

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009**

**SESSION LAW 2009-337
SENATE BILL 755**

AN ACT TO PROMOTE THE USE OF COMPENSATORY MITIGATION BANKS FOR RIPARIAN BUFFER PROTECTION AND NUTRIENT OFFSET PAYMENTS, TO MAKE CLARIFYING CHANGES TO THE STATUTES GOVERNING COMPENSATORY MITIGATION FOR WETLAND AND STREAM IMPACTS, AND TO DIRECT THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES TO STUDY CERTAIN IMPACTS THAT THE PROMOTION OF COMPENSATORY MITIGATION BANKS MAY HAVE ON THE ECOSYSTEM ENHANCEMENT PROGRAM.

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 required as a condition of a section 404 permit issued by the United States Army Corps of Engineers. ~~Definitions.~~ — The following definitions apply to this section:

- (1) "Compensatory mitigation" means the restoration, creation, enhancement, or preservation of jurisdictional waters required as a condition of a permit issued by the Department or by the United States Army Corps of Engineers.
- (2) "Government entity" means the State and its agencies and subdivisions, the federal government, and units of local government.
- (3) "Hydrologic area" means an eight-digit Cataloging Unit designated by the United States Geological Survey.
- (4) "Jurisdictional waters" means wetlands, streams, or other waters of the State or of the United States.
- (5) "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.~~ The North Carolina Department of Transportation Government Entities. — A government entity 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.



- (2) Donation of land to the Ecosystem Enhancement Program or to other public or private nonprofit conservation organizations as approved by the Department.
- (3) Participation in a ~~private wetlands compensatory mitigation bank~~ bank that has been approved by the United States Army Corps of Engineers, provided that the Department or the United States Army Corps of Engineers, as applicable, approves the use of such bank for the required compensatory mitigation.
- (4) Preparing and implementing a ~~wetlands restoration~~ compensatory mitigation plan.

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

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

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

(f) Mitigation Banks. — State agencies and ~~private mitigation banking companies~~ banks 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 Government Entities. – A government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation requirements by any of the following actions:

- (1) Payment of a compensatory mitigation fee into the Riparian Buffer Restoration 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 compensatory 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 Government Entities. – An applicant other than a government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation requirements by any of the following actions:

- (1) Participation in a compensatory mitigation bank if the Department has approved the bank and the Department approves the use of the bank for the required compensatory mitigation. This option is only available in a hydrologic area, as defined in G.S. 143-214.11, where there is at least one compensatory mitigation bank that has been approved by the Department.
- (2) Payment of a compensatory mitigation fee into the Riparian Buffer Restoration Fund established in G.S. 143-214.21. This option only is available to an applicant who demonstrates that the option under subdivision (1) of this subsection is not available.
- (3) 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.
 - 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.
- (4) 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.
 - (5) Construction of an alternative measure that reduces nutrient loading as well as 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.
- (b) Compensatory mitigation is available for loss of a riparian buffer along an intermittent stream, a perennial stream, or a perennial waterbody.
 - (c) The Commission shall establish a standard schedule of compensatory mitigation fees: fees for payments to the Riparian Buffer Restoration Fund pursuant to this section. The compensatory mitigation fee schedule shall be based on the area of the riparian buffer that is permitted to be lost and the cost to provide equivalent or greater protection of water quality in the same river basin as that provided by the riparian buffer this is lost by:
 - (1) Restoration or enhancement of existing riparian buffers.
 - (2) Acquisition of land for and creation of new riparian buffers.
 - (3) Maintenance and monitoring of restored, enhanced, or created riparian buffers over time.
 - (4) Construction of alternative measures that reduce nutrient loading.
 - (d) The Commission may adopt rules to implement this section."

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

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

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

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

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

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

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

SECTION 5. The Department of Environment and Natural Resources shall study whether the preference for compensatory wetland and stream mitigation banks established by S.L. 2008-152, as amended by this act, and the preference for riparian buffer mitigation banks and nutrient offset banks established by this act create a likelihood that the Ecosystem Enhancement Program will be unable to recoup investments made in riparian buffer mitigation and nutrient offset projects. The Department shall document the basis for its findings, including the source, nature, and amount of any prior investments, and may make

recommendations for facilitating the recovery of such investments if it concludes that doing so would be in the public interest. The Department shall report its findings and recommendations, if any, to the Environmental Review Commission no later than February 1, 2010.

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

In the General Assembly read three times and ratified this the 15th day of July, 2009.

s/ Walter H. Dalton
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 9:51 a.m. this 24th day of July, 2009