

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 755

Agriculture/Environment/Natural Resources Committee Substitute Adopted 5/5/09
Agriculture/Environment/Natural Resources Committee Substitute Adopted 5/6/09
PROPOSED HOUSE COMMITTEE SUBSTITUTE S755-PCS55442-SB-48

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. For purposes of this section, "unit of local government" means a "local government," "public authority," or "special district" as defined in G.S. 159-7.

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



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1 the basinwide restoration plans and also meet or exceed the requirements of the Department or
2 of the United States Army Corps of 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 and Units of Local Government. – An
17 applicant other than the North Carolina Department of Transportation or a unit of local
18 government may satisfy compensatory ~~wetlands~~mitigation requirements by the following
19 actions, if those actions meet or exceed the requirements of the United States Army Corps of
20 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 and Units of Local Government. – The North Carolina Department of
22 Transportation and units of local government may satisfy compensatory mitigation
23 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 and Units of Local Government. – An applicant other
3 than the North Carolina Department of Transportation or a unit of local government may satisfy
4 compensatory mitigation requirements by any of the following actions:

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

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

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

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

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

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

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

38 (a3) For purposes of this section, "unit of local government" means a "local
39 government," "public authority," or "special district" as defined in G.S. 159-7.

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

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

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

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

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

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

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

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

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

11 **SECTION 4.(b)** For purposes of this section, "unit of local government" means a
12 "local government," "public authority," or "special district" as defined in G.S. 159-7.

13 **SECTION 4.(c)** The North Carolina Department of Transportation and units of
14 local government may purchase nutrient offset credits through either:

15 (1) Participation in a nutrient offset bank if the Department approves the use of
16 the bank for the required nutrient offsets.

17 (2) Payment of a nutrient offset fee established by the Department into the
18 Riparian Buffer Restoration Fund established in G.S. 143-214.21.

19 **SECTION 4.(d)** A party other than the North Carolina Department of
20 Transportation or a unit of local government may purchase nutrient offset credits through
21 either:

22 (1) Participation in a nutrient offset bank that has been approved by the
23 Department if the Department approves the use of the bank for the required
24 nutrient offsets.

25 (2) Payment of a nutrient offset fee established by the Department into the
26 Riparian Buffer Restoration Fund established in G.S. 143-214.21. This
27 option is only available to an applicant who demonstrates that the option
28 under subdivision (1) of this subsection is not available.

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