

SUMMARY OF PROPOSED NONTIDAL WETLAND REGULATION CHANGES

September 2025 (revised 9-29-2025)

Regulations in COMAR 26.23.04.01 - .07: Regulations are proposed to be replaced with new and revised sections, re-numbered as language proposed under COMAR 26.23.01.01 -.23.

The changes are proposed to be made in this manner for ease in review of the overall sections and to comply with the required page limits for regulations. The proposed format of the new chapter is ordered to follow all steps in the process for completing mitigation requirements, including the consideration of general criteria, mitigation planning, site selection, decision, design construction and post-construction process.

Changes in numbering, and former locations of existing language, are listed below with a summary of additional changes.

Other minor amendments are made in existing regulations.

26.23.01.01 Definitions

New key definitions are added for the following terms: adaptive management plan, authorized person, hydrologic unit, in-lieu fee program terms, in writing, Interagency Review Team, Phase II mitigation plan approval letter, nontidal wetland conversion, prospectus, service area, preservation, site protection mechanism, temporary impact and watershed segment.

Revisions are proposed to the existing definitions for the following terms: bog, creation, Critical Area, enhancement, Federal Manual, functions, mitigation, bank operator (sponsor) mitigation credit, mitigation bank, maintenance, replacement ratio, remediation, utility line, and significant plant or wildlife value.

Changes and additions are proposed to improve clarity or consistency with federal requirements.

Note some changes, such as definitions for enhancement and restoration do not match the federal definitions due to longstanding use and ease of understanding.

26.23.01.01-1 Incorporation by Reference

This is a new regulation listing documents which are incorporated by reference. The federal manual and regional supplements and plant lists are included.

26.23.01.02 Activities Exempt from Permit Requirement

The proposed change replaces the numbering of mitigation regulations referenced in this regulation to be consistent with proposed revisions.

26.23.01.03 County Delegation

The proposed change replaces the numbering of mitigation regulations referenced in this regulation to be consistent with proposed revisions.

26.23.01.05 Enforcement

The proposed change replaces the numbering of mitigation regulations referenced in this regulation to be consistent with proposed revisions.

New proposed language is added to allow for enforcement actions due to violations of plans and agreements required for mitigation.

26.23.02.02 Application Processing Procedures for the Department

New language allows for notifications to be sent by electronic means and corrects a deadline for determining whether or not a project qualifies for a Letter of Authorization.

26.23.02.03 Permit Decision and Appeal

New proposed language states that the Department may not issue a permit until required information is provided, and work may not begin, until certain necessary information is provided to and approved by the Department.

Language is added to update citations for appeal of authorizations under Judicial Review requirements.

Language is added to allow for exchange of information by electronic means.

26.23.02.08 Temporary Emergency Nontidal Wetland Permit

The proposed change replaces the numbering of mitigation regulations referenced in this regulation to be consistent with proposed revisions.

26.23.02.09 Permit Suspension and Revocation

The proposed change replaces the numbering of mitigation regulations referenced in this regulation to be consistent with proposed revisions.

An error is proposed to be corrected in 26.23.02.09D(2)(b).

The regulation is revised to replace outdated regulatory citations for contested case hearings.

26.23.03.01 Activities Requiring a Letter of Authorization

The proposed change replaces the numbering of mitigation regulations referenced in this regulation to be consistent with proposed revisions.

Clarifying language is added to include criteria for qualifying activities for letters of authorization, requiring permits and/or mitigation for activities otherwise listed as qualifying for letters of authorization.

Language describing practices which are not part of utility installations is moved to the definition section.

26.23.04.01 Criteria for Environmentally Preferable Mitigation Options

This regulation previously was named “Mitigation for Agricultural Activities,” which will be repealed and proposed as new 26.23.04.03, with changes noted below.

The new regulation states the intent of the Subtitle and lists criteria for selecting the environmentally preferable mitigation option. Consideration of what is the environmentally preferable option is part of the federal mitigation rule.

26.23.04.02. Order of Preference for Mitigation Options

Regulation 26.23.04.02 (original) Mitigation for Regulated Activities is proposed to be repealed and replaced with two regulations to meet formatting requirements and page limits.

This section replaces language in Section H Geographic Locations in 26.23.04.03 Mitigation Standards. The new general order of preference is mitigation banking, payment into the Nontidal Wetland Compensation Fund, and mitigation by the authorized person. The order of preference is ranked for consistency with the federal mitigation rule. Criteria for deviating from the standard order of preference are included.

Special consideration for the preferred mitigation option required for agricultural activities are added.

26.23.04.03 Mitigation for Agricultural Activities

Regulation 26.23.04.03 (original) is proposed to be repealed and replaced with two regulations to meet formatting requirements and page limits. New regulation 26.23.04.03 applies to mitigation for agricultural activities and contains language previously in 26.23.04.01.

The previous Regulation 26.23.04.03 Mitigation Standards is proposed to be repealed and proposed to meet new formatting standards and to be consistent with federal compensatory mitigation requirements.

Most of the language was previously under COMAR 26.23.04.01. There are updated cross references to other mitigation regulations to reflect the new numbering.

New language is added requiring that the mitigation component of a soil conservation and water quality plan be provided within a time frame specified by the Department.

26.23.04.04 Mitigation for Regulated Activities

The previous regulation 26.23.04.04 Monitoring and Bonding is proposed to be repealed and new language proposed as 26.23.04.19----.22 for consistency with federal mitigation requirements and formatting standards.

The regulation has been revised to meet new formatting standards and for clarity. Most of the language was previously contained in 26.23.04.02. Mitigation for Regulated Activities.

Language is added to apply provisions in this section to all persons subject to a mitigation project, regardless of authorization type.

Language is added to:

- 1) list mitigation banks as a form of mitigation;
- 2) clarify that mitigation shall be conducted according to certain requirements;
- 3) add additional provisions for waiving or reducing mitigation requirements.

26.23.04.05 Replacement of Wetland Acreage and Function

The previous Regulation 26.23.04.05 Mitigation Plan is proposed to be repealed and new language proposed to meet new formatting standards and to be consistent with federal compensatory mitigation requirements.

Regulation 26.23.04.05 Replacement of Wetland Acreage and Function includes language previously under Sections C and G of 26.23.04.03 Mitigation Standards, as well as revised ratios to eliminate higher requirements for use of mitigation banks.

Additional considerations are added for determining whether or not a mitigation proposal replaces lost acreage and function.

Language is added to allow the use of a functional assessment method in the future to adjust the standard replacement ratio.

Language allowing the Department to require a functional assessment is added.

Language requiring a vegetated buffer around the mitigation project is included.

26.23.04.06 Requirements for Enhancement and Out-of-Kind Mitigation

The previous Regulation 26.23.04.06 Mitigation Banking is proposed to be repealed and proposed to meet new formatting standards and to be consistent with federal compensatory mitigation requirements.

New Regulation 26.23.04.06 Requirements for Enhancement and Out-of-Kind Mitigation includes language previously included in Section F in 26.23.04.03 Mitigation Standards. Additional language applies criteria previously used in evaluating enhancement projects to apply also to out-of-kind-mitigation. A list of project types which may qualify for out-of-kind mitigation is revised. Provisions for preservation as a mitigation option are included, with a minimum acreage replacement requirement.

26.23.04.07 Geographic Location of Mitigation Sites

The previous Regulation 26.23.04.07 Nontidal Wetland Compensation Fund is proposed to be repealed and proposed as 26.23.04.23.

New Regulation 26.23.04.07 Geographic Location of Mitigation Sites includes language previously in Section I. Siting Within Geographic Locations in 26.23.04.03 Mitigation Standards.

Additional language is added to clarify exceptions to sites that are generally unsuitable for construction of mitigation sites and for consistency with federal requirements.

26.23.04.08 Components of Mitigation Bank Application

New Regulation 26.23.04.08 Components of Mitigation Bank Application includes language previously in Section A in 26.23.04.06 Mitigation Banks on information to be submitted for a proposed mitigation bank.

Additional language is proposed to be added for consistency with federal requirements and State statute.

26.23.04.09 Processing of Mitigation Bank Application

The new Regulation 26.23.04.09 Processing of Mitigation Bank Application includes language from former Sections A and B in 26.23.04.06 Mitigation Banks and is proposed to meet new formatting standards and to be consistent with federal compensatory mitigation requirements.

26.23.04.10 Mitigation Banking Instrument

New Regulation 26.23.04.10 Mitigation Banking Instrument includes language from former Section C in 26.23.04.06 Mitigation Banks. The new Regulation addresses State formatting requirements and consistency with federal compensatory mitigation requirements.

Requirements for information in the mitigation bank instrument and requirements for implementation of the instrument are listed in this Regulation.

26.23.04.11 Administration and Review of Mitigation Bank Use

New Regulation 26.23.04.11 Administration and Review of Mitigation Bank Use includes language from former Section D in 26.23.04.06 Mitigation Banks. The new Regulation addresses State formatting requirements and consistency with federal compensatory mitigation requirements.

Language includes sale of mitigation bank credits; reporting and accounting; criteria for review of proposals to use a mitigation bank to meet mitigation requirements; and closure of mitigation banks.

26.23.04.12 Phase I of a Mitigation Plan

New Regulation 26.23.04.12 Phase I Mitigation Plan includes language from former Section B in 26.23.04.05 Mitigation Plan. The new Regulation addresses State formatting requirements and consistency with federal compensatory mitigation requirements.

Text is added on how the Department will review proposals to use mitigation banks and evaluate the environmentally preferable option.

26.23.04.13 Phase II Mitigation Plan

New Regulation 26.23.04.13 Phase II Mitigation Plan includes language from former Section C in Regulation 26.23.04.05 Mitigation Plan and provisions for varying the time of submission of Phase II of a Mitigation Plan.

Language is added to require that the Department condition authorizations to require that mitigation projects be constructed in advance or concurrent with regulated activity.

Language is added to include information required for consistency with the federal mitigation rule, including potentially longer monitoring.

26.23.04.14 Site Protection Mechanisms and Long-term Management for Mitigation Sites.

New Regulation 26.23.04.14 for Site Protection Mechanisms and Long-term Management for Mitigation Sites includes language from former Section K Protection Mechanisms in 26.23.04.03 Mitigation Standards.

Language is added for delaying approval of mitigation bank use until the protection mechanism is in place.

Language is added to clarify that the protection in perpetuity includes required buffer areas.

Language is added to ensure that the protection mechanism includes a requirement to establish funds for long-term management and catastrophic events remediation.

Language changes and additions are made to achieve consistency with the federal mitigation rule.

26.23.04.15 Construction of Mitigation Projects

New Regulation 26.23.04.15 Construction of Mitigation Projects includes language from Section C Mitigation Banking Agreement in COMAR 26.23.04.06 Mitigation Banking.

Additional language is added for consistency with federal requirements.

26.23.04.16 Remediation for Mitigation Projects

New Regulation 26.23.04.16 Remediation of Mitigation Projects includes language previously in Sections C and F of COMAR 26.23.04.06 Mitigation Banks. The new Regulation addresses State formatting requirements and consistency with federal compensatory mitigation requirements.

Language was added to the new regulation to clarify that requirements now apply to both mitigation banks and individual mitigation projects, for consistency with the federal mitigation rule.

Language is added to list Department actions in the event of a failure by the person subject to a mitigation requirement, including bank sponsors, to remediate a mitigation site.

26.23.04.17 Mitigation Plan Modification

New Regulation 26.23.04.17 Mitigation Plan Modification includes language from former Section D in COMAR Regulation 26.23.04.05 Mitigation Plan.

Language meets new formatting standards. Permittees, persons conducting agricultural activities requiring mitigation, other persons subject to mitigation requirements and bank sponsors are all included subject to these provisions.

26.23.04.18 Performance Standards

New Regulation 26.23.04.18 Performance Standards includes language previously in Section J. Project Standards in COMAR 26.23.04.03 Mitigation Standards.

The format has changed to meet new requirements for COMAR page limits.

New language requires that persons subject to a mitigation requirement meet standards described in Phase II Mitigation Plan approval letter and the mitigation banking instrument for mitigation banks. Performance criteria are to be stated in the Phase II Mitigation Plan approval letter or mitigation banking instrument.

Replace previously stated plant survival thresholds with plant cover and density requirements. New performance standards are described, including for soils, hydrology, and buffers.

Language is added to describe criteria for performance standards for consistency with the federal mitigation rule.

26.23.04.19 Financial Assurances (for mitigation types other than mitigation banks)

New Regulation 26.23.04.19 Financial Assurances includes language from former Section B. Bonding in Regulation 26.23.04.04 Monitoring and Bonding. The format has changed to meet new requirements for COMAR page limits.

Language is added to describe information to be provided from government entities to document that resources exist to complete a mitigation site while being exempt from bonding requirements. This change is proposed to ensure that other government agencies complete mitigation projects in a timely manner.

The timing of the bond submittal has been changed from after approval of a Phase II mitigation plan to a time specified by the Department but no later than prior to commencement of activities requiring mitigation.

The duration that a bond or alternate form of security has been extended to be at the end of the monitoring period, while allowing for partial release at interim stages of mitigation project completion. This change would achieve consistency with federal requirements.

The amount of the financial assurance has been increased to better reflect construction and monitoring costs, and is consistent with rates for payment into the Nontidal Wetland Compensation Fund. This change would achieve consistency with federal requirements that financial assurances be adequate to ensure that mitigation is successfully completed.

Language is added to clarify that liability is linked to successfully meeting mitigation requirements.

Language is added regarding justification for reducing the amount of financial assurance.

26.23.04.20 Financial Assurances for Mitigation Banks

New Regulation 26.23.04.20 Financial Assurances for Mitigation Banks includes language in former Section B of Regulation 26.23.04.04 Monitoring and Bonding. There are changes to meet format requirements for page limits.

Language is added for assurances from government entities operating a mitigation bank.

Language for consistency with federal mitigation requirements.

Comparable requirements for financial assurances are linked to detailed provisions in Regulation 26.23.04.19.

26.23.04.21 Forfeiture of Financial Assurances

New Regulation 26.23.04.21 Bond Forfeiture includes language from former Section B of Regulation 26.23.04.04 Monitoring and Bonding. There are changes to meet format requirements.

Language has been added to allow for forfeiture of the financial assurance upon failure to complete mitigation requirements or revocation of any nontidal, tidal, or waterway construction authorization.

Language is added to address future proposed regulated activities from participants in a limited liability corporation.

This section has more detail than in the federal mitigation requirements.

26.23.04.22 Monitoring

New Regulation 26.23.04.22 Monitoring includes some language from former Section A of Regulation 26.23.04.04 Monitoring and Bonding. There are changes to meet format requirements.

New language allows for indeterminate reductions or extensions of the monitoring period from a five or ten year period and specifies that monitoring requirements will be described in the Phase II Mitigation Plan approval letter. Current regulations limit extensions to a maximum of 3 years. The varying durations are changed to be consistent with federal requirements.

Language is added to provide more detail on information to be included in monitoring reports.

Language is added for consistency with federal mitigation requirements in some provisions, other provisions are more stringent.

26.23.04.23 Nontidal Wetland Compensation Fund

Regulation 26.23.04.23 Nontidal Wetland Compensation Fund includes language previously in Regulation 26.23.04.07 and adds a process for determining and updating the fees. Additional tasks associated with completing mitigation projects are included in the list of costs which may be paid for using the Fund.

Language alters the previous order of preference for accepting payments as a form of compensatory mitigation, and consideration of the payment when it is the environmentally preferable option. Previous regulations listed payment as generally the least desirable form of mitigation, while under requirements of the federal rule, payment into an approved in-lieu fee program is generally the second preference after a mitigation bank.

The list of activities for which the Fund may pay is expanded.

Language is added describing how fees will be calculated.

Language is added that the Department shall seek approval to operate an in-lieu fee program according to the federal rule; and if approved, operate under terms of the proposed instrument and 33 CFR 332.8.

26.23.05.01 Agricultural Activities

Changes in this section update cross-references to regulations related to mitigation.