

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

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SENATE DRS55248-SBf-15 (02/11)

Short Title: Promote Private Mitigation Banks.

(Public)

Sponsors: Senator Clodfelter.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROMOTE THE USE OF PRIVATE 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.

(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 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. – An applicant other than the North Carolina  
13          Department of Transportation may satisfy compensatory ~~wetlands~~ mitigation requirements by  
14          the following actions, if those actions meet or exceed the requirements of the United States  
15          Army Corps of Engineers:
- 16           (1)     Participation in a private ~~wetlands compensatory mitigation bank.~~—~~This~~  
17           ~~option is only available in a hydrologic area where there is at least one~~  
18           ~~private wetlands mitigation bank that has been (i) approved by the United~~  
19           ~~States Army Corps of Engineers and that has available mitigation credit or~~  
20           ~~(ii) approved by the North Carolina Division of Water Quality for resources~~  
21           ~~regulated under the Neuse and Tar-Pam rules and that has available~~  
22           ~~mitigation credit. For purposes of this subdivision, "hydrologic area" means~~  
23           ~~the eight digit Hydrologic Unit Code where the mitigation bank is~~  
24           ~~located.~~ bank if the United States Army Corps of Engineers has approved the  
25           bank and the Department or the United States Army Corps of Engineers, as  
26           applicable, approves the use of the bank for the required compensatory  
27           mitigation.
- 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 capable of performing the same or similar  
43          functions, including directly related costs of ~~wetlands~~ wetland and stream restoration planning,  
44          long-term monitoring, and maintenance of restored areas. Compensatory mitigation payments  
45          for wetlands shall be calculated on a per-acre basis. Compensatory mitigation payments for  
46          streams shall be calculated on a per-linear foot basis.
- 47          (f)     Mitigation Banks. – State agencies and private mitigation banking companies shall  
48          demonstrate that adequate, dedicated financial surety exists to provide for the perpetual land  
49          management and hydrological maintenance of lands acquired by the State as mitigation banks,  
50          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:~~

14 (a1) Compensatory Mitigation Options Available to the North Carolina Department of  
15 Transportation. – The North Carolina Department of Transportation may satisfy compensatory  
16 mitigation requirements by any of the following actions:

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

47 (a2) Compensatory Mitigation Options Available to Applicants Other than the North  
48 Carolina Department of Transportation. – An applicant other than the North Carolina  
49 Department of Transportation may satisfy compensatory mitigation requirements by any of the  
50 following actions:

- 1           (1) Participation in a private mitigation bank that has been approved by the  
2           Department if the Department approves the use of the bank for the required  
3           compensatory mitigation.
- 4           (2) Payment of a compensatory mitigation fee into the Riparian Buffer  
5           Restoration Fund established in G.S. 143-214.21. This option is only  
6           available to an applicant who demonstrates that the option under subdivision  
7           (1) of this subsection is not available.
- 8           (3) Donation of real property or of an interest in real property to the Department,  
9           another State agency, a unit of local government, or a private nonprofit  
10           conservation organization if both the donee organization and the donated  
11           real property or interest in real property are approved by the Department.  
12           The Department may approve a donee organization only if the donee agrees  
13           to maintain the real property or interest in real property as a riparian buffer.  
14           The Department may approve a donation of real property or an interest in  
15           real property only if the real property or interest in real property either:
- 16           a. Is a riparian buffer that will provide protection of water quality that is  
17           equivalent to or greater than that provided by the riparian buffer that  
18           is lost in the same river basin as the riparian buffer that is lost.
- 19           b. Will be used to restore, create, enhance, or maintain a riparian buffer  
20           that will provide protection of water quality that is equivalent to or  
21           greater than that provided by the riparian buffer that is lost in the  
22           same river basin as the riparian buffer that is lost.
- 23           (4) Restoration or enhancement of an existing riparian buffer that is not  
24           otherwise required to be protected, or creation of a new riparian buffer, that  
25           will provide protection of water quality that is equivalent to or greater than  
26           that provided by the riparian buffer that is lost in the same river basin as the  
27           riparian buffer that is lost and that is approved by the Department.
- 28           (5) Construction of an alternative measure that reduces nutrient loading as well  
29           or better than the riparian buffer that is lost in the same river basin as the  
30           riparian buffer that is lost and that is approved by the Department.
- 31           (6) Any other action consistent with the goals of this section that is approved by  
32           the Department.

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

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

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

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

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

46           **SECTION 4.(a)** Nutrient offset credits may be purchased to partially offset the  
47           nitrogen loading requirements specified in 15A NCAC 2B .0234 and 2B .0235 for the Neuse  
48           River Basin and to partially offset the nitrogen and phosphorous loading requirements specified  
49           in 15A NCAC 2B .0258 for the Tar-Pamlico River Basin. All nutrient offset projects authorized  
50           under this section shall be consistent with rules adopted by the Environmental Management  
51           Commission for implementation of nutrient management strategies in the Neuse River Basin

1 and the Tar-Pamlico River Basin and shall be located within the same eight-digit Cataloging  
2 Unit, designated by the United States Geological Survey, in which the associated nutrient  
3 loading takes place.

4 **SECTION 4.(b)** The North Carolina Department of Transportation may purchase  
5 nutrient offset credits through either:

6 (1) Participation in a private nutrient offset bank that has been approved by the  
7 Department if the Department approves the use of the bank for the required  
8 nutrient offsets.

9 (2) Payment of a nutrient offset fee established by the Department into the  
10 Riparian Buffer Restoration Fund established in G.S. 143-214.21.

11 **SECTION 4.(c)** Applicants for nutrient offset credits other than the North Carolina  
12 Department of Transportation may purchase nutrient offset credits through either:

13 (1) Participation in a private nutrient offset bank that has been approved by the  
14 Department if the Department approves the use of the bank for the required  
15 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. This  
18 option is only available to an applicant who demonstrates that the option  
19 under subdivision (1) of this section is not available.

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