



Implementation of N.C. General Assembly Session Laws 2009-337 and 2011-343

The purpose of this document is to communicate to N.C. Department of Environment & Natural Resources partners and customers how the department will implement Session Law 2009-337 as amended by section 1.1 of S.L. 2011-343. This represents a modification to implementation policy established in July 2009 for implementation of S.L. 2009-337. S.L. 2011-343 restricts access to the In-Lieu Fee programs of the N.C. Ecosystem Enhancement Program (EEP) by broadening the applicability of requirements in S.L. 2009-337 and now requires both private developers and local governments (except those defined in S.L. 2011-343 as government entities) applying for state authorizations to obtain mitigation credits from compensatory mitigation banks (private banks and “existing local” banks as defined in the law) when they are available. This document describes what actions will be taken by the N.C. Division of Water Quality (DWQ) and EEP, two NCDENR agencies whose policies and procedures are affected by the laws. These laws place additional obligations on most applicants for 401 Water Quality Certifications, Buffer variances and CAMA permits before they can access EEP In-Lieu Fee programs. This document is an NCDENR policy document and is not intended to apply to federal permits or authorizations from the U.S. Army Corps of Engineers. [Provisions for the implementation of Section 1.2 of SL 2011-343 will be provided in a separate document.]

Applicability and Regulatory Effect

- The requirements of the laws complement existing statutory and rule requirements, and will be applied to mitigation for streams, wetlands, isolated wetlands and streams, buffers and nutrient loading.
- Together, SL 2009-337 and SL 2011-343 totally or partially override the following existing DWQ rules: 15A NCAC 2H .0506(h)(1); 15A NCAC 2H .0506(h)(3); 15A NCAC 2H .1305(g)(1); and 15A NCAC 2H .1305(g)(3).
- Permittee provided mitigation can still be considered by DWQ, when suitable, even when a bank has credits available in the hydrologic unit.
- The laws are applicable to mitigation that is required for compliance associated with violations of state law.
- The laws are applicable to permit applications to DWQ and or the N.C. Division of Coastal Management for wetland or stream impacts received on or after June 27, 2011.
- The laws are applicable to all applications and stormwater plans that include offsite nutrient reductions (“buydowns”) submitted to local governments on or after June 27, 2011.
- The laws are applicable to applications for authorizations from the DWQ associated with riparian buffer impacts received on or after June 27, 2011.

Definitions

For wetland, stream and riparian buffer mitigation, the term "available" is considered to mean that credits in the amount requested have been released and are otherwise not under contract at the time a permit application is submitted for review to NCDENR regulatory agencies. For nutrient offset credit, bank credit availability is determined at the time an applicant requests nutrient credits from EEP. If credits are available through a private mitigation bank or a mitigation bank operated by a local government that has an instrument executed on or before June 27, 2011, applicants are required to use such a mitigation bank to fulfill their compensatory mitigation

requirements (unless they are considered a government entity as defined in § 143-214.11¹) as indicated below provided that use of such bank is approved for the required compensatory mitigation (unless the applicant chooses to provide the mitigation themselves).

Procedures

The following procedures are being implemented to foster compliance with SL 2009-337 and 2011-343.

Additional information on the process for accessing EEP's In-Lieu Fee programs can be found at:

<http://portal.ncdenr.org/web/eep/stream-wetland-buffer-request-process> and

<http://portal.ncdenr.org/web/eep/nutrient-offset-request-process>

1. Permit applicants are responsible for demonstrating compliance with the subject SL 2009-337 as amended by Section 1.1 of SL 2011-343. EEP and DWQ will assist applicants by notifying them of the new requirements and directing them to applicable information on the Internet. EEP and DWQ will both provide updated links and information on their websites (<http://www.nceep.net/> and <http://h2o.enr.state.nc.us/ncwetlands/documents/mitigation.html>)
2. DWQ will provide on its website a listing of approved mitigation banks, their locations, contact information and credit types available as a reference for permit applicants (see links in previous item). Applicants to EEP's In-Lieu Fee programs should refer to this website for up-to-date information on banks in their hydrologic unit prior to submitting a request to EEP for mitigation.
3. Applicants will need to coordinate with the regulatory agencies and/or local government to determine if use of a bank is approved for the required compensatory mitigation.
4. It is the responsibility of applicants to contact mitigation banks operating in the eight-digit hydrologic unit where the impact will occur to determine and document credit availability prior to submitting an In-Lieu Fee request form to EEP for mitigation. If an applicant contacts the bank(s) and determines that the requested credits are not available or they receive no response from the bank within a two week time period, they may proceed to access the EEP In-Lieu Fee programs. "Government entities" as defined in 143-214.11 as amended by S.L. 2011-343 may choose to use a bank or to access the EEP In-Lieu Fee programs.
5. All users of EEP's Nutrient Offset Program must provide documentation of their compliance with S.L. 2009-337 Section 4 as amended by S.L. 2011-343 in order to access the program by completing a compliance form and submitting it with their request for nutrient credit. Payments into the Nutrient Offset Program cannot be accepted without a completed compliance form.
6. Applicants who wish to access EEP's stream, wetland or buffer In-Lieu Fee programs must verify that they have complied with the S.L. 2009-337 as amended by Section 1.1 of S.L. 2011-343 upon submittal of an ILF request form to EEP. EEP's mitigation request form has been updated to include written acknowledgement by the applicant of the laws' requirements and compliance with them. If bank credits are available prior to an applicant submitting their permit application to the regulatory agencies reviewing the permit, it is important that the applicant take action to comply with the requirement set forth in S.L. 2009-337 as amended by S.L. 2011-343. EEP will assist customers to the extent possible, but the laws place the responsibility on permit applicants to verify bank credit availability prior to submittal of a permit application.
7. EEP's acceptance letters and receipts have been revised to 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 S.L. 2009-337 as amended by S.L. 2011-343."

¹ Government entities are state and federal agencies and any local government that is a party to a mitigation banking instrument executed on or before June 27, 2011. As of this date, the Cities of Charlotte, Greensboro and Raleigh are the only local governments that meet the criteria for being defined as a government entity.

8. Once an applicant has determined that credits are not available from a mitigation bank, the applicant may request to access EEP's In-Lieu Fee program pending approval of the use of this program by permitting agencies for the impacts. If EEP determines it can commit to providing the mitigation requested by the applicant, EEP will issue an acceptance letter. After an acceptance letter expires, applicants may request to renew it, but should revalidate compliance with the session laws by determining if bank credits are available and completing a new compliance form. If an applicant seeks to renew an unexpired acceptance letter, they should also complete a new compliance form. EEP acceptance letter expire six months from the date of issuance.
9. In-Lieu Fee program acceptance letters issued by EEP to local governments that are not defined as "government entities" per S.L. 2011-343 prior to June 27, 2011 for nutrient, wetland, stream or riparian buffer impacts and that are unexpired are considered valid and will be honored.
10. Credits secured through EEP's In-Lieu Fee programs are not transferable to another applicant.

EEP and DWQ Contacts for Questions Regarding This Information:

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| DWQ: | For stream and wetland mitigation banks: | John Dorney, Program Development Unit Manager 919-733-9646 John.dorney@ncdenr.gov |
| | For nutrient offset and riparian buffer mitigation banks: | Katie Merritt, Environmental Compliance Specialist 919-807-6371 Katie.merritt@ncdenr.gov |
| | For general information on Nutrient Offset Program: | John Huisman, Environmental Senior Specialist 919-807-6436 John.huisman@ncdenr.gov |
| EEP: | For accessing EEP's mitigation programs: | Kelly Williams, In-Lieu Fee Coordinator 919-716-1921 Kelly.williams@ncdenr.gov |