

**ARKANSAS NATURAL RESOURCES COMMISSION RULES GOVERNING
THE ARKANSAS WETLANDS MITIGATION BANK PROGRAM
(2007)**

Title XII

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SUBTITLE I. GENERAL

Section 1201.1. PURPOSE.

This program is established to promote the restoration, maintenance and conservation of aquatic resources, including wetlands, streams, and deep water aquatic habitats; to improve cooperative efforts among private, nonprofit and public entities involved in this effort; and to offset losses of aquatic resource values caused by activities which otherwise comply with state and federal laws.

Section 1201.2. STATUTORY AUTHORITY.

Arkansas Code Annotated § 15-22-1601 *et seq.*, the "Arkansas Wetlands Mitigation Bank Act," provides a predictable, efficient framework for environmentally acceptable mitigation including off-site mitigation when such mitigation is required.

Section 1201.3. DEFINITIONS.

As used herein, unless the context otherwise requires:

- A. "Act" means the Arkansas Wetlands Mitigation Bank Act, Arkansas Code Annotated §15-22-1001 *et seq.*
- B. "Aquatic resources" means ecological functions, services, and values provided by the waters of the United States that are subject to compensatory mitigation under the Federal Water Pollution Control Act (33 United States Code § 1251 *et seq.*) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 and 403) as they exist on January 1, 2007, Executive Order 11990 issued May 24, 1977 (42 Federal Register 26961), or other laws requiring mitigation.
- C. "Commission" means the Arkansas Natural Resources Commission.
- D. "Compensatory mitigation" is the restoration, creation, enhancement, or in exceptional circumstances, preservation of aquatic resources expressly for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.
- E. "Committee" means the Wetlands Technical Advisory Committee which is established under the Act and Title XII of the Commission Rules.
- F. "Creation" means the establishment of an aquatic resource on a non-wetland site.
- G. "Credit" means a numerical value that represents the aquatic resource functions and value of a site.
- H. "Enhancement" means activities conducted in existing aquatic resources to achieve specific management objectives

or provide conditions which previously did not exist, and which increase one or more aquatic functions. Enhancement may involve trade-offs between aquatic resource structure, functions, and values; a positive change in one function may result in negative effects to other functions.

I. "Executive Director" means the Executive Director of the Arkansas Natural Resources Commission.

J. "Mitigation" means the process of avoiding impacts, minimizing impacts, rectifying impacts, reducing or eliminating impacts over time, and finally, compensating for any remaining impacts.

K. "Mitigation bank" means a publicly owned, (including by conservation easement), and managed aquatic resources site, created or restored in accordance with the Act to compensate for unavoidable adverse impacts due to activities which otherwise comply with the requirements of the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 and 403) as they exist on January 1, 2007, Executive Order 11990 issued may 24, 1977 (42 F.R. 26961), or other laws requiring mitigation.

L. "Permit action" means activity under a specific federal requirement for mitigation.

M. "Practicable" means the proposed project is feasible and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

N. "Restoration" means re-establishment of previously existing aquatic resource character and function(s) at a site where such character and function(s) no longer exist, or exist only in a substantially degraded state.

O. "Site" means a specific mitigation project under the Arkansas Mitigation Bank Program.

P. "Wetlands" means an area that has water at or near the surface of the ground at some time during the growing season (wetland hydrology). It contains plants that are adapted to wet habitats (hydrophytic vegetation) and is made up of soils that have developed under wet conditions (hydric soils) or any other definition promulgated by the Commission.

Section 1201.4. ADMINISTRATION.

A. The Commission is authorized to initiate and implement a mitigation bank program including the adoption of standards and criteria for site evaluation, selection and operation. The Commission shall adopt rules necessary and convenient to carry out this program. In consultation with the Committee, the Executive Director shall carry out the provisions of the Act and may:

1. Act as a bank sponsor; including, without limitation, establishing and operating sites.
2. Set a sales price for credits in the mitigation bank on behalf of the Commission.

3. Acquire or accept title, including easements, from willing sellers or donors in the name of the Commission suitable for use as sites.
4. Pay costs incurred for alterations needed to create or restore aquatic resources for purposes of carrying out the provisions of the Act.
5. Authorize payment of administrative, research or scientific monitoring expenses of the Commission in carrying out the provisions of the Act.
6. Receive funds from whatever source for the voluntary acquisition of sites and interests therein.
7. Enter into contracts with state and federal agencies, nonprofit corporations, or other persons for the management of sites.
8. Convey sites to other appropriate state agencies for management after satisfactory establishment of the functioning site. The Commission shall reserve such interest in the site, as necessary, to protect its function and value.
9. Enter into all agreements necessary with federal agencies for the development and operation of the mitigation bank including, without limitation, execution of a banking instrument(s) with the U.S. Army Corps of Engineers.
10. Establish a well-defined plan for each site, including preliminary objectives, inventory of resource values and an evaluation of monitoring for each approved program.

Section 1201.5. APPEALS.

Except as otherwise provided herein, the applicant may appeal, pursuant to Title I, Subtitle V of the Commission's rules, any decision or action of the Executive Director under these rules.

SUBTITLE II. WETLANDS TECHNICAL ADVISORY COMMITTEE

Section 1202.1. MEMBERSHIP.

- A. This Committee shall be made up of the directors, or their designees, of the Arkansas Forestry Commission, Arkansas Game & Fish Commission, Arkansas Highway & Transportation Department, Arkansas Natural Heritage Commission, the Arkansas Department of Environmental Quality, and two (2) public members appointed by the Commission. Additional ad hoc members may be named from related federal agencies for advisory purposes only.
- B. Selection of public members shall be made on the basis of their knowledge of wetlands and other aquatic resources with consideration given to the wide variety of interest in aquatic resources.
- C. Term Limits - The public members of the Committee shall be appointed for five-year terms. Individuals appointed are eligible for reappointment at the expiration of this term.

D. Replacement of Public Members - Any vacancies arising in the appointed public membership of this Committee shall be filled by the Commission. Recommendations of the Committee on appointees for the position shall be submitted to the Commission within thirty (30) days of the vacancy. The appointee shall serve the unexpired term and be eligible for reappointment.

E. Officers - The Committee shall elect a chairman and a vice-chairman annually from among its members. Any member may be elected to succeed himself in office. The Executive Director shall appoint an ex-officio secretary to provide administrative assistance to the Committee.

F. Public members of the Committee may be reimbursed for actual expenditures for reasonable and necessary expenses associated with attending Committee meetings, site visits, or other approved activities required for fulfilling Committee obligations under the Act.

Section 1202.2. PROCEDURES.

A. Meetings:

1. It shall be the duty of the Committee to meet when necessary to conduct business.

2. Meetings of the Committee may be called at any time at the discretion of the Chairman or the Secretary. Meetings may also be called upon the request of any two members of the Committee.

B. Quorum/Decisions - Four (4) members shall constitute a quorum at any meeting of the Committee. A quorum shall be required for any action on issues before the Committee. Any action which is not reached by a consensus should be presented to the Executive Director with the multiple recommendations to be considered.

C. Records - The Secretary shall maintain the official records of the Committee, including: accurate minutes of each Committee meeting, a log of all applications received, a summary of all discussions upon which Committee decisions are based and a copy of all recommendations of the Committee to the Executive Director. For each site a record of each transaction, the money and acreage involved, and an evaluation of the success of the project will be maintained.

D. Notice of Meetings - Written notice of all regular and special meetings shall be provided to Committee members and others requesting such notice by the Secretary. However, notice of special meetings may be given by telephone when necessary.

E. Duties -

1. Rules. Act as consultant to the Commission in the administration of rules related to the wetlands mitigation bank. These rules and regulations shall be developed according to the Arkansas Administrative Procedure Act, Ark. Code. Ann. § 25-15-201 *et seq.*

2. Review and comment on proposed sites.

3. Participate in site visits for the establishment, evaluation and certification of sites, and as necessary to verify compliance with the Act.

SUBTITLE III. MITIGATION BANK PROGRAM - IN GENERAL

Section 1203.1. IDENTIFICATION OF NEED FOR MITIGATION SITES.

The Executive Director shall:

- A. Consult with the Committee, agencies and interested parties to identify the area of greatest need and the greatest interest in the mitigation bank.
- B. Review priority listings or designation of areas of aquatic resource values.

Section 1203.2. CRITERIA FOR PRIORITIZING LOCATION OF MITIGATION SITES.

Prioritizing the location of sites will include consideration of the following:

- A. Aquatic resource values most needed for compensatory mitigation.
- B. Practicability of establishment and maintenance of aquatic resource functions.
- C. Incorporation of land adjacent to or near other public lands.
- D. Potential for linking corridors or small areas into one large site.
- E. State-wide water and aquatic resource policies, plans, or strategies.

Section 1203.3. OPERATION PLAN FOR EACH SITE.

- A. The Executive Director shall, in consultation with the Committee, develop and implement a site plan for each site. The plan shall include, but not be limited to, the system of resource values and credits for each site.

Section 1203.4. BANK EVALUATION - EXECUTIVE DIRECTOR.

- A. Periodically, the Executive Director shall evaluate the aquatic resource functions and values created within each site according to criteria established in the plan.
- B. The evaluation shall include a comparison of the current functions and values with the anticipated functions and values.
- C. If the Executive Director finds any significant disparity between the actual and anticipated functions and values, he may:
 - 1. Suspend the withdrawal of credits from that site; or
 - 2. Take prompt action to assure that the anticipated functions and values are established.

Section 1203.5. LONG TERM MONITORING AND REPORTING.

A. The Executive Director shall maintain a record of actions for each site and conduct monitoring of sites with money set aside for that purpose in the Arkansas Water Development Fund.

B. The Executive Director shall prepare annual reports on moneys spent and received for each site. Copies of the report shall be provided to the Commission, the Committee, and other persons requesting a copy.

SUBTITLE IV. PROCEDURE FOR SPECIFIC SITE SELECTION

Section 1204.1. SOLICITATION OF SUITABLE SITES.

Upon prioritizing the location of mitigation bank sites under Section 1203.2, the Executive Director shall solicit available sites for mitigation banks within priority areas.

A. The Executive Director shall publish notice and directly approach landowners to solicit land to be used as sites.

B. Real estate listings and existing lists held by state or federal agencies shall be reviewed for appropriate potential sites.

C. The Executive Director may request that the land owner or a site sponsor [any interested individual, or public or private organization or agency] provide a written proposal detailing the proposed site to be considered, including both a general description and a legal description of the land. Site visits may be made by the Commission staff or the Committee when the Executive Director determines it to be beneficial.

Section 1204.2. EVALUATION OF AVAILABLE SITES.

A. The Committee shall review each proposal to determine whether the proposed site is a desirable, feasible location for a bank.

B. The Committee will compare all feasible sites and prioritize them and recommend the most desirable locations to the Executive Director.

Section 1204.3. SITE EVALUATION CRITERIA.

Evaluation of a potential site shall include consideration of the following:

A. Historical aquatic resource trends, including the estimated rate of current and future losses of the respective aquatic resources.

B. Current and potential contributions of the aquatic resources to:

1. Wildlife, migratory birds and resident species;
2. Commercial and sport fisheries;
3. Surface and ground water quality and quantity, and flood moderation;
4. Habitat and species diversity;
5. Outdoor recreation, including enhancement of scenic waterways; and

- 6. Scientific and research values.
- C. Location of sites in relation to:
 - 1. Location of permit actions where mitigation might be used;
 - 2. Probability of establishing a successful site based on physical and ecological characteristics of the site;
 - 3. Maximization of aquatic resource functions and values; and
 - 4. Recommendations of state water and aquatic resources policies, plans, or strategies.
- D. Economic impact of establishing the site.
- E. Costs involved, including:
 - 1. Actual costs of land acquisition, establishment of aquatic resource functions, and projected cost of maintenance and management of the site.
 - 2. The cost effectiveness of each site based on the percentage of prior converted wetlands or other aquatic resources to be reclaimed, existing aquatic resources, and uplands.
- F. Requirements of the permitting agencies.

Section 1204.4. ACQUISITION AND DEVELOPMENT OF THE SELECTED SITE.

- A. The Executive Director shall attempt to negotiate an option to acquire the highest rated site by willing sale or donation of title or easement. If he is unsuccessful in obtaining the option, then he shall negotiate with the second highest rated site and so on until he has obtained the necessary site(s) or determines that the remaining sites are not acceptable for the mitigation program.
- B. The Commission shall not purchase a site for a price higher than the appraised value of the land.
- C. The Commission shall develop a site plan.
- D. The site plan shall be submitted to the appropriate federal agencies and be approved prior to acquisition of the site.
- E. The Executive Director shall have the authority to make all purchases and enter into all contracts necessary to develop the site in accordance with the plan.
- F. The Executive Director may sell credits from any site prior to the establishment of aquatic resource functions if:
 - 1. The Executive Director determines that the implementation of the site plan will likely result in the establishment of aquatic resource functions on the site according to the criteria established by the site plan, and
 - 2. The US Army Corps of Engineers or other appropriate agency approves the site plan and sale of credits prior to the establishment of aquatic resource functions.

SUBTITLE V. APPLICATION FOR BANK CREDITS

Section 1205.1. WRITTEN APPLICATION.

Upon submission to the Commission of a complete written application for bank credits and copies of the applicable federal permits, special conditions, or other necessary documents, the Committee shall review the application and provide a recommendation to the Executive Director.

Section 1205.2. STATE AGENCIES TO USE BANK

All Arkansas state agencies which are required by permit action to provide compensatory mitigation shall, when mitigating offsite, use the mitigation banks created under the Act when practicable.

SUBTITLE VI. FUNDINGSection 1206.1. SOURCES.

The following moneys shall be used for purposes contained in the Act:

- A. Moneys received from the sale of mitigation bank credits;
- B. Any moneys appropriated for that purpose by the General Assembly;
- C. Moneys obtained by gift, bequest, donation or grant from any public or private source for the purposes of carrying out the intent of the Act;
- D. Moneys obtained from state financial assistance programs for the purpose of carrying out the intent of the Act; and
- E. Moneys obtained from interest or other earnings from investments of moneys set aside for carrying out the purposes of the Act.

Section 1206.2. RECEIPTS.

- A. Deposits. All money received for carrying out of the provisions of the Act shall be deposited in the Arkansas Water Development Fund.
- B. Records. The Commission shall keep a record of all moneys deposited in and withdrawn from the fund. The record shall indicate by separate cumulative accounts the sources from which the moneys are derived and the activity against which each withdrawal is charged.

Section 1206.3. USE OF FUNDS.

The Executive Director may use the moneys in the Arkansas Water Development Fund for the following purposes:

- A. Acquisition of voluntary land suitable for use in the mitigation bank.
- B. Payment of costs incurred for alterations needed to create, restore or enhance sites for purposes of carrying out the provisions of the Act.

C. Payment of administrative, research or scientific monitoring expenses of the Commission in carrying out the provisions of the Act.

D. Repayment for financial assistance received from state financial assistance programs, including interest and applicable fees, used for the purposes of carrying out the intent of the Act.

E. Use for any other purpose related to aquatic resource creation, restoration and preservation.