

Chapter 631

(House Bill 797)

AN ACT concerning

**Nontidal Wetlands – Nontidal Wetland Mitigation Banking**

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

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

~~BY adding to~~  
~~Article – Environment~~  
~~Section 5-901(k)~~  
~~Annotated Code of Maryland~~  
~~(2013 Replacement Volume and 2015 Supplement)~~

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

## Preamble

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

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

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

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

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

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

WHEREAS, Mitigation banking is a reliable form of compensatory mitigation because mitigation bankers are subject to permitting and monitoring requirements and have an economic incentive to produce and sustain the wetlands values needed to generate credits to sell; and

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

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

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

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

### Article – Environment

5-901.

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

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

(2) “Agricultural activity” includes:

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

(ii) The grazing of livestock.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**[(i)] (M) (1) “Nontidal wetland” means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.**

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

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

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

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

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

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

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

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

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

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

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

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

5-910.

(a) The General Assembly declares that:

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

(2) Where unavoidable losses or degradations occur as a result of permitted human activity, there exists a sequential process for mitigation site location ~~¶~~ WHICH INCLUDES CONSIDERATION OF ON-SITE ALTERNATIVES **WHERE IT MAY BE ENVIRONMENTALLY PREFERABLE;**

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

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

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

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

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

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

(4) Maintenance requirements;

(5) Monitoring requirements;

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

(7) Reporting requirements to the Department;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Establish or fund State mitigation banks;

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

(iii) Use State lands for mitigation banking.

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

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

**Approved by the Governor, May 19, 2016.**