



February 6, 2023

DEQ Policy on Credit Availability from Compensatory Mitigation Banks & Nutrient Offset Banks

Purpose and Scope

The purpose of this document is to communicate the N.C. Department of Environmental Quality (NCDEQ) application of statutes including §143-214.11(d) and (d1), §143-214.20 and §143-214.26 that govern the use of the N.C. Division of Mitigation Services (DMS) In-Lieu Fee (ILF) programs. These statutes place additional obligations on non-government entities seeking third party mitigation credit for compensatory mitigation required as a condition of a permit or approval issued by the NCDEQ or by the United States Army Corps of Engineers (USACE) and stormwater management plan approvals. Third-party mitigation providers include compensatory mitigation banks, nutrient offset banks and the DMS ILF Programs. Non-government entities are required to demonstrate that compensatory mitigation bank credits or nutrient offset bank credits are not available before participating in one of the DMS ILF programs. This guidance is not intended to address actions related to resolving compliance/enforcement matters.

Applicable Terms

Applicants not seeking third-party mitigation credits, such as those proposing permittee-responsible mitigation, are excluded from the obligation to evaluate and document mitigation bank credit availability. Non-government entities proposing to use mitigation credits from a third-party provider must first seek available credits from mitigation banks to fulfill their nutrient offset or compensatory mitigation requirements prior to requesting credit from the DMS. For wetland, stream and riparian buffer compensatory mitigation, bank credit **availability** is determined at the time a permit application is received by the regulatory authority for review. For nutrient offset, bank credit **availability** is determined at the time a completed request form is submitted to DMS requesting nutrient offset credits.

Government entities are excluded from this requirement to first seek bank credit if they meet the criteria defined in the applicable statute. *Government entities are defined in §143-214.11(a)(2) as the State and its agencies and subdivisions, or the federal government and any local government that is a party to a mitigation banking instrument executed on or before July 1, 2011.* The cities of Charlotte, Raleigh and Greensboro are local governments that have met this definition. Thus, federal agencies, state agencies and Charlotte, Raleigh and Greensboro may choose to use a compensatory mitigation bank or to access the DMS In-Lieu Fee programs. The use of compensatory mitigation banks, nutrient offset banks and DMS ILF programs for impacts to protected areas is subject to review and approval by permitting agencies.

Procedures

The following procedures are intended to assist in compliance with §143-214.11(d1)(2), §143-214.20 (a2)(2) and §143-214.26(c)(2) as applicable. Additional information on the process for accessing the DMS In-Lieu Fee programs can be found on the DMS website at <https://deq.nc.gov/about/divisions/mitigation-services/dms-customers>

1. Applicants are responsible for demonstrating and documenting compliance with the statutes. DEQ staff will assist applicants by notifying them of the requirements and directing them to applicable information on the divisions' websites.



2. As a reference for permit applicants, DWR provides on its website (linked on page 3) two sources where lists of approved nutrient offset and buffer mitigation banks, as well as approved stream and wetland mitigation banks can be located, along with each bank's service areas, contact information and credit types available. Applicants to the DMS In-Lieu Fee programs should refer to this website for information on banks in each hydrologic unit prior to submitting a request for mitigation credit. The USACE also maintains a list of approved wetland and stream banks in their [RIBITS database](#).
3. Applicants will need to coordinate with the regulatory agencies and/or local government as applicable to determine if use of a bank is approved for the required compensatory mitigation or nutrient offset. The regulatory authority determines suitability of specific bank credits on a case-by-case basis.
4. It is the responsibility of applicants to contact approved banks operating in the eight-digit hydrologic unit or applicable service area where the impact will occur to determine and document credit availability prior to submitting an In-Lieu Fee request form to DMS. Applicants can assume that if a bank has not responded within seven business days, that credits are not available. Applicants must retain documentation of attempted contact with the bank to be submitted to the regulatory authority upon request.
5. If banks have only a portion of the stream, wetland, riparian buffer, or nutrient offset credits needed by an applicant, applicants must first propose to utilize the bank credits that are available for sale and approved for use by DWR and may then request the remainder from the DMS. (NOTE: For activities requiring a 401 authorization by DWR, no more than 25 percent of the total mitigation required by DWR can be met through wetland or stream preservation, unless requested and approved by the DWR Division Director (15A NCAC 02H. 0506(c)(7)).)
6. Applicants who elect to access the DMS Nutrient Offset Program must attest to their compliance with §143-214.26 in order to access the program by completing a compliance form and submitting it along with their request for nutrient credit. Payments into the Nutrient Offset Program cannot be accepted without a completed compliance form.
7. Applicants who elect to access the DMS stream, wetland or buffer in-lieu fee programs must attest to their compliance with §143-214.11 (d) or (d1)(2) and §143-214.20 (a2)(2), as applicable, by completing a compliance form and submitting it along with their ILF mitigation request form to DMS. If bank credits are (or become) available prior to an applicant submitting their application to the regulatory agencies, the applicant must take action to comply with the requirements set forth in the applicable statute. DMS will assist customers to the extent possible, but the statute places the responsibility on applicants to verify bank credit availability prior to submittal of a permit application.
8. DMS acceptance letters and receipts include the following statement: "You must also comply with all other state, federal or local government permits, regulations or authorizations associated with this activity including §143-214.11 or §143-214.26."
9. If an applicant has determined that credits are not available from a mitigation bank, the applicant may request credits from the DMS ILF programs, pending approval by permitting/certifying agency(ies). If DMS determines it can commit to providing the mitigation requested by the applicant, DMS will issue an acceptance letter. If an acceptance letter expires, the applicant may request renewal, but is required to revalidate compliance with §143-214.11(d1)(2) or §143-214.26 by determining if bank credits have become available and completing a new compliance form. If an

applicant seeks to revise an unexpired acceptance letter, they are required to complete a new compliance form to verify bank credit availability. DMS acceptance letters for stream, wetland and riparian buffer credits expire six months from the date of issuance or from the renewal date of an unexpired acceptance letter. DMS acceptance letters for nutrient offset requests expire 30 calendar days from the date of issuance.

10. Applicants who have obtained an acceptance letter from DMS are under no obligation to meet their mitigation requirements through the ILF should bank credits become available and the applicant elects to utilize them. Applicants can withdraw their request to the DMS ILF program at any time prior to payment without penalty. The mitigation responsibility remains with the applicant or permittee until a payment for mitigation has been made or another mitigation option has been approved by the regulatory agencies
11. Credits secured through DMS are not transferable to another project. The DMS refund policy is available on the DMS request forms.

For Questions Regarding this guidance please contact the appropriate staff at the corresponding Website:

DWR: *for* Buffer Mitigation & Nutrient Offset Banks: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting/401-buffer-permitting-contacts>

for All Available Mitigation Banks:

<https://edocs.deq.nc.gov/WaterResources/DocView.aspx?dbid=0&id=2206931&cr=1>

DMS: <https://deq.nc.gov/about/divisions/mitigation-services/dms-customers>