

## Chapter 390. Wetlands Mitigation -- Compensation Policy

### **4VAC20-390-10. Definitions.**

The following words, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

“Ad hoc in-lieu fees” means the payment of funds to a participating locality for the restoration, establishment, or enhancement of wetlands resources to satisfy compensatory mitigation requirements. Ad hoc in-lieu fee programs are not governed by an in-lieu fee program instrument.

“Approved in-lieu fee program” means a program involving the restoration, establishment, or enhancement of wetlands resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements. The operation and use of an approved in-lieu fee program are governed by an in-lieu fee program instrument approved as provided in federal law.

"Compensatory mitigation" means the restoration, establishment, or enhancement of wetlands resources for the purpose of offsetting unavoidable adverse impacts of a permitted development activity which remain after all appropriate and practicable avoidance and minimization has been achieved.

"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. Mitigation includes compensatory mitigation.

“Tidal Wetlands Guidelines” means the latest version of the guidelines that scientifically evaluate vegetated and nonvegetated wetlands by type, describe the consequences of use of these wetlands types, and provide minimum standards for protection and conservation of wetlands promulgated by the Commission pursuant to § 28.2-1301(C) of the Code of Virginia.

#### **Statutory Authority**

§ [28.2-103](#) and Chapter 13 (§ [28.2-1300](#) et seq.) of Title 28.2 of the Code of Virginia.

#### **Historical Notes**

Derived from VR450-01-0051 § 1, Virginia Register Volume 5, Issue 20, eff. August 2, 1989.

### **4VAC20-390-20. Policy.**

Virginia, as a Chesapeake Bay Program partner, has committed to achieving “a no-net loss of existing wetlands acreage and function in [its] regulatory programs.” In addition, Virginia’s Coastal Resilience Master Plan recognizes the importance of tidal wetlands as natural flood buffers. Despite this, pressures to use or develop tidal wetlands along Virginia's shoreline have continued. While losses are controlled by existing permit programs, some impacts to tidal wetlands from development activity are unavoidable. Research has demonstrated that certain wetlands can be established in areas where wetlands are not presently found, wetlands that were previously lost or degraded can be reestablished, and wetland functions in existing wetlands can be improved. As such, compensatory mitigation for permitted wetland losses is viewed as a means of offsetting impacts of necessary projects and achieving the goals and requirements of the Chesapeake Bay Program and the Coastal Resilience Master Plan.

The Commission encourages, where appropriate, compensatory mitigation for all permitted tidal wetland impacts, provided all other mitigative measures have been considered to avoid any impact.

Statutory Authority

§§ [28.2-103](#) and [28.2-1301](#) of the Code of Virginia.

Historical Notes

Derived from VR450-01-0051 § 2, Virginia Register Volume 5, Issue 20, eff. August 2, 1989; amended, Virginia Register [Volume 21, Issue 22](#), eff. July 1, 2005.

#### **4VAC20-390-30. General criteria.**

It shall remain the policy of the Commonwealth to mitigate or minimize the loss of wetlands and the adverse ecological effects of all permitted activities through the implementation of the principles set forth in the Tidal Wetlands Guidelines.

The primary aim is to preserve the wetlands as much as possible in their natural state and to consider appropriate requirements for compensatory mitigation only after it has been proven that the impact to the natural resource is unavoidable and that the project will have the highest public and private benefit.

Since use and development of tidal wetlands are regulated through the Wetlands Zoning Ordinance, a permittee's commitment to preserve other existing tidal wetlands is not ordinarily an acceptable form of compensatory mitigation.

Mitigation, including compensatory mitigation, shall be required for both vegetated and nonvegetated wetlands unless site-specific information indicates such mitigation is not necessary.

Where compensatory mitigation is required, the ratio of the area of required compensatory mitigation to the area of approved impact should, in most cases, be at least 1:1.

Statutory Authority

§§ [28.2-103](#) and [28.2-1301](#) of the Code of Virginia.

Historical Notes

Derived from VR450-01-0051 § 3, Virginia Register Volume 5, Issue 20, eff. August 2, 1989; amended, Virginia Register [Volume 21, Issue 22](#), eff. July 1, 2005.

#### **4VAC20-390-40. Specific criteria.**

An application for a permit to impact tidal wetlands shall only be granted if the three criteria listed below are met. If the application or the activities proposed therein do not meet one or more of these criteria, the application shall be denied.

1. The application must incorporate all reasonable mitigative actions, including alternate siting, that would eliminate or minimize wetlands loss or disturbance.
2. The proposed activities must be water-dependent in nature.
3. The application shall demonstrate clearly the need for the proposed activities to be in the wetlands and the activities' overwhelming public and private benefits.

Should the proposed activities satisfy all three of the above criteria, the proponent shall be required, where appropriate, to provide compensatory mitigation for the wetlands impacted.

Statutory Authority

§§ [28.2-103](#) and [28.2-1301](#) of the Code of Virginia.

Historical Notes

Derived from VR450-01-0051 § 4, Virginia Register Volume 5, Issue 20, eff. August 2, 1989; amended, Virginia Register [Volume 21, Issue 22](#), eff. July 1, 2005.

#### **4VAC20-390-50. Supplemental requirements.**

A. If compensatory mitigation is required, the permit must specify the appropriate compensatory mitigation option and amount of compensatory mitigation required as a condition of the permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts. Compensatory mitigation options shall be considered in the following order of preference: (1) use of an approved mitigation bank, (2) use of an approved in-lieu fee program (3) permittee-responsible on-site and in-kind mitigation, (4) permittee-responsible mitigation through off-site or out-of-kind mitigation within the same watershed, or (5) payment of ad hoc in-lieu fees.

B. Use of mitigation banks. Pursuant to § [28.2-1308](#) of the Code of Virginia, when any activity involving impacts to tidal wetlands authorized by the Commission or a wetlands board is conditioned upon compensatory mitigation, the applicant may be permitted to satisfy all or part of such compensatory mitigation requirements by the purchase or use of credits from any approved wetlands mitigation bank so long as use of the particular bank selected would be ecologically preferable to permittee-responsible on-site or off-site mitigation. Unless the applicant can demonstrate compliance with specific criteria contained in § [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 compensatory mitigation must be in the same USGS cataloging unit or adjacent USGS

cataloging unit in the same watershed. When approving the use of a compensatory mitigation bank, the number and type of credits the permittee is required to secure must be specified by the Commission or wetlands board. The credits secured should be of a type that replicate, as nearly as practicable, the functions of the wetlands impacted.

C. Approved in-lieu fee programs. An applicant may be permitted to satisfy all or part of any compensatory mitigation requirements by the purchase or use of credits from an approved in-lieu fee program. When approving the use of an approved in-lieu fee program, the number and type of credits the permittee is required to secure must be specified by the Commission or wetlands board. The credits secured should be of a type that replicate, as nearly as practicable, the functions of the wetlands impacted.

D. 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 apply.

1. The applicant must provide a detailed plan, including a scaled plan view drawing, 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 wetland establishment, the vegetation to be planted, the exact time frame from initial work to completion, and an abatement and control plan for undesirable plant species. The plan should also address replanting areas where vegetation fails to grow. The permittee must secure approval of the plan by the Commission or wetlands board prior to commencing impacts to tidal wetlands.
2. Once the grading is completed at the planting site, it should be inspected by a competent authority to ensure that the elevations are appropriate for the vegetation to be planted and that the surface drainage is effective.
3. 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.
4. A performance bond or letter of credit should be required and remain in force until a minimum of two growing seasons have passed and a planting

success rate established by the Commission or wetlands board has been achieved.

5. The replacement wetland should be designed to replace, as nearly as possible, the functions of the lost resource on an equal or greater basis.

6. The compensatory mitigation should be accomplished prior to, or concurrently with, the construction of the proposed project. Before any activity under the permit may begin, the permittee must hold all interests in the compensatory mitigation site that are needed to carry out the compensatory mitigation.

7. All reasonable steps must be taken to avoid or minimize any adverse environmental effects associated with the compensatory mitigation activities themselves.

12. Both short-term and long-term monitoring of compensatory mitigation sites should be considered on a case-by-case basis. The permittee will be responsible for funding such monitoring as is deemed necessary.

13. An appropriate site protection instrument that will protect the site in perpetuity should be required for the compensatory mitigation site except in cases where both the impact to wetlands and the compensatory mitigation required are determined by the wetlands board or the Commission to be de minimis.

E. Use of ad hoc in-lieu fees. The use of ad hoc in-lieu fees should be the last form of compensatory mitigation used to offset permitted wetland impacts and must be the result of an agreed upon permit condition between the applicant and the Commission or wetlands board. Before ad hoc in-lieu fees may be used as compensatory mitigation, the applicant must demonstrate

that on-site or off-site compensation options are not practical and no compensatory mitigation banks or approved in-lieu fee programs are available for the project. Localities are encouraged to establish a fund for such payments that is dedicated to tidal wetlands restoration and creation. 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 ad hoc 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 Commission or wetlands board. In no case should an ad hoc in-lieu fee amount be accepted that is less than the cost of necessary compensatory mitigation area or the purchase of necessary credits in an approved bank with an approved geographic service area that includes the wetlands impacted. 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 ad hoc in-lieu fee. Localities are encouraged to combine any ad hoc in-lieu fee with other potential or available funds for wetland restoration or creation projects.

#### Statutory Authority

§§ [28.2-103](#) and [28.2-1301](#) of the Code of Virginia.

#### Historical Notes

Derived from VR450-01-0051 § 5, Virginia Register Volume 5, Issue 20, eff. August 2, 1989; amended, Virginia Register [Volume 21, Issue 22](#), eff. July 1, 2005.