

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

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HOUSE BILL 632

Short Title: Amend Mitigation Services Law. (Public)

Sponsors: Representatives Torbett, Lewis, and McGrady (Primary Sponsors).
For a complete list of sponsors, refer to the North Carolina General Assembly web site.

Referred to: Environment, if favorable, Transportation

April 10, 2017

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND LAWS RELATED TO THE PROVISION OF MITIGATION
3 SERVICES.

4 The General Assembly of North Carolina enacts:

5
6 **COST-EFFECTIVE MITIGATION**

7 **SECTION 1.1.** G.S. 143-214.9 reads as rewritten:

8 "**§ 143-214.9. Division of Mitigation Services: purposes.**

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

- 10 (1) To restore wetlands functions and values across the State to replace critical
11 functions lost through historic wetlands conversion and through current and
12 future permitted impacts. It is not the policy of the State to destroy upland
13 habitats unless it would further the purposes of the Division of Mitigation
14 Services.
- 15 (2) To provide a consistent and simplified approach to address mitigation
16 requirements associated with permits or authorizations issued by the United
17 States Army Corps of Engineers under 33 U.S.C. § 1344.
- 18 (3) To streamline the wetlands permitting process, minimize delays in permit
19 decisions, and decrease the burden of permit applicants of planning and
20 performing compensatory mitigation for wetlands losses.
- 21 (4) To increase the ecological effectiveness of compensatory mitigation.
- 22 (5) To achieve a net increase in wetland acres, functions, and values in each
23 major river basin.
- 24 (6) To prioritize cost-effective approaches to compliance with mitigation
25 requirements that maximize the remaining productive uses of public and
26 private lands consistent with the other purposes of this section.
- 27 ~~(6)~~(7) To foster a comprehensive approach to environmental protection."

28 **SECTION 1.2.** G.S. 143-214.12 reads as rewritten:

29 "**§ 143-214.12. Division of Mitigation Services: Ecosystem Restoration Fund.**

30 (a) Ecosystem Restoration Fund. – The Ecosystem Restoration Fund is established as a
31 nonreverting fund within the Department. The Fund shall be treated as a special trust fund and
32 shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and
33 G.S. 147-69.3. The Ecosystem Restoration Fund shall provide a repository for monetary
34 contributions and donations or dedications of interests in real property to promote projects for
35 the restoration, enhancement, preservation, or creation of wetlands and riparian areas and for



1 payments made in lieu of compensatory mitigation as described in subsection (b) of this
2 section. No funds shall be expended from this Fund for any purpose other than those directly
3 contributing to the acquisition, perpetual maintenance, enhancement, restoration, or creation of
4 ~~wetlands and~~ wetlands, streams, and riparian areas in accordance with the basinwide plan as
5 described in G.S. 143-214.10. The cost of acquisition includes a payment in lieu of ad valorem
6 taxes required under G.S. 146-22.3 when the Department is the State agency making the
7 acquisition.

8 (a1) The Department may distribute funds from the Ecosystem Restoration Fund directly
9 to a federal or State agency, a local government, or a private, nonprofit conservation
10 organization to acquire, manage, and maintain real property or an interest in real property for
11 the purposes set out in subsection (a) of this section. ~~A recipient of funds under this subsection~~
12 ~~shall grant a conservation easement in the real property or interest in real property acquired~~
13 ~~with the funds to the Department in a form that is acceptable to the Department.~~ A recipient of
14 funds under this subsection that acquires a conservation easement or interest in real property
15 appurtenant to a restoration project delivered to the Division of Mitigation Services may
16 transfer the conservation easement or interest in real property to a federal or State agency, a
17 local government, or a private, nonprofit conservation organization approved by the Division of
18 Mitigation Services. The Department may convey real property or an interest in real property
19 that has been acquired under the Division of Mitigation Services to a federal or State agency, a
20 local government, or a private, nonprofit conservation organization approved by the Division of
21 Mitigation Services to acquire, manage, and maintain real property or an interest in real
22 property for the purposes set out in subsection (a) of this section. ~~A~~ When a grantee of real
23 property or an interest in real property under this subsection shall grant grants a conservation
24 easement in the real property or interest in real property to ~~the Department~~ a federal or State
25 agency, a local government, or a private, nonprofit conservation organization approved by the
26 Division of Mitigation Services, the grant shall be made in a form that is acceptable to the
27 Department.

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

41 (c) Accounting of Payments. – The Department shall provide an itemized statement that
42 accounts for each payment into the Fund. The statement shall include the expenses and
43 activities financed by the payment."
44

45 **MAXIMIZE USES OF RIPARIAN BUFFER**

46 **SECTION 2.** Article 21 of Chapter 143 of the General Statutes is amended by
47 adding a new section to read:

48 **"§ 143-214.7D. Permitted uses of privately held riparian buffer.**

49 Except as otherwise required by federal law, land within a riparian buffer required to be
50 maintained under a State or local permit or other regulatory approval in which neither the State
51 nor its subdivisions holds any property interest may be used by a property owner to satisfy any

1 other development-related regulatory requirements based on property size. These requirements
2 include, but are not limited to, stormwater best management practices (where the Department
3 finds the practice is compatible with the purposes of the riparian buffer), residential density,
4 and nonresidential intensity calculations and yields, tree conservation purposes, open space or
5 conservation area requirements, setbacks, perimeter buffers, and lot area requirements."

7 **REVISE MITIGATION SERVICES PROGRAMS**

8 **SECTION 3.(a)** The Division of Mitigation Services of the Department of
9 Environmental Quality shall revise its mitigation services programs to focus its efforts on the
10 preservation, enhancement, and restoration of ecological functions rather than on the spatial
11 proximity of mitigation projects.

12 **SECTION 3.(b)** The Environmental Management Commission, with the assistance
13 of the Division of Mitigation Services of the Department of Environmental Quality, shall
14 review and revise the nutrient offset fee for the Jordan Lake Watershed to establish fees for the
15 different sub-watersheds within the Jordan Lake Watershed that reflect the actual costs of
16 performing the mitigation in the sub-watersheds.

17 **SECTION 3.(c)** The Division of Mitigation Services of the Department of
18 Environmental Quality shall calculate wetland mitigation fees by multiplying the relevant rates
19 by the number of credits being purchased and shall calculate stream mitigation fees by
20 multiplying the relevant rates by the number of whole credits being purchased. The
21 Environmental Management Commission shall amend its rules to be consistent with this
22 section.

24 **DEPARTMENT OF TRANSPORTATION MITIGATION REPORTING**

25 **SECTION 4.(a)** The Department of Transportation shall report annually no later
26 than February 1 to the Environmental Review Commission regarding implementation of the
27 2016 Memorandum of Understanding between the Department of Environmental Quality and
28 the Department of Transportation establishing procedures for the provision of compensatory
29 mitigation by the Department of Environmental Quality's Division of Mitigation Services to
30 offset impacts to waters and wetlands from the Department of Transportation's activities. The
31 report shall include, at a minimum, the following components:

- 32 (1) An update to the portion of the inventory of wetland and stream mitigation
33 credits in State ownership required by section 14.21 of S.L. 2016-94 to
34 include property or credits acquired and disposed of in the prior calendar
35 year by or on behalf of the Department of Transportation.
- 36 (2) The Department of Transportation's plan and timetable for disposition of
37 surplus wetland and stream mitigation credits. For purposes of this
38 subdivision, surplus wetland and stream mitigation credits are those credits
39 located in areas where there is no current or projected mitigation needs and
40 that were (i) generated as part of a mitigation project built by the Department
41 prior to 2003, but not associated with a mitigation need associated with a
42 particular transportation project; (ii) generated as part of a mitigation project
43 built by the Department for which the projection of mitigation need
44 exceeded actual needs; (iii) acquired incidental to procurement of targeted
45 assets for individual transportation projects; or (iv) the excess credit yield for
46 mitigation projects that generated greater credit yield at project closeout than
47 was anticipated at project initiation.
- 48 (3) An overview of the Department of Transportation's Mitigation Order
49 submitted to the Division of Mitigation Services pursuant to the
50 Memorandum of Understanding.

1 (4) A breakdown of credits obtained in the prior year from the Division of
2 Mitigation Services and credits obtained from sources of mitigation other
3 than the Division and a projection of this breakdown for Department of
4 Transportation projects that are prioritized for funding and expected to be let
5 over the next seven years.

6 (5) Legal barriers to further disposition of excess credits, along with suggested
7 legislation to address those barriers.

8 **SECTION 4.(b)** This section expires March 1, 2020.
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10 **MITIGATION BONDING REFORM**

11 **SECTION 5.** The Division of Mitigation Services shall review and revise its
12 bidding and contracting procedures for procurement of mitigation services to include, at a
13 minimum, the following policies:

14 (1) Bonding or other financial surety required for the construction of a
15 mitigation project shall reflect only the minimum amount necessary to
16 secure State funds provided through a contract between the Division and a
17 private mitigation provider.

18 (2) Post-construction bonding periods and amounts shall reflect the minimum
19 length of time necessary to determine with a reasonable degree of certainty
20 project success and the reasonably determined level of financial risk to the
21 State from total or partial failure of the mitigation project.

22 The Division shall report to the Environmental Review Commission regarding the
23 review and revisions required by this section no later than December 1, 2017. The report shall
24 include an explanation of the methodology followed in setting bonding amounts and time lines
25 for procured mitigation projects and a description of any changes made to the Division's
26 procedures as a result of the review required by this section.
27

28 **STUDY OF STATE-OWNED PROPERTIES**

29 **SECTION 6.** The Department of Administration shall develop an inventory of all
30 State-owned properties, determine which State-owned properties would be appropriate for
31 compensatory mitigation to satisfy the compensatory mitigation required of State agencies, and
32 determine whether the stewardship and maintenance of certain State-owned properties would
33 be more efficiently and effectively administered by private nonprofit organizations such as
34 conservation land trusts. Other State agencies, including the Department of Transportation and
35 the Department of Environmental Quality, shall assist the Department of Administration in the
36 implementation of this section. The Department of Administration shall submit the results of
37 implementing this section to the Joint Legislative Commission on Governmental Operations
38 and the Environmental Review Commission no later than February 1, 2017.

39 **SECTION 7.** Except as otherwise provided, this act is effective when it becomes
40 law.