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SENATE BILL DRS35235-ML-10 (11/07)

Short Title: Mitigation Services/DOT.

(Public)

Sponsors: Senator Rabon (Primary Sponsor).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO ESTABLISH THE DIVISION OF MITIGATION SERVICES IN THE
3 DEPARTMENT OF TRANSPORTATION AND REQUIRE THE DEPARTMENT OF
4 ADMINISTRATION TO INVENTORY EXISTING MITIGATION CREDITS HELD BY
5 THE STATE AND DEVELOP A PLAN FOR DISPOSING OF UNNEEDED
6 MITIGATION CREDITS.

7 The General Assembly of North Carolina enacts:

8 **SECTION 1.** Elimination of Division of Mitigation Services in DEQ. – The
9 Division of Mitigation Services in the Department of Environmental Quality, and all positions
10 within that division, are eliminated. All functions, powers, duties, obligations, and services
11 vested in the Division of Mitigation Services in the Department of Environmental Quality prior
12 to its elimination under this section are vested in the Division of Mitigation Services in the
13 Department of Transportation, as established in Section 3 of this act. The elimination required
14 under this section shall occur no later than August 1, 2017.

15 **SECTION 2.** Elimination of ICI/On-Site Mitigation Group in DOT. – The Indirect
16 and Cumulative Impacts (ICI)/On-Site Mitigation Group in the Department of Transportation,
17 and all positions within that group, are eliminated. The elimination required under this section
18 shall occur no later than August 1, 2017.

19 **SECTION 3.** Establishment of Division of Mitigation Services in DOT. – Chapter
20 136 of the General Statutes is amended by adding a new Article to read:

21 "Article 21.

22 "Division of Mitigation Services.

23 **§ 136-277. Division of Mitigation Services; established.**

24 The Division of Mitigation Services is established within the Department of Transportation.
25 The Division of Mitigation Services shall be developed by the Department as a nonregulatory
26 statewide mitigation services program for the acquisition, maintenance, restoration,
27 enhancement, and creation of wetland and riparian resources that contribute to the protection
28 and improvement of water quality, flood prevention, fisheries, wildlife habitat, and recreational
29 opportunities. The Division of Mitigation Services shall consist of the following components:

- 30 (1) Restoration and perpetual maintenance of wetlands.
31 (2) Development of restoration plans.
32 (3) Landowner contact and land acquisition.
33 (4) Evaluation of site plans and engineering studies.
34 (5) Oversight of construction and monitoring of restoration sites.
35 (6) Land ownership and management.
36 (7) Mapping, site identification, and assessment of wetlands functions.



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- 1 (8) Oversight of private wetland mitigation banks to facilitate the components of
2 the Division of Mitigation Services.

3 **"§ 136-278. Division of Mitigation Services; purposes.**

4 The purposes of the Division of Mitigation Services are as follows:

- 5 (1) To restore wetlands functions and values across the State to replace critical
6 functions lost through historic wetlands conversion and through current and
7 future permitted impacts. It is not the policy of the State to destroy upland
8 habitats unless it would further the purposes of the Division of Mitigation
9 Services.
- 10 (2) To provide a consistent and simplified approach to address mitigation
11 requirements associated with permits or authorizations issued by the United
12 States Army Corps of Engineers under 33 U.S.C. § 1344.
- 13 (3) To streamline the wetlands permitting process, minimize delays in permit
14 decisions, and decrease the burden of permit applicants of planning and
15 performing compensatory mitigation for wetlands losses.
- 16 (4) To increase the ecological effectiveness of compensatory mitigation.
- 17 (5) To achieve a net increase in wetland acres, functions, and values in each
18 major river basin.
- 19 (6) To foster a comprehensive approach to environmental protection.

20 **"§ 136-279. Division of Mitigation Services; development and implementation of**
21 **basinwide restoration plans.**

22 The Department shall develop basinwide plans for wetlands and riparian area restoration
23 with the goal of protecting and enhancing water quality, flood prevention, fisheries, wildlife
24 habitat, and recreational opportunities within each of the 17 major river basins in the State. The
25 Department shall develop and implement a basinwide restoration plan for each of the 17 river
26 basins in the State in accordance with the basinwide schedule currently established by the
27 Division of Water Resources in the Department of Environmental Quality.

28 **"§ 136-280. Division of Mitigation Services; compensatory mitigation.**

29 (a) Definitions. – The following definitions apply to this section:

- 30 (1) Compensatory mitigation. – The restoration, creation, enhancement, or
31 preservation of jurisdictional waters required as a condition of a permit
32 issued by the Department or by the United States Army Corps of Engineers.
- 33 (1a) Compensatory mitigation bank. – A private compensatory mitigation bank or
34 an existing local compensatory mitigation bank.
- 35 (1b) Existing local compensatory mitigation bank. – A mitigation bank operated
36 by a unit of local government that is a party to a mitigation banking
37 instrument executed on or before July 1, 2011, notwithstanding subsequent
38 amendments to such instrument executed after July 1, 2011.
- 39 (2) Government entity. – The State and its agencies and subdivisions, or the
40 federal government. "Government entity" does not include a unit of local
41 government unless the unit of local government was a party to a mitigation
42 banking instrument executed on or before July 1, 2011, notwithstanding
43 subsequent amendments to such instrument executed after July 1, 2011.
- 44 (3) Hydrologic area. – An eight-digit Cataloging Unit designated by the United
45 States Geological Survey.
- 46 (4) Jurisdictional waters. – Wetlands, streams, or other waters of the State or of
47 the United States.
- 48 (4a) Mitigation banking instrument. – The legal document for the establishment,
49 operation, and use of a mitigation bank.
- 50 (4b) Private compensatory mitigation bank. – A site created by a private
51 compensatory mitigation provider and approved for mitigation credit by

1 State and federal regulatory authorities through execution of a mitigation
2 banking instrument. No site owned by a government entity or unit of local
3 government shall be considered a "private compensatory mitigation bank."

4 (5) Unit of local government. – A "local government," "public authority," or
5 "special district," as defined in G.S. 159-7.

6 (b) Department to Coordinate Compensatory Mitigation. – All compensatory mitigation
7 required by permits or authorizations issued by the Department or by the United States Army
8 Corps of Engineers shall be coordinated by the Department consistent with the basinwide
9 restoration plans and rules developed by the Environmental Management Commission. All
10 compensatory mitigation, whether performed by the Department or by permit applicants, shall
11 be consistent with the basinwide restoration plans. All compensatory mitigation shall be
12 consistent with rules adopted by the Commission for wetland and stream mitigation and for
13 protection and maintenance of riparian buffers.

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

18 (d) Compensatory Mitigation Options Available to Government Entities. – A
19 government entity may satisfy compensatory mitigation requirements by the following actions,
20 if those actions are consistent with the basinwide restoration plans and also meet or exceed the
21 requirements of the Department or of the United States Army Corps of Engineers, as
22 applicable:

23 (1) Payment of a fee established by the Commission into the Ecosystem
24 Restoration Fund established in G.S. 136-281.

25 (2) Donation of land to the Division of Mitigation Services or to other public or
26 private nonprofit conservation organizations as approved by the Department.

27 (3) Participation in a compensatory mitigation bank that has been approved by
28 the United States Army Corps of Engineers, provided that the Department or
29 the United States Army Corps of Engineers, as applicable, approves the use
30 of such bank for the required compensatory mitigation.

31 (4) Preparing and implementing a compensatory mitigation plan.

32 (e) Compensatory Mitigation Options Available to Applicants Other than Government
33 Entities. – An applicant other than a government entity may satisfy compensatory mitigation
34 requirements by the following actions, if those actions meet or exceed the requirements of the
35 United States Army Corps of Engineers:

36 (1) Participation in a compensatory mitigation bank that has been approved by
37 the United States Army Corps of Engineers, provided that the Department or
38 the United States Army Corps of Engineers, as applicable, approves the use
39 of such bank for the required compensatory mitigation. This option is only
40 available in a hydrologic area where there is at least one compensatory
41 mitigation bank that has been approved by the United States Army Corps of
42 Engineers.

43 (2) Payment of a fee established by the Commission into the Ecosystem
44 Restoration Fund established in G.S. 136-281. This option is only available
45 to an applicant who demonstrates that the option under subdivision (1) of
46 this subsection is not available.

47 (3) Donation of land to the Division of Mitigation Services or to other public or
48 private nonprofit conservation organizations as approved by the Department.

49 (4) Preparing and implementing a compensatory mitigation plan.

50 (f) Payment Schedule. – A standardized schedule of compensatory mitigation payment
51 amounts shall be established by the Commission. Compensatory mitigation payments shall be

1 made by applicants to the Ecosystem Restoration Fund established in G.S. 136-281. The
2 monetary payment shall be based on the ecological functions and values of wetlands and
3 streams permitted to be lost and on the cost of restoring or creating wetlands and streams
4 capable of performing the same or similar functions, including directly related costs of wetland
5 and stream restoration planning, long-term monitoring, and maintenance of restored areas.
6 Compensatory mitigation payments for wetlands shall be calculated on a per acre basis.
7 Compensatory mitigation payments for streams shall be calculated on a per linear foot basis.

8 (g) Mitigation Banks. – State agencies and mitigation banks shall demonstrate that
9 adequate, dedicated financial surety exists to provide for the perpetual land management and
10 hydrological maintenance of lands acquired by the State as mitigation banks, or proposed to the
11 State as privately operated and permitted mitigation banks.

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

15 (i) Sale of Mitigation Credits by Existing Local Compensatory Mitigation Bank. – An
16 existing local compensatory mitigation bank shall comply with the requirements of Article 12
17 of Chapter 160A of the General Statutes applicable to the disposal of property whenever it
18 transfers any mitigation credits to another person.

19 (j) Compensatory Mitigation Procurement Requirement Preferences. – The Division of
20 Mitigation Services shall exercise its authority to provide for compensatory mitigation under
21 the authority granted by this section to use mitigation procurement programs in the following
22 order of preference:

23 (1) Full delivery/bank credit purchase program. – The Division of Mitigation
24 Services shall first seek to meet compensatory mitigation procurement
25 requirements through the Division's full delivery program or by the purchase
26 of credits from a private compensatory mitigation bank.

27 (2) Existing local compensatory mitigation bank credit purchase program. – Any
28 compensatory mitigation procurement requirements that are not fulfillable
29 under subdivision (1) of this subsection shall be procured from an existing
30 local compensatory mitigation bank, provided that the credit purchase is
31 made to mitigate the impacts of a project located within the mitigation bank
32 service area and hydrologic area of the existing local compensatory
33 mitigation bank.

34 (3) Design/build program. – Any compensatory mitigation procurement
35 requirements that are not fulfillable under subdivision (1) or (2) of this
36 subsection shall be procured under a program in which the Division of
37 Mitigation Services contracts with one private entity to lead or implement
38 the design, construction, and postconstruction monitoring of compensatory
39 mitigation at sites obtained by the Division of Mitigation Services. Such a
40 program shall be considered the procurement of compensatory mitigation
41 credits.

42 (4) Design-bid-build program. – Any compensatory mitigation procurement
43 requirements that are not fulfillable under either subdivision (1) or (2) of this
44 subsection may be procured under the Division of Mitigation Services'
45 design-bid-build program. The Division of Mitigation Services may utilize
46 this program only when procurement under subdivision (1) or (2) of this
47 subsection is not feasible. Any mitigation site design work currently being
48 performed through contracts awarded under the design-bid-build program
49 shall be allowed to continue as scheduled. Contracts for construction of
50 projects with a design already approved by the Division of Mitigation
51 Services shall be awarded by the Division of Mitigation Services by issuing

1 a Request for Proposal (RFP). Only contractors who have prequalified under
2 procedures established by the Division of Mitigation Services shall be
3 eligible to bid on Division of Mitigation Services construction projects.
4 Construction contracts issued under this subdivision shall be exempt from
5 the requirements of Article 8B of Chapter 143 of the General Statutes.

6 (k) Vesting. – The regulatory requirements for the establishment, operation, and
7 monitoring of a compensatory mitigation bank or full delivery project shall vest at the time of
8 the execution of the mitigation banking instrument or the award of a full delivery contract.

9 **"§ 136-281. Division of Mitigation Services; Ecosystem Restoration Fund.**

10 (a) Ecosystem Restoration Fund. – The Ecosystem Restoration Fund is established as a
11 nonreverting fund within the Department. The Fund shall be treated as a special trust fund and
12 shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and
13 G.S. 147-69.3. The Ecosystem Restoration Fund shall provide a repository for monetary
14 contributions and donations or dedications of interests in real property to promote projects for
15 the restoration, enhancement, preservation, or creation of wetlands and riparian areas and for
16 payments made in lieu of compensatory mitigation as described in subsection (b) of this
17 section. No funds shall be expended from this Fund for any purpose other than those directly
18 contributing to the acquisition, perpetual maintenance, enhancement, restoration, or creation of
19 wetlands and riparian areas in accordance with the basinwide plan as described in
20 G.S. 136-279. The cost of acquisition includes a payment in lieu of ad valorem taxes required
21 under G.S. 146-22.3 when the Department is the State agency making the acquisition.

22 (b) Distribution of Funds & Conveyance of Land or Interest. – The Department may
23 distribute funds from the Ecosystem Restoration Fund directly to a federal or State agency, a
24 local government, or a private, nonprofit conservation organization to acquire, manage, and
25 maintain real property or an interest in real property for the purposes set out in subsection (a) of
26 this section. A recipient of funds under this subsection shall grant a conservation easement in
27 the real property or interest in real property acquired with the funds to the Department in a form
28 that is acceptable to the Department. The Department may convey real property or an interest in
29 real property that has been acquired under the Division of Mitigation Services to a federal or
30 State agency, a local government, or a private, nonprofit conservation organization to acquire,
31 manage, and maintain real property or an interest in real property for the purposes set out in
32 subsection (a) of this section. A grantee of real property or an interest in real property under
33 this subsection shall grant a conservation easement in the real property or interest in real
34 property to the Department in a form that is acceptable to the Department.

35 (c) Authorized Methods of Payment. – A person subject to a permit or authorization
36 issued by the United States Army Corps of Engineers under 33 U.S.C. § 1344 may contribute
37 to the Division of Mitigation Services in order to comply with conditions to, or terms of, the
38 permit or authorization if participation in the Division of Mitigation Services will meet the
39 mitigation requirements of the United States Army Corps of Engineers. The Department shall,
40 at the discretion of the applicant, accept payment into the Ecosystem Restoration Fund in lieu
41 of other compensatory mitigation requirements of any authorizations issued by the United
42 States Army Corps of Engineers under 33 U.S.C. § 1344 if the contributions will meet the
43 mitigation requirements of the United States Army Corps of Engineers. Payment may be made
44 in the form of monetary contributions according to a fee schedule established by the
45 Environmental Management Commission or in the form of donations of real property provided
46 that the property is approved by the Department as a suitable site consistent with the basinwide
47 wetlands restoration plan.

48 (d) Accounting of Payments. – The Department shall provide an itemized statement that
49 accounts for each payment into the Fund. The statement shall include the expenses and
50 activities financed by the payment.

51 **"§ 136-282. Division of Mitigation Services; reporting requirement.**

1 (a) The Department of Transportation shall report each year by November 1 to the
2 Environmental Review Commission and to the Joint Legislative Commission on Governmental
3 Operations regarding its progress in implementing the Division of Mitigation Services and its
4 use of the funds in the Ecosystem Restoration Fund. The report shall document statewide
5 wetlands losses and gains and compensatory mitigation performed under G.S. 136-277 through
6 G.S. 136-281. The report shall also provide an accounting of receipts and disbursements of the
7 Ecosystem Restoration Fund, an analysis of the per-acre cost of wetlands restoration, and a cost
8 comparison on a per-acre basis between the State's Division of Mitigation Services and private
9 mitigation banks. The Department shall also send a copy of its report to the Fiscal Research
10 Division of the General Assembly.

11 (b) The Department shall maintain an inventory of all property that is held, managed,
12 maintained, enhanced, restored, or used to create wetlands under the Division of Mitigation
13 Services. The inventory shall also list all conservation easements held by the Department. The
14 inventory shall be included in the annual report required under subsection (a) of this section."

15 **SECTION 4.** Ecosystem Restoration Fund. – The Ecosystem Restoration Fund
16 within the Department of Environmental Quality shall be closed and the remaining balance in
17 the Fund shall be transferred to the Ecosystem Restoration Fund within the Department of
18 Transportation, as established in Section 3 of this act.

19 **SECTION 5.** Conforming Change. – G.S. 143-214.8 through G.S. 143-214.13 are
20 repealed.

21 **SECTION 6.** Federal Law. – The Department of Environmental Quality and the
22 Department of Transportation shall take all steps necessary under federal law to implement the
23 provisions of this act.

24 **SECTION 7.** Inventory of Mitigation Credits. – The Department of Transportation
25 shall inventory all existing mitigation credits held by the State. In addition, the Department
26 shall develop a plan for the disposal of mitigation credits determined by the Department to be
27 unneeded. The Department shall report the inventory and plan required by this section to the
28 Joint Legislative Transportation Oversight Committee by no later than December 1, 2017.

29 **SECTION 8.** Temporary Rules. – The Department of Transportation may adopt
30 temporary rules to implement the provisions of this act. Any temporary rules adopted in
31 accordance with this section shall remain in effect until permanent rules that replace the
32 temporary rules become effective.

33 **SECTION 9.** Effective Date. – Sections 3 through 5 of this act become effective
34 August 1, 2017. The remainder of this act is effective when it becomes law.