



Implementation of N.C. General Assembly Session Law 2009-337

The purpose of this document is to communicate to NCDENR partners and customers how the Department will implement SL 2009-337, *An Act to Promote the Use of Compensatory Mitigation Banks*. This document describes what actions will be taken by the Division of Water Quality (DWQ) and the Ecosystem Enhancement Program (EEP), two NCDENR agencies whose policies and procedures are affected by the law. The Act places additional obligations on some permit applicants before they can access EEP In-Lieu Fee (ILF) programs.

Applicability and Regulatory Effect

- The requirements of the law complement existing statutory and rule requirements, and will be applied to mitigation for streams, wetlands, isolated wetlands and streams, buffers and nutrient offset.
- The law totally or partially overrides the following existing DWQ rules: 15A NCAC 2H .0506(h)(1); 15A NCAC 2H .0506(h)(3); 15A NCAC 2H .1305(g)(1); and 15A NCAC 2H .1305(g)(3).
- Applicant provided mitigation is still approvable by DWQ, when suitable, even when a bank has credits available in the hydrologic unit.
- The law is applicable to mitigation that is required for compliance associated with violations.
- The law is applicable to permit applications for wetland or stream impacts submitted on or after October 1, 2008.
- The law is applicable to all applications for offsite nutrient reductions submitted to local governments on or after July 24, 2009.
- The law is applicable to applications for authorizations from the DWQ associated with riparian buffer impacts submitted on or after July 24, 2009.

Definitions

"Available" is considered to mean that credits in the amount requested have been released and are otherwise not under contract at the time of the request. If credits are available through a mitigation bank, applicants other than government entities as defined in G.S. 143-214.11 are required to use a mitigation bank to fulfill their compensatory mitigation requirements as indicated below provided that the Department or the United States Army Corps of Engineers, as applicable, approves the use of such bank for the required compensatory mitigation (unless the applicant chooses to provide the mitigation themselves).

Procedures

The flow charts on subsequent pages are intended to offer a step-by-step guide to permit applicants. In general the following process will be followed:

1. Permit applicants are responsible for demonstrating compliance with SL-2009-337. EEP and DWQ will assist applicants by notifying them of the new requirements and directing them to applicable information on the Web. EEP and DWQ will both provide updated links and information on their Web sites (<http://www.nceep.net/pages/mitigate.htm> and <http://portal.ncdenr.org/web/wq/swp/ws/401/certsandpermits/mitigation>)
2. DWQ will provide on its Web site a listing of approved mitigation banks, their locations, contact information and credit types available as a reference for permit applicants (see Web links in previous

item). Applicants to EEP's In-Lieu Fee (ILF) programs should refer to this Web site for up-to-date information on banks in their hydrologic unit prior to submitting a request to EEP for mitigation.

3. Applicants will need to coordinate with the DWQ, U.S. Army Corps of Engineers and/or local government to determine if use of a bank is approved for the required compensatory mitigation.
4. If use of a bank is approved, it is the responsibility of applicants other than government entities as defined in G.S 143-214.11 to contact mitigation banks operating in the eight-digit hydrologic unit where the impact will occur to determine credit availability prior to submitting an ILF request form to EEP for mitigation. If an applicant contacts the bank(s) and determines that the requested credits are not available or they receive no response from the bank within a two week time period, they may proceed to access the EEP ILF programs. Government entities may choose to use a bank or to access the EEP ILF programs.
5. Beginning July 24, 2009, all users of EEP's Nutrient Offset Program must provide evidence of their compliance with SL 2009-337 Section 4 in order to access the Program by completing a compliance form and submitting it with their payment. Payments into the Nutrient Offset Program cannot be accepted without a completed compliance form. Applications submitted to local governments for approval prior to July 24, 2009 are not subject to this law; however all applicants seeking nutrient buy-down credits are encouraged to seek credit from a private mitigation bank if one exists. Applicants not subject to the law may access EEP's ILF program as planned, or pursue other options to satisfy their nutrient reduction requirements.
6. Applicants who wish to access EEP's stream, wetland or buffer ILF programs must verify that they have complied with SL 2009-337 upon submittal of an ILF request form to EEP. EEP's mitigation request form has been updated to include written acknowledgement by the applicant of the law's requirements and compliance with it.
7. EEP's acceptance letters and receipts have been revised to include the following statement: "You must also comply with all other state, federal or local government permits, regulations or authorizations associated with this activity including SL 2009-337, An Act to Promote the Use of Compensatory Mitigation Banks."
8. Once an applicant has determined that credits are not available from a mitigation bank, the applicant may access EEP's ILF program pending approval of the use of this program by permitting agencies for the impacts, as long as the EEP acceptance letter is current (i.e. unexpired). EEP's acceptance letters currently expire nine months from issuance and can be renewed upon request from an applicant.
9. ILF program acceptance letters issued by EEP prior to October 1, 2008 for wetland and stream impacts or prior to July 24, 2009 for riparian buffer impacts and that are unexpired are considered valid and will be honored.
10. Credits secured through EEP's ILF programs are not transferable to another applicant.

Contacts

DWQ: For streams, wetlands and buffers:

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For nutrient offset:

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EEP:

Kelly Williams, In-lieu Fee Coordinator
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Non-DOT Permit Applicant Option Process for Stream, Wetland and Buffer Mitigation

Definitions

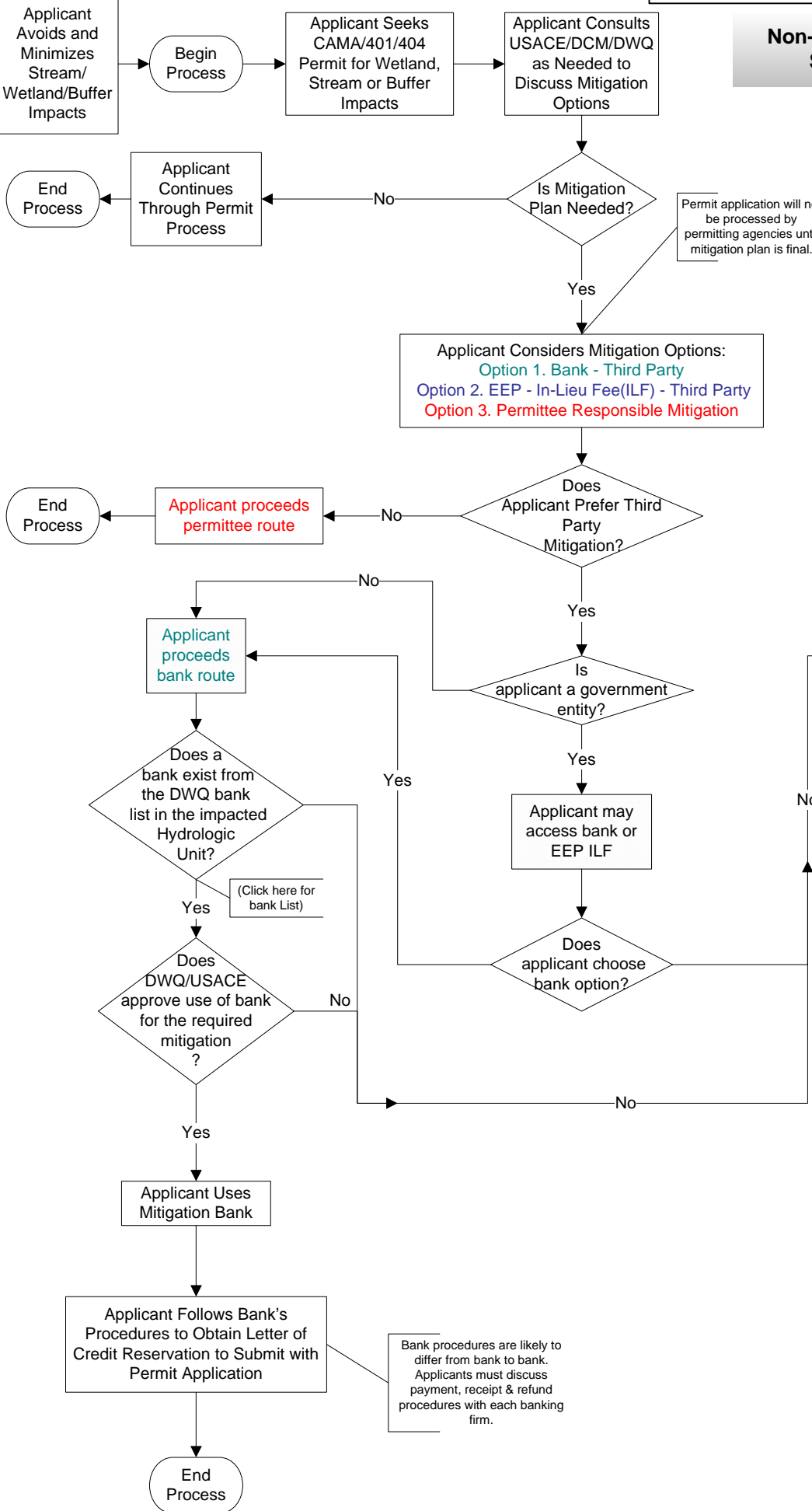
Third-Party Mitigation: Mitigation done by an entity other than the permittee, typically an In-Lieu Fee Program or Mitigation Bank.

Mitigation Bank ("bank"): entities that develop and sell mitigation credits.

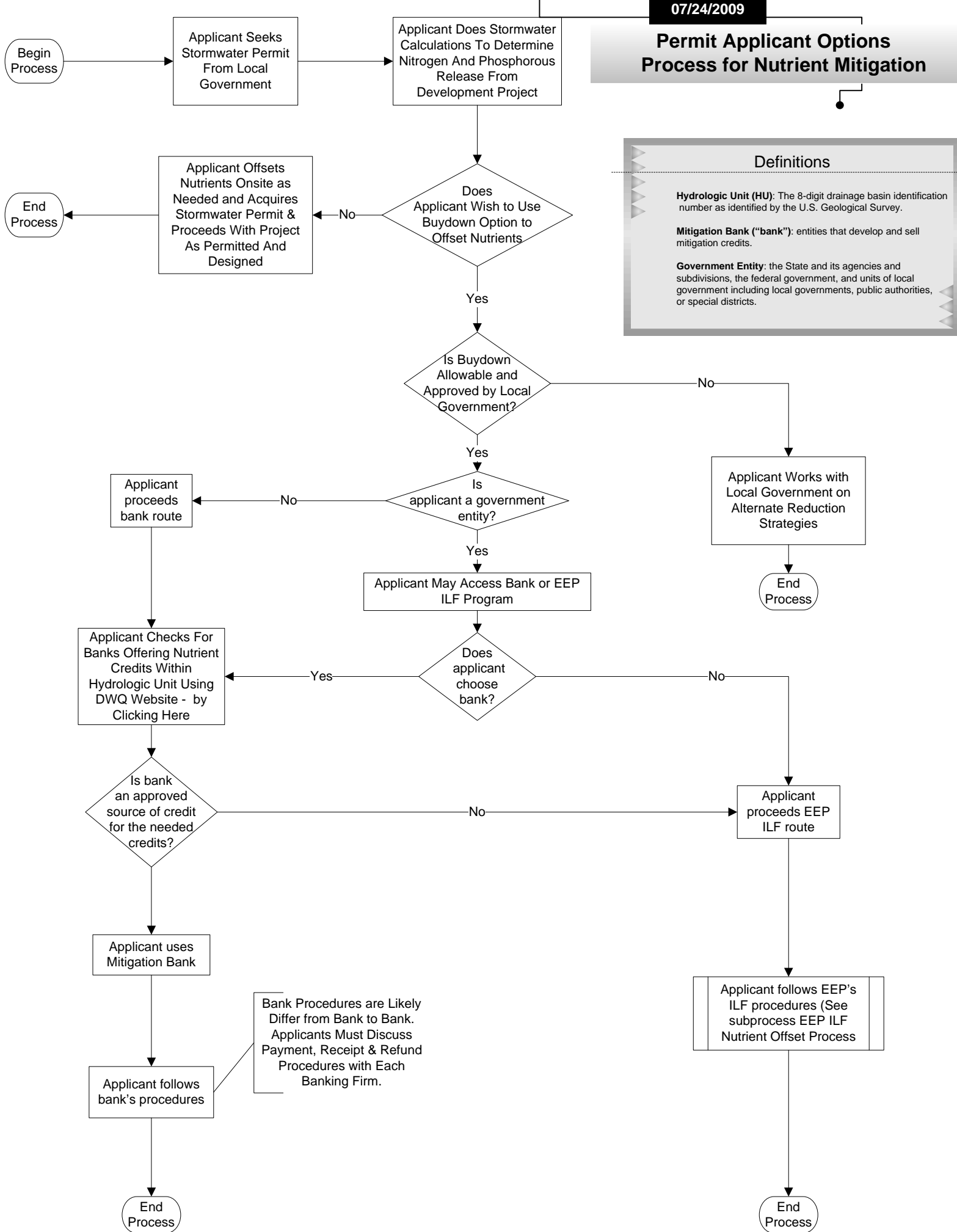
Letter of Credit Reservation: Document that demonstrates that mitigation credits are being held for an applicant.

Permittee Responsible Mitigation: Mitigation done by a company or individual receiving a permit.

Government Entity: the State and its agencies and subdivisions, the federal government, and units of local government including local governments, public authorities, or special districts.



Permit Applicant Options Process for Nutrient Mitigation



Definitions

Hydrologic Unit (HU): The 8-digit drainage basin identification number as identified by the U.S. Geological Survey.

Mitigation Bank ("bank"): entities that develop and sell mitigation credits.

Government Entity: the State and its agencies and subdivisions, the federal government, and units of local government including local governments, public authorities, or special districts.

Bank Procedures are Likely Differ from Bank to Bank. Applicants Must Discuss Payment, Receipt & Refund Procedures with Each Banking Firm.

Non-DOT Permit Applicant ILF Process for Stream, Wetland and Buffer Mitigation

Definitions

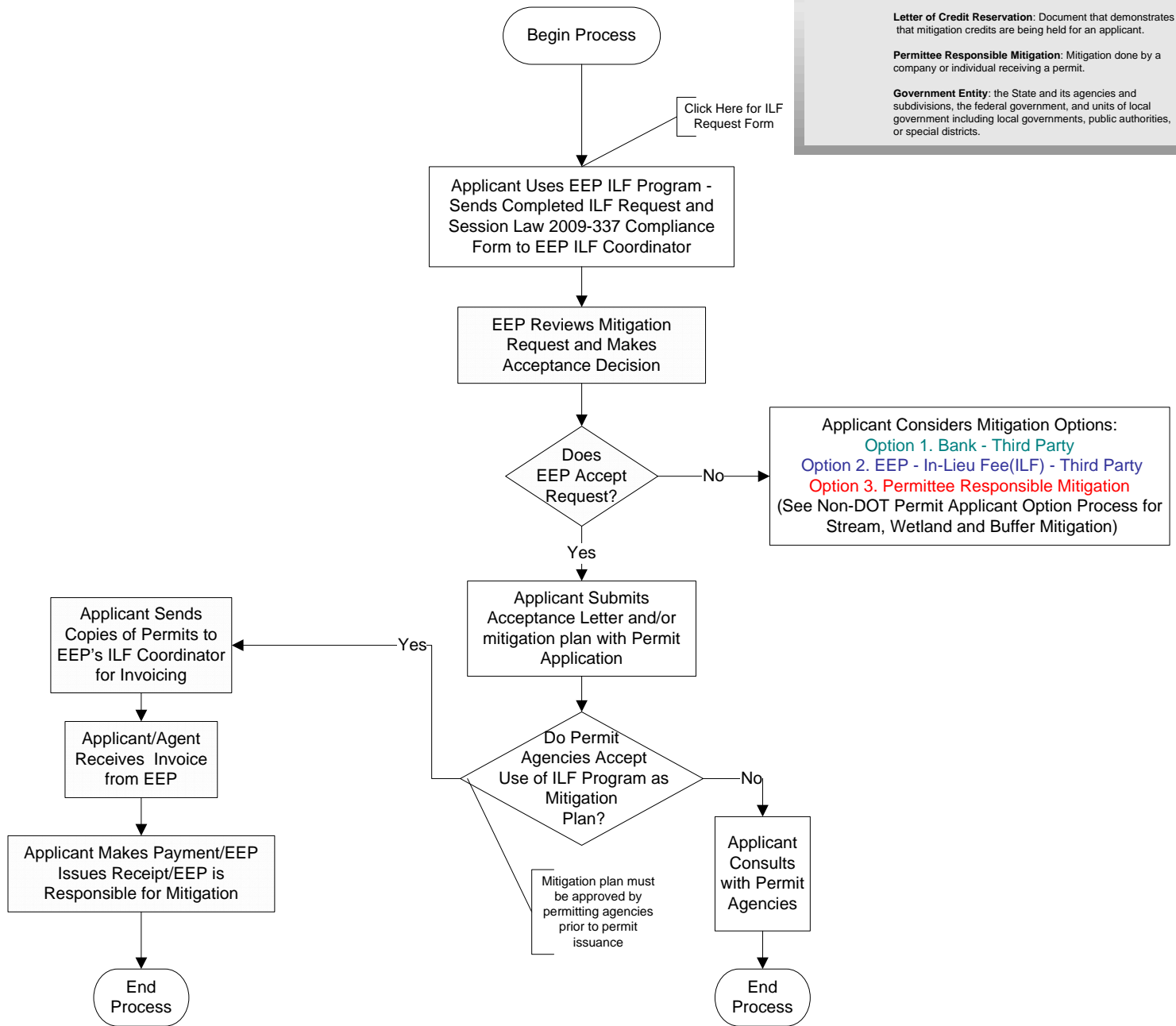
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07/24/2009

EEP ILF Nutrient Offset Process

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