§ 143-214.11. Division of Mitigation Services: compensatory mitigation.

(a) Definitions. – The following definitions apply to this section:

(1) Compensatory mitigation. – The restoration, creation, enhancement, or preservation of jurisdictional waters required as a condition of a permit issued by the Department or by the United States Army Corps of Engineers.

(1a) Compensatory mitigation bank. – A private compensatory mitigation bank or an existing local compensatory mitigation bank.

(1b) Existing local compensatory mitigation bank. – A mitigation bank operated by a unit of local government that is a party to a mitigation banking instrument executed on or before July 1, 2011, notwithstanding subsequent amendments to such instrument executed after July 1, 2011.

(2) Government entity. – The State and its agencies and subdivisions, or the federal government. "Government entity" does not include a unit of local government unless the unit of local government was a party to a mitigation banking instrument executed on or before July 1, 2011, notwithstanding subsequent amendments to such instrument executed after July 1, 2011.

(3) Hydrologic area. – An eight-digit Cataloging Unit designated by the United States Geological Survey.

(4) Jurisdictional waters. – Wetlands, streams, or other waters of the State or of the United States.

(4a) Mitigation banking instrument. – The legal document for the establishment, operation, and use of a mitigation bank.

(4b) Private compensatory mitigation bank. – A site created by a private compensatory mitigation provider and approved for mitigation credit by State and federal regulatory authorities through execution of a mitigation banking instrument. No site owned by a government entity or unit of local government shall be considered a "private compensatory mitigation bank.

(5) Unit of local government. – A "local government," "public authority," or "special district" as defined in G.S. 159-7.

(b) Department to Coordinate Compensatory Mitigation. – All compensatory mitigation required by permits or authorizations issued by the Department or by the United States Army Corps of Engineers shall be coordinated by the Department consistent with the basinwide restoration plans and rules developed by the Environmental Management Commission. All compensatory mitigation, whether performed by the Department or by permit applicants, shall be consistent with the basinwide restoration plans. All compensatory mitigation shall be consistent with rules adopted by the Commission for wetland and stream mitigation and for protection and maintenance of riparian buffers.

(c) Compensatory Mitigation Emphasis on Replacing Ecological Function Within Same River Basin. – The emphasis of compensatory mitigation is on replacing functions within the same river basin unless it is demonstrated that restoration of other areas would be more beneficial to the overall purposes of the Division of Mitigation Services.

(d) Compensatory Mitigation Options Available to Government Entities. – A government entity may satisfy compensatory mitigation requirements by the following actions, if those actions are consistent with the basinwide restoration plans and also meet or exceed the requirements of the Department or of the United States Army Corps of Engineers, as applicable:

(1) Payment of a fee established by the Commission into the Ecosystem Restoration Fund established in G.S. 143-214.12.

(2) Donation of land to the Division of Mitigation Services or to other public or private nonprofit conservation organizations as approved by the Department.

(3) Participation in a compensatory mitigation bank that has been approved by the United States Army Corps of Engineers, provided that the Department or the United States Army Corps of Engineers, as applicable, approves the use of such bank for the required compensatory mitigation.

(4) Preparing and implementing a compensatory mitigation plan.

(d1) Compensatory Mitigation Options Available to Applicants Other than Government Entities. – An applicant other than a government entity may satisfy compensatory mitigation requirements by the following actions, if those actions meet or exceed the requirements of the United States Army Corps of Engineers:

(1) Participation in a compensatory mitigation bank that has been approved by the United States Army Corps of Engineers, provided that the Department or the United States Army Corps of Engineers, as applicable, approves the use of such bank for the required compensatory mitigation. This option is only available in a hydrologic area where there is at least one compensatory mitigation bank that has been approved by the United States Army Corps of Engineers.

(2) Payment of a fee established by the Commission into the Ecosystem Restoration Fund established in G.S. 143-214.12. – This option is only available to an applicant who demonstrates that the option under subdivision (1) of this subsection is not available.

(3) Donation of land to the Division of Mitigation Services or to other public or private nonprofit conservation organizations as approved by the Department.

(4) Preparing and implementing a compensatory mitigation plan.

(e) Payment Schedule. – A standardized schedule of compensatory mitigation payment amounts shall be established by the Commission. Compensatory mitigation payments shall be made by applicants to the Ecosystem Restoration Fund established in G.S. 143-214.12. The monetary payment shall be based on the ecological functions and values of wetlands and streams permitted to be lost and on the cost of restoring or creating wetlands and streams capable of performing the same or similar functions, including directly related costs of wetland and stream restoration planning, long-term monitoring, and maintenance of restored areas. Compensatory mitigation payments for wetlands shall be calculated on a per acre basis. Compensatory mitigation payments for streams shall be calculated on a per linear foot basis.

(f) Mitigation Banks. – State agencies and mitigation banks shall demonstrate that adequate, dedicated financial surety exists to provide for the perpetual land management and hydrological maintenance of lands acquired by the State as mitigation banks, or proposed to the State as privately operated and permitted mitigation banks.

(g) Payment for Taxes. – A State agency acquiring land to restore, enhance, preserve, or create wetlands must also pay a sum in lieu of ad valorem taxes lost by the county in accordance with G.S. 146-22.3.

(h) Sale of Mitigation Credits by Existing Local Compensatory Mitigation Bank. – An existing local compensatory mitigation bank shall comply with the requirements of Article 12 of Chapter 160A of the General Statutes applicable to the disposal of property whenever it transfers any mitigation credits to another person.

(i) The Division of Mitigation Services shall exercise its authority to provide for compensatory mitigation under the authority granted by this section to use mitigation procurement programs in the following order of preference:

(1) Full delivery/bank credit purchase program. – The Division of Mitigation Services shall first seek to meet compensatory mitigation procurement requirements through the Division's full delivery program or by the purchase of credits from a private compensatory mitigation bank.

(2) Existing local compensatory mitigation bank credit purchase program. – Any compensatory mitigation procurement requirements that are not fulfillable under subdivision (1) of this subsection shall be procured from an existing local compensatory mitigation bank, provided that the credit purchase is made to mitigate the impacts of a project located within the mitigation bank service area and hydrologic area of the existing local compensatory mitigation bank.

(3) Design/build program. – Any compensatory mitigation procurement requirements that are not fulfillable under subdivision (1) or (2) of this subsection shall be procured under a program in which the Division of Mitigation Services contracts with one private entity to lead or implement the design, construction, and postconstruction monitoring of compensatory mitigation at sites obtained by the Division of Mitigation Services. Such a program shall be considered the procurement of compensatory mitigation credits.

(4) Design-bid-build program. – Any compensatory mitigation procurement requirements that are not fulfillable under either subdivision (1) or (2) of this subsection may be procured under the Division of Mitigation Services' design-bid-build program. The Division of Mitigation Services may utilize this program only when procurement under subdivision (1) or (2) of this subsection is not feasible. Any mitigation site design work currently being performed through contracts awarded under the design-bid-build program shall be allowed to continue as scheduled. Contracts for construction of projects with a design already approved by the Division of Mitigation Services shall be awarded by the Division of Mitigation Services by issuing a Request for Proposal (RFP). Only contractors who have prequalified under procedures established by the Division of Mitigation Services shall be eligible to bid on Division of Mitigation Services construction projects. Construction contracts issued under this subdivision shall be exempt from the requirements of Article 8B of Chapter 143 of the General Statutes.

(j) The regulatory requirements for the establishment, operation, and monitoring of a compensatory mitigation bank or full delivery project shall vest at the time of the execution of the mitigation banking instrument or the award of a full delivery contract. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 1997-443, s. 11A.119(a); 2004-188, s. 2; 2005-386, s. 3.4; 2008-152, s. 1; 2009-337, s. 1; 2011-343, s. 1.1; 2012-201, s. 5(a); 2015-1, s. 4.4.)