

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

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SENATE BILL 755

Agriculture/Environment/Natural Resources Committee Substitute Adopted 5/5/09  
PROPOSED COMMITTEE SUBSTITUTE S755-PCS35309-RB-15

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, Units of Local Government, and Governmental Authorities. – The North Carolina Department of ~~Transportation~~ Transportation, units of local government, and governmental authorities may satisfy compensatory ~~wetlands~~ mitigation requirements by the following actions, if those actions are consistent with the basinwide restoration plans and



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1 also meet or exceed the requirements of the Department or of the United States Army Corps of  
2 Engineers:Engineers, as applicable:

- 3 (1) Payment of a fee established by the ~~Department~~Commission into the  
4 Ecosystem Restoration Fund established in G.S. 143-214.12.
- 5 (2) Donation of land to the Ecosystem Enhancement Program or to other public  
6 or private nonprofit conservation organizations as approved by the  
7 Department.
- 8 (3) Participation in a ~~private wetlands compensatory mitigation bank~~bank that  
9 has been approved by the United States Army Corps of Engineers, provided  
10 that the Department or the United States Army Corps of Engineers, as  
11 applicable, approves the use of such bank for the required compensatory  
12 mitigation.
- 13 (4) Preparing and implementing a ~~wetlands restoration~~compensatory mitigation  
14 plan.

15 (d1) Compensatory Mitigation Options Available to Applicants Other than the North  
16 Carolina Department of ~~Transportation~~Transportation, Units of Local Government, and  
17 Governmental Authorities. – An applicant other than the North Carolina Department of  
18 ~~Transportation~~Transportation, a unit of local government, or a governmental authority may  
19 satisfy compensatory ~~wetlands~~ mitigation requirements by the following actions, if those  
20 actions meet or exceed the requirements of the United States Army Corps of Engineers:

- 21 (1) Participation in a ~~private wetlands compensatory mitigation bank~~—bank if  
22 the Department or the United States Army Corps of Engineers, as applicable,  
23 approves the use of the bank for the required compensatory mitigation. This  
24 option is only available in a hydrologic area where there is at least one  
25 ~~private wetlands~~compensatory mitigation bank that has been (i) approved by  
26 the United States Army Corps of Engineers ~~and that has available mitigation~~  
27 ~~credit or (ii) approved by the North Carolina Division of Water Quality for~~  
28 ~~resources regulated under the Neuse and Tar Pam rules and that has~~  
29 ~~available mitigation credit.~~Engineers. For purposes of this subdivision,  
30 "hydrologic area" means the eight-digit Hydrologic Unit Code where the  
31 mitigation bank is located.
- 32 (2) Payment of a fee established by the ~~Department~~Commission into the  
33 Ecosystem Restoration Fund established in G.S. 143-214.12. —This option is  
34 only available to an applicant ~~if~~who demonstrates that the option under  
35 subdivision (1) of this subsection is not available as an option.available.
- 36 (3) Donation of land to the Ecosystem Enhancement Program or to other public  
37 or private nonprofit conservation organizations as approved by the  
38 Department.
- 39 (4) Preparing and implementing a ~~wetlands restoration~~compensatory mitigation  
40 plan.

41 (e) Payment Schedule. – A standardized schedule of ~~per acre~~payment  
42 amountscompensatory mitigation payment amounts shall be established by the ~~Environmental~~  
43 ~~Management~~Commission. Compensatory mitigation payments shall be made by applicants to  
44 the Ecosystem Restoration Fund established in G.S. 143-214.12. The monetary payment shall  
45 be based on the ecological functions and values of wetlands and streams permitted to be lost  
46 and on the cost of restoring or creating wetlands and streams capable of performing the same or  
47 similar functions, including directly related costs of ~~wetlands~~wetland and stream restoration  
48 planning, long-term monitoring, and maintenance of restored areas. Compensatory mitigation  
49 payments for wetlands shall be calculated on a per-acre basis. Compensatory mitigation  
50 payments for streams shall be calculated on a per-linear foot basis.

1 (f) Mitigation Banks. – State agencies and ~~private mitigation banking companies~~ banks  
2 shall demonstrate that adequate, dedicated financial surety exists to provide for the perpetual  
3 land management and hydrological maintenance of lands acquired by the State as mitigation  
4 banks, or proposed to the State as privately operated and permitted mitigation banks.

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

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

9 **"§ 143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian  
10 buffers; compensatory mitigation fees.**

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

20 (a1) Compensatory Mitigation Options Available to the North Carolina Department of  
21 Transportation, Units of Local Government, and Governmental Authorities. – The North  
22 Carolina Department of Transportation, units of local government, and governmental  
23 authorities may satisfy compensatory mitigation requirements by any of the following actions:

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

1        (a2) Compensatory Mitigation Options Available to Applicants Other than the North  
2 Carolina Department of Transportation, Units of Local Government, and Governmental  
3 Authorities. – An applicant other than the North Carolina Department of Transportation, a unit  
4 of local government, or a governmental authority may satisfy compensatory mitigation  
5 requirements by any of the following actions:

6            (1) Participation in a compensatory mitigation bank if the Department approves  
7 the use of the bank for the required compensatory mitigation. This option is  
8 only available in a hydrologic area where there is at least one compensatory  
9 mitigation bank that has been approved by the Department. For purposes of  
10 this subdivision, "hydrologic area" means the eight-digit Hydrologic Unit  
11 Code where the mitigation bank is located

12            (2) Payment of a compensatory mitigation fee into the Riparian Buffer  
13 Restoration Fund established in G.S. 143-214.21. This option is only  
14 available to an applicant who demonstrates that the option under subdivision  
15 (1) of this subsection is not available.

16            (3) Donation of real property or of an interest in real property to the Department,  
17 another State agency, a unit of local government, or a private nonprofit  
18 conservation organization if both the donee organization and the donated  
19 real property or interest in real property are approved by the Department.  
20 The Department may approve a donee organization only if the donee agrees  
21 to maintain the real property or interest in real property as a riparian buffer.  
22 The Department may approve a donation of real property or an interest in  
23 real property only if the real property or interest in real property either:

24            a. Is a riparian buffer that will provide protection of water quality that is  
25 equivalent to or greater than that provided by the riparian buffer that  
26 is lost in the same river basin as the riparian buffer that is lost.

27            b. Will be used to restore, create, enhance, or maintain a riparian buffer  
28 that will provide protection of water quality that is equivalent to or  
29 greater than that provided by the riparian buffer that is lost in the  
30 same river basin as the riparian buffer that is lost.

31            (4) Restoration or enhancement of an existing riparian buffer that is not  
32 otherwise required to be protected, or creation of a new riparian buffer, that  
33 will provide protection of water quality that is equivalent to or greater than  
34 that provided by the riparian buffer that is lost in the same river basin as the  
35 riparian buffer that is lost and that is approved by the Department.

36            (5) Construction of an alternative measure that reduces nutrient loading as well  
37 or better than the riparian buffer that is lost in the same river basin as the  
38 riparian buffer that is lost and that is approved by the Department.

39        (b) Compensatory mitigation is available for loss of a riparian buffer along an  
40 intermittent stream, a perennial stream, or a perennial waterbody.

41        (c) The Commission shall establish a standard schedule of compensatory mitigation  
42 fees. The compensatory mitigation fee schedule shall be based on the area of the riparian buffer  
43 that is permitted to be lost and the cost to provide equivalent or greater protection of water  
44 quality in the same river basin as that provided by the riparian buffer this is lost by:

45            (1) Restoration or enhancement of existing riparian buffers.

46            (2) Acquisition of land for and creation of new riparian buffers.

47            (3) Maintenance and monitoring of restored, enhanced, or created riparian  
48 buffers over time.

49            (4) Construction of alternative measures that reduce nutrient loading.

50        (d) The Commission may adopt rules to implement this section."

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

1           **SECTION 4.(a)** Nutrient offset credits may be purchased to partially offset the  
2 nitrogen loading requirements specified in 15A NCAC 2B .0234 and 2B .0235 for the Neuse  
3 River Basin and to partially offset the nitrogen and phosphorous loading requirements specified  
4 in 15A NCAC 2B .0258 for the Tar-Pamlico River Basin. All nutrient offset projects authorized  
5 under this section shall be consistent with rules adopted by the Environmental Management  
6 Commission for implementation of nutrient management strategies in the Neuse River Basin  
7 and the Tar-Pamlico River Basin and shall be located within the same eight-digit Cataloging  
8 Unit, designated by the United States Geological Survey, in which the associated nutrient  
9 loading takes place.

10           **SECTION 4.(b)** The North Carolina Department of Transportation, units of local  
11 government, and governmental authorities may purchase nutrient offset credits through either:

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

16           **SECTION 4.(c)** Applicants for nutrient offset credits other than the North Carolina  
17 Department of Transportation, a unit of local government, or a governmental authority may  
18 purchase nutrient offset credits through either:

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

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