

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
House Committee Substitute Favorable 6/18/09
House Committee Substitute #2 Favorable 7/8/09

Short Title: Promote Mitigation Banks.

(Public)

Sponsors:

Referred to:

March 24, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO PROMOTE THE USE OF COMPENSATORY MITIGATION BANKS FOR
3 RIPARIAN BUFFER PROTECTION AND NUTRIENT OFFSET PAYMENTS, TO
4 MAKE CLARIFYING CHANGES TO THE STATUTES GOVERNING
5 COMPENSATORY MITIGATION FOR WETLAND AND STREAM IMPACTS, AND
6 TO DIRECT THE DEPARTMENT OF ENVIRONMENT AND NATURAL
7 RESOURCES TO STUDY CERTAIN IMPACTS THAT THE PROMOTION OF
8 COMPENSATORY MITIGATION BANKS MAY HAVE ON THE ECOSYSTEM
9 ENHANCEMENT PROGRAM.

10 The General Assembly of North Carolina enacts:

11 **SECTION 1.** G.S. 143-214.11 reads as rewritten:

12 **"§ 143-214.11. Ecosystem Enhancement Program: compensatory mitigation.**

13 (a) ~~Definition.~~ For purposes of this section, the term "compensatory mitigation"
14 ~~means the restoration, creation, enhancement, or preservation of wetlands or other areas~~
15 ~~required as a condition of a section 404 permit issued by the United States Army Corps of~~
16 ~~Engineers.~~ Definitions. – The following definitions apply to this section:

17 (1) "Compensatory mitigation" means the restoration, creation, enhancement, or
18 preservation of jurisdictional waters required as a condition of a permit
19 issued by the Department or by the United States Army Corps of Engineers.

20 (2) "Government entity" means the State and its agencies and subdivisions, the
21 federal government, and units of local government.

22 (3) "Hydrologic area" means an eight-digit Cataloging Unit designated by the
23 United States Geological Survey.

24 (4) "Jurisdictional waters" means wetlands, streams, or other waters of the State
25 or of the United States.

26 (5) "Unit of local government" means a "local government," "public authority,"
27 or "special district" as defined in G.S. 159-7.

28 (b) ~~Department of Environment and Natural Resources to Coordinate Compensatory~~
29 ~~Mitigation.~~ – All compensatory mitigation required by permits or authorizations issued by the
30 ~~Department or by the United States Army Corps of Engineers under 33 U.S.C. § 1344~~ shall be
31 coordinated by the Department consistent with the basinwide ~~plans for wetlands~~
32 ~~restoration~~ restoration plans and rules developed by the Environmental Management
33 Commission. All compensatory ~~wetlands~~ mitigation, whether performed by the Department or



1 by permit applicants, shall be consistent with the basinwide restoration plans. All compensatory
2 mitigation shall be consistent with rules adopted by the Commission for wetland and stream
3 mitigation and for protection and maintenance of riparian buffers.

4 (c) Compensatory Mitigation Emphasis on Replacing Ecological Function Within Same
5 River Basin. – The emphasis of compensatory mitigation is on replacing functions within the
6 same river basin unless it is demonstrated that restoration of other areas would be more
7 beneficial to the overall purposes of the Ecosystem Enhancement Program.

8 (d) Compensatory Mitigation Options Available to the North Carolina Department of
9 Transportation.—~~The North Carolina Department of Transportation~~ Government Entities. – A
10 government entity may satisfy compensatory ~~wetlands~~ mitigation requirements by the
11 following actions, if those actions are consistent with the basinwide restoration plans and also
12 meet or exceed the requirements of the Department or of the United States Army Corps of
13 Engineers:Engineers, as applicable:

- 14 (1) Payment of a fee established by the ~~Department~~ Commission into the
15 Ecosystem Restoration Fund established in G.S. 143-214.12.
- 16 (2) Donation of land to the Ecosystem Enhancement Program or to other public
17 or private nonprofit conservation organizations as approved by the
18 Department.
- 19 (3) Participation in a ~~private wetlands~~ compensatory mitigation bank ~~bank~~ that
20 has been approved by the United States Army Corps of Engineers, provided
21 that the Department or the United States Army Corps of Engineers, as
22 applicable, approves the use of such bank for the required compensatory
23 mitigation.
- 24 (4) Preparing and implementing a wetlands restoration compensatory mitigation
25 plan.

26 (d1) Compensatory Mitigation Options Available to Applicants Other than the North
27 Carolina Department of Transportation.—~~An applicant other than the North Carolina~~
28 ~~Department of Transportation~~ Government Entities. – An applicant other than a government
29 entity may satisfy compensatory ~~wetlands~~ mitigation requirements by the following actions, if
30 those actions meet or exceed the requirements of the United States Army Corps of Engineers:

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

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

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

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

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

19 **"§ 143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian**
20 **buffers; compensatory mitigation fees.**

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

30 (a1) Compensatory Mitigation Options Available to Government Entities. – A
31 government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation
32 requirements by any of the following actions:

33 (1) Payment of a compensatory mitigation fee into the Riparian Buffer
34 Restoration ~~Fund~~ Fund established in G.S. 143-214.21.

35 (2) Donation of real property or of an interest in real property to the Department,
36 another State agency, a unit of local government, or a private nonprofit
37 conservation organization if both the donee organization and the donated
38 real property or interest in real property are approved by the Department.
39 The Department may approve a donee organization only if the donee agrees
40 to maintain the real property or interest in real property as a riparian buffer.
41 The Department may approve a donation of real property or an interest in
42 real property only if the real property or interest in real property either:

43 a. Is a riparian buffer that will provide protection of water quality that is
44 equivalent to or greater than that provided by the riparian buffer that
45 is lost in the same river basin as the riparian buffer that is ~~lost~~ lost.

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

50 (3) Restoration or enhancement of an existing riparian buffer that is not
51 otherwise required to be protected, or creation of a new riparian buffer, that

- 1 will provide protection of water quality that is equivalent to or greater than
2 that provided by the riparian buffer that is lost in the same river basin as the
3 riparian buffer that is lost and that is approved by the Department.
- 4 (4) Construction of an alternative measure that reduces nutrient loading as well
5 or better than the riparian buffer that is lost in the same river basin as the
6 riparian buffer that is lost and that is approved by the Department.
- 7 (5) Participation in a compensatory mitigation bank if the Department has
8 approved the bank and the Department approves the use of the bank for the
9 required compensatory mitigation.
- 10 (a2) Compensatory Mitigation Options Available to Applicants Other than Government
11 Entities. – An applicant other than a government entity, as defined in G.S. 143-214.11, may
12 satisfy compensatory mitigation requirements by any of the following actions:
- 13 (1) Participation in a compensatory mitigation bank if the Department has
14 approved the bank and the Department approves the use of the bank for the
15 required compensatory mitigation. This option is only available in a
16 hydrologic area, as defined in G.S. 143-214.11, where there is at least one
17 compensatory mitigation bank that has been approved by the Department.
- 18 (2) Payment of a compensatory mitigation fee into the Riparian Buffer
19 Restoration Fund established in G.S. 143-214.21. This option only is
20 available to an applicant who demonstrates that the option under subdivision
21 (1) of this subsection is not available.
- 22 (3) 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.
- 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 (4) 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 (5) Construction of an alternative measure that reduces nutrient loading as well
43 as 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 (b) Compensatory mitigation is available for loss of a riparian buffer along an
46 intermittent stream, a perennial stream, or a perennial waterbody.
- 47 (c) The Commission shall establish a standard schedule of compensatory mitigation
48 ~~fees.~~ fees for payments to the Riparian Buffer Restoration Fund pursuant to this section. The
49 compensatory mitigation fee schedule shall be based on the area of the riparian buffer that is
50 permitted to be lost and the cost to provide equivalent or greater protection of water quality in
51 the same river basin as that provided by the riparian buffer this is lost by:

- 1 (1) Restoration or enhancement of existing riparian buffers.
- 2 (2) Acquisition of land for and creation of new riparian buffers.
- 3 (3) Maintenance and monitoring of restored, enhanced, or created riparian
- 4 buffers over time.
- 5 (4) Construction of alternative measures that reduce nutrient loading.

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

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

8 **SECTION 4.(a)** Nutrient offset credits may be purchased to partially offset
9 nutrient loadings to surface waters as required by the Environmental Management Commission.
10 Nutrient offset projects authorized under this section shall be all of the following:

- 11 (1) Consistent with rules adopted by the Commission for implementation of
- 12 nutrient management strategies.
- 13 (2) Located within the same hydrologic area, as defined in G.S. 143-214.11, in
- 14 which the associated nutrient loading takes place.

15 **SECTION 4.(b)** A government entity, as defined in G.S. 143-214.11, may
16 purchase nutrient offset credits through either:

- 17 (1) Participation in a nutrient offset bank that has been approved by the
- 18 Department if the Department approves the use of the bank for the required
- 19 nutrient offsets.
- 20 (2) Payment of a nutrient offset fee established by the Department into the
- 21 Riparian Buffer Restoration Fund established in G.S. 143-214.21.

22 **SECTION 4.(c)** A party other than a government entity, as defined in
23 G.S. 143-214.11, may purchase nutrient offset credits through either:

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

31 **SECTION 5.(a)** The Department of Environment and Natural Resources shall
32 study whether the preference for compensatory wetland and stream mitigation banks
33 established by S.L. 2008-152, as amended by this act, and the preference for riparian buffer
34 mitigation banks and nutrient offset banks established by this act create a likelihood that the
35 Ecosystem Enhancement Program will be unable to recoup investments made in riparian buffer
36 mitigation and nutrient offset projects. The Department shall document the basis for its
37 findings, including the source, nature, and amount of any prior investments, and may make
38 recommendations for facilitating the recovery of such investments if it concludes that doing so
39 would be in the public interest. The Department shall report its findings and recommendations,
40 if any, to the Environmental Review Commission no later than February 1, 2010.

41 **SECTION 6.** This act is effective when it becomes law.