

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 425

Short Title: Ecosystem Enhancement Program Changes. (Public)

Sponsors: Senators Hunt; Allran, Apodaca, Bingham, Blake, Brock, Brown, Brunstetter, Daniel, East, Forrester, Goolsby, Gunn, Hartsell, Hise, Jackson, Pate, Preston, Rouzer, Rucho, Tillman, and Tucker.

Referred to: Agriculture/Environment/Natural Resources.

March 28, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO DIRECT THE DEPARTMENT OF ENVIRONMENT AND NATURAL
3 RESOURCES TO REORGANIZE THE ECOSYSTEM ENHANCEMENT PROGRAM
4 TO IMPROVE OPERATIONAL EFFICIENCY, AND TO MAKE CLARIFYING
5 CHANGES TO THE STATUTES GOVERNING COMPENSATORY MITIGATION
6 AND THE CLEAN WATER MANAGEMENT TRUST FUND.

7 The General Assembly of North Carolina enacts:

8 Part I. Ecosystem Enhancement Program Changes.

9 SECTION 1.1. G.S. 143-214.11 reads as rewritten:

10 "§ 143-214.11. Ecosystem Enhancement Program: compensatory mitigation.

11 (a) Definitions. – The following definitions apply to this section:

12 (1) ~~"Compensatory mitigation" means the~~ Compensatory mitigation. – The
13 restoration, creation, enhancement, or preservation of jurisdictional waters
14 required as a condition of a permit issued by the Department or by the
15 United States Army Corps of Engineers.

16 (2) ~~"Government entity" means the~~ Government entity. – The State and its
17 agencies and subdivisions, or the federal government, and units of local
18 government. "Government entity" does not include a unit of
19 local government.

20 (3) ~~"Hydrologic area" means an~~ Hydrologic area. – An eight-digit Cataloging
21 Unit designated by the United States Geological Survey.

22 (4) ~~"Jurisdictional waters" means wetlands,~~ Jurisdictional waters. – Wetlands,
23 streams, or other waters of the State or of the United States.

24 (4a) Mitigation banking instrument. – A contract between the Ecosystem
25 Enhancement Program or another State or federal agency with jurisdiction
26 over wetlands mitigation and a private compensatory mitigation bank,
27 stipulating the type and amount of compensatory mitigation credit available
28 from one or more sites.

29 (4b) Private compensatory mitigation bank. – A commercial entity incorporated
30 for the purpose of building private compensatory mitigation bank sites. No
31 government entity or unit of local government shall be considered a "private
32 compensatory mitigation bank."

33 (4c) Private compensatory mitigation bank site. – A site created by a private
34 compensatory mitigation bank and approved for mitigation credit by State



1 and federal regulatory authorities through execution of a mitigation banking
2 instrument.

3 (5) ~~"Unit of local government" means a Unit of local government.~~ – A "local
4 government," "public authority," or "special district" as defined in
5 G.S. 159-7.

6 (b) Department to Coordinate Compensatory Mitigation. – All compensatory mitigation
7 required by permits or authorizations issued by the Department or by the United States Army
8 Corps of Engineers shall be coordinated by the Department consistent with the basinwide
9 restoration plans and rules developed by the Environmental Management Commission. All
10 compensatory mitigation, whether performed by the Department or by permit applicants, shall
11 be consistent with the basinwide restoration plans. All compensatory mitigation shall be
12 consistent with rules adopted by the Commission for wetland and stream mitigation and for
13 protection and maintenance of riparian buffers. The Department shall bid and award contracts
14 for compensatory mitigation contracts in accordance with G.S. 143-129.2A.

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

19 (d) Compensatory Mitigation Options Available to Government Entities. – A
20 government entity may satisfy compensatory mitigation requirements by the following actions,
21 if those actions are consistent with the basinwide restoration plans and also meet or exceed the
22 requirements of the Department or of the United States Army Corps of Engineers, as
23 applicable:

- 24 (1) Payment of a fee established by the Commission into the Ecosystem
25 Restoration Fund established in G.S. 143-214.12.
- 26 (2) Donation of land to the Ecosystem Enhancement Program or to other public
27 or private nonprofit conservation organizations as approved by the
28 Department.
- 29 (3) Participation in a compensatory mitigation bank that has been approved by
30 the United States Army Corps of Engineers, provided that the Department or
31 the United States Army Corps of Engineers, as applicable, approves the use
32 of such bank for the required compensatory mitigation.
- 33 (4) Preparing and implementing a compensatory mitigation plan.

34 (d1) Compensatory Mitigation Options Available to Applicants Other than Government
35 Entities. – An applicant other than a government entity may satisfy compensatory mitigation
36 requirements by the following actions, if those actions meet or exceed the requirements of the
37 United States Army Corps of Engineers:

- 38 (1) Participation in a compensatory mitigation bank that has been approved by
39 the United States Army Corps of Engineers, provided that the Department or
40 the United States Army Corps of Engineers, as applicable, approves the use
41 of such bank for the required compensatory mitigation. This option is only
42 available in a hydrologic area where there is at least one compensatory
43 mitigation bank that has been approved by the United States Army Corps of
44 Engineers.
- 45 (2) Payment of a fee established by the Commission into the Ecosystem
46 Restoration Fund established in G.S. 143-214.12. – This option is only
47 available to an applicant who demonstrates that the option under subdivision
48 (1) of this subsection is not available.
- 49 (3) Donation of land to the Ecosystem Enhancement Program or to other public
50 or private nonprofit conservation organizations as approved by the
51 Department.

1 (4) Preparing and implementing a compensatory mitigation plan.
2 (d2) The Department shall purchase mitigation credits from private compensatory
3 mitigation banks upon a finding that it is in the best interests of the State to do so.

4"

5 **SECTION 1.2.** Article 8 of Chapter 143 of the General Statutes is amended by
6 adding a new section to read:

7 "**§ 143-129.2A. Design and construction of compensatory wetlands mitigation projects.**

8 (a) All terms relating to compensatory mitigation as used in this section shall be defined
9 as set forth in G.S. 143-214.11.

10 (b) To acknowledge the highly complex and innovative nature of compensatory
11 mitigation and the economic and technical utility of contracts for compensatory mitigation,
12 which include in their scope particular techniques and expertise and combinations of design,
13 construction, operation, management, and maintenance responsibilities over prolonged periods
14 of time, it may be beneficial to the State to award a contract for compensatory wetlands
15 mitigation on the basis of factors other than cost alone, including, but not limited to, design and
16 operational experience, demonstrated past success in implementation of projects, avoidance of
17 harmful environmental impact, and operational guarantees. Accordingly, and notwithstanding
18 other provisions of this Article or any local law, a contract entered into between the Department
19 of Environment and Natural Resources and any person pursuant to this section may be awarded
20 in accordance with the following provisions for the evaluation of proposals submitted in
21 response to a request for proposals and the award of a contract for compensatory mitigation
22 design and construction.

23 (c) The Department of Natural Resources shall require in its request for proposals for
24 compensatory wetlands mitigation projects that each proposal to be submitted shall include all
25 of the following:

26 (1) Information relating to the experience of the proposer on the basis of which
27 said proposer purports to be qualified to carry out all work required by a
28 proposed contract; the ability of the proposer to secure adequate financing;
29 and proposals for project staffing, implementation of work tasks, and the
30 carrying out of all responsibilities required by a proposed contract.

31 (2) Any other information as the Department may determine to have a material
32 bearing on its ability to evaluate any proposal in accordance with this
33 section.

34 (d) Proposals received in response to a request for proposals may be evaluated on the
35 basis of a technical analysis of mitigation design, operational experience of the elements
36 utilized in the proposed mitigation, and any other factors and information that the Department
37 determines to have a material bearing on its ability to evaluate any proposal, provided,
38 however, that those additional factors were set forth in the request for proposal.

39 (e) The Department may make a contract award to any responsible proposer selected
40 pursuant to this section based upon a determination that the selected proposal is more
41 responsive to the request for proposals and may negotiate a contract with the proposer for the
42 performance of the design and construction services set forth in the request for proposals. The
43 Department's determination shall be deemed to be conclusive even if the contract is not
44 awarded to the proposer submitting the lowest price bid."

45 **SECTION 1.3.** The Program Evaluation Division of the North Carolina General
46 Assembly shall perform a review of the efficiency of the Ecosystem Enhancement Program in
47 meeting the State's mitigation needs. The review shall include an evaluation of the following:

48 (1) Whether it is in the best interest of the State to maintain the Ecosystem
49 Enhancement Program as a State agency.

50 (2) Whether private mitigation banks could replace the Ecosystem Enhancement
51 Program and meet the State's future mitigation needs.

1 **SECTION 1.4.** The Department of Environment and Natural Resources shall
2 consolidate the positions of program director and deputy director of the Ecosystem
3 Enhancement Program into one executive director position. All decision-making authority for
4 the Program shall be vested with the executive director.

5 **SECTION 1.5.** The Department shall hold the mitigation provider harmless in the
6 event of any shortfall of units of mitigation procured under a mitigation contract between the
7 Program and the provider, provided that the shortfall is due to changes in State or federal
8 regulatory policy that occur after the Program and provider have executed the mitigation
9 contract.

10 Part II. Clean Water Management Trust Fund Changes.

11 **SECTION 2.1.** G.S. 113A-254 reads as rewritten:

12 "**§ 113A-254. Grant requirements.**

13 (a) Eligible Applicants. – Any of the following are eligible to apply for a grant from the
14 Fund for the purpose of protecting and enhancing water quality:

15 (1) A State agency.

16 (2) A local government unit.

17 (3) A nonprofit corporation whose primary purpose is the conservation,
18 preservation, and restoration of our State's environmental and natural
19 resources.

20 (4) A corporation or other privately owned business with expertise in the
21 conservation, preservation, and restoration of the State's environmental and
22 natural resources.

23 "

24 **SECTION 2.2.** G.S. 113A-256 reads as rewritten:

25 "**§ 113A-256. Clean Water Management Trust Fund Board of Trustees: powers and**
26 **duties.**

27 (a) Allocate Grant Funds. – The Trustees shall allocate moneys from the Fund as
28 grants. A grant may be awarded only for a project or activity that satisfies the criteria and
29 furthers the purposes of this Article.

30 (b) Develop Grant Criteria. – The Trustees shall develop criteria for awarding grants
31 under this Article. The criteria developed shall include consideration of the following:

32 (1) The significant enhancement and conservation of water quality in the State.

33 (2) The objectives of the basinwide management plans for the State's river
34 basins and watersheds.

35 (3) The promotion of regional integrated ecological networks insofar as they
36 affect water quality.

37 (4) The specific areas targeted as being environmentally sensitive.

38 (5) The geographic distribution of funds as appropriate.

39 (6) The preservation or restoration of water resources with significant
40 ~~recreational-ecological, recreational,~~ or economic value and uses.

41 (7) The development of a network of riparian buffer-greenways bordering and
42 connecting the State's waterways that will serve environmental, educational,
43 and recreational uses.

44 (c) Develop Additional Guidelines. – The Trustees may develop guidelines in addition
45 to the grant criteria consistent with and as necessary to implement this Article.

46 (d) Acquisition of Land. – The Trustees may acquire land by purchase, negotiation, gift,
47 or devise. Any acquisition of land by the Trustees must be reviewed and approved by the
48 Council of State and the deed for the land subject to approval of the Attorney General before
49 the acquisition can become effective. In determining whether to acquire land as permitted by
50 this Article, the Trustees shall consider whether the acquisition furthers the purposes of this

1 Article and may also consider recommendations from the Council. Nothing in this section shall
2 allow the Trustees to acquire land under the right of eminent domain.

3 (e) Exchange of Land. – The Trustees may exchange any land they acquire in carrying
4 out the powers conferred on the Trustees by this Article.

5 (f) Land Management. – The Trustees may designate managers or managing agencies
6 of the lands acquired under this Article.

7 (g) Tax Credit Certification. – The Trustees shall develop guidelines to determine
8 whether land donated for a tax credit under G.S. 105-130.34 or G.S. 105-151.12 are suitable for
9 one of the purposes under this Article and may be certified for a tax credit.

10 (h) Rule-making Authority. – The Trustees may adopt rules to implement this Article.
11 Chapter 150B of the General Statutes applies to the adoption of rules by the Trustees.

12 (i) Repealed by Session Laws 1999-237, s. 15.11, effective July 1, 1999.

13 (j) Debt. – Of the funds credited annually to the Fund, the Trustees may authorize
14 expenditure of a portion to reimburse the General Fund for debt service on special indebtedness
15 to be issued or incurred under Article 9 of Chapter 142 of the General Statutes for the purposes
16 provided in G.S. 113A-253(c)(1) through (4). In order to authorize expenditure of funds for
17 debt service reimbursement, the Trustees must identify to the State Treasurer and the
18 Department of Administration the specific capital projects for which they would like special
19 indebtedness to be issued or incurred and the annual amount they intend to make available, and
20 request the State Treasurer to issue or incur the indebtedness. After special indebtedness has
21 been issued or incurred for a capital project requested by the Trustees, the Trustees must direct
22 the State Treasurer to credit to the General Fund each year the actual aggregate principal and
23 interest payments to be made in that year on the special indebtedness, as identified by the State
24 Treasurer.

25 (k) Balance in Grant Awards. – In awarding grants under this Article, the Trustees shall,
26 as nearly as possible, award equal dollar amounts in each grant cycle for land preservation and
27 land restoration. For purposes of this subsection, "land preservation" means the acquisition of
28 real property or the imposition of a conservation easement on real property, and "restoration of
29 land" means the design and construction of mitigative measures intended to restore the capacity
30 of the land to preserve, protect, or improve water quality."

31 Part III. Enacting Provisions.

32 **SECTION 3.** This act is effective when it becomes law and applies to all projects
33 and contracts awarded on or after that date.