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SENATE DRS15047-SB-6 (01/13)

Short Title: Change EEP Name to Div of Mitigation Services. (Public)

Sponsors: Senators Brock, Cook, and Wade (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO CHANGE THE NAME OF THE ECOSYSTEM ENHANCEMENT PROGRAM
3 TO THE DIVISION OF MITIGATION SERVICES.

4 The General Assembly of North Carolina enacts:

5 SECTION 1.1. G.S. 143-214.8 reads as rewritten:

6 "§ 143-214.8. ~~Ecosystem Enhancement Program~~Division of Mitigation Services:
7 established.

8 The ~~Ecosystem Enhancement Program~~Division of Mitigation Services is established within
9 the Department of Environment and Natural Resources. The ~~Ecosystem Enhancement~~
10 ~~Program~~Division of Mitigation Services shall be developed by the Department as a
11 nonregulatory statewide ~~ecosystem enhancement~~mitigation services program for the
12 acquisition, maintenance, restoration, enhancement, and creation of wetland and riparian
13 resources that contribute to the protection and improvement of water quality, flood prevention,
14 fisheries, wildlife habitat, and recreational opportunities. The ~~Ecosystem Enhancement~~
15 ~~Program~~Division of Mitigation Services shall consist of the following components:

- 16 (1) Restoration and perpetual maintenance of wetlands.
- 17 (2) Development of restoration plans.
- 18 (3) Landowner contact and land acquisition.
- 19 (4) Evaluation of site plans and engineering studies.
- 20 (5) Oversight of construction and monitoring of restoration sites.
- 21 (6) Land ownership and management.
- 22 (7) Mapping, site identification, and assessment of wetlands functions.
- 23 (8) Oversight of private wetland mitigation banks to facilitate the components of
24 the ~~Ecosystem Enhancement Program~~Division of Mitigation Services."

25 SECTION 1.2. G.S. 143-214.9 reads as rewritten:

26 "§ 143-214.9. ~~Ecosystem Enhancement Program~~Division of Mitigation Services:
27 purposes.

28 The purposes of the ~~program~~Division of Mitigation Services are as follows:

- 29 (1) To restore wetlands functions and values across the State to replace critical
30 functions lost through historic wetlands conversion and through current and
31 future permitted impacts. It is not the policy of the State to destroy upland
32 habitats unless it would further the purposes of the ~~Wetlands Restoration~~
33 ~~Program~~Division of Mitigation Services.
- 34 (2) To provide a consistent and simplified approach to address mitigation
35 requirements associated with permits or authorizations issued by the United
36 States Army Corps of Engineers under 33 U.S.C. § 1344.



- 1 (3) To streamline the wetlands permitting process, minimize delays in permit
2 decisions, and decrease the burden of permit applicants of planning and
3 performing compensatory mitigation for wetlands losses.
4 (4) To increase the ecological effectiveness of compensatory mitigation.
5 (5) To achieve a net increase in wetland acres, functions, and values in each
6 major river basin.
7 (6) To foster a comprehensive approach to environmental protection."

8 **SECTION 1.3.** G.S. 143-214.10 reads as rewritten:

9 **"§ 143-214.10. ~~Ecosystem Enhancement Program~~:Division of Mitigation Services:**
10 **development and implementation of basinwide restoration plans.**

11 Develop Basinwide Restoration Plans. – The Department shall develop basinwide plans for
12 wetlands and riparian area restoration with the goal of protecting and enhancing water quality,
13 flood prevention, fisheries, wildlife habitat, and recreational opportunities within each of the 17
14 major river basins in the State. The Department shall develop and implement a basinwide
15 restoration plan for each of the 17 river basins in the State in accordance with the basinwide
16 schedule currently established by the Division of Water Resources."

17 **SECTION 1.4.** G.S. 143-214.11 reads as rewritten:

18 **"§ 143-214.11. ~~Ecosystem Enhancement Program~~:Division of Mitigation Services:**
19 **compensatory mitigation.**

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

- 21 (1) Compensatory mitigation. – The restoration, creation, enhancement, or
22 preservation of jurisdictional waters required as a condition of a permit
23 issued by the Department or by the United States Army Corps of Engineers.
24 (1a) Compensatory mitigation bank. – A private compensatory mitigation bank or
25 an existing local compensatory mitigation bank.
26 (1b) Existing local compensatory mitigation bank. – A mitigation bank operated
27 by a unit of local government that is a party to a mitigation banking
28 instrument executed on or before July 1, 2011, notwithstanding subsequent
29 amendments to such instrument executed after July 1, 2011.
30 (2) Government entity. – The State and its agencies and subdivisions, or the
31 federal government. "Government entity" does not include a unit of local
32 government unless the unit of local government was a party to a mitigation
33 banking instrument executed on or before July 1, 2011, notwithstanding
34 subsequent amendments to such instrument executed after July 1, 2011.
35 (3) Hydrologic area. – An eight-digit Cataloging Unit designated by the United
36 States Geological Survey.
37 (4) Jurisdictional waters. – Wetlands, streams, or other waters of the State or of
38 the United States.
39 (4a) Mitigation banking instrument. – The legal document for the establishment,
40 operation, and use of a mitigation bank.
41 (4b) Private compensatory mitigation bank. – A site created by a private
42 compensatory mitigation provider and approved for mitigation credit by
43 State and federal regulatory authorities through execution of a mitigation
44 banking instrument. No site owned by a government entity or unit of local
45 government shall be considered a "private compensatory mitigation bank."
46 (5) Unit of local government. – A "local government," "public authority," or
47 "special district" as defined in G.S. 159-7.

48 (b) Department to Coordinate Compensatory Mitigation. – All compensatory mitigation
49 required by permits or authorizations issued by the Department or by the United States Army
50 Corps of Engineers shall be coordinated by the Department consistent with the basinwide
51 restoration plans and rules developed by the Environmental Management Commission. All

1 compensatory mitigation, whether performed by the Department or by permit applicants, shall
2 be consistent with the basinwide restoration plans. All compensatory mitigation shall be
3 consistent with rules adopted by the Commission for wetland and stream mitigation and for
4 protection and maintenance of riparian buffers.

5 (c) Compensatory Mitigation Emphasis on Replacing Ecological Function Within Same
6 River Basin. – The emphasis of compensatory mitigation is on replacing functions within the
7 same river basin unless it is demonstrated that restoration of other areas would be more
8 beneficial to the overall purposes of the ~~Ecosystem Enhancement Program~~ Division of
9 Mitigation Services.

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

- 15 (1) Payment of a fee established by the Commission into the Ecosystem
16 Restoration Fund established in G.S. 143-214.12.
- 17 (2) Donation of land to the ~~Ecosystem Enhancement Program~~ Division of
18 Mitigation Services or to other public or private nonprofit conservation
19 organizations as approved by the Department.
- 20 (3) Participation in a compensatory mitigation bank that has been approved by
21 the United States Army Corps of Engineers, provided that the Department or
22 the United States Army Corps of Engineers, as applicable, approves the use
23 of such bank for the required compensatory mitigation.
- 24 (4) Preparing and implementing a compensatory mitigation plan.

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

- 29 (1) 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. This option is only
33 available in a hydrologic area where there is at least one compensatory
34 mitigation bank that has been approved by the United States Army Corps of
35 Engineers.
- 36 (2) Payment of a fee established by the Commission into the Ecosystem
37 Restoration Fund established in G.S. 143-214.12. – This option is only
38 available to an applicant who demonstrates that the option under subdivision
39 (1) of this subsection is not available.
- 40 (3) Donation of land to the ~~Ecosystem Enhancement Program~~ Division of
41 Mitigation Services or to other public or private nonprofit conservation
42 organizations as approved by the Department.
- 43 (4) Preparing and implementing a compensatory mitigation plan.

44 (e) Payment Schedule. – A standardized schedule of compensatory mitigation payment
45 amounts shall be established by the Commission. Compensatory mitigation payments shall be
46 made by applicants to the Ecosystem Restoration Fund established in G.S. 143-214.12. The
47 monetary payment shall be based on the ecological functions and values of wetlands and
48 streams permitted to be lost and on the cost of restoring or creating wetlands and streams
49 capable of performing the same or similar functions, including directly related costs of wetland
50 and stream restoration planning, long-term monitoring, and maintenance of restored areas.

1 Compensatory mitigation payments for wetlands shall be calculated on a per acre basis.

2 Compensatory mitigation payments for streams shall be calculated on a per linear foot basis.

3 (f) Mitigation Banks. – State agencies and mitigation banks shall demonstrate that
4 adequate, dedicated financial surety exists to provide for the perpetual land management and
5 hydrological maintenance of lands acquired by the State as mitigation banks, or proposed to the
6 State as privately operated and permitted mitigation banks.

7 (g) Payment for Taxes. – A State agency acquiring land to restore, enhance, preserve, or
8 create wetlands must also pay a sum in lieu of ad valorem taxes lost by the county in
9 accordance with G.S. 146-22.3.

10 (h) Sale of Mitigation Credits by Existing Local Compensatory Mitigation Bank. – An
11 existing local compensatory mitigation bank shall comply with the requirements of Article 12
12 of Chapter 160A of the General Statutes applicable to the disposal of property whenever it
13 transfers any mitigation credits to another person.

14 (i) The ~~Ecosystem Enhancement Program~~ Division of Mitigation Services shall exercise
15 its authority to provide for compensatory mitigation under the authority granted by this section
16 to use mitigation procurement programs in the following order of preference:

17 (1) Full delivery/bank credit purchase program. – The ~~Ecosystem Enhancement~~
18 ~~Program~~ Division of Mitigation Services shall first seek to meet
19 compensatory mitigation procurement requirements through the ~~Program's~~
20 Division's full delivery program or by the purchase of credits from a private
21 compensatory mitigation bank.

22 (2) Existing local compensatory mitigation bank credit purchase program. – Any
23 compensatory mitigation procurement requirements that are not fulfillable
24 under subdivision (1) of this subsection shall be procured from an existing
25 local compensatory mitigation bank, provided that the credit purchase is
26 made to mitigate the impacts of a project located within the mitigation bank
27 service area and hydrologic area of the existing local compensatory
28 mitigation bank.

29 (3) Design/build program. – Any compensatory mitigation procurement
30 requirements that are not fulfillable under subdivision (1) or (2) of this
31 subsection shall be procured under a program in which ~~Ecosystem~~
32 ~~Enhancement Program~~ the Division of Mitigation Services contracts with one
33 private entity to lead or implement the design, construction, and
34 postconstruction monitoring of compensatory mitigation at sites obtained by
35 the ~~Ecosystem Enhancement Program~~ Division of Mitigation Services. Such
36 a program shall be considered the procurement of compensatory mitigation
37 credits.

38 (4) Design-bid-build program. – Any compensatory mitigation procurement
39 requirements that are not fulfillable under either subdivision (1) or (2) of this
40 subsection may be procured under the ~~Ecosystem Enhancement~~
41 ~~Program's~~ Division of Mitigation Services' design-bid-build program. The
42 ~~Ecosystem Enhancement Program~~ Division of Mitigation Services may
43 utilize this program only when procurement under subdivision (1) or (2) of
44 this subsection is not feasible. Any mitigation site design work currently
45 being performed through contracts awarded under the design-bid-build
46 program shall be allowed to continue as scheduled. Contracts for
47 construction of projects with a design already approved by the ~~Ecosystem~~
48 ~~Enhancement Program~~ Division of Mitigation Services shall be awarded by
49 the ~~Ecosystem Enhancement Program~~ Division of Mitigation Services by
50 issuing a Request for Proposal (RFP). Only contractors who have
51 prequalified under procedures established by the ~~Ecosystem Enhancement~~

1 ~~Program~~Division of Mitigation Services shall be eligible to bid on
2 ~~Ecosystem Enhancement Program~~Division of Mitigation Services
3 construction projects. Construction contracts issued under this subdivision
4 shall be exempt from the requirements of Article 8B of Chapter 143 of the
5 General Statutes.

6 (j) The regulatory requirements for the establishment, operation, and monitoring of a
7 compensatory mitigation bank or full delivery project shall vest at the time of the execution of
8 the mitigation banking instrument or the award of a full delivery contract."

9 **SECTION 1.5.** G.S. 143-214.12 reads as rewritten:

10 "**§ 143-214.12. ~~Ecosystem Enhancement Program~~Division of Mitigation Services:**
11 **Ecosystem Restoration Fund.**

12 (a) Ecosystem Restoration Fund. – The Ecosystem Restoration Fund is established as a
13 nonreverting fund within the Department. The Fund shall be treated as a special trust fund and
14 shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and
15 G.S. 147-69.3. The Ecosystem Restoration Fund shall provide a repository for monetary
16 contributions and donations or dedications of interests in real property to promote projects for
17 the restoration, enhancement, preservation, or creation of wetlands and riparian areas and for
18 payments made in lieu of compensatory mitigation as described in subsection (b) of this
19 section. No funds shall be expended from this Fund for any purpose other than those directly
20 contributing to the acquisition, perpetual maintenance, enhancement, restoration, or creation of
21 wetlands and riparian areas in accordance with the basinwide plan as described in
22 G.S. 143-214.10. The cost of acquisition includes a payment in lieu of ad valorem taxes
23 required under G.S. 146-22.3 when the Department is the State agency making the acquisition.

24 (a1) The Department may distribute funds from the Ecosystem Restoration Fund directly
25 to a federal or State agency, a local government, or a private, nonprofit conservation
26 organization to acquire, manage, and maintain real property or an interest in real property for
27 the purposes set out in subsection (a) of this section. A recipient of funds under this subsection
28 shall grant a conservation easement in the real property or interest in real property acquired
29 with the funds to the Department in a form that is acceptable to the Department. The
30 Department may convey real property or an interest in real property that has been acquired
31 under the ~~Ecosystem Enhancement Program~~Division of Mitigation Services to a federal or
32 State agency, a local government, or a private, nonprofit conservation organization to acquire,
33 manage, and maintain real property or an interest in real property for the purposes set out in
34 subsection (a) of this section. A grantee of real property or an interest in real property under
35 this subsection shall grant a conservation easement in the real property or interest in real
36 property to the Department in a form that is acceptable to the Department.

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

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

4 **SECTION 1.6.** G.S. 143-214.13 reads as rewritten:

5 "**§ 143-214.13. ~~Ecosystem Enhancement Program~~ Division of Mitigation Services:**
6 **reporting requirement.**

7 (a) The Department of Environment and Natural Resources shall report each year by
8 November 1 to the Environmental Review Commission and to the Joint Legislative
9 Commission on Governmental Operations regarding its progress in implementing the
10 ~~Ecosystem Enhancement Program~~ Division of Mitigation Services and its use of the funds in the
11 Ecosystem Restoration Fund. The report shall document statewide wetlands losses and gains
12 and compensatory mitigation performed under G.S. 143-214.8 through G.S. 143-214.12. The
13 report shall also provide an accounting of receipts and disbursements of the Ecosystem
14 Restoration Fund, an analysis of the per-acre cost of wetlands restoration, and a cost
15 comparison on a per-acre basis between the State's ~~Ecosystem Enhancement Program~~ Division
16 of Mitigation Services and private mitigation banks. The Department shall also send a copy of
17 its report to the Fiscal Research Division of the General Assembly.

18 (b) The Department shall maintain an inventory of all property that is held, managed,
19 maintained, enhanced, restored, or used to create wetlands under the ~~Ecosystem Enhancement~~
20 ~~Program~~ Division of Mitigation Services. The inventory shall also list all conservation
21 easements held by the Department. The inventory shall be included in the annual report
22 required under subsection (a) of this section."

23 **SECTION 1.7.** G.S. 143-214.14 reads as rewritten:

24 "**§ 143-214.14. Cooperative State-local coalition water quality protection plans.**

25 (a) Definitions. – The following definitions apply in this section:

- 26 (1) "Basin" means a river basin as defined in G.S. 143-215.22G or any subbasin
27 or segment thereof.
28 (2) "Coalition plan" means a water quality protection plan developed by a
29 coalition of local governments for water quality protection of a basin.
30 (3) "Local government" means a city, county, special district, authority, or other
31 political subdivision of the State.
32 (4) "Water quality protection" means management of water use, quantity, and
33 quality.

34 (b) Legislative Findings. – This section establishes a framework to encourage
35 State-local pollutant reduction strategies for basins under the supervision and coordination of
36 the Commission. The General Assembly finds that:

- 37 (1) Water quality conditions and sources of water contamination may vary from
38 one basin to another.
39 (2) Water quality conditions and sources of water contamination may vary
40 within a basin.
41 (3) Some local governments have demonstrated greater capacity than others to
42 protect and improve water quality conditions.
43 (4) In some areas of the State artificial alteration of watercourses by surface
44 water impoundments or other means may have a significant effect on water
45 quality.
46 (5) Imposition of standard basinwide water quality protection requirements and
47 strategies may not equitably address the varying conditions and needs of all
48 areas.
49 (6) There is a need to develop distinct approaches to address water quality
50 protection in basins in the State, drawing upon the resources of local

- 1 governments and the State, under the supervision and coordination of the
2 Commission.
- 3 (c) Legislative Goals and Policies. – It is the goal of the General Assembly that, to the
4 extent practicable, the State shall adopt water quality protection plans that are developed and
5 implemented in cooperation and coordination with local governments and that the State shall
6 adopt water quality protection requirements that are proportional to the relative contributions of
7 pollution from all sources in terms of both the loading and proximity of those sources.
8 Furthermore, it is the goal of the General Assembly to encourage and support State-local
9 partnerships for improved water quality protection through the provision of technical and
10 financial assistance available through the Clean Water Management Trust Fund, the ~~Ecosystem~~
11 ~~Enhancement Program~~, Division of Mitigation Services, the Ecosystem Restoration Fund, water
12 quality planning and project grant programs, the State's revolving loan and grant programs for
13 water and wastewater facilities, other funding sources, and future appropriations. The
14 Commission shall implement these goals in accordance with the standards, procedures, and
15 requirements set out in this section.
- 16 (d) The Commission may, as an alternative method of attaining water quality standards
17 in a basin, approve a coalition plan proposed by a coalition of local governments whose
18 territorial area collectively includes the affected basin in the manner provided by this section.
19 The Commission may approve a coalition plan proposed by a coalition of local governments
20 whose territorial area or water quality protection plan does not include all of an affected basin if
21 the Commission determines that the omission will not adversely affect water quality.
- 22 (e) A coalition of local governments choosing to propose a coalition plan to the
23 Commission shall do so through a nonprofit corporation the coalition of local governments
24 incorporates with the Secretary of State.
- 25 (f) The Commission may approve a coalition plan only if the Commission first
26 determines that:
- 27 (1) The basin under consideration is an appropriate unit for water quality
28 planning.
 - 29 (2) The coalition plan meets the requirements of subsection (g) of this section.
 - 30 (3) The coalition of local governments has formed a nonprofit corporation
31 pursuant to subsection (e) of this section.
 - 32 (4) The coalition plan has been approved by the governing board of each local
33 government that is a member of the coalition of local governments
34 proposing the coalition plan.
 - 35 (5) The coalition plan will provide a viable alternative method of attaining
36 equivalent compliance with federal and State water quality standards,
37 classifications, and management practices in the affected basin.
- 38 (g) A coalition plan shall include all of the following:
- 39 (1) An assessment of water quality and related water quantity management in
40 the affected basin.
 - 41 (2) A description of the goals and objectives for protection and improvement of
42 water quality and related water quantity management in the affected basin.
 - 43 (3) A workplan that describes proposed water quality protection strategies,
44 including point and nonpoint source programs, for achieving the specified
45 goals and objectives; an implementation strategy including specified tasks,
46 timetables for action, implementation responsibilities of State and local
47 agencies; and sources of funding, where applicable.
 - 48 (4) A description of the performance indicators and benchmarks that will be
49 used to measure progress in achieving the specified goals and objectives, and
50 an associated monitoring framework.

1 (5) A timetable for reporting to the Commission on progress in implementing
2 the coalition plan.

3 (h) A coalition plan shall cover a specified period. The coalition plan may provide for
4 the phasing in of specific strategies, tasks, or mechanisms by specified dates within the period
5 covered by the plan. The Commission may approve one or more successive coalition plan
6 periods. The coalition plan may include strategies that vary among the subareas or jurisdictions
7 of the geographic area covered by the coalition plan.

8 (i) If a local government chooses to withdraw from a coalition of local governments or
9 fails to implement a coalition plan, the remaining members of a coalition of local governments
10 may prepare and submit a revised coalition plan for approval by the Commission. If the
11 Commission determines that an approved coalition plan no longer provides a viable alternative
12 method of attaining equivalent compliance with federal and State water quality standards,
13 classifications, and management practices, the Commission may suspend or revoke its approval
14 of the coalition plan.

15 (j) The Commission may approve one or more amendments to a coalition plan
16 proposed by a coalition of local governments through its nonprofit corporation with the
17 approval of the governing board of each local government that is a member of the coalition of
18 local governments that proposed the coalition plan.

19 (k) With the approval of the Commission, any coalition of local governments with an
20 approved coalition plan may establish and implement a pollutant trading program for specific
21 pollutants between and among point source dischargers and nonpoint pollution sources.

22 (l) The Commission shall submit an annual progress report on the implementation of
23 this section to the Environmental Review Commission on or before 1 October of each year."

24 **SECTION 2.** This act is effective when it becomes law.