

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

A BILL ENTITLED

1 AN ACT concerning

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

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

19 BY repealing and reenacting, without amendments,
20 Article – Environment
21 Section 5–901(a)
22 Annotated Code of Maryland
23 (2013 Replacement Volume and 2015 Supplement)

24 BY adding to
25 Article – Environment
26 Section 5–901(k)
27 Annotated Code of Maryland
28 (2013 Replacement Volume and 2015 Supplement)

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



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

6 Preamble

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

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

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

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

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

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

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

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

35 WHEREAS, While Chapter 347 of the Acts of the General Assembly of 1993
36 established the framework for the creation of mitigation banking in Maryland, that Act also

1 created a disincentive to mitigation banking through the compensation ratio requirement;
2 and

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

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

8 **Article – Environment**

9 5–901.

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

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

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

17 5–910.

18 (a) The General Assembly declares that:

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

22 (2) Where unavoidable losses or degradations occur as a result of permitted
23 human activity, there exists a sequential process for mitigation site location [which
24 includes consideration of on-site alternatives];

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

29 (4) Mitigation banking may not alter the regulatory requirements of §
30 5–907 of this subtitle.

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

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

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

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

8 (4) Maintenance requirements;

9 (5) Monitoring requirements;

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

11 (7) Reporting requirements to the Department;

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

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

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

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

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

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

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

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

1 (4) Mitigation through wetland banking should be accomplished in and
2 with preference to the same watershed and county as the wetland for which mitigation is
3 required] **MITIGATION THROUGH A MITIGATION BANK SHALL BE ACCOMPLISHED IN**
4 **SERVICE AREAS DETERMINED BY THE DEPARTMENT.**

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

6 (i) Establish or fund State mitigation banks;

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

9 (iii) Use State lands for mitigation banking.

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

12 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July
13 1, 2016.