

Advance Notice of Proposed Rulemaking

Final draft full regulations 8/14/2025

26.23.01.01 Definitions.	2
26.23.01.01-1 Incorporation by Reference	10
26.23.01.02 Activities Exempt from Permit Requirement.	12
26.23.01.03 County Delegation.	13
26.23.01.05 Enforcement.	16
26.23.02.02 Application Processing Procedures for the Department.	17
26.23.02.03 Permit Decision and Appeal.	18
26.23.02.08 Temporary Emergency Nontidal Wetland Authorizations.	23
26.23.02.09 Suspension and Revocation.	25
26.23.03.01 Activities Requiring a Letter of Authorization.	26
26.23.04.01 [Mitigation for Agricultural Activities.] Criteria for Environmentally Preferable Mitigation Options.	28
26.23.04.02 [Mitigation for Regulated Activities.] Order of Preference for Mitigation	30
26.23.04.03 [Mitigation Standards] Mitigation for Agricultural Activities.	32
26.23.04.04 [Monitoring and Bonding] Mitigation for Regulated Activities.	34
26.23.04.05 [Mitigation Plan.] Replacement of Nontidal Wetland Acreage and Function.	36
26.23.04.06 [Mitigation Banking.] Requirements for Enhancement, Preservation, and Out of Kind Mitigation	39
26.23.04.07 [Nontidal Wetland Compensation Fund.] Geographic Location of Mitigation Sites	40
26.23.04.08 Components of Mitigation Bank Application	42
26.23.04.09 Processing of Mitigation Bank Application.	44
26.23.04.10 Mitigation Banking Instrument.	45
26.23.04.11 Administration and Review of Mitigation Bank Use.	47
26.23.04.12 Phase I of a Mitigation Plan.	49
26.23.04.13 Phase II of a Mitigation Plan	51
26.23.04.14 Protection Mechanisms and Long-term Management for Mitigation Sites.	54
26.23.04.15 Construction of Mitigation Projects	56
26.23.04.16 Remediation for Mitigation Projects	57
26.23.04.17 Mitigation Plan Modification	58
26.23.04.18 Performance Standards.	59
26.23.04.19 Financial Assurances.	61
26.23.04.20 Financial Assurances for Mitigation Banks	64
26.23.04.21 Forfeiture of Financial Assurances	65
26.23.04.22 Monitoring	66
26.23.04.23 Nontidal Wetland Compensation Fund.	68
26.23.05.01 Agricultural Activities.	70

26.23.01.01 Definitions.

26.23.04.01 Definitions.

A. The following definitions describe the meaning of terms used in this subtitle, unless the context in which they are used clearly requires a different meaning or a different meaning is prescribed at the point of use. Terms not defined below shall have the meaning given to them in Environment Article, Title 5, Subtitle 9, Annotated Code of Maryland, in other or relevant statutes or regulations in this title or, if not defined in statutes, the meaning attributed by common use.

B. Terms Defined.

(1) "Act" means the Nontidal Wetlands Protection Act, Environment Article, Title 5, Subtitle 9, Annotated Code of Maryland.

(1-1) *"Adaptive management plan" means a strategy to:*

(a) *Address unforeseen changes in site conditions or other components of the mitigation project, including the parties responsible for implementing adaptive management measures; and*

(b) *Guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect mitigation success.*

(2) "Adaptive vegetation" means plant species which are not native but provide similar value to native species and grow successfully in Maryland.

(3) "Administrative Procedure Act" means the provisions of State Government Article, §10-101 et seq., Annotated Code of Maryland.

(4) "Adverse impact" means any diminishment of nontidal wetland acreage or function.

(5) "Agricultural activity" means aquaculture and farming activities including plowing, tillage, cropping, seeding, cultivating, the grazing and raising of livestock, sod production, other products cultivated as part of a recognized commercial enterprise, and harvesting for production of food and fiber products, excluding forest products. The definition includes tobacco, nursery stock, Christmas trees, and aquaculture ponds and other ponds used to conduct farming activities. Activities that result in a change to a land use other than agriculture are not agricultural activities. Structures or temporary storage areas related to the sale of the products are excluded from this definition.

(6) "Agriculture" means a land use dominated by the production of food, fiber, aquaculture, or livestock, and other products cultivated as part of a recognized commercial enterprise.

(7) "Areas that have lain fallow" means areas used for agriculture or forestry activities that are not in production for agriculture or forest products.

(8) "Aquaculture" means the commercial rearing of finfish, shellfish, and aquatic plants for sale, trade, barter, or shipment.

(9) "Aquaculture facility" means a pond, impoundment, raceway, or tank, and their associated structures essential for the purpose of aquaculture.

(9-1) *"Authorized person" means a person who has been issued a nontidal wetland permit or other type of authorization pursuant to this subtitle.*

(10) "Avoid" means to refrain from conducting an activity that may adversely impact a nontidal wetland.

(10-1) "Bank [operator] sponsor" means the person responsible for construction, maintenance, operation, monitoring, and undertaking activities to establish a mitigation bank and to sell mitigation credits.

(11) "Bedding" means a site preparation method when a small ridge of surface soil is formed to provide an elevated area on which forest seedlings are to be planted.

(12) "Best management practices" means conservation practices or systems of practices and management measures that:

- (a) Control soil loss and reduce water quality degradation caused by nutrients, animal waste, toxics, and sediment; and
- (b) Minimize adverse impacts to the surface water, [ground water] *groundwater* flow, and circulation patterns, and to the chemical, physical, and biological characteristics of nontidal wetlands.
- (13) "Bog" means a nontidal wetland [characterized by organic soils, accumulated peat, and soils saturated to the surface throughout the year with minimal fluctuations in water level.] *with the following characteristics:*
 - (a) *Organic soils saturated to the surface throughout the year with minimal fluctuation in water level;*
 - (b) *Accumulated peat; or*
 - (c) *A floating vegetative mat.*
- (14) "Buffer" means a regulated area, 25 feet in width, surrounding a nontidal wetland, measured from the outer edge of the nontidal wetland.
- (15) "Clean Water Act" means the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977 and later amendments (33 U.S.C. §1251 et seq.).
- (16) "COMAR" means the Code of Maryland Regulations.
- (17) "Comprehensive watershed management plan" means a plan developed in cooperation with local, county, State, and federal agencies and approved by the Department which addresses nontidal wetland protection, creation, restoration, enhancement, cumulative impacts, flood protection, water supply concerns, and other natural resource elements.
- (18) "Conventional rotational cycle" means the growing of crops in a planned and used system that:
 - (a) Alternates the type of crop planted in a method that protects soil and water from degradation, noxious weeds, insects, and diseases; and
 - (b) Seeks to achieve the objectives of the landowner.
- (19) "Creation" means actions performed which establish nontidal wetlands [on upland sites.] *where they did not previously exist.*
- (19-1) Critical Area.
 - (a) "Critical Area" means the Chesapeake and Atlantic Coastal Bays Critical Area and all lands and waters defined in Natural Resources Article, §8-1807, Annotated Code of Maryland.
 - (b) "Critical Area" includes:
 - (i) All waters of and lands under the Chesapeake and Atlantic Coastal Bays and [its] *their* tributaries to the head of the tide as indicated on the State tidal wetlands maps, and all State and private tidal wetlands designated under Environment Article, Title 16, Annotated Code of Maryland;
 - (ii) All land and water areas within 1,000 feet beyond the landward boundaries of State or private tidal wetlands and the heads of tides designated under Environment Article, Title 16, Annotated Code of Maryland; and
 - (iii) Modification to the areas in this subsection through inclusions or exclusions proposed by local jurisdictions and approved by the Critical Area Commission as specified in Natural Resources Article, §8-1807, Annotated Code of Maryland.
- (20) "Critical habitat" means habitat necessary for the survival of threatened or endangered species, or species in need of conservation.
- (21) "Delmarva bay" means a nontidal wetland characterized by an elliptical or oval shape and centripetal drainage[, usually bordered by a distinct rim,] that is:
 - (a) *Usually bordered by a distinct rim;*
 - [(a)](b) Located in a depression with seasonal surface water that is *often* absent in summer;
 - [(b)](c) Generally located on the Delmarva Peninsula; and
 - [(c)](d) Thinly forested or unforested with [abundant] herbaceous vegetation that may be apparent only [after] *if* surface water recedes in the summer.
- (22) "Department" means the Department of the Environment.
- (23) "Destruction or removal of plant life that would alter the character of a nontidal wetland" means:
 - (a) The physical removal of natural nontidal wetlands vegetation; or
 - (b) Causing mortality of nontidal wetland vegetation by the application of herbicides, hydrologic alteration, or by other means.
- (24) "Detention basin" means an impoundment area made by constructing an embankment or excavating a pit, or both, for the purpose of temporarily storing storm water.
- (25) "Director" means the Director of the Water [Management] and Science Administration in the Department.
- (26) "Discharge of fill material" means the addition from any source of fill material into nontidal wetlands, which includes the following activities:

- (a) Placement of fill necessary for the construction of any structure;
 - (b) Building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction;
 - (c) Site development fill for recreational, industrial, commercial, residential, and other uses;
 - (d) Causeways or road fills;
 - (e) Dams and dikes;
 - (f) Artificial islands;
 - (g) Property protection or reclamation devices, or both;
 - (h) Levees; and
 - (i) Fills for structures such as, and associated with, sewage treatment facilities and intake and outfall pipes.
- (27) "Disturbance of water level or water table" means the alteration of the existing elevation of [ground water] *groundwater* or surface water by:
- (a) Adding or impounding a sufficient quantity of storm water or water from other sources to modify the existing vegetation, values, or functions of the nontidal wetland; or
 - (b) Draining, ditching, or otherwise causing the depletion of the existing [ground water] *groundwater* or surface water levels so that the activity would modify the existing vegetation.
- (28) "Drainage" means methods for changing the hydrologic conditions of nontidal wetlands, including lowering [ground water] *groundwater* or surface water levels through pumping, ditching, or otherwise altering water flow patterns.
- (29) "Emergent nontidal wetland" means that portion of a nontidal wetland dominated by erect, rooted, herbaceous vegetation as the uppermost vegetative strata.
- (30) "Enhancement" means actions performed to [provide additional protection to, or] create or improve *upon* the functions of[,] a nontidal wetland, [or other aquatic sites or resources] *that does not result in a gain of nontidal wetland acreage*.
- (31) "Excavation" means to dig or remove soil, rocks, or other materials resulting in a change in all or part of the elevation of a site.
- (32) "Exotic" means any species of plant or animal that is foreign to the State.
- (33) "Expanded buffer" means a regulated area 100 feet in width, surrounding a nontidal wetland, measured from the outer edge of a nontidal wetland, and established because of the presence of steep slopes, highly erodible soils, or the presence of nontidal wetlands of special State concern.
- (34) "Extenuating circumstances" means conditions requiring extension of a set time limit to process an application, render a decision, or conduct a public hearing.
- (35) "Farm pond" means a predominantly open water body used primarily to support agricultural activities, including livestock watering, irrigation, sediment control, fire protection, or aquaculture. Predominantly open water bodies on areas with a land use other than agriculture or that are not used primarily for agricultural activities are not considered farm ponds.
- (36) "Farmed nontidal wetlands" means an area designated by §B(62) that is presently tilled, grazed, or under conservation tillage for agricultural activities, or is lying fallow and has been out of production for agricultural activities for less than 5 consecutive years.
- (37) "Federal Manual" means the ["Federal Manual for Identifying and Delineating Jurisdictional Wetlands", 1989, promulgated by the Federal Interagency Committee for Wetland Delineation,] *Corps of Engineers Wetland Delineation Manual, 1987, and Regional Supplements to the Corps of Engineers Wetland Delineation Manual*, which [is] *are* incorporated by reference.
- (38) "Fill" means any materials placed in an area which change the elevation of the preexisting surface or [ground water] *groundwater* level, or the soil surface.
- (39) "Forested nontidal wetland" means that portion of a nontidal wetland dominated by woody vegetation greater than 20 feet in height.
- (40) "Forestry activity" means planting, cultivating, thinning, harvesting, or any other activity undertaken to use forest resources or to improve their quality or productivity. Activities that change nontidal wetlands to another land use, including but not limited to agriculture or development, are not forestry activities.
- (41) "Forest harvesting" means the felling, skidding, loading, and transporting of forest products.
- (42) "Forest road" means a temporary or permanent access road used to conduct forestry activities or transport timber or other forest products from a felling site to a public road. Roads constructed or used to convert forest land to another land use are not forest roads.
- (43) "Functions" means *the physical, chemical, and biological processes that support the roles* nontidal wetlands serve [through], *including*:

- (a) Reduction of pollutant loadings, including excess nutrients, sediment, and toxics;
- (b) Attenuation of flood waters and storm waters;
- (c) Shoreline stabilization and erosion control;
- (d) Breeding grounds and habitat for many species of plants and wildlife including fish, game, and nongame birds and mammals, including threatened and endangered species and species in need of conservation;
- (e) Food chain support; [and]
- (f) *Groundwater discharge and recharge; and*
- [(f)] (g) Timber production.

(44) "General area" means the geographic or market vicinity that has desired characteristics for fulfilling the basic project purpose.

(45) "Grazing" means feeding on grass or other herbaceous plants in a field.

(46) "Hybrid" means the offspring of any species of plants or animals of genetically dissimilar parents or stock.

(46-1) *"Hydrologic unit" has the meaning stated in Environment Article, §5-901(g), Annotated Code of Maryland.*

(46-2) *"Hydrologic unit code" means a numerical identifier that describes a hydrologic unit's physical location and position within the drainage system hierarchy.*

(47) "Hydrologically connected" means a nontidal wetland that:

- (a) Is contiguous to a watercourse, surface water body, tidal wetland, or drainage ditch;
- (b) Is within or connected to any 100-year floodplain as determined by calculation or Federal Emergency Management Agency maps;
- (c) Receives or discharges surface water or groundwater as intermittent or perennial flow from or to a surface water body, watercourse, or other tidal or nontidal wetland as demonstrated by the presence of an intermittent or perennial stream or spring flow; or
- (d) Was formerly contiguous to a surface water body, watercourse, or a nontidal wetland described in §B(47)(a)—(c), above, and is presently separated from these areas by a man-made berm, fill, road, or other structure.

(48) "Hydrophyte" means plant life adapted to growth and reproduction under periodically saturated root zone conditions during at least a portion of the growing season. A listing of these plants can be found in the ["National List of Plant Species that Occur in Wetlands: 1988, Maryland,"] *"2022 National Wetland Plant List, version 3.6" or derivative documents 2022 National Wetland Plant List Atlantic and Gulf Coastal Plain Region; and 2022 National Wetland Plant List Eastern Mountains and Piedmont Region* which [is] are incorporated by reference.

(49) "In kind" means characteristics closely approximating those of a nontidal wetland before it was adversely impacted by a regulated or an agricultural activity.

(49-1) *"In writing" means a method of transmitting correspondence by paper or electronic mail.*

(50) "Initial planning phase" means the period of time in which the feasibility of a project is evaluated before committing resources necessary for its implementation.

(50-1) *"In-lieu fee program" means a program that performs restoration, creation, enhancement, and/or preservation of wetlands by using funds paid into a governmental or non-profit natural resources management entity to satisfy mitigation requirements.*

(50-2) *"In-lieu fee program instrument" means the legal document for the establishment, operation, and use of the in-lieu fee program between the Department and an Interagency Review Team for operation of the Department's in-lieu fee program to meet mitigation requirements under 33 CFR § 332.8(2008), which is incorporated by reference, for federal authorizations.*

(50--3) *"In-lieu fee site" means a specific site proposed under the in-lieu fee program to provide compensatory mitigation.*

(50-4) *"Interagency Review Team" means an interagency group of federal, State, and local agencies that reviews documentation for, and advises the Department on, the establishment of proposed:*

- (a) *Mitigation banks; or*
- (b) *In-lieu fee programs accepting fees to meet federal compensatory mitigation requirements.*

(51) "Intermittent stream" means those areas that are surface waters, contained within a defined channel or bed, that flow at least once per year. A defined channel or bed is indicated by hydraulically sorted sediment, or the removal of vegetative litter, or loosely rooted vegetation by the action of moving water.

(52) "Isolated nontidal wetland" means a nontidal wetland that is not hydrologically connected, through surface or subsurface flow to streams, tidal or nontidal wetlands, or tidal waters.

(53) "Landscape management" means to maintain or alter vegetation on land that was planted or manipulated for horticultural purposes. Landscape management includes mowing, pruning, and private gardening, excluding agricultural activities.

(54) "Landscape management area" means an area predominately covered with grasses or herbaceous ground cover established and maintained for horticultural purposes. The landscape management area may include a lawn which contains trees, shrubs, or other plants.

(55) "Log deck" means a place where logs or tree-length materials are assembled in or near the forest for loading and transporting.

(56) "Loss of nontidal wetlands" means the alteration of:

(a) Existing nontidal wetland vegetation or water levels that significantly impairs or eliminates its principal functions, but excluding:

(i) Forestry activities conducted in accordance with an approved sediment and erosion control plan that complies with COMAR 26.23.05.02 and .03;

(ii) Rectification; and

(iii) Department-approved enhancement projects; or

(b) An area so that it no longer meets the nontidal wetland definition.

(57) Maintenance.

(a) "Maintenance" means activities undertaken to prevent the deterioration, impairment, or need for repair of a serviceable fill area, *existing* structure, right-of-way, or land use, which includes management of vegetation and replacement of structural components.

(b) "Maintenance" does not include the following activities, unless conducted in a temporary sediment control structure, wash pond, or roadside ditch:

(i) Dredging;

(ii) Excavating; or

(iii) Filling.

(58) "Minimize" means to reduce adverse impacts to nontidal wetlands to the greatest practicable and reasonable degree.

(59) "Mitigation" means [creation,] restoration, *creation*, [or] enhancement, *preservation or other compensation* [of] *for* nontidal wetlands[,], that were or will be lost due to regulated or agricultural activities.

(60) "Mitigation bank" means [an area of land that is:

(a) Developed and operated as approved by the Department;

(b) Used to satisfy wetland mitigation requirements when use of mitigation credits is specifically approved by the Department;

(c) Managed using a system of credits and debits jointly recorded by the bank operator and the Department.] *a wetland restoration, creation, enhancement, or preservation site undertaken expressly for the purpose of providing compensation credits for wetland losses due to regulated or agricultural activities.*

(60-1) ["Mitigation banking agreement" means a legally binding document between a bank [operator] *sponsor*, mitigation bank owner, and the Department that describes operation, maintenance, remediation, and monitoring requirements for a mitigation bank.] "*Mitigation bank application*" means the information, including components required in the prospectus for meeting federal compensatory mitigation requirements pursuant to 33 CFR § 332.8, (2008) which is incorporated by reference, submitted by the bank sponsor to the Department to start the official mitigation bank review process.

(60-2) "*Mitigation banking instrument*" means the legal document for the establishment, operation, and use of the mitigation bank.

[60-2)](60-3) "Mitigation credit" or "credit" means [an acreage] *a unit of value assigned to a mitigation bank.*

(61) (text unchanged)

(61) "Native" means any plant or animal species indigenous to Maryland.

(62) "Nontidal wetland":

(a) Means an area that is inundated or saturated by surface water or [ground water] *groundwater* at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation;

(b) Is determined according to the Federal Manual;

(c) Does not include tidal wetlands regulated under Environment Article, Title 16, Annotated Code of Maryland.

(62-1) *"Nontidal wetland conversion" means activities that result in a loss of nontidal wetlands due to a change of one dominant nontidal wetland vegetative class to another.*

(63) "Nontidal wetlands of special State concern" means the areas designated based on criteria in Regulation .04 of this chapter, and listed in COMAR 26.23.06.01 as having exceptional ecological or educational value of [State wide] *Statewide* significance.

(64) "Off-site" means not on the same parcel as a nontidal wetland which has been adversely impacted by a regulated activity.

(65) "On-site" means the same parcel on which a nontidal wetland has been adversely impacted by a regulated activity.

(66) "Out of kind" means biological characteristics not closely approximating those of the nontidal wetland before it was adversely impacted by a regulated or an agricultural activity.

(67) "Peat mining" means the extraction of peat of a commercially valuable quality and quantity.

(68) "Person" means the federal government, the State, any county, municipal corporation, or other political subdivision of the State, or any of their units, or an individual, receiver, trustee, guardian, executor, administrator, fiduciary, or representative of any kind, or any partnership, firm, association, public or private corporation, or any other entity.

(68-1) *"Phase II mitigation plan approval letter" means the official correspondence from the Department stating detailed mitigation requirements under this regulation, including approved plans and attached documents, that are assigned to permittees, authorized persons, and persons conducting agricultural activities.*

(69) "Practicable" means available and capable of being done after taking into consideration costs, existing technology, and logistics in light of overall project purposes.

(70) "Presently conducted" means existing or ongoing.

(70-1) *"Preservation" means actions performed to maintain the existing chemical, physical, and biological integrity of a nontidal wetland. Preservation does not result in a gain of aquatic resource function.*

(71) "Project" means the entire activity on a parcel of land including all proposed and projected phases and sections of land subdivisions of which all regulated or other activities conducted in a nontidal wetland, buffer, or expanded buffer are a part.

(72) "Project purpose" means the principal reason for conducting all regulated activities and other activities on a project site.

(72-1) *"Prospectus" means the documents submitted at the beginning of the mitigation bank review process summarizing how a proposed mitigation bank or in-lieu fee program will meet requirements of the federal mitigation regulations and State nontidal wetland mitigation regulations.*

(73) "Rectify" or "rectification" means actions performed to nontidal wetlands which have been temporarily impacted by regulated, forestry, or agricultural activities to return them to previous conditions with at least the same nontidal wetland acreage and equivalent function.

(74) "Regulated activity":

(a) Means any of the following activities which are directly undertaken or originate in a nontidal wetland, or within a buffer or expanded buffer of a nontidal wetland:

(i) Removal, excavation, or dredging of soil, sand, gravel, minerals, organic matter, or materials of any kind;

(ii) Changing existing drainage characteristics, sedimentation patterns, flow patterns, or flood retention characteristics;

(iii) Disturbance of the water level or water table by drainage, impoundment, or other means;

(iv) Dumping, discharging of material, or filling with material, including the driving of piles, and placing of obstructions;

(v) Grading or removal of material that would alter existing topography; and

(vi) Destruction or removal of plant life that would alter the character of a nontidal wetland; and

(b) Does not include an agricultural activity or forestry activity as defined in this subtitle.

(74-1) "Remediation" means corrective actions necessary to ensure success of a mitigation [site] *project* or a mitigation bank.

(75) "Repair" means an activity that restores the scope, size, and design of a serviceable fill area, structure, or land use to its previously authorized and undamaged condition. Activities that change the size or scope of a project beyond the original design so as to drain, dredge, fill, flood, change the hydrology, or otherwise convert nontidal

wetlands that were not previously impacted by the project are not included in this definition. Minor deviations to plans or specifications are allowed as long as no permanent nontidal wetland impact results from the deviation.

(75-1) "Replacement ratio" or "compensation ratio" means the ratio of the area of wetland restored, created, [or] enhanced, *or preserved as mitigation* to the area of wetland *lost* for which mitigation is required.

(76) "Restoration" or "restore" means actions performed which [establish] *re-establish* nontidal wetlands on former nontidal wetland sites.

(77) "Scrub-shrub wetland" means that portion of a nontidal wetland dominated by woody vegetation less than 20 feet in height as the uppermost strata.

(78) "Seed tree law" means Natural Resources Article, §5-501 et seq., Annotated Code of Maryland.

(78-1) "*Service area*" means the geographic area within which impacts can be mitigated at a specific mitigation bank or in-lieu fee site, as designated in its instrument, and:

(a) *Is consistent with federal guidelines in 33 CFR Part 332 (2008) which is incorporated by reference;*

(b) *Is the 8 digit hydrologic unit in which the mitigation bank or in lieu fee site is located; and*

(c) *May be expanded to include other 8 digit hydrologic unit code watersheds if environmentally justified.*

(79) "Serviceable" means presently usable or currently fulfilling its basic, original purpose.

(80) "Significant plant or wildlife value" means a nontidal wetland:

(a) Of the following unusual or unique community types:

(i) Bogs,

(ii) Areas with bald cypress (*Taxodium distichum*), Atlantic white cedar (*Chamaecyparis thyoides*), red spruce (*Picea rubens*), balsam fir (*Abies balsamea*), or American larch (*Larix laricina*) that contain at least 20 percent of these species in any strata as determined by the Federal Manual[, or];

(iii) Delmarva bays; *or*

(iv) *Areas with Magnolia virginiana that contains at least 25 percent of this species in any strata as determined by the Federal Manual;*

(b) With water discharge that maintains minimum stream base flow important for maintaining plant and wildlife species;

(c) With threatened or endangered species, or species in need of conservation[;]*as identified in COMAR .08.03.08;*

(d) [Adjacent to] *Bordering, neighboring, or contiguous to, or within the 100-year floodplain of*, Class III or Class IV waters defined in COMAR 26.08.02.08;

(e) Of special State concern;

(f) Supporting vernal pools; [or]

(g) That is regularly or periodically influenced by tidal waters[.]; *or*

(h) *Within the watershed of Tier II waters defined in COMAR 26.08.02.04-1.*

(81) "Site preparation" means a forest activity to remove unwanted vegetation and other material, and to cultivate or prepare the soil for reforestation.

(81-1) "*Site protection mechanism*" means a description of the legal arrangements, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site.

(82) "Skid trail" means a temporary, nonstructural pathway over forest soil to drag felled trees or logs to a log deck.

(83) "Soil conservation and water quality plan" means a land use plan for a farm that shows a farmer how to make best possible use of soil and water resources while protecting and conserving those resources for the future.

(84) "Spring" means a nontidal wetland that discharges [ground water] *groundwater* at the surface to form a pool or to provide intermittent or perennial surface flow, and that is usually characterized by saturated or organic soils.

(85) "State programmatic general permit" means a general permit issued by the U.S. Army Corps of Engineers governing the protection of nontidal wetlands in Maryland.

(85-1) "*Temporary impact*" means the effect of an activity in a nontidal wetland, buffer, or expanded buffer which is:

(a) *Rectified within the time frame specified by the Department after the activity starts; and*

(b) *Will not result in a change in nontidal wetland acreage and function.*

(86) "Utility line" means any underground or overhead transmission line, pipe, cable, or wire for the conveyance of public or private water or sewer, natural gas, or the transmission of electrical, radio, or telecommunications service[.]. "Utility line" *does not include*:

- (a) *Intake and outfall structures;*
- (b) *Pipes or pipelines used to transport any liquid or slurry substance except as associated with water and sewage lines; or,*
- (c) *Storm water conveyance systems.*

(87) "Vernal pool" means a nontidal wetland in a confined depression that has surface water for at least 2 consecutive months during the growing season, and:

- (a) Is free of adult fish populations;
- (b) Provides habitat for amphibians; and
- (c) Lacks abundant herbaceous vegetation.

(88) "Water dependent activity" means an activity for which the use of surface water would be essential to fulfill a basic purpose of the proposed project.

(88-1) *"Watershed segment" means one of 138 watersheds of third order streams that are:*

- (a) *Designated by an eight-digit numeric code;*
- (b) *Delineated by the Department to comprise the sum total of surface waters of the State; and*
- (c) *Less than 15,000 acres in size.*

[(88-1)] (88-2) "Watershed sub-basin" means one of the 20 watershed areas delineated by the Department in COMAR 26.08.[01]02 and comprising, in sum total, the surface waters of the State.

(89) "Wildlife" means any species of a vertebrate or invertebrate animal, excluding domestic species.

.01-1 Incorporation by Reference.

In this subtitle, the following documents are incorporated by reference:

- A. Corps of Engineers Wetland Delineation Manual. Technical Report Y-87-1. Environmental Laboratory, U.S. Army Corps of Engineers. January 1987.*
- B. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region (Version 2.0) (U.S. Army Corps of Engineers. Final Report. ERDC/EL TR-12-9 April 2012);*
- C. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0) (U.S. Army Corps of Engineers. Final Report. ERDC/EL TR-10-20 November 2010);*
- D. 33 CFR Part 332 (2008);*
- E. 2022 National Wetland Plant List, version 3.6. (U.S. Army Engineer Research and Development Center, Vicksburg, MS);*
- F. 2022 National Wetland Plant List Atlantic and Gulf Coastal Plain Region (U.S. Army Engineer Research and Development Center, Vicksburg, MS);*
- G. 2022 National Wetland Plant List Eastern Mountains and Piedmont Region (U.S. Army Engineer Research and Development Center, Vicksburg, MS);*
- H. Rank and Status Code Definitions, (Maryland Department of Natural Resources Wildlife and Heritage Service, September 17, 2015); and*
- I. Maryland State Wildlife Action Plan Chapter 3, Maryland's Wildlife Species of Greatest Conservation Need..*

26.23.01.02 Activities Exempt from Permit Requirement.

26.23.01.02 Activities Exempt from Permit Requirement.

The following activities are exempt from the letter of authorization, permit, and mitigation requirements of this subtitle:

A. Forestry activities.

B. Agricultural activities in COMAR 26.23.05.01B. All other agricultural activities are exempt from the permit requirements of this subtitle, but are subject to the mitigation requirements of COMAR 26.23.04.01 - .03 and COMAR [26.23.04.03—.07.] 26.23.04.05 - .23.

C. Approved mitigation projects required under this subtitle[.] *provided that an authorization under this subtitle for the impacts to be mitigated has been issued.*

D. Any proposed regulated activity conducted by a person who has applied to the U.S. Army Corps of Engineers by December 31, 1990, for a permit under §404 of the Clean Water Act, provided that the following conditions are satisfied:

- (1) The U.S. Army Corps of Engineers ultimately issues a permit or other document under §D(3) of this regulation;
- (2) The applicant does not alter the scope of the regulated activity originally applied for without authorization from the U.S. Army Corps of Engineers;
- (3) A person submits the following information to the Department, as may be applicable, and as may be requested by the Department:
 - (a) A copy of a dated application for a permit under §404 of the Clean Water Act;
 - (b) A copy of the plans for the project which were submitted to the U.S. Army Corps of Engineers;
 - (c) A letter from the U.S. Army Corps of Engineers describing the project and proposed activity and stating one of the following:
 - (i) The project and proposed activity is authorized by the U.S. Army Corps of Engineers;
 - (ii) The proposed activity is exempt from §404 of the Clean Water Act permit requirements.

E. Activities within farmed nontidal wetlands and their buffers, excluding farmed nontidal wetlands with 15 or more consecutive days of inundation during the growing season, and their buffers. The duration of inundation is determined by the Department consistent with federal agency procedures adopted pursuant to the Food Security Act of 1985, 16 U.S.C. §3801 et seq.

F. The following activities, if they do not result in cumulative direct or indirect adverse impacts:

- (1) Construction of additions, outbuildings, and accessories to existing structures within a landscape management area which impacts less than 1,000 square feet of nontidal wetlands;
- (2) Construction placed on existing impervious surfaces or on structures within the buffer or expanded buffer;
- (3) Removal of 30 percent of the trees in the buffer, provided that:
 - (a) The density but not the areal extent of the trees is reduced; and
 - (b) Not more than 30 percent of the understory is removed;
- (4) Mowing or other forms of vegetation control on existing rights-of-way;
- (5) The control of State-designated noxious weeds;
- (6) Landscape management in the nontidal wetland, buffer, or expanded buffer;
- (7) Soil investigations;
- (8) Percolation tests for sewage disposal fields;
- (9) Survey markers or survey monuments;
- (10) Other similar activities with minimal adverse impacts as approved by the Department;
- (11) The maintenance of the following serviceable structures or fills:
 - (a) Aboveground and underground utilities;
 - (b) Structures in rights-of-way;
 - (c) Railroad beds;

- (d) Road beds, roadside ditches, culverts, outlet ditches, wash ponds, and temporary sediment control structures;
 - (e) Bridges;
 - (f) Dams;
 - (g) Dikes;
 - (h) Levees;
 - (i) Water and wastewater control structures; and
 - (j) Facilities designed for storm water management;
- (12) Within the Critical Area, a cumulative removal of 10 percent of the trees within the buffer or expanded buffer, if:
- (a) The density but not the areal extent of the trees is reduced; and
 - (b) Not more than 10 percent of the understory is removed.

26.23.01.03 County Delegation.

26.23.01.03 County Delegation

A. Request for Delegation.

(1) The Department may delegate all or part of its authority under the Act to a county that enacts a nontidal wetlands protection program that meets or exceeds the standards adopted by the Department.

(2) To request delegation, a county shall submit a written request to the Department which includes the following information:

- (a) A copy of the proposed program, as enacted, or other evidence of authority to implement a program;
- (b) Schedule for program implementation and procedures;
- (c) Description of overall program administration, including sufficient staff for enforcement, administration, and training;
- (d) Proposed program budget and funding; and
- (e) Evidence that the program has been approved by the county legislative body.

(3) The Department may provide technical assistance and a model county ordinance for use and consideration by a county.

(4) Within 30 days of receiving all of the information in this section, the Department shall submit written comments to the county, including recommendations and proposals for program revisions and improvements. This time period may be modified by mutual agreement of the Department and the county. A county shall resolve any issues raised in the Department's written comments to the Department's satisfaction, including making any required legislative changes.

(5) In reviewing the acceptability of the county's program, the Department may consider:

- (a) Consistency with the minimum standards of the Act;
- (b) Consistency with this subtitle;
- (c) Whether the county employs or plans to employ an adequate number of qualified personnel to implement the program; and
- (d) Likelihood of successful implementation.

(6) When the county has formally approved a program satisfactory to the Department, the Department shall, in writing, grant or deny delegation. If denied, the Department, in writing, shall state its grounds for denial. The Department may not deny a requested delegation unless opportunity has been afforded to the appropriate officials of the affected county to present arguments before the Secretary on why delegation should be granted. The presentation of arguments to the Secretary is not a contested case hearing. The Secretary's determination shall be final.

(7) If granted, delegation shall be effective from the date of written notice to the county and shall continue for not more than 2 years unless renewed or withdrawn by the Department.

(8) A county accepting delegation in accordance with this subtitle shall:

- (a) Use the joint federal and State permit application form;
- (b) For activities not qualifying under a State programmatic general permit from the U.S. Army Corps of Engineers, issue a joint State and county permit on a form adopted by the Department; the joint State and county permit shall be separate and distinct from existing county permits and approval; and
- (c) For activities qualifying under a State programmatic general permit, issue a recommended permit decision to the Department.

(9) If a county is authorized to issue permits for activities qualifying under a State programmatic general permit, it shall establish a nontidal wetland compensation fund, independent of the fund maintained by the Department, in accordance with the Act and COMAR [26.23.04.07] 26.23.04.23.

B. Authority and Standards for Delegation.

(1) Provided that this authority has been delegated, a county with an approved nontidal wetlands protection program shall have the authority to issue, deny, or condition nontidal wetlands permits for all regulated activities within a nontidal wetland or buffer, except for the following regulated activities:

- (a) In nontidal wetlands of special State concern and their expanded buffers;
- (b) Which directly impact two or more county jurisdictions;
- (c) Undertaken by a unit of the State or federal government, or on State or federal owned or controlled land;
- (d) Qualifying under a State programmatic general permit that does not apply to county governments; and
- (e) For which the State has elected to make the final permit decision.

(2) The Department may not grant local program delegation authority for agricultural and forestry activities specified under Environment Article, §5-905, Annotated Code of Maryland. However, this section is not intended to

preclude a county from exercising any authority over agricultural or forestry activities granted to it under any other existing State law.

(3) If authorized by the U.S. Army Corps of Engineers, the Department may grant a county the authority to issue nontidal wetland permits for activities qualifying under a State programmatic general permit.

C. State Oversight.

(1) The following procedures apply for permit applications evaluated by a county for activities not qualifying under a State programmatic general permit:

(a) Complete applications shall be submitted to the Department and the county.

(b) The Department shall notify the county when the Department intends to process the application and render a final permit decision.

(c) A county shall provide the Department with a copy of the public notice for any complete application that the Department has not processed for a final permit decision, if the responsibility to prepare public notices has been delegated to the county.

(d) If the Department intends to comment upon, object to, or make recommendations with respect to a permit application, the Department shall notify the county within 10 days of receipt of the public notice. If a county is notified, a permit may not be issued until the Department has approved issuance of the permit.

(e) At the Department's request, a county shall transmit the following information to the Department:

(i) A copy of the complete permit application with all of the information required by COMAR 26.23.02.01;

(ii) A copy of any other documents relevant to permit review including a mitigation plan; and

(iii) Information brought out by the public during the comment period or at a hearing.

(f) Within 20 days of receipt of all of the information required by §C(1)(e) of this regulation, the Department shall comment upon, object to, recommend, or condition issuance of a permit. The Department's recommendation shall be binding on a county. A recommendation of permit denial shall state the reasons for a denial. If the Department fails to make a recommendation to the county within the specified time period, the county may take whatever action it deems appropriate.

(g) If a county denies an application due to the recommendation of the Department, the applicant may appeal the denial to the Department under COMAR 26.24.02.03B.

(h) A county shall provide a copy of a mitigation plan upon written request by the Department.

(2) Permit applications for activities qualifying under a State programmatic general permit shall be:

(a) Submitted to the Department and the county; and

(b) Processed and evaluated by a county for a recommended permit decision within 10 days of the:

(i) Expiration of the public comment period under COMAR [26.23.02.02F] 26.23.02G(2)(d); or

(ii) Determination that the activity tentatively qualifies for a letter of authorization.

(3) A county shall submit its recommended permit or letter of authorization decision to the Department.

(4) The final permit or letter of authorization decision shall be made by the Department.

(5) An applicant aggrieved by the Department's decision may appeal the decision under COMAR 26.23.02.03B.

D. Program Reporting. A county granted delegation authority shall submit an annual report to the Department, coinciding with the State fiscal year and evaluating the county's administration of the program. The report shall include the following information:

(1) Number of permits issued, modified, and denied;

(2) Types of activities;

(3) Locations of activities;

(4) Number of violations identified and number and nature of enforcement actions taken;

(5) Comments from the regulated community and members of the public, including copies of any written complaints on a county's administration of the program;

(6) Acreage totals of nontidal wetland losses by type;

(7) Mitigation actions, including acreage totals of mitigation projects by type of project;

(8) Examples of minimization efforts;

(9) Number of letters of authorization granted and nontidal wetlands lost as a result; and

(10) A report on the county's nontidal wetland compensation fund in accordance with COMAR [26.23.04.07.] 26.23..04.23.

E. The Department may investigate complaints concerning a county's implementation of the Act. The investigation may include an on-site investigation.

F. The Department may take enforcement action against a permittee or person not complying with the requirements of the Act and this subtitle when it determines that the action is necessary and appropriate, and shall notify the county in a timely manner of the action taken.

G. Renewal.

(1) At least 3 months before a county's delegation expires, the county may submit a written request to the Department for renewal of program delegation. The Department shall notify the county, in writing, within 30 days of receipt of the request whether its request is granted or denied.

(2) The Department may require necessary or appropriate amendments to a county program before renewing a delegation.

(3) The Department may not deny delegation renewal unless opportunity has been afforded to the appropriate officials of the county to present arguments before the Secretary as to why delegation should be renewed. The Secretary's determination shall be final.

(4) The presentation of arguments to the Secretary is not a contested case hearing.

H. Withdrawal of Delegation Authority.

(1) The Department may withdraw program delegation authority upon a finding that the county program is not being administered in a manner consistent with the Act or this subtitle.

(2) The Department shall notify the county in writing that delegation is withdrawn and the reason for withdrawal.

(3) The Department may not withdraw delegation unless opportunity has been afforded to the appropriate officials of the county to present arguments before the Secretary as to why delegation should be renewed. The Secretary's determination shall be final.

(4) The presentation of arguments to the Secretary is not a contested case hearing.

(5) If county delegation is withdrawn, any unencumbered funds contained in a county's nontidal wetlands compensation fund shall be transferred to the nontidal wetland compensation fund maintained by the Department.

26.23.01.05 Enforcement.

26.23.01.05 Enforcement.

A. Enforcement Authority. The means of enforcement under this regulation may be made available to county governments with delegated authority under Regulation .03 of this chapter. Any hearing and associated processes under this regulation may be conducted by authorized county governments when these enforcement means are used, upon agreement between the Department and the county.

B. Complaints and Orders.

(1) In addition to any other sanction authorized by Environment Article, §5-911, Annotated Code of Maryland, the Department may serve a written complaint upon an alleged violator if the Department determines that there has been a violation of:

- (a) Any provision of Environment Article, §§5-901—5-911, Annotated Code of Maryland;
- (b) A regulation in this subtitle;
- (c) A permit or condition of a permit;
- (d) An administrative order; [or]
- (e) *A Phase II mitigation plan approval letter or approved mitigation banking instrument;*
- (f) *Terms of a long-term protection agreement required for mitigation or an authorization; or*
- [(e)] (g) A condition of an authorization letter.

(2) The complaint shall:

- (a) Identify the violator and the location of the violation;
- (b) State the provision violated;
- (c) State the specific facts upon which the complaint is based; and
- (d) Provide an opportunity to request a hearing to contest the complaint.

(3) At any time, including during an enforcement action, the Department may issue an administrative order requiring the violator to take corrective action within a certain time period. The corrective action may include any or all of the following:

- (a) Cease the violation;
- (b) Stabilize the site;
- (c) Stop all construction work at the site of a regulated activity;
- (d) Restore or rectify unlawfully impacted nontidal wetlands; or
- (e) Submit a written report or plan concerning the violation.

(4) Service.

(a) A complaint, order, or other administrative notice issued by the Department may be served on the violator personally, on the violator's agent at the activity site, or by certified mail to the violator's last known address as shown in the Department's records.

(b) An order issued under this regulation is effective immediately, according to its terms, when it is served.

C. Hearings.

(1) The Department shall give notice and hold any hearing under this subtitle in conformance with the Administrative Procedure Act and COMAR [08.01.04.] 26.01.02.

(2) Within 10 calendar days of receiving a complaint, order, or notice under this regulation, the violator may request a hearing in writing.

(3) If a person has been served with an order for corrective action, the person may request a stay in conjunction with a request for a hearing.

(4) A request for stay may be heard before or during a hearing on the complaint. At the request of a permittee, a request for stay may be heard within 10 business days of the Department's receipt of the request.

D. Administrative Action with Regard to Permit or [Bond] *Financial Assurance*. The Department may suspend or revoke a permit, letter of authorization, or forfeit a [bond] *financial assurance* on a mitigation plan upon failure of the violator to comply with the requirements of an administrative order. The administrative procedures for permit or letter authorization suspension, revocation, and [bond] forfeiture *of financial assurances* are set forth in COMAR 26.23.02.09 and [26.23.04.04.] 26.23.04.21.

E. Statutory Remedies. The provisions of this regulation may not be construed to limit or otherwise affect the authority of the Department to proceed against violators under Environment Article, §5-911, Annotated Code of Maryland.

26.23.02.02 Application Processing Procedures for the Department.

26.23.02.02 Application Processing Procedures for the Department.

A. The Department shall acknowledge receipt of the application in writing, by regular mail, and assign the application a processing number. An applicant shall use the application processing number when making inquiries concerning the application.

B. The Department shall notify an applicant in writing within 45 days of receipt of an application whether the application is complete and the delineation correct.

C. The Department shall consider an application complete if:

(1) It contains all of the information required in Regulation .01C of this chapter and requested in Regulation .01D of this chapter; and

(2) The Department determines that all the information submitted is sufficient for the Department to process the application.

D. The following apply to the Department's determination whether the application is complete and the delineation correct:

(1) If the information submitted is insufficient for the Department to make either determination, the Department shall notify the applicant in writing of any items of additional information listed in Regulation .01D of this chapter that will be required.

(2) If the information submitted is so insufficient that the Department is unable to make an initial completeness determination, the Department shall return the application and may not review the delineation, if one is submitted.

E. If the Department fails to notify an applicant within 45 days of receipt of the application, the application shall be considered complete and the delineation correct.

F. The Department, upon written notice, *including electronic notification*, to the applicant, may extend the 45-day time period when the following extenuating circumstances prevent consideration of the application:

(1) Inclement weather conditions;

(2) Review required by federal agencies; or

(3) Review required by other State agencies, or local government agencies.

G. Public Notice.

(1) After the Department has determined that an application is complete, and the delineation is correct, the Department shall issue, at the applicant's expense, a public notice of an opportunity to submit written *or electronic* comments or to request a public informational hearing about the application. Public notice may not be required for activities that qualify for a letter of authorization under COMAR 26.23.03.

(2) The public notice shall contain:

(a) The name and address of the applicant;

(b) A description of the nature and location of the proposed activity and mitigation plan, if applicable;

(c) Instructions for submission of written *or electronic* comments, requests for a public hearing, and requests to be included on the interested persons list;

(d) The expiration date for the opportunity to comment or to request a public informational hearing;

(e) A statement that any further notices concerning actions on the application will be provided only [to those persons on the interested persons list;] *to those persons on the interested persons list and notices shall be sent by regular mail, unless a person on the interested persons list requests in writing to be notified by electronic mail;*

(f) The name, address, and telephone number of a person in the Department from which information about the application may be obtained; and

(g) A reference to the applicable statute or regulations governing the application process.

(3) The public notice may be given by:

(a) Joint notice with other federal, State, or county agencies;

(b) Joint notice with other units or programs within the Department;

(c) Selected mailing, *including electronic mailing where applicable under G(2)(e) of this regulation*, to federal, State, county, or municipal authorities and other persons on the interested persons list;

(d) Publication for at least 1 business day in a daily newspaper distributed in one or more counties which the Department determines may be directly affected by the proposed activity or, if there is no local daily newspaper, in a newspaper of general circulation in that county; or

(e) Publication in the Maryland Register under State Government Article, §7-214, Annotated Code of Maryland.

H. Public Informational Hearing.

(1) Any interested person may request in writing a public informational hearing.

(2) If requested, a public informational hearing shall be held on a permit application within 45 days of the expiration date specified in the public notice. After setting the date, time, and place for the hearing, the Department shall mail a hearing notice only to those persons on the interested persons list. *Notices may be sent by electronic mail.*

(3) The Department may extend the time period for the public informational hearing for the following extenuating circumstances:

(a) Circumstances listed in §F of this regulation;

(b) A request by an applicant; or

(c) A Department request for individual permit review under COMAR 26.23.01.03C.

(4) The Director may delegate all or part of the Director's authority to hold a public informational hearing to any employee of the Department, or a county delegated authority under COMAR 26.23.01.03. The employee authorized to conduct the public informational hearing shall be designated as the presiding official.

(5) An applicant and any interested person shall be given an opportunity at the public informational hearing to present facts and make statements for or against granting the permit. Questions may be asked of, and directed to, the presiding official, but cross-examination may not be conducted. The hearing is not a contested case hearing under the Administrative Procedure Act.

(6) The presiding official may determine the order of presentation of comments and questions at the public informational hearing. The public informational hearing may be conducted in the following order:

(a) Introduction by the Department;

(b) Presentation of proposed project by the applicant;

(c) Comments and questions by public officials;

(d) Comments and questions by other persons; and

(e) Closing of the public informational hearing by the presiding official.

(7) The presiding official has the authority and duty to:

(a) Conduct a full and fair public informational hearing;

(b) Act to avoid unnecessary delay, and to maintain order; and

(c) Regulate the course of the public informational hearing and the conduct of the participants.

(8) The presiding official shall prepare an official record of the public informational hearing.

(9) A tape recording or stenographic notes of the public informational hearing, if any, may not be transcribed unless the Department, the applicant, or a participant in the public informational hearing requests a transcript. Costs of transcription shall be paid by the person requesting the transcript.

I. In calculating any time period provided for in this subtitle, if the last day falling within the time period falls on a Saturday, Sunday, or a State holiday, the time period will be extended until the close of business on the next normal business day.

J. Letters of Authorization.

(1) Within [21] 45 days of the Department's determination that the application is complete and the delineation correct, the Department shall notify the applicant in writing whether the activity qualifies for a letter of authorization and, if so, what best management practices, if any, will be required.

(2) The letter of authorization is void if the information submitted is later shown to have been false, misleading, or inaccurate, and the Department shall pursue any appropriate enforcement action under COMAR 26.23.01.05 as to any activities that have been undertaken under the void letter of authorization.

(3) If the Department determines that the proposed activity does not qualify for a letter of authorization, it shall notify the applicant of the need to apply for a permit under Regulation .01 of this chapter.

(4) The Department shall specify in the letter of authorization the time period for which it is valid.

(5) If an applicant applies for both a letter of authorization and a permit, the Department may withhold its decision on the letter of authorization pending a final permit decision.

K. Interested Persons List. Upon written request, the Department may add additional names to the interested persons list. Those wishing to have their names placed on the interested persons list may send a written request to the Water [Management] *and Science* Administration, Nontidal Wetlands [and Waterways] Division.

26.23.02.03 Permit Decision and Appeal.

26.23.02.03 Permit Decision and Appeal.

A. Permit Decision.

(1) After the closing date for receipt of written comments and after a public informational hearing, if requested, the Department shall:

(a) Consider the written comments, *including comments submitted electronically*, testimony, and other information received; and

(b) Render a decision to grant, deny, or condition a permit within:

(i) 60 days from the Department's determination that an application is complete and the delineation correct, if no public informational hearing is requested, or

(ii) 45 days of a public informational hearing.

(2) The Department may extend the time period in which to render a decision for an additional 30 days for the following extenuating circumstances:

(a) Review required by a federal, State, or local government agency;

(b) A Department request for individual permit review under COMAR 26.23.01.03; or

(c) A request by an applicant.

(3) The Department may afford the applicant an opportunity to provide additional information to address concerns raised in written comments or testimony at the public informational hearing.

(4) The applicant may request in writing, *including a request sent electronically*, that the Department withhold its decision until additional information can be provided. The Department may withhold its permit decision for 6 months, after which the application shall be deemed withdrawn and a new application submitted, unless otherwise determined by the Department.

(5) The Department may request additional information from the applicant as a result of concerns raised in written comments, *including comments submitted electronically*, or testimony at the public informational hearing.

(6) Written notice of the permit decision shall be mailed *or sent by electronic mail* to the applicant and to all persons on the interested persons list. Notice of the permit decision need not be published.

(7) Work authorized under a permit shall begin within 3 years of the date of permit issuance and the work shall be completed within the time period specified in the permit, which may not exceed 10 years.

(8) An applicant may not resubmit a denied permit application for 6 months from the date of denial unless there is a substantive change in the application.

(9) A permit may not be issued, and work may not begin under a permit, [unless a final site plan or any necessary information is provided to the Department] *the following have been provided to and approved by the Department:*

(a) *A final site plan; and,*

(b) *The required mitigation information, including:*

(i) *Evidence of purchase of credits in an approved mitigation bank;*

(ii) *Evidence of payment into the Nontidal Wetland Compensation Fund; or*

(iii) *Phase I of a mitigation plan; and*

(c) *A bond or alternate form of security under COMAR 26.23.04.19.*

(10) *The Department shall condition authorizations so that any required mitigation, if applicable, is constructed concurrently or in advance of the regulated activities, unless the person subject to a mitigation requirement provides evidence to the Department's satisfaction a different time period to completing construction is necessary; or*

(11) *The Department may delay issuance of an authorization to an applicant who has failed to meet mitigation requirements associated with a separate authorization under this subtitle until the mitigation requirement is met to the Department's satisfaction.*

B. [Appeal of Permit Decision.

[(1) A person who has legal rights, duties, interests, or privileges different from the general public which are adversely affected by the Department's decision to grant, deny, or condition a permit, may request a contested case hearing.

(2) The contested case hearing request shall be in writing and filed within 30 days of issuance of the permit decision with the unit issuing the decision.

(3) The contested case hearing request shall contain:

- (a) The name, address, and telephone number of the person requesting the hearing;
- (b) The name, address, and telephone number of any attorney representing the person requesting a hearing, or a statement of intent to proceed without counsel;
- (c) A description of the grounds for the request, including the specific legal right, duty, privilege, or interest which may be adversely affected by the permit determination, and which is different from those interests held by the general public;
- (d) A statement of the specific relief desired as a result of the contested case hearing; and
- (e) A general outline of the evidence to be presented in support of the desired relief, including the names and addresses of all witnesses to be called.

(4) The contested case hearing shall be conducted under the Administrative Procedure Act and COMAR 08.01.04.

(5) The decision of the Department on the basis of the contested case hearing shall be the final decision for purposes of judicial review.

C. Delegation of Decision-Making Authority.

(1) The Chief of the Nontidal Wetlands and Waterways Division in the Water Management Administration shall render the decision to grant, deny, or condition a permit under §A of this regulation.

(2) In the event of an appeal under §B of this regulation, the Director shall render the final decision for the Department.

D. Determinations on Standing.

(1) The Director or a designee shall review a request for a contested case hearing to determine whether the person requesting a hearing has:

- (a) A specific legal right, duty, privilege, or interest which is or may be adversely affected by the permit determination and which is different from that held by the general public;
- (b) Raised at least one issue that is related to the subject of the permit and arises under the Act or this subtitle; and
- (c) Made a contested case hearing request within the required 30-day time period.

(2) The Director or a designee shall determine whether to grant or deny the request for a contested case hearing. If the determination is to deny the request for a contested case hearing, the determination shall be in writing and mailed by certified mail to the person requesting a hearing.

(3) The notification of the determination to deny a request for a contested case hearing shall contain the following:

- (a) The specific reasons for the denial;
- (b) A statement of the right to request a review of the denial under §D(4) of this regulation; and
- (c) A statement that if review under this regulation is not sought, the denial shall be the Department's final decision as to the contested case hearing request.

(4) A person who is adversely affected by the determination to deny a request for a contested case hearing may, within 10 calendar days of receipt of the denial, file with the Director written exceptions and a request to present oral argument. After considering the written exceptions, the Director may hear oral argument, and shall issue a written final decision.

(5) If the Director's written final decision as to the contested case hearing request is adverse to a party other than the Department, the party may obtain judicial review of the decision in accordance with the Administrative Procedure Act and the Maryland Rules of Procedure.]

B. Judicial Review of Final Permit Decision.

(1) *In accordance with Environment Article, 5-204(f), Annotated Code of Maryland, a final determination by the Department to issue or deny a permit under this subtitle shall be subject to judicial review at the request of any person who:*

- (a) Meets the threshold standing requirements under federal law; and*
- (b) Is the applicant or participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not provided.*

(2) *Judicial review shall be on the administrative record before the Department and shall be limited to objections raised during the public comment period, unless the petitioner demonstrates that:*

- (a) The objections were not reasonably ascertainable during the comment period; or*
- (b) Ground for objections arose after the comment period.*

(3) Unless otherwise required by statute, a petition for judicial review shall be filed with the circuit court for the county where the application for the permit states that the proposed activity will occur.

(4) A person submitting a petition for judicial review shall file the petition within 30 days after the date of the mailing of the final decision.

(5) Judicial review under this regulation shall be limited to a record compiled by the Department consisting of:

- (a) Any permit application and any data submitted to the Department in support of the application;*
- (b) Any draft permit issued by the Department;*
- (c) Any notice of intent from the Department to deny the application or to terminate the permit;*
- (d) A statement or fact sheet explaining the basis for the determination by the Department;*
- (e) All documents referenced in the statement or fact sheet explaining the basis for the determination by the Department;*
- (f) All documents, except documents for which disclosure is precluded by law or that are subject to privilege, contained in the supporting file for any permit;*
- (g) All comments submitted to the Department during the public comment period;*
- (h) Any tape or transcript of any public hearings held on the application; and*
- (i) Any response to any comments submitted to the Department.*

26.23.02.08 Temporary Emergency Nontidal Wetland Authorizations.

26.23.02.08 Temporary Emergency Nontidal Wetland Authorizations.

A. The Department may issue a temporary emergency nontidal wetland permit or letter of authorization for a regulated activity if:

(1) A threat to life, severe loss or damage of property, or threat to public safety or public works is imminent; and

(2) The anticipated threat, loss, or damage may occur before a permit or letter of authorization can be issued under the procedures otherwise required by this subtitle.

B. Emergency Authorization Requirements. The temporary emergency permit or letter of authorization shall:

(1) Incorporate, to the greatest extent practical and feasible, the standards and criteria required for nonemergency regulated activities;

(2) Be limited in duration to the time required to complete the authorized emergency activity, not to exceed 90 days;

(3) Require rectification for nontidal wetlands with temporary adverse impacts; and

(4) Require mitigation for nontidal wetland losses, unless exempt under COMAR [26.23.04.02.] 26.23.04.04.

C. Temporary Emergency Procedure.

(1) Not later than the next business day after beginning an emergency regulated activity, a temporary emergency permit or letter of authorization shall be requested.

(2) A temporary emergency permit or letter of authorization request may be made orally. However, the applicant shall submit a written request to the Department within 3 business days of the oral request.

(3) The request in §C(2) of this regulation shall include the:

(a) Applicant's name;

(b) Location of the emergency activity;

(c) Extent of work to be done;

(d) Anticipated adverse impact on nontidal wetlands; and

(e) Reason for the emergency.

(4) The temporary emergency permit or letter of authorization may be granted orally or in writing. If oral approval is granted, the Department shall issue a written emergency permit or letter of authorization within 3 business days of the approval.

(5) If oral approval is not granted, the Department shall issue a written temporary emergency permit or letter of authorization within 10 business days of the request if the temporary emergency permit or letter of authorization is approved by the Department.

D. For activities which do not qualify for a letter of authorization under Chapter .03 of this subtitle, the Department shall provide public notice and opportunity for comment on the issuance of a temporary emergency permit in a local newspaper of general circulation, not later than 15 days after the issuance of a permit.

E. Upon written request by a permittee, or authorized person, the Department may extend the temporary emergency permit or letter of authorization if more time is required to complete the work authorized or to rectify the site.

F. The Department may suspend or revoke a temporary emergency permit or letter of authorization in conformance with Regulation .09 of this chapter.

G. Work performed under a temporary emergency permit or letter of authorization shall conform to conditions specified by the Department.

H. A person shall apply for a nontidal wetland permit or letter of authorization pursuant to Regulation .01 of this chapter if:

(1) The person intends to conduct an additional regulated activity at the site which does not qualify for a temporary emergency permit or letter of authorization;

(2) A temporary emergency permit or letter of authorization is denied;

(3) Work authorized under the temporary emergency permit or letter of authorization is conducted beyond the 90-day period in §B(2) of this regulation without approval from the Department;

(4) The activity does not qualify for a temporary emergency permit or letter of authorization; or

(5) Mitigation is required under §B(4) of this regulation.

26.23.02.09 Suspension and Revocation.

26.23.02.09 Suspension and Revocation.

A. Grounds for Suspension or Revocation. The Department may suspend or revoke a permit or a letter of authorization after notice to the permittee or person issued letter of authorization and opportunity for a hearing if the Department determines that any of the following has occurred:

- (1) Failure of a permittee or person issued a letter of authorization to post [a bond required] *the required financial assurances* under COMAR [26.23.04.04;] 26.23.04.19;
- (2) Permittee or person issued letter of authorization has failed to comply with the requirements of an administrative action or order under this subtitle or for a violation of the Act or this subtitle;
- (3) Misrepresentation or fraud in the application process or failure to disclose a relevant or material fact;
- (4) Requirements of the permit or letter of authorization have been violated;
- (5) Substantial deviation from the plans, specifications, or requirements of the permit or letter of authorization;
- (6) Permittee or person issued letter of authorization has prevented a representative of the Department from entering the activity site to make reasonable inspections;
- (7) Rights under the permit or letter of authorization have not vested and new information, changes in site conditions, or amended regulatory requirements necessitate revocation or suspension; or
- (8) The permittee or person issued a letter of authorization has not begun work under the authorization and requested that the permit or letter of authorization be withdrawn.

B. Notice. Except as provided for emergency actions under §D of this regulation, the Department may not suspend or revoke a nontidal wetlands permit or letter of authorization unless the Department first gives written notice by certified mail of the specific facts that warrant suspension or revocation, and an opportunity to make a written request for a contested case hearing under §C of this regulation.

C. Contested Case Hearings.

- (1) Upon receipt of written notice to suspend or revoke a permit or a letter of authorization, the permittee or person issued a letter of authorization shall have 10 calendar days to request a contested case hearing.
- (2) A hearing under this section shall be conducted in conformance with the Administrative Procedure Act and COMAR 26.23.02.09.
- (3) If the Department receives no request for a hearing, the permit or letter of authorization shall be revoked or suspended.

D. Emergency Action.

- (1) The Department may order the immediate suspension or revocation of a permit letter of authorization if the Department:
 - (a) Finds that the public health, safety, or welfare imperatively requires the emergency action; and
 - (b) Promptly gives the permittee written notice of the emergency action.
- (2) A notice of emergency action shall include a statement of the:
 - (a) Specific facts upon which the emergency action is based; and
 - (b) [Permittee's opportunity] *Shall include an opportunity* to be heard, in accordance with §C of this regulation.

26.23.03.01 Activities Requiring a Letter of Authorization

26.23.03.01 Letters of Authorization.

A. [Except for regulated activities proposed within the Critical Area, an activity that qualifies for a letter of authorization is exempt from the permit and mitigation requirements of this subtitle. Activities proposed in the Critical Area are not exempt from the mitigation requirements of COMAR 26.23.04.02—.07.] *A proposed activity does not qualify for a letter of authorization and shall be subject to permit, public notice, and mitigation requirements if the Department determines that the activity:*

- (1) *Does not qualify under §§C and D of this regulation;*
- (2) *May result in significant individual or cumulative impacts to nontidal wetlands, and associated aquatic resources, attributable to an entire and complete project;*
- (3) *Is for installation of a natural gas line greater than 12 inches in diameter; or*
- (4) *Does not comply with the best management practices in Regulation .02 of this chapter.*

B. *An activity that qualifies for a letter of authorization is exempt from the following requirements:*

- (1) *Permit, public notice, and mitigation requirements of this subtitle listed in §C of this regulation;*
or
- (2) *Permit and public notice requirements of this subtitle if the activity is proposed in the Critical Area. Activities proposed in the Critical Area are not exempt from the mitigation requirements of COMAR 26.23.04.01—.02 and 26.23.04.04-.23.*

[B.] C. Upon application, the activities listed below may qualify for a letter of authorization provided that the conditions in Regulation .02B of this chapter are satisfied and best management practices, which may be required by the Department, are all met:

(1) Activities in isolated nontidal wetlands, [of] *when the wetland is less than 1 acre in size and [having] has no significant plant or wildlife value. An applicant's determination of whether an area is an isolated nontidal wetland shall be based on published hydrologic and hydraulic data or data obtained in the field which shows whether the nontidal wetland is hydrologically connected.*

(2) Activities whose cumulative loss of nontidal wetlands and buffer, which contains no significant plant or wildlife value, is:

- (a) Less than 5,000 square feet; or
- (b) Greater than 5,000 square feet, provided that:
 - (i) The actual loss of nontidal wetlands is less than 5,000 square feet, and
 - (ii) Activities in the buffer result in minimal additional adverse impacts to nontidal wetlands, as

determined by the Department.

(3) Installation of Utility Lines.

[(a)] The installation of utility lines includes the following activities:

- [(i)] (a) Trenching, jetting, jackhammering, or plowing of nontidal wetlands;
- [(ii)] (b) Laying of pipe, cable, or wire;
- [(iii)] (c) Backfilling of the excavated trench containing the pipe, cable, or wire;
- [(iv)] (d) Placement of riprap; and
- [(v)] (e) Rectification of nontidal wetland areas which have been *temporarily* disturbed[.]

for utility line installation.

[(b)] Utility lines do not include:

- (i) Intake and outfall structures;
- (ii) Pipe or pipeline used to transport any liquid or slurry substance except as associated with water and sewage lines;
- (iii) Natural gas lines greater than 12 inches in diameter; or
- (iv) Storm water conveyance systems.]

(4) Construction of overhead power transmission lines.

(5) Mitigation projects not required under this subtitle.

(6) Regulated activities which impact the buffer, and less than 2 acres of farmed nontidal wetlands with 15 or more consecutive days of inundation during the growing season, except in nontidal wetlands containing significant plant or wildlife value.

(7) The repair of the following serviceable structures or fills:

- (a) Aboveground and underground utilities;
- (b) Structures in rights-of-way;
- (c) Railroad beds;
- (d) Road beds, roadside ditches, culverts, and outlet ditches;
- (e) Bridges;
- (f) Dams;
- (g) Dikes;
- (h) Levees;
- (i) Water and wastewater control structures; and
- (j) Facilities designed for storm water management.

(8) Activities which will result in the loss of nontidal wetlands that have been temporarily created by a permitted or authorized construction activity or as a result of a permitted mining activity, including wetlands created:

(a) Incidental to mining activities that were conducted under an approved mining plan or permit, or wetlands that have been created incidental to a mining activity, and that will be impacted during implementation of an approved reclamation plan;

(b) As a result of the construction of an approved sediment control structure; and

(c) For a specific purpose that will remain for a specified period of time, including wash ponds and grassed waterways.

[C.] D. The following conditions apply to the activities listed in [§B(7)]§C(7) of this regulation:

(1) If the structure or fill has been put to uses other than the use originally intended or authorized for the original construction, and the repair activity will alter or impair any additional nontidal wetland area, the [repair of the structure may not be exempted] *Department will evaluate the repair activity to the Department's satisfaction to determine if it qualifies for a letter of authorization.*

(2) Repair to be made more than 3 years after damage occurs or is first identified does not qualify for [an exemption] *a letter of authorization.*

[D.] E. An applicant seeking a letter of authorization under [§B(8)] §C(8) of this regulation shall submit the following:

- (1) Information regarding the creation of the wetlands;
- (2) The purpose of the wetland creation, if applicable;
- (3) The length of time the wetland will exist;
- (4) A copy of the approved site plan, erosion and sediment control plan, mining plan, or reclamation plan;
- (5) A description of the function the created wetland will serve;
- (6) A request for the length of time the letter of authorization is to be valid; and
- (7) Justification for conducting the regulated activity in the nontidal wetland.

[E.] F. Structures that have been placed in nontidal wetlands [(for example, sediment traps)] *such as sediment traps*, or that have impacted nontidal wetlands through their construction or operation do not qualify for a letter of authorization under [§B(8)]§C(8) of this regulation.

[F.] G. A letter of authorization issued under [§B(8)]§C(8) of this regulation is in effect for a period of up to 5 years and may be extended for one additional 5-year period. A letter of authorization granted under [§B(8)] §C(8) may not be extended for more than one 5-year period, for a total of 10 years, unless the regulated activity is part of a permitted mining activity or involves implementation of a mining reclamation plan.

[26.23.04.01 Mitigation for Agricultural Activities.] 26.23.04.01 Environmentally Preferable Mitigation Options.

26.23.04.01 Environmentally Preferable Mitigation Options.

A. It is the intent of this Subtitle to:

- (1) Align the State's mitigation preferences with federal compensatory mitigation requirements under 33 CFR § 332 (2008), which is incorporated by reference;
- (2) Establish a standard order of preference under Regulation .02 of this Chapter for mitigation options;
- (3) Allow persons subject to a mitigation requirement options for justifying environmentally preferable and practicable, cost-effective mitigation projects; and
- (4) Support overburdened or underserved communities as defined in § 1-701, Environment Article, Annotated Code of Maryland.

B. Exemptions. Mitigation or monetary compensation for nontidal wetland losses is not required for the following activities:

- (1) Activities exempted under COMAR 26.23.01.02 and 26.23.03.01, except where specified;
- (2) Which do not result in a loss, degradation, or significant impairment of nontidal wetlands; or
- (3) Occurring only in the buffer or expanded buffer.

C. Requirements. Unless exempt in §B of this regulation, the Department shall require mitigation for activities resulting in a loss, degradation, or significant impairment of:

- (1) Nontidal wetlands, including activities that destroy or alter wetland vegetation; or
- (2) Water quality

D. A person subject to a mitigation requirement shall develop and implement mitigation as required by the Department.

E. The Department shall require and approve the most environmentally preferable mitigation option for losses, degradation, or significant impairment of nontidal wetlands when mitigation is required under this subtitle.

F. Environmentally preferable options shall be based, as much as practicable, upon:

- (1) Information and priorities in watershed plans or other resource management plans;
- (2) Other watershed-based information, including information listed in Regulation .07C(2) of this chapter;
- (3) Other resource characterizations and information, when available, shall be used when there is not a watershed plan;
- (4) Potential for onsite mitigation to be the environmentally preferable option; and
- (5) Likelihood that the option will be sustainable when affected by changing environmental conditions

G. In addition to information in §F of this regulation, the Department shall consider the following in determining the environmentally preferable mitigation option:

- (1) The significance of wetlands and associated aquatic resources at the impact site, mitigation site, and in the watershed, including:
 - (a) Whether the landscape position and resource type of the mitigation project will contribute toward the sustainability of aquatic resource functions in the watershed;
 - (b) The degree to which the mitigation activity replaces acreage and functions of the lost nontidal wetland according to criteria of Regulations .05 and .06 of this chapter, including:
 - (i) Improvement of the suite of wetland and other aquatic resource functions at or near the permitted impacts;
 - (ii) Consideration of unique functions or resources;
 - (iii) Current trends in nontidal wetland losses, including conversions; and
 - (iv) Nontidal wetland resource needs and opportunities that are better met at a smaller hydrological unit or watershed scale than offered by a mitigation bank or through payment into the Nontidal Wetland Compensation Fund;
 - (c) The degree to which the mitigation site would maintain or improve the condition of:
 - (i) Nontidal wetlands of special State concern;

- (ii) Other nontidal wetlands having significant plant or wildlife value; or
 - (iii) Other unique and important resources as determined by the Department;
 - (d) Temporal losses expected as a result of delays in completing the mitigation project;
 - (e) Connectivity of the mitigation site to other water and natural resources, including upland forest; and
 - (f) Adverse impacts of the mitigation activity on water or other natural resources, including upland forest;
 - (2) The current watershed conditions or needs;
 - (3) The presence and needs of sensitive species in the watershed;
 - (4) The cumulative impacts of past or anticipated actions on water or other natural resources;
 - (5) Any chronic environmental problems in the watershed, including those related to poor water quality and flooding;
 - (6) The likelihood of long-term ecological success of the proposed mitigation project and sustainability in achieving anticipated ecological benefits and results to replace lost acreage and function, including:
 - (a) Technical merits of the proposal; including
 - (i) Demonstrated success by project designer and contractors of similar designs and construction methods; and
 - (ii) Extent of potential long-term maintenance needs;
 - (b) Department-approved plan and funding to implement effective long-term management, including:
 - (i) Assurance that the permittee will be responsible through the monitoring period for any required remediation to ensure that the site functions as designed;
 - (ii) A monitoring and maintenance Plan;
 - (iii) Long-term management plan;
 - (iv) Contingencies for catastrophic events;
 - (v) Protection of the site in perpetuity according to Regulation .14 of this chapter; and
 - (vi) Establishment of a Department-approved long-term steward capable of managing the site in the long-term;
 - (c) Commitment of the person subject to a mitigation requirement to voluntarily fulfill mitigation requirements; including agreement to delay permit issuance until the Department receives and approves a Phase II mitigation plan; and
 - (d) Size of the mitigation project; and
 - (7) A comparison of costs of successfully fulfilling mitigation requirements, including comparisons between costs of purchase of credits in a mitigation bank, payment into the Nontidal Wetland Compensation Fund, onsite or other offsite mitigation locations.
- H. The environmentally preferable option is the mitigation option that, after considering factors in §§F and G of this regulation:
- (1) Achieves no net overall loss in nontidal wetland acreage and functions and strives for a net resource gain;
 - (2) Contributes toward the sustainability of aquatic resource functions in the watershed, based upon the landscape position and resource type of the mitigation project; and
 - (3) Can be successfully completed and maintained in a practicable manner;
 - (4) May help address past or ongoing environmental problems in Department-mapped overburdened or underserved communities; and
 - (5) Be in the best interests of the State.
- I. The extent of review and consideration of mitigation proposals shall be commensurate with the scope, scale, and effect of proposed impacts.

[26.23.04.02 Mitigation for Regulated Activities.] 26.23.04.02 Order of Preference for Mitigation

26.23.04.02 Order of Preference for Mitigation

A. The Department shall consider, and may approve, mitigation required under this Chapter that differs from the standard order of preference when:

(1) The person subject to a mitigation requirement proposes a different mitigation option and provides documentation to the Department which supports the mitigation option as being the most environmentally preferable according to criteria in Regulation .01 of this chapter and to the Department's satisfaction;

(2) A particular mitigation option is supported by other resource agencies, including the Interagency Review Team;

(3) Federal requirements under 33 CFR 332.3 (2008), which is incorporated by reference, support a mitigation option which does not follow the standard order of preference;

(4) Available credits in the mitigation bank or payment into the Nontidal Wetland Compensation Fund fail to adequately replace lost nontidal wetland acreage and function:

(a) For individual impacts from single projects, when the lost nontidal wetland provides, as determined by the Department, rare or unique functions; or

(b) When the Department determines that there has been a cumulative loss over time of nontidal wetlands:

(i) Of a certain type;

(ii) Occupying a certain position in the landscape; or

(iii) Providing certain desired or important functions;

(5) The mitigation requirement is for a nontidal wetland loss from an agricultural activity; or

(6) Circumstances listed in Regulations .01F- G of this chapter justify a particular mitigation option as being environmentally preferable as determined by the Department.

B. With the exception of Regulations .18, .22, and .23N(2) of this Chapter, the Department shall apply mitigation requirements and regulations in place at the time of the:

(1) Approval of Phase 1 of the mitigation plan; or

(2) Request for review of the mitigation component of a soil conservation and water quality plan.

C. The Department shall coordinate with the person conducting an agricultural activity and the soil conservation district to determine the order of preference for wetland mitigation resulting from agricultural activities. The determinations shall be made on a case by case basis.

D. The Department may allow certain impacts to be mitigated through payment into the Nontidal Wetland Compensation Fund or by the person subject to a mitigation requirement as the first order of preference if:

(1) Cost of mitigation bank credits in comparison with in-lieu fee rates exceed the threshold rate set by the Department in determining that use of a mitigation bank is the environmentally preferable option; and

(2) Other environmentally preferable options for mitigation are not practicable.

E. The Department shall prepare a process for determining when costs of mitigation bank credits result in a bank not being the environmentally preferable option. The process shall be placed on public notice for comment.

F. Except when the Department determines that circumstances in Regulation .01 of this chapter justify another option, the standard order of environmentally preferable options for mitigation sites for wetland losses not resulting from agricultural activities shall be:

(1) A mitigation bank site that has sufficient available credits, and the site of wetland loss requiring mitigation is in the:

(a) Primary service area of a mitigation bank, as the first preference; and

(b) Secondary service area of a mitigation bank, as the next preference;

(2) Monetary compensation through payment into the Nontidal Wetland Compensation Fund according to criteria in Regulation .23 of this chapter;

(3) Locations onsite, or on parcels adjacent to the project site, that would implement wetland management recommendations approved by the Department and included in:

- (a) Watershed or regional conservation plans;*
- (b) The State Wildlife Action Plan; or*
- (c) Other State policies or guidance.*
- (4) Locations off-site, where the Department has determined, in consultation with other State, local, and federal government agencies, that regional needs for nontidal wetlands functions strongly justify the siting of mitigation projects, and the location of the mitigation project in relation to the nontidal wetland loss is:*
 - (a) In the same watershed segment;*
 - (b) In the same watershed sub-basin, or watershed at the comparable scale designated by federal hydrologic unit code;*
 - (c) Outside the watershed sub-basin, or watershed at the comparable scale designated by federal hydrologic unit code; or*
- (5) In a county with delegation authority, the preferred location of off-site mitigation projects is within the county.*

[Mitigation Standards.]26.23.04.03

Mitigation for Agricultural Activities.

26.23.04.03 Mitigation for Agricultural Activities.

A. Exemptions. Mitigation or monetary compensation for nontidal wetland losses are not required for agricultural activities which are exempted under COMAR 26.23.05.01B.

B. Requirements.

(1) It is the intent of this Chapter to recognize that different mitigation requirements may apply for losses of nontidal wetlands from agricultural activities, and may be less than for losses from regulated activities. Reductions in requirements may apply to monitoring, performance standards, financial assurances, and long-term management. If there is a mitigation requirement from a federal agency, the Department may alter its mitigation requirement to match federal requirements, so as to avoid imposition of conflicting mitigation requirements.

(2) A person conducting an agricultural activity which causes the loss of nontidal wetlands shall, in consultation with a soil conservation district, develop a mitigation component of the soil conservation and water quality plan.

(3) A person conducting an agricultural activity which causes the loss of nontidal wetlands shall, in consultation with a soil conservation district, develop a mitigation component of the soil conservation and water quality plan and propose the order of preference for mitigation options according to Regulation .02 of this chapter.

(4) The Department shall review the mitigation component of the soil conservation and water quality plan for consistency with the other regulations of this chapter except when other requirements for mitigation for agricultural activities are specified.

(5) The Department shall notify the landowner and the soil conservation district within 60 days of receipt of the mitigation component whether:

- (a) The mitigation component is consistent or inconsistent with Regulations of this Chapter as specified for agricultural activities; or*
- (b) The Department requires additional information to make a determination on consistency with mitigation requirements.*

(6) If additional information is required, the landowner or soil conservation district shall provide the information within a time frame specified by the Department.

(7) If the Department fails to notify the landowner and the soil conservation district within 60 days of receipt of a mitigation component, then the mitigation component shall be deemed to be consistent with requirements of this chapter as specified for agricultural activities.

8) A soil conservation district may not approve the components of a soil conservation and water quality plan pertaining to nontidal wetland impacts if the Department has determined that the mitigation component is inconsistent with regulations of this chapter as specified for agricultural activities.

(9) The Department, in determining the extent of mitigation, shall consider the benefit provided by best management practices in replacing lost nontidal wetland acreage and functions.

(10) The Department may accept monetary compensation only if it is determined that creation, restoration, or enhancement of nontidal wetlands are not feasible alternatives. Monetary compensation shall be accepted only under the conditions, and based on the fee structure guidelines, in Regulation .23 of this chapter.

(11) If the Department of Agriculture determines in writing that mitigation will create an economic hardship that would jeopardize the continued operation of a farm, mitigation may be deferred until one or more of the following occur:

(a) The economic hardship no longer exists.

(b) The current owner or operator transfers the farm to a new owner or operator. In this case, the current owner or operator shall remain responsible for mitigation.

(c) Agricultural activities no longer take place on the nontidal wetland.

(12) When an economic hardship, as determined by the Maryland Department of Agriculture, ends due to conditions described in §B(11) of this regulation:

(a) A person conducting an agricultural activity shall implement the mitigation component of an approved soil conservation and water quality plan within 3 years of the loss of the nontidal wetland, or within 1 year of the end of the economic hardship, whichever is greater; and

(b) The Department of Agriculture shall notify the Department in writing within 30 days of the end of the economic hardship.

(13) The Department shall require that a person conducting an agricultural activity in a nontidal wetland, which requires mitigation, to file a surety bond or other financial assurance with the Department consistent with Regulation .19 of this chapter prior to conducting the agricultural activity in a nontidal wetland.

(14) The Department of Agriculture shall submit a mitigation report to the Department at the end of each fiscal year.

(15) The mitigation report shall provide the following information on the status of the Department of Agriculture's economic hardship determinations for each farm:

(a) Whether the economic hardship still exists;

(b) Whether the owner or operator granted the deferral is the current owner or operator; and

(c) The acreage of nontidal wetland losses for which mitigation has been deferred by the economic hardship.

[26.23.04.04 Monitoring and Bonding.]

26.23.04.04 Mitigation for Regulated Activities.

26.23.04.04 Mitigation for Regulated Activities.

A. Exemptions. Mitigation or monetary compensation for nontidal wetland losses is not required for regulated activities:

- (1) Exempted in:*
 - (a) COMAR 26.23.01.02;*
 - (b) COMAR 26.23.03.01, except when specified and no other impacts associated with the project require mitigation;*
 - (2) Which do not result in a loss of nontidal wetlands; or*
 - (3) Occurring only in the buffer or expanded buffer.*
- B. The Department may reduce or waive mitigation requirements if the Department determines to its satisfaction that:*
 - (1) The regulated activity would provide a significant environmental benefit, with minimal loss or degradation of:*
 - (a) Wetland acreage and function;*
 - (b) Functions of other natural or water resources, including upland forest; and*
 - (c) Water quality;*
 - (2) The Department may waive up to 1 acre of an offsite mitigation requirement from nontidal wetland loss due to construction of special wastewater disposal facilities in a nontidal wetland on residential property, provided that:*
 - (a) A waiver is conditioned upon the applicant siting the special wastewater disposal facility so as to avoid and minimize impacts to nontidal wetlands; and*
 - (b) Performance of on-site mitigation is implemented to the maximum extent practicable; or*
 - (3) The proposed mitigation project has a high likelihood of success, as determined by the Department..*

C. Requirements.

- (1) A person subject to a mitigation requirement as an authorization condition shall take all necessary steps to first avoid adverse impacts and then minimize losses of nontidal wetlands.*
- (2) The Department shall require a person subject to a mitigation requirement, as a condition of an authorization, to mitigate for nontidal wetland losses when the:*
 - (a) Person subject to a mitigation requirement demonstrates to the Department's satisfaction that losses of nontidal wetlands are unavoidable and necessary; and*
 - (b) Nontidal wetland losses are caused by regulated activities not listed as exemptions in §A of this regulation and Regulation .03 of this chapter.*
- (3) [The Department shall require a permittee to develop] A person subject to a mitigation requirement shall develop and submit for Department review and approval mitigation plans consistent with the mitigation[:*
 - (a) Standards of Regulation .03 of this chapter;*
 - (b) Plan requirements in Regulation .05 of this chapter; and*
 - (c) Monitoring and bond requirements in Regulation .04 of this chapter.] requirements of this chapter.*
 - (4) The Department may accept monetary compensation only if it is determined that [creation,] restoration, creation, or enhancement of nontidal wetlands are not feasible alternatives. Monetary compensation shall only be accepted under conditions and based on the fee structure guidelines described in Regulation .23 of this chapter.*
 - (5) The Department may not base a final nontidal wetland permit determination solely on the environmental benefits of a mitigation proposal or the financial benefits of monetary compensation proposals.*

D. If the Department denies approval of a mitigation plan and the person subject to a mitigation requirement is aggrieved by the decision, the person subject to a mitigation requirement may appeal the denial under the procedures in COMAR 26.01.01. The Department may order a cessation of the permitted activity or interim stabilization measures pending resolution of the judicial review over denial of a mitigation plan.

E. Mitigation bank sites for identified projects shall meet the requirements set forth in this chapter for:

- (1) Standards in Regulations .05---.11 of this chapter;*
- (2) Requirements in Regulations .14 - .19 of this chapter;*
- (3) Financial assurance requirements in Regulations .20 and .21 of this chapter; and*
- (4) Monitoring in Regulation .22 of this chapter.*

F. The person subject to a mitigation requirement shall complete mitigation construction and planting in advance of, or concurrent with, the permitted or authorized regulated activity according to:

- (1) All mitigation requirements of this chapter; and*
- (2) The requirements in the Phase II mitigation plan approval letter.*

[26.23.04.05 Mitigation Plan.] 26.23.04.05 Replacement of Nontidal Wetland Acreage and Function.

26.23.04.05 Replacement of Nontidal Wetland Acreage and Function.

A. It is the goal of the Act to attain no net overall loss in nontidal wetland acreage and function, and to strive for a net resource gain in nontidal wetlands. However, it may not be possible for the goal of no net loss to be achieved in each authorized action. Achievement of this goal will occur through the regulatory components of this subtitle and other Statewide initiatives which incorporate nontidal wetlands restoration, creation, and enhancement projects outside of the regulatory framework.

B. The Department may accept mitigation projects which do not fully replace lost acreage and function when the mitigation project:

- (1) Is located in an area qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland; and*
- (2) Is environmentally beneficial as determined by the Department.*

C. Mitigation areas shall replace similar wetland types as those lost, except when the person subject to a mitigation requirement documents that out of kind mitigation would better serve the aquatic resource needs of the watershed. In determining if mitigation activities will replace nontidal wetland acreage and functional losses, the Department shall evaluate the mitigation activity against the size and functions of the wetlands proposed to be lost and consider all of the following:

- (1) Whether the mitigation activity would result in the same wetland type as the wetland which would be lost;*
- (2) Whether the wetland is of a type difficult to replace, and the mitigation activity would enhance or preserve similar wetlands;*
- (3) The degree to which the suite of ecological functions and wetland acreage would be replaced, enhanced, or maintained;*
- (4) Proximity of the mitigation activity to the nontidal wetland loss;*
- (5) Technical merits of the mitigation activity, including its:*
 - (a) Likelihood of long-term success, and;*
 - (b) Ability to sustain itself as designed in perpetuity;*
- (6) Adverse impact of the mitigation activity on natural resources, including loss of forest;*
- (7) Relationship of the mitigation activity to ongoing natural resource management activities;*
- (8) Compatibility of the mitigation activity with a watershed plan that has been developed by or reviewed and approved by the Department that:*
 - (a) Is developed or implemented by other State, local, or federal governments, or non-government entities, in consultation with relevant stakeholders;*
 - (b) Contains specific goals for nontidal wetland and other aquatic and natural resource restoration, establishment, enhancement, and preservation; and*
 - (c) Describes aquatic resource conditions in the watershed; and*
- (9) The ability of the mitigation area to be resilient to environmental disturbance and changing environmental conditions.*

D. In order for mitigation activities to be accepted as replacement of lost nontidal wetlands functions, the person subject to a mitigation requirement may be required to:

- (1) Perform functional assessments based upon techniques acceptable to the Department on the:*
 - (a) Wetland proposed to be impacted before the loss or degradation of any nontidal wetlands occurs; and*
 - (b) Proposed mitigation site, unless the Department has approved a functional assessment for a mitigation bank site; and*
- (2) Describe how the mitigation project would replace specified nontidal wetland functions that will be lost.*

E. Mitigation project types for the loss of nontidal wetlands shall be considered in the following order of preference, except as otherwise determined by the Department:

- (1) In-kind restoration;*
- (2) Enhancement of farmed nontidal wetlands;*
- (3) In-kind creation;*
- (4) In-kind enhancement of wetlands which are not farmed;*
- (5) Out of kind mitigation which replaces the lost wetland with:*
 - (a) A different wetland type; or*
 - (b) Improvements to other aquatic resources; or*
- (6) Preservation.*

F. The Department may alter mitigation requirements based upon use of a functional assessment of the wetland proposed to be lost and the mitigation site. The functional assessment and process for determining adjustments to standard ratios in §N of this regulation shall be placed on public notice for review and comment prior to use by the Department.

G. The Department shall consider the mitigation requirement for replacing a loss of nontidal wetlands to be fulfilled when the standards and criteria of this chapter are met.

H. Replacement of lost nontidal wetland acreage and function shall be determined in part through the use of ratios. Acreage replacement ratios are expressed as a relationship between two numbers. The first number shall specify the acreage or credits of nontidal wetlands to be mitigated and the second shall specify the acreage of nontidal wetlands lost.

I. The acreage replacement ratios in §N of this regulation are the standard basis for determining the amount of required mitigation. Ratios are for in-kind restoration, which may be achieved through:

- (1) Purchase of appropriate mitigation bank credits;*
- (2) Payment into the Nontidal Wetland Compensation Fund for the amount of loss offset by standard replacement ratio; or*
- (3) Restoration undertaken by the person subject to a mitigation requirement.*

J. For nontidal wetland type conversions, the replacement requirement shall be:

- (1) One-half of the required ratio in §N of this regulation, when the wetland is not a nontidal wetland of special State concern;*
- (2) In an emergent nontidal wetland of special State concern, the replacement ratio is 2:1; or*
- (3) In a forested or scrub-shrub nontidal wetland of special State concern, the replacement ratio is 3:1.*

K. For nontidal wetland conversions to landscape management areas, the Department may require higher replacement ratios than those in §J of this regulation based on:

- (1) Extent of proposed management;*
- (2) Frequency of maintenance or mowing; and*
- (3) Remaining nontidal wetland functions.*

L. Preservation. The Department may accept preservation as mitigation for losses to nontidal wetlands which are difficult to replace, including resources of unusual or high quality, specific species requirements, and hydrological regimes. The Department shall only accept preservation as mitigation when combined with restoration or creation of nontidal wetlands.

M. The Department shall set mitigation requirements to achieve an equivalent gain to the replacement ratios in §N of this regulation when the mitigation proposal contains options other than only in-kind restoration or creation. The Department shall require the following in setting mitigation requirements for other mitigation options, including enhancement or preservation:

- (1) A minimum in-kind 1:1 acreage replacement ratio through wetland restoration or creation; and*
- (2) An assessment of the amount of functional gain which would be achieved by the mitigation option. The amount of mitigation required shall be determined by the amount of functional uplift provided by the other proposed mitigation options.*

N. Standard replacement ratios are as follows for:

- (1) Emergent, farmed emergent, farmed unvegetated, or landscape management area nontidal wetlands-----1:1;*
- (2) Scrub-shrub nontidal wetlands or farmed scrub-shrub nontidal wetlands-----2:1; and*
- (3) Forested nontidal wetlands or farmed forested nontidal wetlands-----2:1;*
- (4) Nontidal wetlands designated as nontidal wetlands of special State concern:*
 - (a) Emergent or farmed emergent nontidal wetlands designated as nontidal wetlands of special State concern-----3:1;*

(b) Scrub-shrub or farmed scrub-shrub nontidal wetlands designated as nontidal wetlands of special State concern-----4:1; and

(c) Forested or farmed forested nontidal wetlands designated as nontidal wetlands of special State concern--- 4:1;

O. The amount of mitigation credit derived from a certain type of mitigation project shall be determined in part through use of ratios. Mitigation credit ratios are expressed as a relationship between two numbers. The first number shall specify the acreage of nontidal wetland mitigation and the second shall specify the credits of nontidal wetland mitigation.

P. The Department may require a higher mitigation credit ratio for creation of nontidal wetlands than in-kind restoration.

Q. The mitigation credit ratios for some mitigation types shall be higher than in-kind restoration:

(1) Enhancement of nontidal wetlands as mitigation, including farmed wetlands;

(2) Preservation of nontidal wetlands as mitigation; and

(3) Out-of-kind mitigation.

R. The mitigation credit ratio for enhancement of nontidal wetlands will be based on the amount of functional uplift.

S. Nontidal wetland mitigation projects shall have a vegetated buffer:

(1) Of a width acceptable to the Department. The buffer shall generally be a minimum of 25 feet, unless physical constraints necessitate a smaller or larger width; and

(2) Be measured around the entire edge of the nontidal wetland.

[26.23.04.06 Mitigation Banking.]

26.23.04.06 Requirements for Enhancement, Preservation, and Out of Kind Mitigation.

26.23.04.06 Requirements for Enhancement, Preservation, and Out of Kind Mitigation.

A. Enhancement activities, preservation activities, or out of kind mitigation requirements may be determined on a case-by-case basis in areas qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland..

B. Enhancement activities, preservation activities, or out of kind mitigation may be accepted to replace the loss of nontidal wetland functions when:

- (1) Existing functions, values, and benefits of wetlands, streams, floodplains or other upland habitats are not reduced due to the mitigation project;*
- (2) Enhancement, preservation, or out-of-kind mitigation:*
 - (a) Creates or improves the functions of, nontidal wetlands or other water resources; and*
 - (b) Improves resiliency of the wetland to environmental disturbance or changing environmental conditions;*
- (3) The wetland resources are difficult to replace;*
- (4) Additional 1:1 restoration or creation acreage is successfully accomplished according to Regulation .05 of this chapter; and*
- (5) The Department has determined on a case-by-case basis that enhancement of a farmed nontidal wetland may be considered as meeting the 1:1 acreage replacement.*

C. The Department may determine on a case-by-case basis to its satisfaction that out-of-kind mitigation or enhancement to protect and improve the quantity and quality of other aquatic resources is preferable to in-kind mitigation. Activities which may qualify as acceptable enhancement or out of kind mitigation after a case-by-case determination include:

- (1) Enhancement of degraded nontidal wetlands;*
- (2) Removal of fill or contaminants from a nontidal wetland;*
- (3) Successful and sustainable removal of invasive species;*
- (4) Restoration of natural patterns of hydrology comparable to reference sites approved by the Department by re-establishing:*
 - (a) Surface and groundwater levels in drained or partially drained nontidal wetlands, including fluctuations appropriate to the wetland type;*
 - (b) Reference stream flows; or*
 - (c) Inundation frequency, depth, and duration in floodplains;*
- (5) Establishment of additional vegetated buffers;*
- (6) Restoring or enhancing passage of aquatic life in streams;*
- (7) Increasing tidal wetland acreage or functions;*
- (8) Planting or allowing growth of natural plant communities appropriate to the site; or*
- (9) Establishing or expanding forested riparian buffers.*

D. Preservation of nontidal wetlands, their buffers, or expanded buffers in conjunction with nontidal wetland restoration or creation may be considered to replace the lost acreage when the applicant demonstrates to the Department's satisfaction that the:

- (1) Nontidal wetland resources to be preserved provide significant physical, chemical, biological or cultural functions to the watershed;*
- (2) Preservation proposal includes a vegetated buffer sufficient to maintain the acreage and function of the nontidal wetland;*
- (3) Nontidal wetland resources are under threat of destruction or adverse modification; and*
- (4) Preserved site will be permanently protected under an appropriate legal instrument.*

[26.23.04.07 Nontidal Wetland Compensation Fund.] 26.23.04.07 Geographic Location of Mitigation Sites.

26.23.04.07 Geographic Location of Mitigation Sites.

A. A person subject to a mitigation requirement or a bank sponsor shall avoid selecting mitigation projects on sites where mitigation activities would reduce functions and benefits of existing aquatic and other natural resources.

B. A person subject to a mitigation requirement or bank sponsor shall avoid, whenever practicable, siting mitigation projects on:

- (1) Forested lands, unless the mitigation project supports criteria of §§C(1)(d) and C(1)(f) of this regulation;*
- (2) Lands or waters where contamination problems may persist after the mitigation project is completed;*
- (3) Lands or waters which are existing habitat or potential habitat for plant or animal species, when the mitigation project adversely alters the habitat for species:*
 - (a) Listed as endangered or threatened or species listed as in need of conservation by the Department of Natural Resources as defined in Regulation .01.01B(80)(c) of this subtitle;*
 - (b) Considered as a candidate for listing by the U.S. Fish and Wildlife Service, or considered to be locally unusual or rare by the Department of Natural Resources under Rank and Status Code Definitions, Maryland Department of Natural Resources Wildlife and Heritage Service (September 17, 2015), which is incorporated by reference.*

C. Preferred Geographic Locations for Mitigation Sites.

- (1) A person subject to a mitigation requirement or bank sponsor should pursue mitigation on sites which would advance goals for wetland conservation and are likely to successfully replace desired acreage and functions, including:*
 - (a) Locations in a coastal watershed when the wetland loss occurs in a coastal watershed;*
 - (b) Location in a Tier II watershed when the wetland loss occur in the same Tier II watershed;*
 - (c) Sites connected to existing nontidal wetlands, waterways, or 100-year floodplains.*
 - (d) For enhancement projects, sites which would result in:*
 - (i) Improvements to habitat function in farmed wetlands; or*
 - (ii) Restoration of previous levels of hydrology in wetlands*
 - (e) Sites which would improve habitat for species listed in §B(3) of this regulation;*
 - (f) Sites which connect or create corridors for movement of wildlife;*
 - (g) Areas which support or expand nontidal wetlands having significant plant or wildlife value; or*
 - (h) Areas which are likely to replace, and continue to provide over time, desired wetland acreage and function in association with land uses in the watershed of the project.*
- (2) Sites shall be preferably located at sites identified as priority areas for restoration, creation, enhancement, or preservation through watershed approaches, including those identified in:*
 - (a) Comprehensive planning frameworks for in-lieu fee programs; or*
 - (b) Other management or restoration plans, or prioritization tools, with comprehensive inventories and specific recommendations for increasing or enhancing other wetland, water, or other natural resources;*

D. Watershed-based approaches or plans which may be used to identify priority areas for restoration or preservation shall contain information on water and other natural resources. Examples of relevant information include:

- (1) Wetland characterizations, including:*
 - (a) Historic wetland extent and functions;*
 - (b) Current wetland extents, condition, and function;*
 - (c) Past and projected wetland impacts; and*
 - (d) Forest location and extent;*
- (2) Goals for resource restoration and protection;*

(3) Habitat requirements of important species, including Species of Greatest Conservation Need as identified in the Maryland State Wildlife Action Plan, which is incorporated by reference, and commercially or recreationally harvested species;

(4) Water quality impairments and restoration plans to address impairments;

(5) Inventory and characterization of condition of other waters and aquatic resources;

(6) Non-wetland riparian areas and other uplands which contribute to overall ecological functioning in the watershed;

(7) Development trends which may affect sustainability of the mitigation site in providing planned functions;

(8) Areas which may be subject to flooding;

(9) Descriptions of requirements of other programs which affect ecological functioning of wetlands and other waters; and

(10) Areas identified as priorities to improve efforts to address:

(a) changing environmental conditions; or

(b) Areas qualifying as overburdened communities or underserved communities under §1-701, Environment Article, Annotated Code of Maryland.

E. Projects may be located on multiple parcels.

26.23.04.08 Components of Mitigation Bank Application

26.23.04.08 Components of Mitigation Bank Application.

A. A person proposing to establish and operate a mitigation bank shall submit a mitigation bank application to the Department.

B. The mitigation bank application shall contain the following information:

- (1) The signature of person meeting requirements of COMAR 26.23.02.01B(6);*
- (2) A written prospectus that includes the following information:*
 - (a) A letter from property owner indicating interest in establishing a mitigation bank;*
 - (b) The proposed mitigation bank name;*
 - (c) The purpose of the proposed bank and its relationship to other legal requirements for mitigation under Environment Article, Title 5, Subtitle 9, Annotated Code of Maryland and COMAR 26.23.04;*
 - (d) A vicinity map of the proposed mitigation bank site;*
 - (e) Plan view drawings, depicting:*
 - (i) The existing waterbodies;*
 - (ii) The existing wetlands and 25-foot wetland buffers or 100-foot expanded buffers;*
 - (iii) The 100-year floodplains;*
 - (iv) The proposed limits of work, including proposed impacts to resources in §B(2)(e)(i) – (iii) of this regulation;*
 - (v) The demarcated areas of proposed wetland and waterway restoration, creation, enhancement, and/or preservation;*
 - (f) Contact information for:*
 - (i) Bank sponsor;*
 - (ii) Consultant;*
 - (iii) Principal contact;*
 - (g) Names and addresses of adjacent property owners and appropriate local officials for notification purposes, as required in §5-204(b)(1)-(2), Environment Article, Annotated Code of Maryland;*
 - (h) As applicable, information regarding:*
 - (i) Historic and archeological resources;*
 - (ii) Endangered, threatened, or species in need of conservation;*
 - (iii) Other nontidal wetlands having significant plant or wildlife value;*
 - (iv) Consistency with natural resource management plans, approved watershed plans, forest conservation, local growth management policies, and local comprehensive plans;*
 - (v) Effects on areas qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland; and*
 - (vi) Effects of changing environmental conditions.*
 - (i) Objectives of the proposed mitigation bank;*
 - (j) Acreage and type of nontidal wetlands and other waters to be established or enhanced in the bank;*
 - (k) Methods of establishment of nontidal wetlands and functions;*
 - (l) A description of how the bank will be operated;*
 - (m) Proposed mitigation credit release schedule;*
 - (n) Justification for the service area of the bank, including:*
 - (i) The 8 digit hydrologic code in which the bank would be located; and*
 - (ii) If applicable, additional environmental justification for expansion into other 8 digit hydrologic code watersheds;*
 - (o) General need and technical feasibility of the mitigation bank;*
 - (p) Proposed ownership and long-term management strategy;*
 - (q) Proposed mechanism to protect the mitigation bank site in perpetuity, including easements, covenants, deed restrictions, or similar means approved by the Department;*
 - (r) The amount and type of financial assurances required under Regulation .19 of this chapter;*

- (s) Qualifications of the bank sponsor to successfully complete the mitigation bank, including previous relevant experience;*
- (t) Ecological suitability of the site and mitigation proposal to meet stated objectives, including:*
 - (i) Chemical, physical, and biological characteristics of the site;*
 - (ii) Ability to support planned aquatic resource types and functions;*
 - (iii) Assurances of sufficient water sources to support long-term sustainability of the site; and*
 - (iv) A preliminary assessment of impact, if any, on existing wetlands, buffers, waterways, and 100-year floodplains; and*
- (u) Other information required by Regulations .12 and .13 of this chapter;*
- (3) Other information necessary to complete a public notice in accordance with COMAR 26.23.02.02G; and*
- (4) Other pertinent information as required by the Department, including information needed to meet federal compensatory mitigation requirements.*

26.23.04.09 Processing of Mitigation Bank Application.

26.23.04.09 Processing of Mitigation Bank Application.

A. The Department shall review the proposed mitigation bank application and its components in coordination with the Interagency Review Team.

B. The Department shall render a decision on the completeness of the mitigation bank application within 30 days or according to deadlines in federal compensatory mitigation requirements under 33 CFR §332, (2008) which is incorporated by reference, whichever is longer.

C. The Department may extend the time period for review of the mitigation bank application:

(1) Due to inclement weather conditions; or

(2) To allow for additional review required by other State, federal, or local agencies on the Interagency Review Team, including review for effects to an area qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland.

D. Public Notice and Public Informational Hearing.

(1) After the Department has determined that a mitigation bank application is complete, the Department shall issue, at the bank sponsor's expense, a public notice in accordance with:

(a) COMAR 26.23.02.02G(2) and (3). The public notice shall also be posted on the Department's web site; and

(b) COMAR 26.08.02.10C and D, when an individual water quality certification is required.

(2) If requested, a public informational hearing shall be conducted in accordance with COMAR 26.23.02.02H.

(3) The Department may issue a joint public notice and hold a joint public hearing with the U.S. Army Corps of Engineers to satisfy State and federal requirements for public notice of proposals for mitigation banking. If a joint hearing is held, the Department may adjust deadlines for conducting the hearing and issuing findings to coincide with federal time frames.

(4) After the public notice comment period and requested public hearing, the Department shall notify the bank sponsor in writing or electronic mail of:

(a) The completeness and acceptability of the mitigation bank application;

(b) The additional information needed to complete review of the mitigation bank application, based on information presented at the public hearing or during the public comment period; or

(c) The Department's decision to reject approval of the mitigation bank application based on information provided.

E. After the Department has approved the mitigation bank application, the bank sponsor may submit a mitigation banking instrument to the Department.

26.23.04.10 Mitigation Banking Instrument.

26.23.04.10 Mitigation Banking Instrument.

A. A bank sponsor shall submit a mitigation banking instrument after the Department approves the mitigation bank application.

B. The mitigation banking instrument shall be based on the mitigation bank application and describe in detail how the mitigation bank will be established and operated.

C. A mitigation banking instrument may be proposed to serve as an umbrella agreement which adds additional mitigation banking sites under a single instrument. The additional mitigation sites may be reviewed as modifications to the original instrument after its review and approval as an umbrella instrument.

D. The information in the mitigation banking instrument shall include details regarding:

(1) Site background and site description, including:

(a) Description of, and justification for, the proposed service areas;

(b) Objectives of the mitigation bank, including the:

*(i) Amount, types, and functions of resources to be provided;
and*

(ii) Design method proposed to restore, create, enhance, or preserve the resource;

(c) How the mitigation bank will address the following issues:

(i) The needs of the watershed;

(ii) Areas qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland; and

(iii) The effects of changing environmental conditions and long-term sustainability of the project.

(d) Baseline information describing the ecological characteristics of mitigation site;

(e) The specific factors considered in site selection;

*(f) The determination and rationale for amount of mitigation credits to be provided by the mitigation bank;
and*

(g) A digital and georeferenced depiction of the mitigation site showing:

(i) Existing and proposed boundaries of wetlands and other aquatic resources;

(ii) Proposed service area; and

(iii) Other features as required by the Department;

(2) A description of the administrative operations, including:

(a) Accounting procedures;

(b) Default and closure procedures;

(c) Reporting protocols; and

(d) Bank operation procedures;

(3) Site management, including:

(a) Construction plans and specifications developed in accordance with Regulation .13 of this chapter;

(b) Provisions for post-construction monitoring and maintenance of the mitigation bank consistent with

Regulation .22 of this chapter;

(c) Performance standards in Regulation .18 of this chapter to demonstrate short-term and long-term success of the mitigation bank;

(d) Long-term management plan;

(e) Adaptive management plan;

(f) Provisions for addressing catastrophic events which may affect the success of the mitigation bank; and

(g) Remediation procedures;

(4) Additional requirements, including:

(a) A statement that legal responsibility for providing mitigation lies with the bank sponsor once the:

(i) Person subject to a mitigation requirement purchases credit(s) from the mitigation bank; and

(ii) The Department approves use of the mitigation bank credit for mitigation;

(b) A description of the mechanism proposed to protect the mitigation bank in perpetuity consistent with Regulation .14 of this chapter;

(c) Procedures for termination of the instrument;

(d) Proposed financial assurances, including:

(i) A bond or alternate form of security, as approved by the Department, or
(ii) Documentation from a government agency of its commitment and resources to operate the mitigation bank and perform required remediation; and
(iii) Bank sponsor responsibilities; and

(5) Other terms required by the Department, including additional terms required by federal compensatory mitigation requirements.

E. The Department shall execute a mitigation banking instrument if the Department has reviewed and approved all information required in this chapter:

(1) Before or during construction of the mitigation bank; or

(2) After a mitigation site has been constructed, and the Department has determined that the site satisfies performance standards established in Regulation .18 of this Chapter.

F. The Department shall only consider proposals regarding the use of the mitigation credits by applicants after a mitigation banking instrument has been executed.

G. The bank sponsor shall construct, operate, and maintain the mitigation bank according to the terms of the mitigation banking instrument.

H. The Department shall notify the bank sponsor, in writing, of approvals or denials of revisions, amendments, or modifications to the mitigation banking instrument.

26.23.04.11 Administration and Review of Mitigation Bank Use.

26.23.04.11 Administration and Review of Mitigation Bank Use.

- A. The bank sponsor may not sell credits prior to Department approval of the mitigation banking instrument.*
- B. Only the Department may communicate to a person subject to a mitigation requirement that the Department has approved the use of credits for specific projects.*
- C. The Department may, at its discretion, approve use of mitigation bank credits based on the Department's:*
 - (1) Approval of a mitigation banking instrument, including:*
 - (a) Construction plans;*
 - (b) Credit release schedule; and*
 - (c) Performance standards;*
 - (2) Approval of the executed mechanism to protect the bank in perpetuity;*
 - (3) Recognition that financial assurance requirements have been fulfilled; and*
 - (4) Recognition that the mitigation bank is meeting all requirements of the mitigation banking instrument.*
 - (5) Issuance of applicable authorizations associated with the mitigation bank construction required by:*
 - (a) Nontidal wetlands issued under COMAR 26.23;*
 - (b) Waterway construction issued under COMAR 26.17.04;*
 - (c) Other local, State, or federal agencies;*
- D. Mitigation bank credits shall reflect the difference between pre-construction and post-construction conditions at the mitigation bank site, as determined by appropriate metrics indicating:*
 - (1) Area in acres or square feet; or*
 - (2) Units of measure showing functional changes.*
- E. Mitigation bank credit may be allowed without functional or area gains of wetlands if the mitigation bank credit is for:*
 - (1) Preservation if it meets criteria in Regulation .06C of this chapter and §E(2)(b)----(d) of this regulation; or*
 - (2) Restoration, enhancement, or preservation of riparian areas, buffers, and upland areas when the Department determines that they are:*
 - (a) At a higher credit ratio;*
 - (b) In combination with wetland restoration, creation, or enhancement of nontidal wetlands;*
 - (c) Essential in sustaining wetland and other aquatic resources in the watershed; and*
 - (d) A small portion of the total mitigation bank credits except when the project would protect or improve habitat for species listed in §.07B(3) of this chapter;*
- F. The Department shall review proposals to use mitigation credit from an approved mitigation bank based on Regulations .01---.02 and .05---.07 of this chapter and showing that the:*
 - (1) The proposed mitigation bank is the environmentally preferable option under Regulation .01 of this chapter;*
 - (2) The bank sponsor is compliant with the terms of the mitigation banking instrument;*
 - (3) Wetlands proposed to be lost are in the same service area for the bank; and*
 - (4) There are available credits of the same wetland vegetation class in the mitigation bank.*
- G. The Department shall advise, in writing, the bank sponsor and applicants proposing to use credits of the Department's decision to accept or reject use of the bank.*
- H. The Department may approve use of mitigation credits as partial fulfillment of a mitigation requirement.*
- I. Accounting and Reporting Requirements.*
 - (1) The bank sponsor shall provide information required in the mitigation banking instrument.*
 - (2) The bank sponsor shall submit the following information for each transaction to the Department within the time frames specified in the mitigation banking instrument:*
 - (a) Name and address of the person purchasing or returning credits;*
 - (b) Date of the transaction;*
 - (c) Amount and type of wetland credit to be used or returned;*
 - (d) Project name, location, and the Department's application processing number, if applicable, for which use of mitigation credit is proposed;*

- (e) 8-digit hydrologic unit code of impact; and*
 - (f) Amount and type of wetland acreage to be impacted.*
 - (3) A government agency responsible for a government operated mitigation bank shall submit the name and address of the agency utilizing credits, the name of the contact person, and the information specified in §I(2)(b)----(f) of this regulation.*
 - (4) The bank sponsor and the Department shall jointly record withdrawal of the credit approved for use by an applicant.*
 - (5) Mitigation credits shall be withdrawn from the mitigation bank in the order approved by the Department.*
 - (6) The bank sponsor shall, within the time frame specified in the mitigation banking instrument, submit to the Department a summary of all activities relating to the sale or transfer of mitigation credits for each year of operation of the mitigation bank.*
 - (7) The bank sponsor shall notify the Department if the bank sponsor wishes to cease consideration of areas representing unsold or unused credits as part of the mitigation bank.*
 - (8) Mitigation credit withdrawn for a project under this subtitle shall be returned to the mitigation bank if the Department is provided documentation that the credit sale or transaction is fully or partially canceled, and the Department:*
 - (a) Denies the authorization;*
 - (b) Authorizes impacts that are less than the amount anticipated;*
 - (c) Requires mitigation by a method other than use of the mitigation credit;*
 - (d) Determines that the authorization expired and the regulated activities did not occur; or*
 - (e) Revokes the authorization when the permittee or authorized person has:*
 - (i) Requested withdrawal of the authorization; and*
 - (ii) No authorized regulated activities have commenced.*
- J. Closure of Mitigation Banks.*
- (1) The Department and a bank sponsor may close out a mitigation bank when all provisions for closure in the mitigation banking instrument have been fulfilled and:*
 - (a) Monitoring has been completed to the Department's satisfaction and final performance standards for a successful mitigation bank have been met; and*
 - (i) All credits have been withdrawn;*
 - (ii) Protection in perpetuity has been established; and*
 - (iii) Financial assurances for long-term management are established and the long-term management plan is implemented; or*
 - (b) The Department has determined that the bank fails to meet performance standards and remediation required by the Department has not been completed to the Department's satisfaction.*
 - (2) The bank sponsor shall notify the Department in writing to request confirmation of the decision to close out the mitigation bank.*
 - (3) The Department shall confirm the close out within 45 days of receipt of the request, unless:*
 - (a) Additional information is needed;*
 - (b) The conditions in §J(1) of this regulation have not been met; or*
 - (c) Coordination and consultation with other agencies warrants an extension of the deadline.*

26.23.04.12 Phase I of a Mitigation Plan.

26.23.04.12 Phase I of a Mitigation Plan.

A. A person subject to a mitigation requirement shall submit Phase I of a mitigation plan:

(1) As part of a soil conservation and water quality plan for an agricultural activity in nontidal wetlands under COMAR 26.23.05; or

(2) As part of an application to conduct a regulated activity.

B. Phase I of the mitigation plan shall include all of the following information:

(1) A description of the type and acreage of proposed nontidal wetland losses;

(2) A description of the functions provided by the existing wetland that would all or in part be lost as a result of the regulated activity;

(3) A description of the mitigation site selection process and justification that the proposed mitigation is the environmentally preferable option.

(4) For mitigation proposals deviating from the order of preference in Regulation .02 of this chapter, documentation to demonstrate to the Department's satisfaction why higher ranked mitigation options are not environmentally preferable, including:

(a) Criteria in Regulations .01F and .01G of this chapter; and

(b) A comparison with costs associated with higher ranked mitigation options;

(5) For proposals to mitigate through the use of mitigation credits in a mitigation bank, including information on the:

(a) Name of the bank sponsor;

(b) Name and location of the mitigation bank;

(c) Type, number of available credits, and total amount of mitigation credits in the mitigation bank proposed for use;

(d) Ways in which impacts within an area qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland will be offset by the mitigation bank; and,

(e) For proposed nontidal wetland loss within a secondary service area of the mitigation bank, a description of how the proposed mitigation bank will replace lost acreage and function;

(6) A proposal, if applicable, to use monetary compensation consistent with Regulations .01 ---.02 and .23 of this chapter to fulfill mitigation requirements and how impacts within an area qualifying as an overburdened community or underserved community under §1-701, Environment Article, Annotated Code of Maryland will be offset by the monetary compensation;

(7) For persons individually responsible for completing mitigation requirements, the Phase I mitigation plan shall include the following information unless otherwise determined by the Department:

(a) A description of how the proposed mitigation will replace lost acreage and function;

(b) Location map of the proposed mitigation site;

(c) Project location maps showing the geographic relationship between the area of potential nontidal wetland losses and the proposed mitigation sites;

(d) A description of mitigation projects, including best management practices for agricultural activities, proposed as fulfillment of the required replacement of lost nontidal wetland acreage and function;

(e) Objectives of the mitigation project;

(f) Consistency with a comprehensive watershed management plan according to COMAR 26.23.02.06, when applicable;

(g) How the project is consistent with other watershed goals for wetland conservation, when applicable;

(h) The proposed source of hydrology;

(i) A draft copy of the selected protection mechanisms for each mitigation site as required in Regulation .14 of this chapter;

(j) Written evidence of the landowner's consent to the use of the selected site or other written evidence of a possessory or ownership interest in the selected site;

(k) An evaluation for the presence of threatened or endangered species or species in need of conservation;

(l) Archeological or historical site designations;

(m) Existing or planned easements within or adjacent to the proposed mitigation site;

(n) Description of other wetlands, wetland buffers, waterways, 100-year floodplains, and other upland habitats on the mitigation site, including extent of proposed impacts to these resources from the proposed mitigation project;

(o) Draft schedule for completing the mitigation project;

(p) Description of how long-term management will be accomplished;

(q) Names, addresses, and telephone numbers of the principals associated with project implementation;

(r) Other information required for consistency with federal compensatory mitigation requirements; and

(s) A description of how the project considers changing environmental conditions and overburdened or underserved communities.

C. The Department shall, in rendering a decision concerning the acceptability of Phase I of a mitigation plan:

(1) Determine whether adequate justification has been provided that the proposal is the environmentally preferable option; including:

(a) The following criteria, if the mitigation proposal is to use credits in a mitigation bank:

(i) Level of compliance by the bank sponsor with terms of the mitigation banking instrument; and

(ii) Availability of suitable credits to replace lost acreage and function; and

(b) Adequacy of the information provided in §B of this regulation; and

(2) Provide guidance to the person subject to a mitigation requirement and request additional information to complete its review when:

(a) The information submitted for Phase I of a mitigation plan is insufficient for rendering a decision; or discuss change if necessary; or

(b) The proposed Phase I of a mitigation plan is unacceptable.

D. The Department shall make a determination on whether Phase I of a mitigation plan for regulated activities is complete prior to issuing a public notice, if a public notice is required.

E. The Department may require more information or a different mitigation option from the Phase I of a mitigation plan deemed complete for public notice based upon:

(1) Information received during the comment period of the public notice, if required;

(2) Information received during the public hearing process;

(3) The Corps of Engineers requirements for mitigation which differs from the option deemed complete for public notice by the Department; or

(4) Other factors as determined by the Department.

The Department shall render a decision concerning the acceptability of Phase I of a mitigation plan:

(1) As part of the final authorization or upon completion of the review of a soil conservation and water quality plan;

(2) After the public notice comment period or a public informational hearing, if one is held, and prior to issuing a final authorization; or

(3) As part of the decision that the regulated activity qualifies for a letter of authorization requiring mitigation.

G. The Department, in rendering a decision on Phase I of a mitigation plan, shall provide guidance to the applicant on the contents, timing, and necessity of proceeding with Phase II of the mitigation plan.

26.23.04.13 Phase II of a Mitigation Plan

26.23.04.13 Phase II of a Mitigation Plan.

A. Timing For Submittal of Phase II of a Mitigation Plan.

- (1) The Department shall specify the timing of submittal for Phase II of a mitigation plan. The timing for submittal shall be:***
 - (a) As part of the permit application, to the maximum extent practicable;***
 - (b) Prior to issuance of an authorization;***
 - (c) Specified in correspondence to a person conducting an agricultural activity;***
 - (d) Prior to conducting a regulated activity; or***
 - (e) Unless otherwise determined by the Department, not later than 3 months after the Department's final permit decision or determination that an activity qualifies as a letter of authorization requiring mitigation.***

(2) The person subject to a mitigation requirement shall submit Phase II of a mitigation plan within the time frame specified by the Department.

B. Unless otherwise determined by the Department, Phase II of a mitigation plan shall include all of the following information:

- (1) Plan view scaled drawings, including:***
 - (a) Vicinity map showing the mitigation project location, existing land use, and zoning;***
 - (b) Location, type, and acreage of proposed nontidal wetland mitigation activities, including surveyed mitigation area boundaries;***
 - (c) Proposed location of stockpile areas;***
 - (d) Location of sediment and erosion control practices;***
 - (e) Locations of all areas used to store machinery, equipment, or supplies;***
 - (f) Proposed source of borrow materials;***
 - (g) Proposed location, spacing, and type of propagules for each plant species;***
 - (h) Location of best management practices for agricultural activities;***
 - (i) Locations of any conflicting land uses, including utility easements;***
 - (j) Identification and location, including surveyed boundaries as required by the Department, of existing wetlands, wetland buffers, other waters, and 100-year floodplains connected or adjacent to, or influenced by, the mitigation project;***
 - (k) Cross-section drawing showing existing and proposed final site conditions including grade, elevation, and slope;***
 - (l) Grading plan and erosion control measures; and***
 - (m) Other information pertinent to Phase II of a mitigation plan as required by the Department;***
- (2) Construction schedule, which includes estimated start and completion dates.***
- (3) Hydrology assessment, which may include:***
 - (a) Estimated elevation of surface and groundwater as measured from the soil surface once every 2 weeks, March--May, and once a month, June--October;***
 - (b) The source of the water such as groundwater, precipitation, and surface water, over various seasons of the year, with relevant data; and***
 - (c) The reliability of the hydrologic sources throughout the various seasons of the year.***
- (4) Substrate conditions including a description of existing soil and substrate conditions as verified in the field, and planned soil conditions;***
- (5) Soil and substrate amendments needed and required by the Department to:***
 - (a) Meet hydric soil characteristics;***
 - (b) Maintain the specified plant species; and***
 - (c) Restore, establish, or enhance wetland functions.***
- (6) Vegetation to be planted including all of the following:***
 - (a) The scientific and common name of plant species, which shall be native to the physiographic region where the mitigation site is located or non-persistent;***
 - (b) Planting dates for each species according to propagation method; and***
 - (c) Type of material.***

- (7) *A monitoring plan with a schedule and duration for implementation specified by the Department which:*
 - (a) *Establishes responsibility for:*
 - (i) *The removal of exotic and nuisance vegetation; and*
 - (ii) *Permanent establishment of the nontidal wetland system and its component parts; and*
 - (b) *Describes parameters to be measured to determine if the project:*
 - (i) *Is meeting performance standards;*
 - (ii) *Requires adaptive management;*
- (8) *A maintenance plan to cover the monitoring period to ensure continued viability of the mitigation site after initial construction is completed;*
- (9) *Performance standards to determine if the mitigation project is meeting its objectives;*
- (10) *Adaptive management plans and designation of parties responsible for implementing adaptive measures;*
- (11) *The proposed protection mechanisms required in Regulation .14 of this chapter;*
- (12) *Other information, such as digital plans, georeferenced resource and mitigation areas, aerial photographs;*
- (13) *Description of financial assurances;*
- (14) *A long-term management plan describing how the site will be managed for long-term sustainability after performance standards have been met, including financing for the management;*
- (15) *Funds to manage and remediate the site due to damage from catastrophic events;*
- (16) *Other information consistent with federal compensatory mitigation requirements; and*
- (17) *Efforts to consult with communities in areas qualifying as overburdened communities or underserved communities under §1-701, Environment Article, Annotated Code of Maryland.*
- C. *The Department may require in the Phase II mitigation plan approval letter that the person subject to a mitigation requirement:*
 - (1) *Provide for additional monitoring and maintenance beyond the standard monitoring period, if the project fails to meet performance standards;*
 - (2) *Provide for long-term maintenance and monitoring of the mitigation site; and*
 - (3) *Grant the Department access to the mitigation site in perpetuity during business hours; and*
 - (4) *Provide the Department with as-built plans for the mitigation site.*
- D. *The person subject to a mitigation requirement may not conduct regulated activities until the Department has approved Phase II of a mitigation plan and has received all necessary authorizations.*
- E. *The person subject to a mitigation requirement shall present evidence of a legal right to implement the proposed mitigation plan on the selected sites by providing:*
 - (1) *An executed deed conveying title to the selected site to the permittee or person conducting an agricultural activity;*
 - (2) *An executed conservation easement agreement; or*
 - (3) *A fully executed option agreement, long-term lease agreement, or contract of sale for the selected site.*
- F. *The Department may only approve mitigation plans that include:*
 - (1) *Native or non-persistent plant species; and*
 - (2) *A plant species composition acceptable to the Department..*
- G. *Timing for Review of Phase II of a Mitigation Plan.*
 - (1) *The Department shall render a decision or request additional information concerning the Phase II of a mitigation plan within 45 days of receipt of a completed plan, unless a final permit decision has not been made; or*
 - (2) *If the Department fails to notify the applicant within the 45-day period, the plan shall be considered acceptable unless a final permit decision has not been made.*
- H. *The Department shall:*
 - (1) *Condition authorizations requiring mitigation so that:*
 - (a) *Regulated activities may not commence until the Department approves Phase II of a mitigation plan;*
 - (b) *Construction and planting of mitigation sites are conducted concurrently or in advance of commencement of regulated activities; and*
 - (c) *Construction and planting of mitigation sites are completed:*
 - (i) *Within a time frame specified by the Department; and*
 - (ii) *To the satisfaction of the Department; and*
 - (2) *Reference an acceptable plan and associated documents in a Phase II mitigation plan approval letter sent to the person subject to a mitigation requirement.*
- I. *The person subject to a mitigation requirement shall implement the mitigation requirements under terms stated in the Phase II mitigation plan approval letter.*

J. Additional mitigation requirements shall be imposed upon persons subject to a mitigation requirement who fail to comply with conditions H(1)(b)-(c) of this regulation.

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

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

- A. A person conducting an agricultural activity is not subject to requirements of §J of this regulation.*
- B. A person subject to a mitigation requirement or bank sponsor shall provide site protection mechanisms to ensure that the mitigation site, including any required buffer, is protected in perpetuity.*
- C. The Department shall require that all:*
- (1) Site protection mechanisms allow only activities on the mitigation site which support the goals of the mitigation project and its long-term sustainability; and*
 - (2) Persons implementing a long-term management plan for the mitigation site shall demonstrate to the Department's satisfaction that the entity has sufficient resources and expertise to implement the plan.*
- D. The Department may require and approve different persons for implementing the protection mechanism and the long-term management plan.*
- E. The Department may not approve use of a bank credit for mitigation until the approved protection mechanism is in place, as required in COMAR 26.23.04.11C.*
- F. Protection in perpetuity may be achieved through any protection mechanism approved by the Department, and shall include a Department approval of both the long-term management plan and person or entity responsible for its implementation.*
- G. The order of preference for a site protection mechanism in perpetuity is the following as approved by the Department:*
- (1) Final ownership of the completed mitigation site by:*
 - (a) A conservation organization, provided that the mitigation site is under a conservation easement; or*
 - (b) A public entity with capability and authority to protect the area in perpetuity, provided that the entity also does the following::*
 - (i) Allows the mitigation site to be placed under a conservation easement as described in §G(2) of this regulation;*
 - (ii) Places a declaration of restrictive covenants on the property as described in §G(3)(a) of this regulation; or*
 - (iii) Includes provisions for protection under a management plan for the property;*
 - (2) A conservation easement held by an entity dedicated to environmental protection and restoration; or*
 - (3) The following mechanisms, placed on the property and recorded with the local jurisdiction with primary authority over land use:*
 - (a) Restrictive covenants; or*
 - (b) Deed restriction.*
- H. The person subject to a mitigation requirement shall provide evidence of the legal recordation of the protection mechanism, where applicable, for the mitigation site within a time frame specified by the Department.*
- I. Any protection mechanism under this regulation shall include provisions on the following:*
- (1) If the person subject to a mitigation requirement forfeits a financial assurance and the Department decides to complete construction of the mitigation project:*
 - (a) Language granting the Department, or any successor agency, access to the mitigation site for inspections during the construction or monitoring period;*
 - (b) In the case of an easement agreement, language allowing assignment of the interest under the easement agreement to the Department to;*
 - (i) Construct the mitigation project; and*
 - (ii) Undertake monitoring and remediation activities;*
 - (2) An absolute prohibition on activities in the nontidal wetland mitigation site unless authorized by the Department, including:*
 - (a) Alteration of water levels;*
 - (b) Dredging or excavation;*
 - (c) Removal or alteration of vegetation;*

- (d) Filling; or
- (e) Uses or activities incompatible with the objectives of the mitigation sites;
- (3) Language that the restriction is perpetual and binding on the grantor's personal representatives, heirs, successors, and assigns, and runs with the land; and
- (4) Language granting the Department access to the property during normal business hours in perpetuity to:
 - (a) Enforce provisions in the protection mechanism;
 - (b) Verify long-term management of the site;
- (5) Long-term rights of water usage, if necessary;
- (6) A requirement to provide the Department with 60 days' notice of:
 - (a) Modifications to the protection mechanism; or
 - (b) Intentions to void or terminate the protection mechanism; and
- (7) Other provisions required by the Department for consistency with federal compensatory mitigation requirements.

J. The person subject to a mitigation requirement or bank sponsor shall develop and implement a long-term management plan that:

- (1) Is approved by the Department;
- (2) Designates a long-term steward to monitor and maintain the site in perpetuity;
- (3) Identifies long-term management and maintenance needs specific to the site;
- (4) Estimates costs associated with the long-term management and maintenance of the site as described in:
 - (a) Regulation .19 of this chapter for persons subject to a mitigation requirement; or
 - (b) Regulation .20 of the chapter for mitigation bank sponsors;
- (5) Provides funds to cover implementation of the costs for tasks in this regulation;
- (6) Includes a requirement to submit reports to the Department on:
 - (a) An annual basis, unless otherwise determined in writing by the Department;
 - (b) Any activities undertaken for long-term stewardship or remediation of catastrophic events;
 - (c) Financial statements including amount spent on monitoring and remediation, and amount remaining in the fund; and
- (7) Includes other provisions required by the Department for consistency with federal compensatory mitigation requirements;

K. The protection mechanism shall be in place within a time frame specified by the Department.

26.23.04.15 Construction of Mitigation Projects

26.23.04.15 Construction of Mitigation Projects.

A. Mitigation Banks. The bank sponsor shall:

- (1) Construct the mitigation bank according to terms of the mitigation banking instrument;***
- (2) Notify the Department upon completion of construction and planting of the mitigation bank; and***
- (3) Submit to the Department within 60 days after completion of construction and planting, or as specified in the mitigation banking instrument, as-built drawings with:***

- (a) Original contours;***
- (b) Contours approved in the mitigation banking instrument;***
- (c) Post construction contours;***
- (d) Actual planting lists; and***
- (e) Revised georeferenced boundaries of mitigation bank credit areas, if boundaries of the wetland mitigation area have changed from the original plan.***

B. The bank sponsor and landowner shall allow representatives or agents of the Department to enter the mitigation bank at any time during or after construction to conduct inspections and to assess the success of the mitigation bank.

C. Mitigation Projects Constructed by Persons Subject to a Mitigation Requirement. The person subject to a mitigation requirement shall:

- (1) Construct the mitigation project according to terms of the Phase II mitigation plan approval letter;***
- (2) Notify the Department upon completion of the construction and planting of the mitigation project;***
- (3) Submit to the Department within 60 days after completion of construction and planting, or as specified in the Phase II mitigation plan approval letter, as-built drawings with:***

- (a) Original contours;***
- (b) Contours approved in the Phase II mitigation plan;***
- (c) Post construction contours;***
- (d) Actual planting lists; and***
- (e) Revised georeferenced boundaries of mitigation credit areas, if boundaries of the wetland mitigation area have changed from the original plan.***

26.23.04.16 Remediation for Mitigation Projects

26.23.04.16 Remediation for Mitigation Projects.

A. The Department shall require remediation to ensure that the performance standards specified in the mitigation banking instrument or Phase II of a mitigation plan will be met.

B. A person subject to a mitigation requirement or bank sponsor shall perform remediation as required by the Department.

C. The Department may require:

(1) The bank sponsor or person subject to a mitigation requirement to collect and submit specific data to determine if remediation is necessary; and

(2) Remediation at any time before the end of the monitoring period to ensure compliance with the performance standards specified in the mitigation banking instrument or Phase II of a mitigation plan.

D. The Department may, for mitigation banks requiring remediation:

(1) Withhold or suspend approval of use of credits in the mitigation bank until remediation is completed to the Department's satisfaction;

(2) Consider whether to continue to approve use of credits in the mitigation bank for that portion of the bank not requiring remediation; or

(3) Require that other actions be undertaken as specified in the mitigation banking instrument.

E. A bank sponsor shall provide an alternate form of mitigation or remediation of the mitigation bank acceptable to the Department when mitigation bank credits which were sold fail to meet interim and final performance standards.

F. The Department shall, after a period specified in a mitigation banking instrument, take the following actions if the Department determines that a bank sponsor has not performed remediation:

(1) Revoke financial assurances of a non-government mitigation bank; or

(2) Impose the penalty specified in the mitigation banking instrument upon the government agency responsible for a government-operated mitigation bank.

G. The Department may, for failure of a person subject to an individual mitigation requirement to remediate a mitigation site:

(1) Revoke the bond or retain other financial assurances; or

(2) Require the person subject to a mitigation requirement to select another environmentally preferable option acceptable to the Department; and

(a) Purchase credits from an approved mitigation bank;

(b) Pay into the Nontidal Wetland Compensation Fund; or

(c) Successfully complete the mitigation project on another site.

H. The Department may consult with other agencies and the person subject to a mitigation requirement in determining;

(1) Appropriate remediation activities; or

(2) Other actions which shall be required to ensure that ecological objectives for aquatic resource functions from the mitigation project are met. Actions may include changes to:

(a) Monitoring requirements;

(b) Performance standards;

(c) Project design and construction; or

(d) Maintenance and management requirements.

26.23.04.17 Mitigation Plan Modification

26.23.04.17 Mitigation Plan Modification.

A. To ensure compliance with this subtitle, the Department may require, and a bank sponsor or person subject to a mitigation requirement may request, modifications to an approved:

- (1) Mitigation plan;*
- (2) Mitigation component of a soil conservation and water quality plan; or*
- (3) Mitigation banking instrument.*

B. Modification, substitution, or other deviations from an approved mitigation plan or component may not be made without approval from the Department and the Interagency Review Team as applicable under this section.

C. A modification request may be made to the Department by the person subject to a mitigation requirement or bank sponsor in writing.

D. Persons subject to a mitigation requirement or bank sponsor shall follow up requests for a modification with updated plans, within 10 days of a request to the Department.

E. A written request for a modification shall contain the following information:

- (1) The name of the bank sponsor, applicant, or authorized person subject to a mitigation requirement;*
- (2) Reference number of the authorization;*
- (3) Location of the mitigation project;*
- (4) A description of the proposed modification; and*
- (5) A justification for the modification.*

F. The Department shall, within 30 days of a written request for modification to a mitigation plan not under a mitigation bank:

- (1) Request additional information; or*
- (2) Provide a written notification of the Department's decision to approve or deny modification of a mitigation plan to a person subject to a mitigation requirement;*

G. The Department shall respond to a request for modification to a mitigation banking instrument within time frames specified within the mitigation banking instrument or federal compensatory mitigation requirements, whichever is longer.

H. A person subject to a mitigation requirement or bank sponsor may not implement a modification to a mitigation plan without approval from the Department.

I. The Department's decision is binding on the person subject to a mitigation requirement or bank sponsor.

26.23.04.18 Performance Standards.

26.23.04.18 Performance Standards.

A. A person subject to a mitigation requirement or bank sponsor shall design and construct a mitigation project to provide beneficial functions in its watershed and complement the surrounding landscape features.

B. The person subject to a mitigation requirement or bank sponsor shall successfully implement the approved mitigation plan:

- (1) To the Department's satisfaction;*
- (2) In accordance with Regulation .04 of this chapter;*
- (3) Within the time period required by the Department; and*
- (4) As specified in the Phase II mitigation plan approval letter or mitigation banking instrument.*

C. Performance standards for mitigation shall measure components of the mitigation project that reflect the project objectives. Performance standards shall be identified in the Phase II mitigation plan approval letter or approved mitigation banking instrument.

D. Performance standards shall be:

- (1) Objective and verifiable;*
- (2) Based on best available science which can be measured or assessed in a practicable manner; including:*
 - (a) Measures or variables in functional assessment methodologies;*
 - (b) Measurements of hydrology, taking into account hydrologic variability of wetlands and other water resources; or*
 - (c) Comparison to reference resources of similar type and landscape position; and*
- (3) Established to take into account expected stages of development of the wetland and associated aquatic resource ecological processes.*

E. The Phase II mitigation plan approval letter or mitigation banking instrument shall specify the performance standards for vegetation, soils, and hydrology to be achieved within the time frame specified by the Department.

F. Performance standards shall include:

- (1) The required cover or density of native species in a condition and composition acceptable to the Department, including standards for:*
 - (a) Growth;*
 - (b) Succession; and*
 - (c) Species composition;*
- (2) Evidence of actively reducing soil conditions which:*
 - (a) Meet the hydric soil criteria developed by the National Technical Committee for Hydric Soils as stated in the Federal Manual; and*
 - (b) Are accepted by the Department; and*
- (3) Flooding, saturation, or inundation of a sufficient duration and frequency to achieve the goals of the mitigation project and:*

- (a) Create anaerobic conditions in the upper part of the soil and support hydrophytic vegetation;*
- (b) Demonstrate indicators designated in the Federal Manual, its amendments, and regional supplements;*

and

- (4) Other requirements to improve wetland function, including standards for:*
 - (a) Microtopography;*
 - (b) Coarse woody debris;*
 - (c) Additional soil parameters; and*
- (5) Measurable standards to meet other goals established in the Phase II mitigation plan approval letter or mitigation banking instrument.*

G. Performance standards shall ensure that the desired characteristics and functions in wetland preservation areas are maintained.

H. Performance standards for out-of-kind mitigation shall be specified in the Phase II mitigation plan approval letter or mitigation banking instrument and may include:

- (1) Survival and extent of plant species composition at the mitigation site, if appropriate;*
- (2) Flooding, saturation, inundation, or other surface water flow regimes of a sufficient duration and frequency to achieve goals of the mitigation project; and*

- (3) *Quantitative measures of:*
 - (a) *Water quality improvement, including presence and numbers of aquatic species;*
 - (b) *Functions and environmental outcomes listed in the Phase II mitigation plan approval letter or mitigation banking instrument; or*
 - (c) *Other wildlife presence and extent;*
- I. *Performance standards for buffers, if required, around mitigation projects may include:*
 - (1) *The percentage of acceptable cover and composition of plant species;*
 - (2) *Other natural features approved by the Department; and*
 - (3) *Other standards specified in the:*
 - (a) *Phase II mitigation plan approval letter; or*
 - (b) *Mitigation banking instrument.*
- J. *The Department shall use performance standards in place at the time of the Phase II mitigation plan approval letter or approval of the mitigation banking instrument.*
- K. *Failure to successfully fulfill specified mitigation requirements may result in the Department taking any combination of the following actions:*
 - (1) *Appropriate enforcement action under 26.23.01.05 of this subtitle for persons subject to a mitigation requirement;*
 - (2) *Revocation of financial assurances;*
 - (3) *Requiring penalties or actions specified in mitigation banking instruments;*
 - (4) *Changing consideration of use of the mitigation bank to:*
 - (5) *Cease acceptance of use of the bank;*
 - (6) *Withdraw additional credits to offset failed areas of the bank; or*
 - (7) *Implement other remedies according to the mitigation banking instrument;*
 - (8) *Requiring the bank sponsor or person subject to a mitigation requirement to perform successful alternate forms of mitigation or remediation as required by the Department for the unsuccessful area or credit of required mitigation, including:*
 - (a) *Purchase of credits in an approved mitigation bank;*
 - (b) *Payment into the Nontidal Wetland Compensation Fund; or*
 - (c) *Implementation of another approved mitigation project.*

26.23.04.19 Financial Assurances.

26.23.04.19 Financial Assurances.

A. Exceptions. Sections F – M of this regulation do not apply to agencies of any federal, State, county, or municipal government, unless otherwise requested by the agency. A government agency may request the option of meeting requirements of §§ F-M of this regulation as an alternative to meeting the requirements of §D of this regulation.

B. The Department may waive or alter financial assurance requirements if:

(1) The financial assurance is posted by a person subject to a mitigation requirement and held by another entity to meet financial assurances under federal compensatory mitigation requirements;

(2) The likelihood of success merits reduction of the financial assurance amount or its duration;

(3) Mitigation requirements are fulfilled before an activity results in a loss of nontidal wetland;

(4) The Department approves a written request and justification from the person subject to a mitigation requirement, including estimated or actual costs to complete the mitigation project that are less than those in I(1)(b) of this regulation, and any other relevant information; or

(5) The costs are for activities associated with mitigation for agricultural activities, including:

(a) Long-term management and catastrophic events; and

(b) Monitoring, provided that there is a commitment from another entity to fund and conduct monitoring.

C. The Department shall require financial assurances for the following steps in the mitigation process:

(1) Construction;

(2) Maintenance and monitoring;

(3) Catastrophic events; and

(4) Long-term Management.

D. Agencies of any federal, State, county, or municipal government shall demonstrate to the Department's satisfaction that:

(1) The agency has identified, allocated and encumbered funds to ensure the successful completion of the mitigation project in meeting project objectives and ecological performance standards; including:

(a) Acquisition of the property;

(b) Design and construction;

(c) Active maintenance during and after the monitoring period;

(d) Remediation;

(e) Long-term management and protection;

(f) Provisions for remediating effects of catastrophic events; or

(2) The agency provides a signed letter:

(a) Documenting commitment to pay for all items associated with §D(1) of this regulation; and

(b) Stating that in the event the mitigation site does not meet mitigation requirements, and the agency and the Department determine that the mitigation site cannot be remediated, the agency shall satisfy the mitigation requirement by providing mitigation according to:

(i) The order of preference specified in Regulation .02F of this chapter; and

(ii) According to a schedule approved by the Department.

E. A person subject to a mitigation requirement shall, by a time frame specified by the Department, file with the Department evidence of financial assurances on a form to be prescribed and furnished by the Department. The time frame for filing evidence of a financial assurance with the Department may not be set later than commencement of activities requiring mitigation.

F. A person subject to a mitigation requirement shall make the financial assurance for all items associated with §§C and D of this regulation payable to the Nontidal Wetland Compensation Fund. The financial assurance shall be conditioned upon the successful completion of the mitigation project according to mitigation requirements of this chapter, including requirements under §J of this regulation..

G. Forms of Financial Assurances:

(1) Related to §C(1)-(2) of this regulation:

(a) A surety bond, which is the preferred form of security.

(b) *A deposit of cash or negotiable bonds of the U.S. Government having a market value equal to the acceptable bond amount accompanied by a written deposit account control agreement between the bank, the Department, and the depositor wherein the bank agrees to pay the State on demand in the event of forfeiture;*

(c) *A certificate of deposit equal to the required bond, issued by a bank in the State and accompanied by a written agreement of the bank to pay the State on demand in the event of forfeiture;*

(d) *An irrevocable letter of credit that is equivalent to the required bond that:*

(i) *Is issued by a bank or financial institution organized or authorized to do business in the State; and*

(ii) *Includes a specific statement that the total sum is guaranteed to be available and payable directly to the State on demand in the event of forfeiture;*

- (e) *An escrow account;*
- (f) *An insurance policy specific to conservation projects or mitigation sites;*
- (g) *An acceptable financial assurance held by another entity; and*
- (2) *Related to §C(3)-(4) of this regulation:*
- (a) *Funds placed in an endowment for the long-term steward;*
- (b) *An alternative form of security approved by the Department; or*
- (c) *An acceptable financial assurance held by another entity.*

H. *The person subject to a mitigation requirement shall submit to the Department documentation that the financial assurances under §G of this regulation will be established and maintained until authorized for release.*

I. Amount of Financial Assurance.

- (1) *The amount of the financial assurance for a person subject to a mitigation requirement shall be set to:*
- (a) *Ensure there is a high likelihood that the mitigation project will successfully meet applicable performance standards according to Regulation .18 of this chapter and be maintained in the long-term; and*
- (b) *The amount equivalent to:*
- (i) *Nontidal Wetland Compensation Fund payment per acre of nontidal wetland mitigation required, provided that the Nontidal Wetland Compensation Fund is approved under the federal compensatory mitigation requirements; or*
- (ii) *Costs associated with criteria in Regulation .23I of this chapter.*
- (2) *The Department shall consider the following factors to determine the likelihood of success of the project in consideration of amount of financial assurance, including:*
- (a) *Number of acres to be mitigated;*
- (b) *The cost and availability of land in the area of the mitigation site;*
- (c) *The proposed method of mitigation;*
- (d) *Design, survey, permitting and construction costs;*
- (e) *Maintenance and monitoring;*
- (f) *Remediation;*
- (g) *Whether a long-term protection mechanism has been executed and recorded;*
- (h) *Any other relevant factors;*
- (i) *Past performance of the project sponsor; and*
- (j) *Costs of long-term management and management after catastrophic events.*

J. *The person subject to the mitigation requirement shall maintain the financial assurance:*

- (1) *Until the Department determines that all of the following conditions are met:*
- (a) *Construction and planting was completed according to Regulation .15C of this chapter;*
- (b) *The Department has approved an as-built plan for the mitigation project according to Regulation .15C(3) of this chapter;*
- (c) *All terms in the Phase II mitigation plan approval letter have been satisfied;*
- (d) *The monitoring period has been successfully completed according to Regulation .22 of this chapter;*
- (e) *Performance standards have been met according to Regulation .18 of this chapter;*
- (f) *The Department received a copy of the fully executed and recorded site protection mechanism as described in Regulation .14 of this chapter on those lands where mitigation has occurred; and*
- (g) *The surety, financial institution, or other entity providing the approved financial assurance receives written notice from the Department that requirements in §J(1)(a)-(f) of this regulation were successfully met; and*
- (2) *In perpetuity for the financial assurances associated with long-term management and catastrophic events unless they are transferred to a long-term steward:*
- (a) *Acceptable to the Department; and*
- (b) *When long-term management and catastrophic funds are intended to be maintained in perpetuity by the long-term steward.*

K. The financial assurances may be released in part after the Department determines that the mitigation project has been constructed and planted according to requirements of the Phase II mitigation plan approval letter. The Department may decide on a case by case basis to release the financial assurances in part based on compliance with mitigation project milestones, including periodic performance standards.

L. A financial assurance may not be canceled by the surety, bank, or other issuing entity unless the following conditions are satisfied:

(1) The surety or other issuing entity notifies the Department and the person subject to a mitigation requirement of its intent to cancel the financial assurance, in writing, by registered mail, at least 120 days before cancellation; and

(2) At least 45 days before the cancellation date indicated in the notice, the person subject to a mitigation requirement files a commitment from a surety, bank, or other issuing entity to provide a substitute financial assurance which will be effective on the cancellation date indicated in the notice.

M. The Department may require an annual report showing beginning and ending balances, including deposits and withdrawals, from any accounts used for financial assurances.

26.23.04.20 Financial Assurances for Mitigation Banks

26.23.04.20 Financial Assurances for Mitigation Banks.

A. The Department may waive or alter financial assurance requirements in Regulation .19I of this chapter for mitigation banks if:

(1) A bond or alternate form of security is posted by a bank sponsor and held by another entity to meet financial assurances under federal compensatory mitigation requirements; or

(2) The likelihood of success merits reduction of the amount or duration of the financial assurance according to criteria in Regulation .19I of this chapter.

B. Bank sponsors who are government agencies are subject to the requirements of:

(1) Regulation .19D---E of the chapter; or

(2) Regulation .19E---L of this chapter if requested by the bank sponsor who is a government agency.

C. As approved by the Department and as provided in Regulation .19C and .19E---L of this chapter, a bank sponsor shall:

(1) Post financial assurances, payable to the Department, an amount equal to the amount due under the:

(a) Mitigation fee structure in place at the time the financial assurance is required for the area in which the mitigation bank is located;

(b) Costs associated with criteria in Regulation .23I of this chapter;

(c) The amount specified in the mitigation banking instrument; or

(2) Provide such other alternate forms of security acceptable to the Department.

D. The bank sponsor shall maintain the financial assurance:

(1) Until the Department determines that:

(a) All conditions in Regulation .19J(1)(a)---(b) and .19J(1)(d)---(g) of this chapter are met;

(b) All other terms in the mitigation banking instrument have been satisfied; and

(2) All conditions in Regulation .19J(2) are met.

E. The Department may partially release the financial assurances during the term of the monitoring period according to criteria in Regulation .19K of this chapter.

F. The financial assurance is subject to forfeiture upon failure of the bank sponsor to comply with:

(1) The terms of the mitigation banking instrument; or

(2) Regulations .01---.02 and .04-----.23 of this chapter, as applicable.

G. The forfeiture provisions for financial assurances in Regulation .21 of this chapter apply to mitigation banks.

H. The Department may require an annual report showing beginning and ending balances, including deposits and withdrawals, from any accounts used for financial assurances.

26.23.04.21 Forfeiture of Financial Assurances

26.23.04.21 Forfeiture of Financial Assurances.

A. The financial assurances or other instrument securing compliance with the mitigation plan, mitigation banking instrument, or mitigation component of a soil conservation or water quality plan may be subject to forfeiture upon:

- (1) Revocation of the associated:*
 - (a) Nontidal wetlands authorization;*
 - (b) Waterway construction permit issued under COMAR 26.17.04;*
 - (c) Tidal wetland authorization under COMAR 23.02.04.20 or COMAR 26.24.01.06;*
- (2) Failure of the person subject to a mitigation requirement to comply with an administrative order;*
- (3) Failure to comply with any element of the:*
 - (a) Phase II mitigation plan approval letter, including:*
 - (i) Any approved modifications;*
 - (ii) Specified performance standards; or*
 - (iii) Approved mitigation banking instrument.*

B. The Department shall state its intention to initiate forfeiture proceedings by certified mail to the surety, financial institution, or insurer and person subject to a mitigation requirement or bank sponsor, as appropriate.

C. The Department shall set the time allowed to show cause why the financial assurance or other instrument should not be forfeited to be the following upon receipt of notice of forfeiture:

- (1) A period of 30 days for a person subject to a mitigation requirement, to end no later than 60 days prior to the expiration of the financial assurance; or*
- (2) The time specified in the mitigation banking instrument for a bank sponsor.*

D. On showing cause, the Department shall provide for a reasonable time for the person subject to a mitigation requirement, bank sponsor, surety, or other financial institution, to correct the problem.

E. If the person subject to a mitigation requirement or bank sponsor fails to show cause, the financial assurance or other instrument shall be forfeited nisi and the Department shall send notice of the forfeiture to the surety or other financial institution and the:

- (1) Authorized person subject to a mitigation requirement;*
- (2) Person conducting an agricultural activity; or*
- (3) Bank sponsor.*

F. If a showing of an intention to correct the problem in compliance with the mitigation plan is not submitted to the Department within 30 days from forfeiture nisi, or as determined in the mitigation banking instrument, the bond or other security shall be forfeited absolute.

G. The Department shall use forfeited financial assurances to perform mitigation requirements under the Nontidal Wetland Compensation Fund.

H. A person subject to a mitigation requirement or bank sponsor may not conduct a regulated or agricultural activity in a nontidal wetland if the person previously forfeited any financial assurance under this subtitle unless the person:

- (1) Repays the Department the cost of completing the mitigation project in excess of the forfeited financial assurance or alternate security, plus interest at the rate set in the Courts and Judicial Proceedings Article, §11-107(a), Annotated Code of Maryland; or*
- (2) Completes the mitigation project at its expense according to the approved mitigation plan and any approved modifications.*

I. A corporation, limited liability company, partnership, or similar entity may not conduct a regulated activity if any of its members, officers or principals have, as individuals or part or another corporation, limited liability company, partnership, or similar entity, previously forfeited a financial assurance unless conditions in §H(1) or §H(2) of this regulation are met.

26.23.04.22 Monitoring

26.23.04.22 Monitoring.

A. The person subject to a mitigation requirement or bank sponsor shall:

- (1) Submit as-built plans to the Department and;
- (2) Conduct monitoring as required in the:
 - (a) Phase II mitigation plan approval letter; or
 - (b) Mitigation banking instrument.

B. Duration of Monitoring.

(1) The Department may alter the duration of monitoring to extend or reduce the monitoring period.
(2) If the Department alters the duration of monitoring, the Department shall provide written notification to the person subject to a mitigation requirement or bank sponsor, that the monitoring period has been altered. The written notification shall become part of the Phase II mitigation plan approval letter or mitigation banking instrument. The altered duration may be:

(a) Extended beyond the duration stated in the Phase II mitigation plan approval letter, if the project fails to comply with Regulation .18 of this chapter;

(b) Extended for a time period consistent with federal requirements;

(c) Extended due to the slow rate of development of a resource type to meet project objectives; or

(d) Reduced because performance standards have been fulfilled in less than the required monitoring period.

(3) A person subject to a mitigation requirement or bank sponsor shall submit to the Department five monitoring reports over a period of 5 to 10 years, from the completion of construction of the mitigation project, as specified by the Department, unless the Department specifies a different frequency of monitoring and reporting.

C. The Department shall require that monitoring reports be submitted according to the requirements of the:

(1) Phase II mitigation plan approval letter, or;

(2) Mitigation bank instrument.

D. Contents of Monitoring Reports. The person subject to a mitigation requirement or bank sponsor shall provide monitoring reports to the Department which include the following information:

(1) Documentation of how the project meets goals for the mitigation site;

(2) A description of how the mitigation project meets the mitigation performance standards in Regulation .18 of this chapter and the Phase II mitigation plan approval letter or mitigation banking instrument; including data to determine:

(a) Plant survival, growth, and colonization;

(b) Hydrology; and

(c) Presence of reducing soil conditions to meet the definition of hydric soils;

(3) Photographs of the mitigation project;

(4) A description of any modifications which have been made or need to be made to implement Phase II of a mitigation plan or mitigation banking instrument to meet the:

(a) Standards of Regulation .18 of this chapter; and

(b) Requirements of the Phase II mitigation plan approval letter or mitigation banking instrument;

(5) For mitigation banks, monitoring information required in a mitigation banking instrument; and

(6) Other qualitative and quantitative measures or assessments required by the Department.

E. The Department shall use monitoring requirements in place at the time of the Phase II mitigation plan approval letter or approval of the mitigation banking instrument.

F. The Department reserves the right to inspect the mitigation project at any time during the construction and required monitoring period, and any time after that to assess the long-term viability of the mitigation site.

G. The Department may require interim monitoring to occur at a mitigation bank when the mitigation bank has met all final performance standards but has not:

(1) Sold all credits; and

(2) Met closeout requirements in .11J(1)(a) of this chapter.

H. During interim monitoring of a mitigation bank, the bank sponsor shall inspect and maintain the mitigation site to ensure that the mitigation site continues to meet performance standards, until the mitigation bank is closed following requirements in .11J(1)(a) of this chapter.

I. The Department may require that monitoring be conducted under the long-term management plan.

J. The person subject to a mitigation requirement shall consider monitoring requirements fulfilled upon receipt of written notice from the Department. If the Department fails to send written notice to the person subject to a mitigation requirement within 60 days after the end of the monitoring period, the monitoring requirement shall be considered fulfilled.

K. The bank sponsor shall consider monitoring requirements satisfied upon confirmation from the Department that monitoring terms under the approved mitigation bank instrument have been met to the Department's satisfaction.

26.23.04.23 Nontidal Wetland Compensation Fund.

26.23.04.23 Nontidal Wetland Compensation Fund.

A. The Department may accept monetary compensation if the Department determines that monetary compensation is the environmentally preferable option for mitigation.

B. Monetary compensation may not substitute for the requirement to avoid or minimize nontidal wetland losses.

C. A person subject to a mitigation requirement shall propose that the Department accept monetary compensation when practicable alternatives are not available under Regulations .01 and .02 of this chapter for another environmentally preferable mitigation option.

D. A proposal for acceptance of monetary compensation shall be submitted to the Department for review as a part of Phase I of a mitigation plan:

(1) For a regulated activity; or

(2) As part of the mitigation component of the soil conservation and water quality plan.

E. Monetary compensation proposals may be rejected if the Department determines that other environmentally preferable mitigation options exist.

F. The Department may make a preliminary decision on the acceptability of monetary compensation as part of the determination that an application is complete.

G. The Department shall render final decisions on proposals to accept monetary compensation based on Regulations .01 and .02 of this chapter as part of a final authorization requiring mitigation or a mitigation component decision.

H. The Nontidal Wetland Compensation Fund shall include:

(1) Monetary compensation paid by a person subject to a mitigation requirement instead of engaging in the restoration, creation, or enhancement of nontidal wetlands;

(2) A civil or criminal penalty imposed by a court pursuant to COMAR 26.23.01.05 or COMAR 26.23.02.09;

(3) Money from financial assurances revoked for failure to meet mitigation requirements; and

(4) Other monetary contributions to the Nontidal Wetland Compensation Fund from other sources.

I. Funds in the Nontidal Wetland Compensation Fund may be used only for the restoration, creation, enhancement, or preservation of nontidal wetlands, nontidal wetland buffers, or expanded buffers. Expenditures shall:

(1) Be made to ensure that mitigation is consistent with Regulations .01F-H of this chapter and .05C, and .05E, and .05S of this chapter; and

(2) Include costs associated with:

(a) Site selection and evaluation;

(b) Development of mitigation plans;

(c) Acquisition of land;

(d) Acquisition of easements or other site protection mechanisms;

(e) Design, surveying, permitting, construction, planting, monitoring, maintenance, and remediation of mitigation sites;

(f) Purchase of credits in mitigation banks;

(g) Administrative tasks associated with wetland mitigation;

(h) Financial assurances;

(i) Costs for long-term management and catastrophic events;

(j) Costs associated with technical training to accomplish intent of this chapter;

(k) Costs for actions required under federal compensatory mitigation requirements; and

(l) Contractual services necessary to accomplish the intent of this chapter.

J. The Department may determine monetary compensation fees based on costs anticipated to construct mitigation projects. The Department may use the costs for tasks in §I of this regulation and actual costs from past projects to determine the fee schedule.

K. The Department may reduce the amount of monetary compensation for:

(1) Impacts on single family-owned lots when:

(a) Permanent nontidal wetland losses are less than 5,000 square feet;
(b) An existing habitable structure is on the property and no new habitable structure is proposed; and
(c) Nontidal wetland impacts would result from the following qualifying accessory structures or similar structures:

- (i) Minor additions to existing structures;
- (ii) Decks or patios;
- (iii) Driveways;
- (iv) Sheds; or
- (vi) Sewer and water system improvements.

L. Fee Schedule. The Department:

(1) May publish and establish:

(a) A schedule for updating rates generally in use since 1991, beginning with:

- (i) An initial interim fee rate;*
- (ii) A secondary interim fee rate 1.5 years after establishing the initial interim fee rate;*
- (iii) A baseline rate 3 years after establishing the initial interim fee rate; and*
- (b) A method for adjusting subsequent rates;*

(2) Shall evaluate the following:

(a) Baseline fee rates at successive intervals of 3 years and modify them based on the costs in §I of this regulation;

(b) Baseline fee rates annually based upon the Consumer Price Index on January 1 of the current year and calculated and implemented by April 1 of that year; and

(c) The general standard for when costs of mitigation bank credits render use of a mitigation bank less environmentally preferable to payment into the Nontidal Wetland Compensation Fund;

(2) Shall issue a public notice of proposed fees prior to establishing or adjusting rates; and

(3) May raise or lower baseline fee rates based on:

- (a) Costs for items in §I of this regulation; and*
- (b) Changes in the Consumer Price Index.*

M. During the interim 3-year period in §L(1), the Department shall require payment of baseline fee rates when:

(1) Mitigation required is 0.5 acre or greater; and

(2) The Department has approved payment into the Nontidal Wetland Compensation Fund as the environmentally preferable option.

N. The Department shall use fee rates in place at the time of an application submittal when calculating the amount of payment due from an applicant, unless:

(1) Circumstances in §K of this regulation apply; or

(2) The application was received at least two years prior to:

- (a) The authorization for the impacts to nontidal wetlands requiring the mitigation; and*
- (b) Payment into the Nontidal Wetland Compensation Fund.*

O. Funds credited and any interest accrued to the Nontidal Wetland Compensation Fund shall remain available until expended, and may not revert to the general fund.

P. The Department shall prepare an annual report on the Nontidal Wetland Compensation Fund that includes an accounting of:

- (1) Financial receipts and expenditures to and from the Fund; and*
- (2) Mitigation projects completed and in progress.*

Q. The Department shall provide a copy of the annual report to the General Assembly as provided under State Government Article, §2-1312, Annotated Code of Maryland.

R. The Department shall seek approval for the Nontidal Wetland Compensation Fund to be a federally approved in-lieu fee program and provide required information to the Corps of Engineers and Interagency Review Team.

S. The Department shall operate a federally approved in-lieu fee program according to terms of the approved in-lieu fee instrument and 33 CFR § 332.8 (2008), which is incorporated by reference.

T. Monetary payments into the Nontidal Wetland Compensation Fund which are not part of a federal regulatory mitigation requirement are not subject to the approved in-lieu fee instrument or 33 CFR § 332.8 (2008), which is incorporated by reference.

26.23.05.01 Agricultural Activities.

26.23.5.01 Agricultural Activities.

A. A person conducting an agricultural activity is exempt from the requirement to obtain a nontidal wetlands permit under this subtitle. Unless exempted in §B of this regulation, a person conducting an agricultural activity which adversely impacts a nontidal wetland shall implement best management practices to protect nontidal wetlands and provide mitigation for any loss of nontidal wetlands through a soil conservation and water quality plan submitted to, and approved by, a soil conservation district after December 31, 1990.

B. Exemptions. The following activities are exempt from the approval and mitigation requirements of this subtitle:

(1) Repair and maintenance for agricultural activities in nontidal wetlands. These activities include repair and maintenance of:

- (a) Drainage ditches;
- (b) Farm ponds;
- (c) Channels;
- (d) Subsurface drains;
- (e) Bridges;
- (f) Water control structures;
- (g) Aquaculture ponds and associated structures;
- (h) Roads and causeways; and
- (i) Existing best management practices.

(2) Agricultural activities and operation and maintenance activities conducted in accordance with public drainage regulations contained in COMAR 15.20.01.

(3) Agricultural activities on areas that have lain fallow for any reason. The exemption may not apply if agricultural activities have not taken place for 5 consecutive years.

(4) Agricultural activities on areas set aside or taken out of production if the area is under and complies with a formal program for agriculture, as authorized by the Agricultural Stabilization and Conservation Service within the U.S. Department of Agriculture, or the Conservation Reserve Program, or other formal set-aside programs that may be established by the Maryland Department of Agriculture. The exemption does not apply if agricultural activities have not resumed within 5 years after expiration of the time limit specified in the set-aside program.

(5) Structures for agricultural activities essential to the continued operation of a farm if the nontidal wetland being impacted is on land which is farmed, set aside, lying fallow, or part of a crop rotation.

(6) Agricultural activities including plowing, seeding, cultivating, harvesting, tilling, grazing, farm pond construction, and draining on areas not otherwise fallow or part of a set-aside program, provided that the activities do not drain, dredge, fill, or otherwise convert a nontidal wetland on which agricultural activities are not presently conducted. The following apply:

(a) Construction or operation of a pond in nontidal wetlands used exclusively for wildlife management is not considered an agricultural activity.

(b) Agricultural activities in nontidal wetlands dominated by woody hydrophytes shall maintain a dominance of woody hydrophytes and not alter the surface or [ground water] *groundwater* hydrology or drain, dredge, fill, convert, or degrade the water quality of nontidal wetlands, to qualify for an exemption under this subsection.

(7) Agricultural activities in isolated nontidal wetlands [of] *when the wetland is* less than 1 acre and having no significant plant or wildlife value. A soil conservation district shall:

(a) Determine whether an area is an isolated nontidal wetland based on published hydrologic and hydraulic data and data obtained in the field which shows whether the nontidal wetland is hydrologically connected.

(b) Determine whether a nontidal wetland has significant plant or wildlife value.

(c) Notify the Department when a determination is made under §B(7)(a) or (b) of this regulation. If the Department has not responded within 60 days of the notification, the determination made by a soil conservation district shall be considered correct. If the Department verifies or rejects the determination within 60 days of the notification, the decision made by the Department shall be binding on a soil conservation district.

(8) Agricultural activities whose cumulative impact for the entire and complete project is less than 5,000 square feet of nontidal wetland which contains no significant plant or wildlife value. A soil conservation district shall:

(a) Determine whether a nontidal wetland has significant plant or wildlife value.

(b) Notify the Department when a determination under §B(8)(a) of this regulation is made. If the Department has not responded within 60 days of the notification, the determination made by a soil conservation district shall be considered correct. If the Department verifies or rejects the determination within 60 days of the notification, the decision made by the Department shall be binding on a soil conservation district.

C. Aquaculture facilities associated with land uses other than agriculture shall be used exclusively for aquaculture in order to be considered an agricultural activity.

D. Intent of Best Management Practices. Best management practices for agricultural activities in nontidal wetlands shall be designed to achieve the following goals:

- (1) Control soil loss and minimize sediment deposition in nontidal wetlands;
- (2) Minimize water quality degradation;
- (3) Minimize adverse impacts to the surface water and [ground water] *groundwater* circulation patterns; and
- (4) Minimize adverse impacts to the chemical, physical, or biological characteristics of nontidal wetlands.

E. A soil conservation district shall consider all of the following criteria when approving the use of a best management practice for agricultural activities in nontidal wetlands:

(1) Whether an alternate best management practice can accomplish the purpose with less adverse impact to a nontidal wetland.

(2) The feasibility of future nontidal wetland restoration.

(3) The cost and extent of mitigation.

(4) Landowner objectives.

(5) Whether activities change the level of surface water or [ground water] *groundwater* in a nontidal wetland.

This includes whether changes to flow and circulation:

(a) Are recommended in the soil conservation and water quality plan; and

(b) Are reversible.

(6) Whether the locations of aquaculture ponds, farm ponds, and any other structures for agriculture minimize adverse impacts to nontidal wetlands. The following locations minimize nontidal wetland adverse impacts in decreasing order of preference:

(a) Uplands;

(b) Isolated farmed nontidal wetlands;

(c) Other farmed nontidal wetlands;

(d) Emergent nontidal wetlands;

(e) Scrub-shrub nontidal wetlands; and

(f) Forested nontidal wetlands.

F. Best Management Practices.

(1) A person conducting agricultural activities in nontidal wetlands that are not otherwise exempt in §B of this regulation shall implement best management practices that meet the intent of D and E of this regulation as set forth in a soil conservation and water quality plan that is consistent with this regulation.

(2) A person conducting an agricultural activity may use best management practices recommended in publications by the Maryland Department of Agriculture and the U.S. Department of Agriculture Soil Conservation Service. Individual practices may include:

(a) Conservation cropping sequences;

(b) Conservation tillage;

(c) Filter strips;

(d) Fertilizer management; or

(e) Waste management.

(3) When farm roads are constructed in nontidal wetlands, they shall be designed according to the following criteria:

(a) Contain not more than the minimum length and width necessary to conduct agricultural activities;

(b) Minimize encroachment in nontidal wetlands;

(c) Maintain flow of water unless otherwise recommended in the soil conservation and water quality plan;

and

(d) Be stabilized.

(4) Best management practices for changes in surface water patterns or [ground water] *groundwater* levels shall attempt to accommodate nontidal wetland restoration, creation, or enhancement if agricultural activities no longer occur on the site.

(5) Best management practices that require planting of vegetation shall use native or adaptive vegetation.

(6) Farm ponds or aquaculture facilities that are located in intermittent or perennial streams, or that divert water from intermittent or perennial streams, shall:

(a) Not cause a violation of applicable State water quality standards as established by the Department;
(b) Allow the continued migration and reproduction of fish and wildlife that do occur, and that traditionally have occurred, in the streams and nontidal wetlands; and

(c) Minimize changes to upstream, downstream, and adjacent nontidal wetland hydrology and vegetation.

(7) Aquaculture facilities shall be designed to minimize the escape of exotic or hybrid plant species into nontidal wetlands.

(8) Temporary adverse impacts shall be rectified.

G. Plan Processing and Approval.

(1) A soil conservation district shall:

(a) Delineate or review and approve the extent of nontidal wetlands impacted by the agricultural activity according to the Federal Manual; and

(b) Assist in the preparation of and approve a soil conservation and water quality plan, including mitigation components, that complies with this regulation and (b) Assist in the preparation of and approve a soil conservation and water quality plan, including mitigation components, that complies with this regulation and COMAR 26.23.04.01 -.03 and [03-----07.] COMAR 26.23.04.05-.23.

(2) A soil conservation district may use guidance maps prepared by the Department to assist in the identification of nontidal wetlands.

(3) A soil conservation district may not approve a plan if it fails to comply with criteria and best management practices as set forth in this regulation, and mitigation requirements contained in COMAR 26.23.04.01 -.03 and [03-----07.] COMAR 26.23.04.05-.23.

(4) A soil conservation district shall modify a plan when there is a change in the agricultural activity being conducted or a new best management practice is implemented that results in the loss of additional nontidal wetlands on areas not exempted under §B of this regulation. A modified plan that impacts additional nontidal wetlands shall require additional mitigation.

H. Coordination with Other Programs.

(1) To assist a person conducting agricultural activities in expediting the permit process for other State or federal programs, the Department may provide additional comments on voluntary protection standards for agricultural activities in nontidal wetlands.

(2) A person conducting an agricultural activity in a nontidal wetland may request that the soil conservation district incorporate the voluntary protection standards into the soil conservation and water quality plan.

(3) If additional standards are met, the person conducting an agricultural activity may request that the Department coordinate review of the agricultural activities in nontidal wetlands with other appropriate governmental agencies.

I. Agricultural activities in nontidal wetlands shall be subject to the enforcement provisions of COMAR 26.23.01.05.

J. A soil conservation district and the Department of Agriculture shall cooperate with the Department to resolve a violation of these regulations caused by an agricultural activity.