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HOUSE BILL DRH10204-SB-4 (11/22)

Short Title: Amend Mitigation Services Law. (Public)

Sponsors: Representatives Torbett, Lewis, and McGrady (Primary Sponsors).

Referred to:

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
36 payments made in lieu of compensatory mitigation as described in subsection (b) of this



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

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

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

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

44 **MAXIMIZE USES OF RIPARIAN BUFFER**

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

47 **"§ 143-214.7D. Permitted uses of privately held riparian buffer.**

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

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

6 **REVISE MITIGATION SERVICES PROGRAMS**

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

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

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

23 **DEPARTMENT OF TRANSPORTATION MITIGATION REPORTING**

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

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

1 than the Division and a projection of this breakdown for Department of
2 Transportation projects that are prioritized for funding and expected to be let
3 over the next seven years.

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

6 **SECTION 4.(b)** This section expires March 1, 2020.

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8 **MITIGATION BONDING REFORM**

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

- 12 (1) Bonding or other financial surety required for the construction of a
13 mitigation project shall reflect only the minimum amount necessary to
14 secure State funds provided through a contract between the Division and a
15 private mitigation provider.
16 (2) Post-construction bonding periods and amounts shall reflect the minimum
17 length of time necessary to determine with a reasonable degree of certainty
18 project success and the reasonably determined level of financial risk to the
19 State from total or partial failure of the mitigation project.

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

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26 **STUDY OF STATE-OWNED PROPERTIES**

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

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