

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 755

Agriculture/Environment/Natural Resources Committee Substitute Adopted 5/5/09
Finance Committee Substitute Adopted 5/6/09

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.

(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 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.



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

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

48 (a2) Compensatory Mitigation Options Available to Applicants Other than the North
49 Carolina Department of Transportation, Units of Local Government, and Governmental
50 Authorities. – An applicant other than the North Carolina Department of Transportation, a unit

1 of local government, or a governmental authority may satisfy compensatory mitigation
2 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 (b) Compensatory mitigation is available for loss of a riparian buffer along an
37 intermittent stream, a perennial stream, or a perennial waterbody.

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

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

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

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

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

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

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

49 **SECTION 4.(a)** Nutrient offset credits may be purchased to partially offset the
50 nitrogen loading requirements specified in 15A NCAC 2B .0234 and 2B .0235 for the Neuse
51 River Basin and to partially offset the nitrogen and phosphorous loading requirements specified

1 in 15A NCAC 2B .0258 for the Tar-Pamlico River Basin. All nutrient offset projects authorized
2 under this section shall be consistent with rules adopted by the Environmental Management
3 Commission for implementation of nutrient management strategies in the Neuse River Basin
4 and the Tar-Pamlico River Basin and shall be located within the same eight-digit Cataloging
5 Unit, designated by the United States Geological Survey, in which the associated nutrient
6 loading takes place.

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

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

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

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

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