

**Wetlands Mitigation/Compensation Policy
Draft Changes**

4 VAC 20-390-10 ET SEQ.

Wetlands Mitigation-Compensation Policy and Supplemental Guidelines

Definitions

The following words, when used in these guidelines, shall have the following meaning unless the context clearly indicates otherwise:

"Compensation" means actions taken which have the effect of substituting some form of wetland resource for those lost or significantly disturbed due to a permitted development activity; generally habitat creation or restoration. Compensation is a form of mitigation.

"Mitigation" means all actions, both taken and not taken, which eliminate or materially reduce the adverse effects of a proposed activity on the living and nonliving components of a wetland system or their ability to interact.

Policy

In spite of the passage of the Virginia Wetlands Act and the Federal Water Pollution Control Act in 1972, the pressures to use or develop tidal wetlands along Virginia's shoreline, have continued to accelerate as evidenced by the increasing number of permit applications being submitted. While losses are controlled by existing permit programs, data compiled by the Virginia Institute of Marine Science (VIMS) over the last 11 years (1993 – 2004) has shown a total permitted loss of 132 acres of tidal wetlands. Of these losses, most are associated with shoreline stabilization projects where each individual project may account for only a few hundred square feet of impact. Compensation for these losses has not usually been required. In fact, during the same period only 20.3 acres of mitigation have been required. Research, however has demonstrated that certain wetlands can be established or re-established in areas where wetlands are not presently found. As such, compensation for permitted wetland losses is viewed as a means of offsetting impacts of necessary projects.

The Commission, through this policy, intends to encourage, where appropriate, the compensation of all permitted tidal wetland losses especially vegetated losses provided all mitigative measures have been considered to avoid any impact. This should include compensation on-site, compensation within the watershed, compensation through the use of a mitigation bank as authorized by Section 28.2-1308 of the code of Virginia or through acceptance of an applicant's offer of payment to an in-lieu fee account established at the local, regional or state level and dedicated to wetland creation and restoration.

Supplemental Guidelines

If compensation is required, then the following guidelines should be given due consideration and, if appropriate, may be included as conditions of the permit. In any case, on-site compensation at the project site is the preferred location alternative with off-site, in the same watershed, as a consideration when on-site is not feasible. Locating a compensation site outside the river basin of the project is not acceptable unless it is done as part of a state-coordinated program of ecological enhancement. The sequence of acceptable mitigation options should be as follows: On-site, off-site within the same watershed or mitigation bank in the watershed, or through a proffered payment of an in-lieu fee if on-site and off-site compensation are shown by the applicant to be impractical considering the project location.

1. Use of on-site and off-site Compensation - When on-site or off-site compensation is required as a condition of permit approval the following items should be considered. The Commission or wetlands board may wish to condition any approval on the receipt of an acceptable compensation plan before issuance of the final permit for an approved project.

- A. A detailed plan, including a scaled plan view drawing, should be submitted describing the objectives of the wetland compensation, the type of wetland to be created, the mean tide range at the site, the proposed elevations relative to a tidal datum, the exact location, the areal extent, the method of marsh establishment and the exact time frame from initial work to completion. The plan should also include plans for replanting areas where vegetation fails to grow.
- B. Once the grading is completed at the planting site, it should be inspected by a competent authority to insure that the elevations are appropriate for the vegetation to be planted and that the surface drainage is effective.
- C. The compensation plan and its implementation should be accomplished by experienced professionals knowledgeable of the general and site-specific requirements for wetland establishment and long-term survival.
- D. A performance bond or letter of credit should be required and required remain in force until the a new wetland is successfully established; a minimum of two growing seasons and a required planting success rate established by the Commission or wetlands board has been achieved.
- E. The compensation marsh should be designed to replace as nearly as possible, the functional values of the lost resource on an equal or greater basis. In general this means creating a marsh of similar plant structure to that being

lost. This may not be the case where a lesser value marsh is involved (i.e. Group 4 or 5 wetlands). A minimum 1:1 area exchange should be required in all case. The ratio of required compensation to approved loss should be specified by the Commission or wetlands board and may be based on the use of the Function Specific Credit Calculation Method established by the Virginia Institute of Marine Science (VIMS) and contained in 4 VAC 20-391-10 ET SEQ.; Guidelines for the Establishment, Use and Operation of Tidal Wetland Mitigation Banks in Virginia

- F. The compensation should be accomplished prior to, or concurrently with, the construction of the proposed project. Before any activity under the permit may begin, the permittee should own all interests in the mitigation site, which are needed to carry out the mitigation.
- G. All reasonable steps should be taken to avoid or minimize any adverse environmental effects associated with the compensation activities themselves.
- H. In selecting a compensation site, one aquatic community should not be sacrificed to "create" another. In cases where dredged material must be placed overboard, the area may be used to create marsh, oyster rock or improve the resource value of the bottom.
- I. The type of plant community proposed as compensation should have a demonstrated history of successful establishment in order to be acceptable.
- J. Manipulating the plant species composition of an existing marsh community, as a form of compensation, is unacceptable.
- K. Nonvegetated wetlands should be treated on an equal basis with vegetated wetlands with regard to compensation and mitigation, unless site-specific information indicates one is more valuable than the other.
- L. Both short- and long-term monitoring of compensation sites should be considered on a case-by-case basis. For unproven types of compensation the applicant will be responsible for funding such monitoring as is deemed necessary.
- M. Conservation or other easements to be held in perpetuity should be required for the compensation marsh. Easements accepted by the Commission will be processed in accordance with the provisions of Section 28.2-1301 of the Code of Virginia.

2. Use of Mitigation Banks – Pursuant to Section 28.2-1308 of the Code of Virginia, when any activity involving the loss of tidal wetlands authorized by the Commission or a wetlands board is conditioned upon compensatory mitigation the applicant may be

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permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any approved wetlands mitigation bank. Guidelines for the Establishment, Use and Operation of Tidal Wetland Mitigation Banks in Virginia have been promulgated by the Commission and are listed under 4 VAC 20-391-10 ET SEQ. in the Virginia Administrative Code. Unless the applicant can demonstrate compliance with specific criteria contained in Section 28.2-1308 for use of a compensatory mitigation bank outside the watershed where a permitted project is located the use of a mitigation bank for permitted activities requiring compensation must be in the same U.S.G. S cataloging unit or adjacent U.S.G. S cataloging unit in the same watershed. When approving the use of a compensatory mitigation bank the ratio of required compensation to approved loss must be specified by the Commission or wetlands board and should incorporate the use of Function Specific Credit Calculation Method established by the Virginia Institute of Marine Science (VIMS) and contained in 4 VAC 20-391-10 ET SEQ.

3. Use of in-lieu fees - The use of in-lieu fees should be the last form of mitigation used to offset permitted wetland losses and must be the result of an agreed upon permit condition between the applicant and the Commission or wetlands board provided the applicant can demonstrate that on-site or off-site compensation options are not practical and no compensatory mitigation banks have been established in the project watershed. Localities are encouraged to establish a fund, for such payments, that is dedicated to tidal wetlands restoration and creation. At the local level this could be the same fund established for the receipt of Civil Charges or Civil Penalties. Administration of such a fund should include an ability to trace the contribution of in-lieu fees to eventual use in actual wetland restoration or creation projects. If payments are made to other dedicated wetland restoration funds this should be recognized in the permit issued by the board. In no case should an in-lieu fee amount be accepted for less than the cost of necessary compensation acreage or the purchase of necessary credits in an approved bank. This is intended to prevent the avoidance of use of on-site or off-site compensation, or compensatory mitigation bank for a cheaper alternative that would not be able to fund the same level of wetland restoration or creation required by on-site or off site compensation or through use of a compensatory mitigation bank. Use of the fund could be for actual tidal wetland creation or restoration projects in the locality or for the purchase of credits in an approved compensatory mitigation bank that is authorized subsequent to the receipt of any in-lieu fee. Localities are encouraged to combine any in-lieu fee with other potential or available funds for wetland restoration or creation projects.