

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

S

D

SENATE BILL 755
PROPOSED COMMITTEE SUBSTITUTE S755-PCS35304-SB-17

Short Title: Promote Mitigation Banks.

(Public)

Sponsors:

Referred to:

March 24, 2009

A BILL TO BE ENTITLED

AN ACT TO PROMOTE THE USE OF COMPENSATORY MITIGATION BANKS FOR
RIPARIAN BUFFER PROTECTION AND NUTRIENT OFFSET PAYMENTS AND TO
MAKE CLARIFYING CHANGES TO THE STATUTES GOVERNING
COMPENSATORY MITIGATION FOR WETLAND AND STREAM IMPACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-214.11 reads as rewritten:

"§ 143-214.11. Ecosystem Enhancement Program: compensatory mitigation.

(a) Definition. – For purposes of this section, the term "compensatory mitigation" means the restoration, creation, enhancement, or preservation of ~~wetlands or other areas~~jurisdictional waters required as a condition of a ~~section 404~~ permit issued by the Department or by the United States Army Corps of Engineers. For purposes of this section, "jurisdictional waters" means wetlands, streams, or other waters of the State or of the United States.

(b) ~~Department of Environment and Natural Resources~~ to Coordinate Compensatory Mitigation. – All compensatory mitigation required by permits or authorizations issued by the Department or by the United States Army Corps of Engineers ~~under 33 U.S.C. § 1344~~ shall be coordinated by the Department consistent with the basinwide ~~plans for wetlands restoration~~restoration plans and rules developed by the Environmental Management Commission. All compensatory ~~wetlands~~ mitigation, whether performed by the Department or by permit applicants, shall be consistent with the basinwide restoration plans. All compensatory mitigation shall be consistent with rules adopted by the Commission for wetland and stream mitigation and for protection and maintenance of riparian buffers.

(c) Compensatory Mitigation Emphasis on Replacing Ecological Function Within Same River Basin. – The emphasis of compensatory mitigation is on replacing functions within the same river basin unless it is demonstrated that restoration of other areas would be more beneficial to the overall purposes of the Ecosystem Enhancement Program.

(d) Compensatory Mitigation Options Available to the North Carolina Department of Transportation. – The North Carolina Department of Transportation may satisfy compensatory ~~wetlands~~ mitigation requirements by the following actions, if those actions are consistent with the basinwide restoration plans and also meet or exceed the requirements of the Department or of the United States Army Corps of Engineers; Engineers, as applicable:

- (1) Payment of a fee established by the ~~Department~~Commission into the Ecosystem Restoration Fund established in G.S. 143-214.12.



* S 7 5 5 - P C S 3 5 3 0 4 - S B - 1 7 *

- 1 (2) Donation of land to the Ecosystem Enhancement Program or to other public
2 or private nonprofit conservation organizations as approved by the
3 Department.
- 4 (3) Participation in a ~~private wetlands compensatory mitigation bank~~ bank that
5 has been approved by the United States Army Corps of Engineers, provided
6 that the Department or the United States Army Corps of Engineers, as
7 applicable, approves the use of such bank for the required compensatory
8 mitigation.
- 9 (4) Preparing and implementing a ~~wetlands restoration~~ compensatory mitigation
10 plan.
- 11 (d1) Compensatory Mitigation Options Available to Applicants Other than the North
12 Carolina Department of Transportation. – An applicant other than the North Carolina
13 Department of Transportation may satisfy compensatory ~~wetlands~~ mitigation requirements by
14 the following actions, if those actions meet or exceed the requirements of the United States
15 Army Corps of Engineers:
- 16 (1) Participation in a ~~private wetlands compensatory mitigation bank~~ bank if
17 the Department or the United States Army Corps of Engineers, as applicable,
18 approves the use of the bank for the required compensatory mitigation. This
19 option is only available in a hydrologic area where there is at least one
20 ~~private wetlands~~ compensatory mitigation bank that has been ~~(i)~~ approved by
21 the United States Army Corps of Engineers ~~and that has available mitigation~~
22 ~~credit or (ii) approved by the North Carolina Division of Water Quality for~~
23 ~~resources regulated under the Neuse and Tar Pam rules and that has~~
24 ~~available mitigation credit.~~ Engineers. For purposes of this subdivision,
25 "hydrologic area" means the eight-digit Hydrologic Unit Code where the
26 mitigation bank is located.
- 27 (2) Payment of a fee established by the ~~Department~~ Commission into the
28 Ecosystem Restoration Fund established in G.S. 143-214.12. – This option is
29 only available to an applicant ~~if~~ who demonstrates that the option under
30 subdivision (1) of this subsection is not available as an option available.
- 31 (3) Donation of land to the Ecosystem Enhancement Program or to other public
32 or private nonprofit conservation organizations as approved by the
33 Department.
- 34 (4) Preparing and implementing a ~~wetlands restoration~~ compensatory mitigation
35 plan.
- 36 (e) Payment Schedule. – A standardized schedule of ~~per-acre~~ payment
37 amounts compensatory mitigation payment amounts shall be established by the ~~Environmental~~
38 ~~Management~~ Commission. Compensatory mitigation payments shall be made by applicants to
39 the Ecosystem Restoration Fund established in G.S. 143-214.12. The monetary payment shall
40 be based on the ecological functions and values of wetlands and streams permitted to be lost
41 and on the cost of restoring or creating wetlands and streams capable of performing the same or
42 similar functions, including directly related costs of ~~wetlands~~ wetland and stream restoration
43 planning, long-term monitoring, and maintenance of restored areas. Compensatory mitigation
44 payments for wetlands shall be calculated on a per-acre basis. Compensatory mitigation
45 payments for streams shall be calculated on a per-linear foot basis.
- 46 (f) Mitigation Banks. – State agencies and ~~private mitigation banking companies~~ banks
47 shall demonstrate that adequate, dedicated financial surety exists to provide for the perpetual
48 land management and hydrological maintenance of lands acquired by the State as mitigation
49 banks, or proposed to the State as privately operated and permitted mitigation banks.

1 (g) Payment for Taxes. – A State agency acquiring land to restore, enhance, preserve, or
2 create wetlands must also pay a sum in lieu of ad valorem taxes lost by the county in
3 accordance with G.S. 146-22.3."

4 **SECTION 2.** G.S. 143-214.20 reads as rewritten:

5 "**§ 143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian
6 buffers; compensatory mitigation fees.**

7 (a) Compensatory Mitigation for Riparian Buffer Loss. – The Commission shall
8 establish a program to provide alternatives for persons who would otherwise be required to
9 maintain riparian buffers and who can demonstrate that they have attempted to avoid and
10 minimize the loss of the riparian buffer and that there is no practical alternative to the loss of
11 the buffer. This program is intended to allow these persons to perform compensatory mitigation
12 in lieu of complying with laws and rules that require that riparian buffers be protected and
13 maintained. ~~Alternatives shall include, but are not limited to:~~ All compensatory mitigation for
14 riparian buffer loss shall be consistent with rules adopted by the Commission for protection and
15 maintenance of riparian buffers.

16 (a1) Compensatory Mitigation Options Available to the North Carolina Department of
17 Transportation. – The North Carolina Department of Transportation may satisfy compensatory
18 mitigation requirements by any of the following actions:

- 19 (1) Payment of a compensatory mitigation fee into the Riparian Buffer
20 Restoration Fund. ~~Fund~~ established in G.S. 143-214.21.
- 21 (2) Donation of real property or of an interest in real property to the Department,
22 another State agency, a unit of local government, or a private nonprofit
23 conservation organization if both the donee organization and the donated
24 real property or interest in real property are approved by the Department.
25 The Department may approve a donee organization only if the donee agrees
26 to maintain the real property or interest in real property as a riparian buffer.
27 The Department may approve a donation of real property or an interest in
28 real property only if the real property or interest in real property either:
- 29 a. Is a riparian buffer that will provide protection of water quality that is
30 equivalent to or greater than that provided by the riparian buffer that
31 is lost in the same river basin as the riparian buffer that is ~~lost~~; or lost.
- 32 b. Will be used to restore, create, enhance, or maintain a riparian buffer
33 that will provide protection of water quality that is equivalent to or
34 greater than that provided by the riparian buffer that is lost in the
35 same river basin as the riparian buffer that is lost.
- 36 (3) Restoration or enhancement of an existing riparian buffer that is not
37 otherwise required to be protected, or creation of a new riparian buffer, that
38 will provide protection of water quality that is equivalent to or greater than
39 that provided by the riparian buffer that is lost in the same river basin as the
40 riparian buffer that is lost and that is approved by the Department.
- 41 (4) Construction of an alternative measure that reduces nutrient loading as well
42 or better than the riparian buffer that is lost in the same river basin as the
43 riparian buffer that is lost and that is approved by the Department.
- 44 (5) Participation in a mitigation bank if the Department has approved the bank
45 and the Department approves the use of the bank for the required
46 compensatory mitigation.

47 (a2) Compensatory Mitigation Options Available to Applicants Other than the North
48 Carolina Department of Transportation. – An applicant other than the North Carolina
49 Department of Transportation may satisfy compensatory mitigation requirements by any of the
50 following actions:

- 1 (1) Participation in a compensatory mitigation bank if the Department approves
2 the use of the bank for the required compensatory mitigation. This option is
3 only available in a hydrologic area where there is at least one compensatory
4 mitigation bank that has been approved by the Department. For purposes of
5 this subdivision, "hydrologic area" means the eight-digit Hydrologic Unit
6 Code where the mitigation bank is located
- 7 (2) Payment of a compensatory mitigation fee into the Riparian Buffer
8 Restoration Fund established in G.S. 143-214.21. This option is only
9 available to an applicant who demonstrates that the option under subdivision
10 (1) of this subsection is not available.
- 11 (3) Donation of real property or of an interest in real property to the Department,
12 another State agency, a unit of local government, or a private nonprofit
13 conservation organization if both the donee organization and the donated
14 real property or interest in real property are approved by the Department.
15 The Department may approve a donee organization only if the donee agrees
16 to maintain the real property or interest in real property as a riparian buffer.
17 The Department may approve a donation of real property or an interest in
18 real property only if the real property or interest in real property either:
- 19 a. Is a riparian buffer that will provide protection of water quality that is
20 equivalent to or greater than that provided by the riparian buffer that
21 is lost in the same river basin as the riparian buffer that is lost.
- 22 b. Will be used to restore, create, enhance, or maintain a riparian buffer
23 that will provide protection of water quality that is equivalent to or
24 greater than that provided by the riparian buffer that is lost in the
25 same river basin as the riparian buffer that is lost.
- 26 (4) Restoration or enhancement of an existing riparian buffer that is not
27 otherwise required to be protected, or creation of a new riparian buffer, that
28 will provide protection of water quality that is equivalent to or greater than
29 that provided by the riparian buffer that is lost in the same river basin as the
30 riparian buffer that is lost and that is approved by the Department.
- 31 (5) Construction of an alternative measure that reduces nutrient loading as well
32 or better than the riparian buffer that is lost in the same river basin as the
33 riparian buffer that is lost and that is approved by the Department.
- 34 (b) Compensatory mitigation is available for loss of a riparian buffer along an
35 intermittent stream, a perennial stream, or a perennial waterbody.
- 36 (c) The Commission shall establish a standard schedule of compensatory mitigation
37 fees. The compensatory mitigation fee schedule shall be based on the area of the riparian buffer
38 that is permitted to be lost and the cost to provide equivalent or greater protection of water
39 quality in the same river basin as that provided by the riparian buffer this is lost by:
- 40 (1) Restoration or enhancement of existing riparian buffers.
41 (2) Acquisition of land for and creation of new riparian buffers.
42 (3) Maintenance and monitoring of restored, enhanced, or created riparian
43 buffers over time.
44 (4) Construction of alternative measures that reduce nutrient loading.
- 45 (d) The Commission may adopt rules to implement this section."

46 **SECTION 3.** Section 4 of S.L. 2007-438 is repealed.

47 **SECTION 4.(a)** Nutrient offset credits may be purchased to partially offset the
48 nitrogen loading requirements specified in 15A NCAC 2B .0234 and 2B .0235 for the Neuse
49 River Basin and to partially offset the nitrogen and phosphorous loading requirements specified
50 in 15A NCAC 2B .0258 for the Tar-Pamlico River Basin. All nutrient offset projects authorized
51 under this section shall be consistent with rules adopted by the Environmental Management

1 Commission for implementation of nutrient management strategies in the Neuse River Basin
2 and the Tar-Pamlico River Basin and shall be located within the same eight-digit Cataloging
3 Unit, designated by the United States Geological Survey, in which the associated nutrient
4 loading takes place.

5 **SECTION 4.(b)** The North Carolina Department of Transportation may purchase
6 nutrient offset credits through either:

- 7 (1) Participation in a nutrient offset bank if the Department approves the use of
8 the bank for the required nutrient offsets.
- 9 (2) Payment of a nutrient offset fee established by the Department into the
10 Riparian Buffer Restoration Fund established in G.S. 143-214.21.

11 **SECTION 4.(c)** Applicants for nutrient offset credits other than the North Carolina
12 Department of Transportation may purchase nutrient offset credits through either:

- 13 (1) Participation in a nutrient offset bank that has been approved by the
14 Department if the Department approves the use of the bank for the required
15 nutrient offsets.
- 16 (2) Payment of a nutrient offset fee established by the Department into the
17 Riparian Buffer Restoration Fund established in G.S. 143-214.21. This
18 option is only available to an applicant who demonstrates that the option
19 under subdivision (1) of this section is not available.

20 **SECTION 5.** This act is effective when it becomes law.