



Implementation of N.C. General Assembly Session Law 2011-343 Section 1.2

The purpose of this document is to convey to stakeholders and interested parties how the N.C. Ecosystem Enhancement Program (EEP) will implement Section 1.2, [Session Law 2011-343](#). The implementation of Section 1.1 of said session law is addressed in a [separate document](#). Section 1.2 sets forth a hierarchical order of purchasing methods for EEP to use in developing mitigation credits. These specifications require consideration of projects already underway and the development of new methods for acquiring information from mitigation providers and for new types of contracting. The following more specifically describes how the hierarchy will be applied by EEP.

1. When EEP seeks to procure new mitigation credits, EEP will first seek to acquire mitigation credits through Full Delivery or the purchase of credits from private mitigation banks. In cases where EEP is unsure that either of these approaches are viable (for example, EEP is unaware of the existence of a bank, or historical Full Delivery Requests For Proposals submitted prior to June 27, 2011 have been unsuccessful), EEP will issue a Request for Information to evaluate the private sector's ability to deliver the needed mitigation. Depending upon the responses received, EEP will either issue a Full Delivery RFP, an RFP for private bank credits or move down the hierarchy.
2. If Step 1 is unsuccessful or unviable, and if the impacts are within the service area of an existing local compensatory mitigation bank, EEP will seek to procure mitigation from such a bank. There are three in the state that meet the definition included in the session law (the City of Charlotte Umbrella Stream and Wetland Bank, the City of Raleigh Umbrella Stream and Wetland Mitigation Bank and the City of Greensboro Umbrella Wetland, Stream and Watershed Mitigation Bank). The N.C. Interagency Review Team currently does not allow them to sell mitigation credits to third parties. Consequently, this procurement option is not currently available to EEP. EEP will monitor changes in this situation, but at this time will proceed down the hierarchy.
3. If steps 1 or 2 are not successful or viable, EEP will seek to outsource mitigation work through a Design/Build program. Step 3 is also intended for implementation of projects associated with donation of property. In order to apply this approach the program is working to establish the procedural mechanisms called for in the law and required for all state procurement activities. EEP is aggressively developing various Design/Build contracting tools and methods and expects

to submit a draft to Department of Environment and Natural Resources management in the coming months. Until EEP develops Design/Build contracting methods that have been approved by the Department of Administration, the program will utilize Step 4, Design-Bid-Build (DBB) procurement procedures. The departments of Administration and Justice are actively working with EEP to resolve these procurement issues.

4. If steps 1, 2 or 3 are not successful or viable, EEP will seek to develop mitigation credits through DBB. S.L. 2011- 343 also allows EEP to complete projects currently programmed through the DBB contracting procedures. This applies to all projects under contract for designer services as of June 27, 2011. EEP will continue with these projects as scheduled.

An additional provision of this approach is that construction contractors must be pre-qualified for eligibility to bid on DBB construction projects. EEP has finalized project-specific prequalification procedures. In October 2011 EEP advertised DBB contractor prequalifications for three projects. Bids will be solicited from the pre-qualified contractors in November 2011. EEP expects the first DBB construction contract awards since the enactment of S.L. 2011-343 will be made in December 2011. Concurrent with the bid solicitations, EEP will solicit feedback from the contractor community on the project-specific prequalification process. This feedback will be used to refine the applicable procedures.

EEP is also studying the feasibility of a statewide contractor prequalification program. Under such a program, a contractor would apply for prequalification to bid on DBB projects. Study results and recommendations for implementing a statewide pre-qualification program will be made to the EEP Deputy Director in December 2011.

Additional Clarifications for Application of the Hierarchy

- Best interest of the state: All steps in the procurement process shall be applied in consideration of making decisions that are in the best interest of the state. Factors affecting such decisions include associated procurement costs, timing of regulatory compliance, project partners, whether a procurement approach can be accomplished within required timeframes, the amount of mitigation available for procurement and whether available mitigation is sufficient to satisfy existing and/or projected requirements.
- EEP is approached (unsolicited) with a project site: It is common for private landowners, public entities or other interested parties approach EEP with a project site. In such situations, EEP project managers will respond to the inquiry by gathering pertinent information on the project, and the watershed within which it is located, without committing to its implementation. In cases where EEP has sought to meet mitigation needs according to the prescribed hierarchy and found steps 1 and 2 to be unsuccessful or unviable, EEP may pursue the project site starting with Step 3, Design/Build.

- Projects that have been on hold: In the event that a design process has been terminated and a project has been on hold for an extended period of time, EEP will re-evaluate the project implementation options should the need for or viability of the project's status change. EEP may choose to continue project implementation through established DBB contracting methods or complete the project through the Design/Build contracting method.

For questions related to the implementation of procurement provisions associated with S.L. 2011-343, please contact Michael Ellison of EEP (Michael.ellison@ncdenr.gov and 919-715-1835).