

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
House Committee Substitute Favorable 6/18/09

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

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

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

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

49 (f) Mitigation Banks. – State agencies and ~~private~~ mitigation banking companies ~~banks~~
50 shall demonstrate that adequate, dedicated financial surety exists to provide for the perpetual

land management and hydrological maintenance of lands acquired by the State as mitigation banks, or proposed to the State as privately operated and permitted mitigation banks.

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

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

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

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

(a1) 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 mitigation requirements by any of the following actions:

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

(a2) Compensatory Mitigation Options Available to Applicants Other than the North Carolina Department of Transportation and Units of Local Government. – An applicant other

1 than the North Carolina Department of Transportation or a unit of local government may satisfy
2 compensatory mitigation requirements by any of the following actions:

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

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

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

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

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

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

33 (5) Construction of an alternative measure that reduces nutrient loading as well
34 or better than 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 (a3) For purposes of this section, "unit of local government" means a "local
37 government," "public authority," or "special district" as defined in G.S. 159-7.

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

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

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

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

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

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

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

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

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

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

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

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

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