

**Routine Program Change
To
Commonwealth of Virginia Coastal Management Program**

**Request for Concurrence
January 2010**

Wetlands Mitigation-Compensation Policy
Virginia Administrative Code, 9VAC20-390-10 et seq.

Submitted by: The Commonwealth of Virginia
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Introduction

The following constitutes a request by the Commonwealth of Virginia for the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) to concur in a Routine Program Change to the Commonwealth of Virginia's Coastal Management Program (CMP).

The Commonwealth of Virginia has adopted an interpretive Wetlands Mitigation-Compensation Policy, codified in Virginia's regulations at 4VAC20-390-10 et seq. The Policy helps guide implementation of the enforceable policies by the Virginia Marine Resources Commission ("Commission") under the existing Wetlands Program component of the approved CMP.

In accordance with the requirements for Routine Program Changes as set forth in Coastal Zone Management Act (CZMA) §306(e), 15 C.F.R. §923.84, and the guidelines contained in OCRM's 1996 Program Change Guidance, the Commonwealth of Virginia has prepared the following analysis of the Policy. The analysis: (A) explains why the proffered change to the CMP is a Routine Program Change and not an Amendment as described in 15 C.F.R. §923.80(d); and (B) identifies the enforceable policies added to the management program, describes the nature of each program change, and examines the impact the changes have on the existing management program.

Analysis

The Commonwealth submits Virginia Administrative Code 4VAC20-390-10 et seq. as a Routine Program Change. The regulations for the Wetlands Mitigation-Compensation Policy were adopted in 1989 and amended in 2005. The policy guides implementation of a portion of the Wetlands Program, which is an approved part of the CMP.

(A) Routine Program Change

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this analysis notifies OCRM of the Routine Program Change and explains why the program change will not result in an Amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of the five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization
- (5) coordination, public involvement and national interest.

OCRM's Program Change guidance states that a substantial change is a high threshold based on a case-by-case determination. Such determination is made by reviewing indicators of substantial change, such as whether new or revised enforceable policies address coastal uses or resources not previously managed, or make major changes in the

way a state CMP manages coastal uses or resources. OCRM's Program Change guidance also states that an explanation why a proposed change will not result in an Amendment should describe the elements of the State CMP that are affected.

The policy provisions being submitted and contained in the Wetlands Mitigation-Compensation Policy do not represent substantial changes to the State CMP as they do not address coastal uses or resources not previously managed, or make major changes in the way Virginia's CMP manages coastal uses or resources. The Wetlands Mitigation-Compensation Policy, adopted in 1989 and updated in 2005, derives from the mandate adopted originally under §62.1-13.1 of the Virginia Code (and now codified at §28.2-1301 describing Powers and Duties of the Commission) "to preserve the wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation." It also derives from the approved CMP provisions adopted originally in §62.1-13.3 (now at §28.2-1308), providing standards for the "use and development of wetlands" based on ecological significance in determining whether and under what conditions permit applications should be granted or denied. The Policy also implements former §62.1-13.4 (now at §28.2-1301), which provides for the development of guidelines to carry out Virginia's statutory wetlands policy, including the evaluation of vegetated and nonvegetated wetlands types and the consequences of the use of these wetland types.

The changes do not substantially affect the uses subject to management under the CMP, special management areas, boundaries of the coastal zone, authorities and organization, or coordination, public involvement and national interest. Hence Virginia requests concurrence in this Routine Program Change.

(B) Effect of Changes on Program

The Policy is described by section in the attached table, which provides a description and analysis of each provision.

4 VAC 20-390-20 defines the terms "Compensation" and "Mitigation"

4 VAC 20-390-20 states the policy of the Commonwealth to encourage compensation, in the form of substitute wetland resources, for permitted wetland losses after all mitigation measures have been considered to avoid any wetland impact.

4 VAC 20-390-30 reaffirms the Commonwealth's reliance on its Wetland Guidelines, approved as part of the original CMP in 1986, and requires that compensation "will be required and implemented" for wetland losses that are "unavoidable."

4 VAC 20-390-40 defines specific criteria that a proposed permitted wetland loss must meet to be considered for approval and subsequent compensation: (1) the proposal must incorporate all reasonable mitigative actions, which would eliminate or minimize wetland loss or disturbance, including alternate siting; (2) the proposal must be water-dependent; and (3) the proposal must clearly demonstrate the necessity of it's being located in

wetlands and demonstrate “overwhelming public and private benefits.” These provisions are based on the Wetlands Guidelines and the Wetlands Act’s policy statements, both approved as part of the original CMP.

4 VAC 20-390-50 defines supplemental guidelines for compensation for permitted wetland loss and establishes a hierarchical preference for compensatory mitigation in the following sequence: on-site, off-site within the same watershed or mitigation bank in the watershed, proffered payment of an in-lieu fee if on-site and off-site compensation are shown to be impractical given the project location. The authority to impose permit conditions to assure avoidance and compliance is in former Va. Code §62.1-13.5 (the Wetlands Zoning Ordinance), now codified at Va. Code §28.2-1302. The guidelines also implement, in part, amendments to the Wetlands Law codified at Va. Code §28.2-1308, dealing with mitigation banks.

From the beginning of Virginia’s Wetlands Program, compensatory mitigation has been a recognized part of the enforceable mechanisms used to carry out the goals of the law “to preserve wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation.” (former Va. Code §62.1-13.1, now codified at Va. Code §28.2-1301). The provisions of the Wetlands Mitigation-Compensation Policy submitted as a Routine Program Change do not constitute a substantial change in the approved Virginia CMP.