

HOUSE BILL 797

M3

6lr0052

By: **Chair, Environment and Transportation Committee (By Request –
Departmental – Environment)**

Introduced and read first time: February 8, 2016

Assigned to: Environment and Transportation

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 16, 2016

CHAPTER _____

1 AN ACT concerning

2 **Nontidal Wetlands – Nontidal Wetland Mitigation Banking**

3 FOR the purpose of altering a certain declaration to ~~remove~~ include the consideration of
4 on-site alternatives ~~from a certain process~~ under certain circumstances for selecting
5 the location of a mitigation site; repealing a requirement that the Department of the
6 Environment develop standards and adopt regulations to establish certain
7 compensation ratios for mitigation through mitigation banks; altering a requirement
8 that the Department develop standards and adopt regulations to establish certain
9 public notice and comment requirements for a wetland bank; repealing a
10 requirement that certain standards and regulations adopted by the Department
11 ensure that on-site mitigation is examined before conducting mitigation off site;
12 requiring certain standards and regulations adopted by the Department to ensure
13 that the potential for on-site mitigation is considered under certain circumstances;
14 repealing a requirement that certain standards and regulations adopted by the
15 Department ensure that mitigation through wetland banking should be
16 accomplished in, and with preference to, the same watershed and county as the
17 wetland for which the mitigation is required; requiring certain standards and
18 regulations adopted by the Department to ensure that mitigation through a
19 mitigation bank is accomplished in certain areas determined by the Department in
20 a certain manner; requiring certain standards and regulations adopted by the
21 Department to ensure that a certain service area meets certain requirements;
22 defining a ~~certain term~~ certain terms; and generally relating to nontidal wetlands
23 mitigation.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 BY repealing and reenacting, ~~without~~ with amendments,
 2 Article – Environment
 3 Section ~~5–901(a)~~ 5–901 and 5–910
 4 Annotated Code of Maryland
 5 (2013 Replacement Volume and 2015 Supplement)

6 ~~BY adding to~~
 7 ~~Article – Environment~~
 8 ~~Section 5–901(k)~~
 9 ~~Annotated Code of Maryland~~
 10 ~~(2013 Replacement Volume and 2015 Supplement)~~

11 ~~BY repealing and reenacting, with amendments,~~
 12 ~~Article – Environment~~
 13 ~~Section 5–901(k) and 5–910~~
 14 ~~Annotated Code of Maryland~~
 15 ~~(2013 Replacement Volume and 2015 Supplement)~~

16 Preamble

17 WHEREAS, Preservation of nontidal wetlands is vital to the protection of the
 18 Chesapeake Bay and other waters of the State and it is the policy of the State that wetland
 19 disturbance may be authorized only if it is unavoidable and necessary for the completion of
 20 a development project; and

21 WHEREAS, Only after determining that nontidal wetland losses are unavoidable do
 22 mitigation issues arise, and the primary concern then becomes the most beneficial location
 23 for a mitigation project to create, restore, or enhance a wetland area; and

24 ~~WHEREAS, Since the beginning of the nontidal wetlands program in 1991, the~~
 25 ~~preferred method for satisfying regulatory wetlands mitigation requirements was to create,~~
 26 ~~restore, or enhance wetlands on the same site as the proposed project or at least within the~~
 27 ~~same watershed; and~~

28 ~~WHEREAS, This preference resulted in a patchwork of isolated individual~~
 29 ~~mitigation projects that complied with the regulatory requirements; and~~

30 ~~WHEREAS, Because these mitigation projects were often isolated, their ability to~~
 31 ~~enhance clean water or achieve habitat protection goals was diminished; and~~

32 WHEREAS, Mitigation banking allows a public or private developer to acquire a
 33 long-term interest in a degraded wetland or appropriate upland area, to restore, enhance,
 34 or create a functional wetland ecosystem, and ultimately to sell credits from the mitigation
 35 bank to permittees whose projects will unavoidably impact nontidal wetlands; and

36 WHEREAS, Mitigation banking is a reliable form of compensatory mitigation
 37 because mitigation bankers are subject to permitting and monitoring requirements and

1 have an economic incentive to produce and sustain the wetlands values needed to generate
2 credits to sell; and

3 WHEREAS, The 2008 Federal Mitigation Rule, published by the U.S. Army Corps of
4 Engineers and the U.S. Environmental Protection Agency, established a preference for the
5 use of mitigation banks, when appropriate credits are available, to compensate for impacts
6 to aquatic resources that the U.S. Army Corps of Engineers permits under § 404 of the
7 Clean Water Act; and

8 WHEREAS, While Chapter 347 of the Acts of the General Assembly of 1993
9 established the framework for the creation of mitigation banking in Maryland, that Act also
10 created a disincentive to mitigation banking through the compensation ratio requirement;
11 and

12 WHEREAS, It is the purpose of this Act to remove the disincentive to mitigation
13 banking, to align the State's mitigation preferences with the 2008 Federal Mitigation Rule,
14 and to stimulate Maryland's mitigation banking industry; now, therefore,

15 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
16 That the Laws of Maryland read as follows:

17 **Article – Environment**

18 5–901.

19 (a) In this subtitle the following words have the meanings indicated.

20 (b) (1) “Agricultural activity” means aquaculture and farming activities.

21 (2) “Agricultural activity” includes:

22 (i) Plowing, tillage, cropping, seeding, cultivating, and harvesting
23 for the production of food and fiber products; and

24 (ii) The grazing of livestock.

25 (c) “Best management practices” means conservation practices or systems of
26 practices and management measures that:

27 (1) Control soil loss and reduce water quality degradation caused by
28 nutrients, animal waste, toxics, and sediment; and

29 (2) Minimize adverse impacts to the surface water and groundwater flow
30 and circulation patterns, and to the chemical, physical, and biological characteristics of a
31 nontidal wetland.

1 (d) “Compensation ratio” means the ratio of the area of wetland restored, created,
2 or enhanced to the area of wetland for which mitigation is required.

3 (e) “Department” means the Department of the Environment.

4 (f) “Forestry activity” means planting, cultivating, thinning, harvesting, or any
5 other activity undertaken to use forest resources or to improve their quality or productivity.

6 (g) “HYDROLOGIC UNIT” MEANS A DRAINAGE AREA WITHIN:

7 (1) A MULTILEVEL HIERARCHICAL DRAINAGE SYSTEM ESTABLISHED
8 UNDER THE NATIONAL WATERSHED BOUNDARY DATASET AS PUBLISHED BY THE
9 U.S. GEOLOGICAL SURVEY AND AS AMENDED, REVISED, OR REPLACED FROM TIME
10 TO TIME; AND

11 (2) WHICH DRAINAGE BOUNDARIES ARE ESTABLISHED USING
12 HYDROGRAPHIC AND TOPOGRAPHIC DATA TO DELINEATE AN AREA OF LAND
13 UPSTREAM FROM A SPECIFIC POINT ON A RIVER, STREAM, OR A SIMILAR SURFACE
14 WATER.

15 (h) “HYDROLOGIC UNIT CODE” MEANS A NUMERICAL IDENTIFIER THAT
16 DESCRIBES A HYDROLOGIC UNIT’S PHYSICAL LOCATION AND POSITION WITHIN THE
17 DRAINAGE SYSTEM HIERARCHY.

18 (i) “INSTRUMENT” MEANS THE FORMAL WRITTEN AGREEMENT BETWEEN
19 MITIGATION BANK OWNERS AND THE DEPARTMENT THAT ESTABLISHES LIABILITY,
20 PERFORMANCE STANDARDS, MANAGEMENT AND MONITORING REQUIREMENTS, AND
21 THE TERMS OF BANK CREDIT APPROVAL.

22 (j) “INTERAGENCY REVIEW TEAM” MEANS AN INTERAGENCY GROUP OF
23 FEDERAL, STATE, AND LOCAL AGENCIES THAT REVIEWS DOCUMENTATION FOR, AND
24 ADVISES THE DEPARTMENT ON, THE ESTABLISHMENT OF PROPOSED MITIGATION
25 BANKS AND THE DEVELOPMENT OF THE INSTRUMENT.

26 [(g)] (k) “Isolated nontidal wetland” means a nontidal wetland that is not
27 hydrologically connected, through surface or subsurface flow, to streams, tidal or nontidal
28 wetlands, or tidal waters.

29 [(h)] (l) “Mitigation banking” means wetland restoration, creation, or
30 enhancement undertaken expressly for the purpose of providing compensation credits for
31 wetland losses from future activities.

32 [(i)] (m) (1) “Nontidal wetland” means an area that is inundated or saturated
33 by surface water or groundwater at a frequency and duration sufficient to support, and that

1 under normal circumstances does support, a prevalence of vegetation typically adapted for
2 life in saturated soil conditions, commonly known as hydrophytic vegetation.

3 (2) The determination of whether an area is a nontidal wetland shall
4 be made in accordance with the publication known as the “Federal Manual for Identifying
5 and Delineating Jurisdictional Wetlands”, published in 1989 and as may be amended.

6 (3) “Nontidal wetlands” do not include tidal wetlands regulated
7 under Title 16 of this article.

8 ~~[(j)]~~ (N) (1) “Regulated activity” means any of the following activities in a
9 nontidal wetland or within a 25 foot buffer of the nontidal wetland:

10 (i) The removal, excavation, or dredging of soil, sand, gravel,
11 minerals, organic matter, or materials of any kind;

12 (ii) The changing of existing drainage characteristics, sedimentation
13 patterns, flow patterns, or flood retention characteristics;

14 (iii) The disturbance of the water level or water table by drainage,
15 impoundment, or other means;

16 (iv) The dumping, discharging of material, or filling with material,
17 including the driving of piles and placing of obstructions;

18 (v) The grading or removal of material that would alter existing
19 topography; and

20 (vi) The destruction or removal of plant life that would alter the
21 character of a nontidal wetland.

22 (2) “Regulated activity” does not include an agricultural activity or forestry
23 activity as defined in this section.

24 ~~(K)~~ (O) **“SERVICE AREA” MEANS THE GEOGRAPHIC AREA WITHIN WHICH**
25 **IMPACTS CAN BE MITIGATED AT A SPECIFIC MITIGATION BANK, AS DESIGNATED IN**
26 **ITS INSTRUMENT.**

27 [(k)] ~~(L)~~ (P) **“Soil conservation and water quality plan” means a land use plan for a**
28 **farm that shows a farmer how to make best possible use of soil and water resources while**
29 **protecting and conserving those resources for the future.**

30 5–910.

31 (a) The General Assembly declares that:

1 (1) In the application review process, one of the primary mitigation issues
2 is locating the most beneficial area to conduct wetland restoration, creation, or
3 enhancement;

4 (2) Where unavoidable losses or degradations occur as a result of permitted
5 human activity, there exists a sequential process for mitigation site location ~~¶~~which
6 includes consideration of on-site alternatives] **WHERE IT MAY BE ENVIRONMENTALLY**
7 **PREFERABLE**;

8 (3) Mitigation banking, which allows a person to restore, enhance, or create
9 a functional wetland ecosystem, may offer a sound mitigation alternative and may provide
10 an opportunity to contribute to the goal of no net loss in wetlands acreage and function;
11 and

12 (4) Mitigation banking may not alter the regulatory requirements of §
13 5-907 of this subtitle.

14 (b) The Department shall develop standards and adopt regulations for the
15 creation of wetland mitigation banks, including:

16 (1) The types and locations of wetlands to be restored, created, or enhanced
17 and the types and locations of wetlands to be filled for which a person may obtain credit
18 through a mitigation bank;

19 (2) The types and number of credits available through the bank to offset
20 losses by acreage and by function of a wetland to be filled;

21 (3) The method of wetland construction, supervision, and maintenance to
22 be required of a bank owner seeking to obtain credit for use of the bank;

23 (4) Maintenance requirements;

24 (5) Monitoring requirements;

25 (6) Bonding requirements, to include assurance of wetland function;

26 (7) Reporting requirements to the Department;

27 (8) Consistency with developed watershed plans, forest conservation, local
28 growth management policies, and local comprehensive plans;

29 (9) Requirements for the protection in perpetuity of mitigation banks,
30 through methods that include easements, covenants, or similar mechanisms, that shall be
31 in place at the time credits are withdrawn; **AND**

32 (10) [Compensation ratios for mitigation through mitigation banks that
33 shall equal or exceed 1.5 to 1; and

1 (11)] Public notice and comment requirements, including opportunity for
2 public review and comment on any specific wetland bank [that is greater than 5 acres in
3 size].

4 (c) The standards and regulations adopted by the Department under this section
5 shall ensure that:

6 (1) The provisions of § 5–907 of this subtitle, including the avoidance,
7 alternative analysis, and minimization of disturbance of nontidal wetlands, are fully
8 adhered to;

9 (2) The goals of § 5–902 of this subtitle to attain no net overall loss in
10 nontidal wetland acreage and function and to strive for a net resource gain are achieved;
11 ~~AND~~

12 (3) [On–site mitigation is examined before conducting mitigation off site;
13 and

14 (4) Mitigation through wetland banking should be accomplished in and
15 with preference to the same watershed and county as the wetland for which mitigation is
16 required] **THE POTENTIAL FOR ON–SITE MITIGATION IS CONSIDERED WHENEVER IT**
17 **MAY BE ENVIRONMENTALLY PREFERABLE;**

18 **(4) MITIGATION THROUGH A MITIGATION BANK SHALL BE**
19 **ACCOMPLISHED IN SERVICE AREAS ~~DETERMINED;~~**

20 **(I) DETERMINED BY THE DEPARTMENT IN COORDINATION**
21 **WITH AN INTERAGENCY REVIEW TEAM; AND**

22 **(II) THAT ARE CONSISTENT WITH FEDERAL GUIDELINES; AND**

23 **(5) FOR PURPOSES OF ITEM (4) THIS SUBSECTION, A SERVICE AREA:**

24 **(I) IS THE SAME 8 DIGIT HYDROLOGIC UNIT CODE WATERSHED**
25 **IN WHICH THE MITIGATION BANK IS LOCATED; AND**

26 **(II) MAY BE EXPANDED TO INCLUDE OTHER 8 DIGIT**
27 **HYDROLOGIC UNIT CODE WATERSHEDS IF ENVIRONMENTALLY JUSTIFIED.**

28 (d) (1) This section may not be construed to require the Department to:

29 (i) Establish or fund State mitigation banks;

30 (ii) Fund the establishment of mitigation banking by the private
31 sector; or

1 (iii) Use State lands for mitigation banking.

2 (2) The Department may establish mitigation banking through and with
3 the cooperation of the private sector and may use State lands for mitigation banking sites.

4 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July
5 1, 2016.

Approved:

Governor.

Speaker of the House of Delegates.

President of the Senate.