

Summary of Questions Submitted
Webinar on the Ecosystem Enhancement Program's Draft Instrument to Gain
Compliance with the Federal Mitigation Rule
Dec. 16, 2009

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This document presents questions that were submitted during the subject Webinar, and associated responses to those questions. Questions of a technical nature related to the mechanics of Webinar delivery are not included. Multiple questions of the same nature were combined into one. Any questions regarding this document may be directed to Suzanne Klimek at suzanne.klimek@ncdenr.gov or 828-329-0871.

- 1. Regarding Section IV, M (Grandfathering): What if a Restoration plan has been submitted prior to the adoption of the instrument, but construction has not occurred? Will the as-built (mitigation plan) and monitoring have to meet the requirements stipulated in the instrument, or would the project still be grandfathered in?**

A: If a project has been instituted prior to the execution of the instrument, it will not be subject to the requirements of the instrument. A project at the stage described in the question would be grandfathered.

- 2. Is the advance credit to be repaid, and if so, how will its repayment schedule be balanced with future release of needed available credits?**

A: The mitigation rule requires that released credits be used to fulfill any advance credits used in the service area. Once a released credit has been applied to a requirement, the advance credit is returned to the pool of allocated advance credits in the service area for future use.

- 3. Regarding the Transfer of Liability procedure for ILF: .."Permit conditions will state the permit authorization is not valid until the Permittee is in possession of a receipt from NCEEP for the full payment of required mitigation." This is in conflict with how Private Banks are have been instructed by both the DWQ and the U.S. Army Corps of Engineers rules and guidelines state that proof of mitigation must be shown "prior to impact" and cannot require proof of payments as a condition of permit approval. We don't disagree with how its worded in the EEP ILF Instrument but need clarification.**

A: According to this section, proof of payment is not required when the permit is issued, but it is required for the issued permit to be valid. This section of the instrument requires that every Permittee must receive a receipt verifying that EEP has received their payment prior to conducting authorized impact. The receipt is also provided to the Corps project manager. This is how the process works currently, as

well. When the permit decision is made and the permit is issued, the Corps must be in possession of a letter of acceptance from EEP verifying that they (EEP) are able to accept liability for the mitigation. The actual transfer of liability does not occur until EEP receives payment, which occurs after the issuance of the permit. The purpose of the receipt is to provide a record to the Permittee and the agencies that the permittee has fulfilled their obligations under the permit and that EEP has accepted liability, been paid for the mitigation, and is legally responsible for providing the mitigation.

4. How will EEP administer the credit release schedule for FDP and DBB projects, what would be the consultant's role?

A: EEP will be responsible for requesting and securing credit releases from the District Engineer and Interagency Review Team. Consultants for EEP will be developing documentation that will be submitted as part of these requests.

5. Under paragraph IV (G), who will have responsibility for enforcing the provisions of the applicable preservation mechanism?

A: Regarding the long-term disposition of projects that have been successfully closed out by the regulatory agencies, the entity to which stewardship responsibilities have been transferred will be responsible for enforcing the easement provisions.

6. Under this instrument, will EEP be required to provide credits that are within the Local Watershed Plans or Targeted Local Watersheds within the impacted eight-digit Catalog Unit, assuming potential credits exist?

A: Yes. The instrument specifies that EEP will provide mitigation within the same eight-digit CU as the impact and based on the Compensation Planning Framework (CPF). The CPF specifies that mitigation will be within LWPs and/or TLWs and that anything outside of those areas must be approved by the IRT.

7. Will there be any changes to the standard documents (mitigation plans, monitoring reports, etc.) when the instrument is adopted?

A: No significant changes are necessary but the documents are being updated to reflect their connection to the 12 elements required by the rule. Mitigation Plans already include the 12 items required by the Federal rule.

8. Will there be a distinction between intermittent and perennial streams in terms of reporting and generating credits?

A: The instrument does not require that stream mitigation be tracked by flow regime (i.e., intermittent or perennial).

9. How do you determine how much can be spent in advance of formal project approval for project development?

A: The instrument basically allows the development of a project into the design stage and associated expenditures prior to formal approval. The amount of money spent on a project at this stage varies for each project. A determination of a specific approved amount will not be made. EEP will report to the IRT on expenditures and the IRT can consider setting a limit on advance expenditures if necessary.

10. What is the definition of Riparian Nonriverine? It sounds counterintuitive....

A: This occurs when a wetland exists within the floodplain but is not receiving overbank flooding. Additional clarification will be provided by the IRT prior to the execution of the instrument.

11. So if you create credits for transportation projects that haven't been created yet, the EEP invests in credits via Full Delivery/Design-Bid-Build. What happens if these permits are denied?

A: Essentially, the instrument does not predetermine the permit decision. In the scenario described, the credits would be available for use in association with other permits if determined to be appropriate.

12. Do the advanced credit allocations take into consideration the new mitigation rule and the impacts that private banks may have on supply? What happens if markets shift?

A: The advance credit allocations are designed to allow EEP to continue to operate at historic levels. If use of EEP declines, then advance credits will remain unused. In addition, allocations will be reviewed at least annually and will be updated as appropriate by the IRT.

13. To what extent does minimization/avoidance come in when you're already planning compensation for construction projects that have not been permitted yet?

A: As required by the Mitigation Rule, nothing in the instrument affects the requirements that all DA permits subject to Section 404 of the Clean Water Act comply with applicable provisions of the Section 404(b)(1) guidelines, including minimization and avoidance. Provisions included in the instrument will apply only after Corps project managers have determined that impacts associated with specific permits have been avoided and minimized.

14. Will there be a mechanism to allow early release of actual credits based upon improved performance of plant materials used, where new or expanded plantings are needed?

A: Yes. If EEP believes that credit releases are appropriate in advance of the schedule of a typical release, they can submit such a request to the DE and IRT for consideration.

15. Can you explain what an "advance credit" is?

A: The definition of an advance credit is included in the Federal Mitigation Rule, which says:

“Advance credits means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area here applicable. The instrument must also contain a schedule for fulfillment of advance credit sales.”

16. Do you think that having large service areas increases the likelihood for more banks or less likely?

A: The service area for EEP projects will be limited to the eight-digit CU, which is consistent with the existing operation of EEP and the requirements of private banks within North Carolina.

17. Does the Memorandum of Understanding with respect to adjacent CU mitigation still apply? For example, assets are not available in one CU, but the adjacent CU does have credits (per the DWQ memorandum whereby higher ratios are required).

A: This question is referring to existing policy that says if use of credits in an adjacent eight-digit CU are approved, they will be allowed with a penalty (ratio). This policy is still applicable.