

# Guidelines for Establishment, Use and Operation of Tidal Wetland Mitigation Banks in Virginia

## I. INTRODUCTION

These guidelines were originally promulgated in 1998. This update is necessary to comply with Chapter 334 of the 2023 Acts of the Virginia General Assembly, which requires the Virginia Marine Resources Commission (the “Commission”) to review and update these guidelines and to “consider provisions relating to the generation of vegetated and unvegetated wetland credits from wetland creation, restoration, conversion, and enhancement activities, invasive species control, and the establishment of open water channels.” The law also requires the Commission to make these guidelines consistent with its Tidal Wetlands Guidelines (May 2021 Update), including updating wetlands types and properties. This update is also necessary to bring these guidelines into alignment with current banking guidelines and practices in place with the Interagency Review Team (“IRT”). The IRT is composed federal, state, tribal, and/or local regulatory entities and serves to review documentation for the establishment and management of mitigation banks and in-lieu fee programs. The IRT operates in accordance with the Final Compensatory Mitigation for Losses of Aquatic Resources Rule, codified at 33 C.F.R. part 332 and 40 C.F.R. part 230, subpart J, and other applicable laws and guidelines.

## II. PURPOSE AND SCOPE

This document provides guidance to the Commission, local wetlands boards, and the public for the development and operation of tidal wetland mitigation banks in the Commonwealth of Virginia.

These guidelines will supplement the existing Wetlands Mitigation-Compensation Policy currently codified at 4 Va. Admin. Code §§ 20-390-10 through 20-390-50. . The effective date of these guidelines will be August 1, 2024.

## III. DEFINITIONS

For the purposes of these guidelines, the terms defined in the Wetlands Zoning Ordinance, codified at Va. Code § 28.2-1302, as amended, and in the Compensatory Mitigation for Losses of Aquatic Resources Rule, codified at 33 C.F.R. part 332, as amended, shall have the same meanings when used herein except for those terms set forth below:

**Cataloging Unit:** Specific geographic area as defined by the U.S. Geological Survey in the Hydrologic Unit Map of the United States.

**Mitigation Bank:** A site, or suite of sites, where tidal wetlands are restored, established, enhanced, or, in exceptional circumstances, preserved for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

**Restoration:** The manipulation of the physical, chemical, or biological characteristics of a wetland where it previously existed with the goal of returning natural/historic functions.

**Watershed:** The drainage area for each major river system within the Commonwealth.

#### **IV. TIDAL WETLAND MITIGATION BANKING GUIDANCE**

Any project which involves the use of credits from an approved mitigation bank to provide compensatory mitigation for the project's adverse impacts to tidal wetlands must comply fully with existing State and Federal statutes and regulations, as well as be consistent with applicable agency policies, including, but not limited to:

1. Title 28.2 of the Code of Virginia
2. VMRC Wetlands Mitigation-Compensation Policy
3. Clean Water Act, Section 404 (33 U.S.C. § 1344)
4. Rivers and Harbors Act of 1899, Section 10 (33 U.S.C. § 403)
5. Section 404(b)(1) Guidelines for the Specification of Disposal Sites for Dredged or Fill Material (40 C.F.R. part 230)
6. Section 404 Permit Regulations (33 C.F.R. parts 320 through 330)

7. Compensatory Mitigation for Losses of Aquatic Resources (33 C.F.R. part 332; 40 C.F.R. part 230, subpart J).

8. National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.) and the Council on Environmental Quality's implementing regulations (40 C.F.R. parts 1500 through 1508).

9. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.).

10. U.S. Fish and Wildlife Service Mitigation Policy available at <https://www.fws.gov/policy/a1501fw2.pdf>.

11. Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801 et seq.).

12. National Marine Fisheries Service Habitat Conservation Policy

13. Coastal Zone Management Act (16 U.S.C. §§ 1451 et seq.)

The policies set forth in this document are intended solely as guidance. This guidance does not establish or affect legal rights or obligations, establish a binding norm on any party, or constitute the final determination of the issues addressed.

## **V. IMPLEMENTATION PROCEDURES**

The following criteria should be followed for bank planning, siting, construction and operation:

1. Any party or parties interested in creating a tidal wetland mitigation bank should first contact the Commission and the U. S. Army Corps of Engineers (“Corps”) regarding the proposal. The Corps and Commission will gather pertinent information about the proposal and will, as co-chairs, establish the IRT. The IRT will consider the proposal and review all submitted documentation, including the prospectus, proposed mitigation banking instrument, and other appropriate documents, in accordance with applicable Federal and State law.

2. The sponsor will be required to provide a bond, letter of credit, or other financial assurance to ensure alternative compensatory mitigation is provided in the event the mitigation bank fails.

3. The mitigation bank's service area must be specified in the mitigation banking instrument. Unless otherwise provided by law, a mitigation bank's service area may only include the cataloging unit in which it is located or an adjacent cataloging unit in the same watershed.

4. The IRT will determine the number of credits available at the mitigation bank. Credits will be available for the establishment, restoration, enhancement, or, in certain circumstances, preservation of wetlands.

5. Upon receipt of a complete banking instrument, the Commission or Corps shall provide notification to the public, through standard procedures, and provide a reasonable comment period.