Department of Legislative Services

Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 797 (Chair, Environment and Transportation Committee)(By Request - Departmental - Environment)

Environment and Transportation Education, Health, and Environmental Affairs

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Nontidal Wetlands - Nontidal Wetland Mitigation Banking

This departmental bill alters the State's nontidal wetland mitigation policy to conform to standards established under the federal Mitigation Rule of 2008 by (1) repealing current law provisions that establish compensation ratios for wetland mitigation through mitigation banks; (2) requiring the potential for on-site mitigation to be considered whenever it may be environmentally preferable; and (3) adding specificity to mitigation bank policies. The bill adds several related definitions.

The bill takes effect July 1, 2016.

Fiscal Summary

State Effect: The bill's changes are not anticipated to materially affect State finances or operations in the foreseeable future. To the extent the bill's changes eventually result in a more robust wetland mitigation banking industry in Maryland, special fund revenues to the Nontidal Wetlands Compensation Fund within the Maryland Department of the Environment (MDE) may decrease.

Local Effect: The bill is not anticipated to materially affect local government operations or finances.

Small Business Effect: MDE has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary: Mitigation through a mitigation bank must be accomplished within a "service area," as determined by MDE in coordination with an interagency review team. A service area must be consistent with federal guidelines and in the same eight-digit "hydrologic unit code" watershed in which the mitigation bank is located. However, if environmentally justified, a service area may be expanded. A "service area" is defined as the geographic area within which impacts can be mitigated at a specific mitigation bank, as designated in its instrument.

The bill defines "hydrologic unit" as a drainage area (1) within a multilevel hierarchical drainage system established under the National Watershed Boundary Dataset as published by the U.S. Geological Survey and (2) within 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 other similar surface area. The "hydrologic unit code" is the numerical identifier that describes a hydrologic unit's physical location and position within the drainage system hierarchy.

Finally, the bill establishes that public notice and comment is required when siting any wetland bank, not just those that are greater than five acres in size.

Current Law/Background: A person must obtain a permit from MDE before conducting a regulated activity in nontidal wetlands. During the permit application review process, MDE works with an applicant to prevent wetland loss by requiring an evaluation of project designs that will avoid wetland impacts. Based on this evaluation of alternatives, if MDE finds that impacts are unavoidable, the applicant must utilize the project design that will minimize the impacts and provide appropriate mitigation for those impacts. Mitigation means that an applicant must replace lost wetland acreage and function. This is usually accomplished by creating new wetlands, restoring relic wetlands, enhancing degraded wetlands, or by completing a combination of these options. MDE may also accept monetary compensation if it is determined that mitigation for nontidal wetland losses is not feasible.

Historically, the preferred method for satisfying both State and federal regulatory wetlands mitigation requirements was for the permittee to mitigate on site or to find an appropriate off-site location. However, the National Academy of Sciences has shown that permittee-responsible mitigation results in a patchwork of small ecologically-isolated mitigation projects that are often less successful, provide less function, and require more time to manage than larger projects, which would be promoted by a mitigation banking industry. Additionally, according to MDE, opportunities for permittee-responsible mitigation are getting more difficult to find and result in additional time and effort required by an applicant. Data presented at the 2015 National Mitigation & Ecosystem Banking

Conference showed that applicants relying on mitigation bank credits to offset their unavoidable impacts receive permit approval more quickly than do those who use other mitigation options.

In 1993, the Nontidal Wetlands Protection Act was amended to encourage the development of a mitigation banking industry in Maryland. 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. However, only seven mitigation banks have been approved and built in Maryland since then. According to MDE, a major factor that has contributed to the weak mitigation banking industry in Maryland is a statutory disincentive requiring higher compensation ratios when a permittee chooses to mitigate by purchasing credits from an approved mitigation bank. This disincentive, coupled with limited mitigation acreage needed by permittees to compensate for unavoidable nontidal wetland impacts, strict siting guidelines, small service areas, and expensive start-up costs, made mitigation banking financially unattractive in Maryland.

The U.S. Environmental Protection Agency released a Federal Mitigation Rule in 2008 that established mitigation banking as the preferred method to compensate for unavoidable impacts to aquatic resources. MDE notes that the bill aligns Maryland's mitigation banking provisions with the federal rule and that the bill is intended to stimulate mitigation banking in the State.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Department of the Environment, Department of General Services, Department of Natural Resources, Maryland Department of Transportation, Department of Legislative Services

Fiscal Note History: First Reader - February 29, 2016
min/lgc Revised - House Third Reader - March 31, 2016

Analysis by: Kathleen P. Kennedy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Nontidal Wetlands – Nontidal Wetland Mitigation Banking

BILL NUMBER: **HB 797**

PREPARED BY: Department of the Environment
(Dept./Agency)

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

__X__ WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

______ WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

This Bill will result in the creation of mitigation banks (which could be managed by small businesses). Other businesses affected by the proposed legislation are those that are conducting regulated activities in nontidal wetlands and, as a result of these activities, are required to obtain an authorization from the Department and the U.S. Army Corps of Engineers. The proposed legislation eliminates a provision of the Nontidal Wetlands Protection Act that requires higher replacement ratios for authorized nontidal wetland losses offset through a mitigation bank. The legislation would remove the disincentive to mitigation banking created by unfavorable compensation ratios, align the State's mitigation preferences with Federal standards, and stimulate Maryland's mitigation banking industry. While difficult to quantify, a vibrant mitigation banking industry in Maryland will benefit the business community by providing additional options to satisfy compensatory mitigation required by authorizations issued by the Department or the U.S. Army Corps of Engineers at a lower cost.