

"WETLANDS MITIGATION – COMPENSATION POLICY"**CHAPTER 4VAC20-390-10 ET SEQ.****PREAMBLE**

This chapter sets forth the policy of the Commonwealth to avoid, minimize, and then compensate for impacts to tidal wetlands. The chapter further sets forth the methods by which compensatory mitigation for unavoidable impacts to tidal wetlands may be achieved and the restrictions on each method.

This chapter is promulgated pursuant to the authority contained in §28.2-103 and §28.2-1301 of the Code of Virginia. This chapter amends and re-adopts, as amended, Chapter 4VAC 20-390-10 et seq., which was promulgated May 24, 2005, and made effective July 1, 2005. The effective date of this chapter, as amended, is February 1, 2025.

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, enhancement or, in certain circumstances, preservation 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, enhancement, or, in certain circumstances, preservation of wetlands resources through funds paid to a governmental or non-profit natural resources management entity for the purchase of credits 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.

"Commission" means the Virginia Marine Resources Commission.

“Compensatory mitigation” means the restoration, establishment, enhancement, or, in certain circumstances, preservation 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.

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

"WETLANDS MITIGATION – COMPENSATION POLICY"**CHAPTER 4VAC20-390-10 ET SEQ.**

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.

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

4VAC20-390-30 General Criteria.

A. It shall remain the policy of the Commonwealth to avoid, minimize, and then compensate for impacts to wetlands and the adverse ecological effects of all permitted activities.

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.

B. A permittee's commitment to preserve existing tidal wetlands can, under certain circumstances, be a form of compensatory mitigation.

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

D. 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 one to one.

4VAC20-390-40. Repealed.**4VAC20-390-50 Compensatory mitigation requirements.**

A. When a permit is issued for the use or development of, or activities in, wetlands, the permit shall require, where appropriate, the provision of compensatory mitigation.

B. If compensatory mitigation is required, the permit must specify the appropriate mitigation option and amount of mitigation required as a condition of the permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts. Unless otherwise permitted by law, the compensatory mitigation should occur in, or have

"WETLANDS MITIGATION – COMPENSATION POLICY"**CHAPTER 4VAC20-390-10 ET SEQ.**

an approved service area that includes, the same USGS cataloging unit or adjacent USGS cataloging unit in the same watershed as the permitted project. The wetlands board or commission shall select the compensatory mitigation option in the following order of preference: (i) use of an approved mitigation bank (ii) use of an approved in-lieu fee program, (iii) permittee-responsible on-site and in-kind mitigation, or (iv) permittee-responsible mitigation through off-site or out-of-kind mitigation within the same watershed.

C. Use of mitigation banks. Pursuant to § 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 permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any approved wetlands mitigation bank. 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 to replicate, as nearly as practicable, the functions of the wetlands impacted.

D. 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 to replicate, as nearly as practicable, the functions of the wetlands impacted.

E. 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 plan for any plants listed on the Virginia Invasive Species Plant List promulgated by the Virginia Department of Conservation and Recreation. 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.

"WETLANDS MITIGATION – COMPENSATION POLICY"**CHAPTER 4VAC20-390-10 ET SEQ.**

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.
8. 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.
9. 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.

4VAC20-390-60. Ad hoc in-lieu fees.

Compensatory mitigation requirements may be met by payment of an ad hoc in-lieu fee only in exceptional circumstances where federal regulators do not require compensatory mitigation and the applicant demonstrates that other forms of compensatory mitigation are not available. The use of ad-hoc in-lieu fees must be the result of an agreed upon permit condition between the applicant and the commission or wetlands board. 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, at the prevailing market rate, of establishing an area of wetlands that exceeds the area of wetlands impacted by a ratio of at least 2:1. 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 establishment projects.

"WETLANDS MITIGATION – COMPENSATION POLICY"

CHAPTER 4VAC20-390-10 ET SEQ.

This is to certify that the foregoing is a true and accurate copy of the chapter passed by the Marine Resources Commission, pursuant to authority vested in the Commission by §§28.2-103 and 28.2-1301 of the Code of Virginia, duly advertised according to statute, and recorded in the Commission's minute book, at meeting held in Hampton, Virginia on January 28, 2025.

COMMONWEALTH OF VIRGINIA
MARINE RESOURCES COMMISSION

BY: *Jamie L. Green* ON BEHALF OF
Jamie L. Green
Commissioner

Subscribed and sworn to before me this 30th day of January, 2025.

Malinda Cross

Notary Public

