial values served by floodplains in carrying out their responsibilities for managing and disposing of Federal lands. Before taking an action, an agency must determine whether the proposed action would occur in a floodplain; if so, consideration must be made of alternatives to avoid adverse effects and incompatible development in floodplains. This executive order complies with the Flood Disaster Protection Act of 1973, which prohibits Federal actions in areas subject to flooding.

### **Executive Order 13112, Invasive Species (February 3, 1999)**

This E.O. directs Federal agencies to expand and coordinate their efforts to combat the introduction and spread of plants and animals not native to the United States. The Federal Highway Administration has developed guidance to implement the E.O. It provides a framework for preventing the introduction of and controlling the spread of invasive plant species on highway rights-of-way.

## **Presidential Executive Memorandum on Environmentally and Economically Beneficial Landscaping Practices (April 1994)**

This E.M. directs agencies of the Federal government to follow principles for environmentally and economically beneficial landscape practices in order to improve their current landscape practices. These practices include use of regionally native plants for landscaping; design, use, or promote construction practices that minimize adverse effects on natural habitat; seek to prevent pollution; implement water and energy efficient practices; and create outdoor demonstration projects. The FHWA has developed a guidance for this E.M. that states that at every opportunity where it is determined to be appropriate and cost-effective, the guiding principles of the E.M. to use native plants should be considered to the maximum extent practicable. The FHWA guidance defines what a native plant is and provides guidance on design, plant management and how to use native plants in roadside situations.

## **Regulations of the District of Columbia**

### **DC Law 2-144, the Historic Landmark and Historic District Protection Act of 1978**

This law is the local ordinance that authorizes the designation and protection of historic landmarks and historic districts. While it puts in place a special review process for properties in a historic district, it also recognizes change as an important element in the city's evolution. It is charged with making decisions on applications to demolish or alter an historic landmark or a building or structure in a historic district; to subdivide an historic landmark or a property in a historic district; or to construct a new building or structure in an historic district or on the site of an historic landmark. The Historic Preservation Review Board maintains the official inventory of historic landmarks and historic districts in the District of Columbia and has authority to designate new landmarks or districts. The Board also reviews subdivision and permit applications affecting regulated properties and makes recommendations to the Mayor's Agent about whether to grant or deny applications.

### **Soil Erosion and Sedimentation Control Act (1977)**

The District of Columbia's Soil Erosion and Sediment Control Program implements and enforces D.C. Law 2-23 (D.C. Erosion and Sedimentation Control Act of 1977), which regulates all land-disturbing activities to prevent accelerated erosion and transport of sediment to its receiving waters. The program reviews and approves all construction and grading plans submitted to the District of Columbia Government for compliance with the regulations. Inspections are conducted at construction sites to ensure that control devices are constructed in accordance with approved plans. In addition, the program is also responsible for investigating erosion, drainage and related complaints and providing recommendations towards their resolution. The sediment control program complements the water management program. Therefore, in an effort to meet the goals and objectives of the USEPA Chesapeake Bay Program, the District strengthened its sediment control law by enacting D.C. Law 10-166 (D.C. Erosion and Sedimentation Control Amendment Act of 1994) to specifically remove the exemption provision for sediment control compliance associated with construction activities by federal agencies.

### **D.C. Stormwater Management Regulations, 21 D.C.M.R. §§ 526-535**

21 D.C.M.R. § 526 provides that “No person shall, unless exempt, engage in any earth movement or land change within the District of Columbia without instituting appropriate stormwater management measures to control or manage runoff from such developments.” A stormwater management plan is required for 5000 square feet of land disturbance and the submission of stormwater management plan is required prior to issuance of a building permit.

#### **D.C. Law 13-311 Stormwater Permit Compliance Amendment Act of 2000 (June 12, 2001)**

This law established the Stormwater Administration as a branch of DCWASA and provides for the collection of fees from various activities to fund work directly related NPDES MS4 permit. The law also established that affected agencies could apply for reimbursement from fund for work supporting NPDES MS4 permit and created the MS4 Advisory Panel consisting of the Mayor, Chairman of Council of District of Columbia, General Manager of DCWASA, Director of Department of Health (DOH) Environmental Health Administration and the Director of DDOT.

#### **D.C. Law 5-188, Water Pollution Control Act of 1984**

Law 5-188, the “Water Pollution Control Act of 1984,” was introduced in Council and assigned Bill No. 5-326, which was referred to the Committee on Transportation and Environmental Affairs. The Bill was adopted and then signed by the Mayor on January 11, 1985.

The Act states that, while regulating against water pollution and except as provided in subsection (d) of this section, the Mayor shall protect aquatic animals and plants, and shall preserve and restore aquatic life in District waters for aesthetic enjoyment, for recreation, and for industry. The Mayor shall study the number and the well-being of aquatic plants and animals, and shall determine the need to license or otherwise limit fishing and other forms of hunting, sports or industry which take or destroy aquatic life or the aquatic habitat. The Mayor shall consider the economic impact upon the various segments of the public before establishing fees for licenses. The Mayor may establish fishing seasons and other seasons for hunting, sports or industry, which take or destroy aquatic life or the aquatic habitat. Revenues from a licensing regulatory scheme under this section shall be used only for protecting and managing aquatic life. The Mayor may enter into agreements with state and federal agencies to manage and protect aquatic life and the Mayor may protect against aquatic life that creates a nuisance in the District (Mar. 16, 1985, D.C. Law 5-188, § 4, 32 DCR 919).

The legislation also states that any segment or segments of the surface waters of the District that are of water quality better than needed for the current use or have scenic or aesthetic importance shall be designated as Special Waters of the District of Columbia (SWDC). Rock Creek and its tributaries have been designated as SWDC. The water quality of SWDC-designated segments of the District’s surface waters shall be maintained at or above the current level by implementing the following:

a) Existing nonpoint source discharges, storm water discharges, and storm sewer discharges to SWDC segments shall be controlled through implementation of best management practices and regulatory reform.

b) Construction of development projects such as roads, bridges, and bank stabilization of the stream in which a SWDC-designated segment is located, which may lead to pollution of the water, shall be permitted on a case-by-case basis to ensure there are no long-term adverse water quality effects and no impairment of the designated uses of the segment occurs.

c) Short-term degradation of water quality in a SWDC segment due to construction projects may be permitted provided that prior notice is given to the public as well as other local and federal government agencies, and provided that their concerns are properly addressed.

## **Multi-State Agreements**

### **Chesapeake Bay Agreement 2000**

In June 2000, Chesapeake Bay Program partners, the District of Columbia and Virginia, Maryland and Pennsylvania, adopted the Chesapeake 2000 agreement, a strategic plan to achieve a vision for the future of the Chesapeake Bay. A vision that includes abundant, diverse populations of living resources, fed by healthy streams and rivers, sustaining strong local and regional economies, and our unique quality of life.

To restore an ecosystem as complex as the Chesapeake Bay requires work on many fronts. The agreement details nearly one hundred commitments important to Bay restoration, organized into five strategic focus areas, which include:

- Protecting and Restoring Living Resources - Chesapeake 2000 aims to restore, enhance and protect the finfish, shellfish and other living resources, their habitats and ecological relationships to sustain all fisheries and provide for a balanced ecosystem.
- Protecting and Restoring Vital Habitats - The Bay Program aims to preserve, protect and restore those habitats and natural areas that are vital to the survival and diversity of the living resources of the Bay and its rivers.
- Improving Water Quality - Improving water quality in the Bay and its rivers is the most critical element in ensuring the future health of Chesapeake Bay.
- Managing Lands Soundly - Because pollutants on land are easily washed into streams and rivers, our actions on land ultimately affect the Bay.
- Engaging Individuals and Local Communities - To contribute to Bay restoration, we have to first be concerned about resource stewardship in our own communities, homes and backyards.