

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader - Revised

House Bill 530
(Delegate Kerr)
Environment and Transportation

Natural Resources – Forest Mitigation Banks and the Forest Conservation Fund
– Alterations

This bill makes permanent, and modifies, provisions relating to “qualified conservation” under the Forest Conservation Act (FCA), that were enacted under Chapter 645 of 2021 and otherwise terminate June 30, 2024. The bill also increases the amount of time the Department of Natural Resources (DNR) has to accomplish reforestation or afforestation with money deposited in the State Forest Conservation Fund. **The bill takes effect July 1, 2023.**

Fiscal Summary

State Effect: Special fund revenues may decrease, beginning in FY 2024, as discussed below. No direct, material impact on expenditures.

Local Effect: Local government revenues may decrease, beginning in FY 2024, as discussed below. No direct, material impact on expenditures.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Qualified Conservation

The bill makes permanent, and modifies, provisions enacted under Chapter 645 that (1) modified the definition of “forest mitigation banking” under FCA to include qualified

conservation (specified conservation of existing forest) and (2) allow for qualified conservation – which, by definition, is conservation of existing forest approved for the purpose of establishing a forest mitigation bank on or before December 31, 2020 – to be used to meet afforestation or reforestation requirements through afforestation or reforestation credit for 50% of the forest area encumbered in perpetuity.

The bill removes the December 31, 2020 time limitation from the definition of “qualified conservation” so that, under the bill, “qualified conservation” means the conservation of all or a part of an existing forest that (1) has been approved by the appropriate State or local forest conservation program for the purpose of establishing a forest mitigation bank and (2) is encumbered in perpetuity by a restrictive easement, covenant, or another similar mechanism recorded in the county land records to conserve its character as a forest.

The bill also makes the provision established under Chapter 645 that allows for qualified conservation to be used to meet afforestation or reforestation requirements (but only with 50% of the forest area encumbered in perpetuity) applicable only to a “qualified project.” A “qualified project” means a project that uses qualified conservation for which an application was submitted or approved on or before December 31, 2020.

Forest Conservation Fund

The bill also increases the amount of time within which DNR must accomplish reforestation or afforestation for which money is deposited in the State Forest Conservation Fund, before any portion that has not been used must be returned to the person who provided the money to be used for documented tree planting in the same county or watershed beyond that required by FCA or other applicable statutes. The amount of time is increased from two years or three growing seasons to five years or six growing seasons. The bill also establishes that the money must be used, *or encumbered*, within that time period.

Current Law:

Forest Conservation Act – Generally

The Forest Service within DNR administers FCA, but it is primarily implemented on the local level. FCA establishes minimum forest conservation requirements for land development, and local governments with planning and zoning authority are required to develop local forest conservation programs that meet or are more stringent than the requirements of FCA. However, FCA does not apply in Allegany and Garrett counties, or in municipalities within those counties, because FCA does not apply to a county that has and maintains 200,000 acres or more of its land area in forest cover. FCA applies to any public or private subdivision plan or application for a grading or sediment control permit

by any person, including a unit of State or local government, on areas 40,000 square feet (0.9 acres) or greater, subject to certain exceptions.

A proposed construction activity goes through a process of evaluation of existing vegetation on a site and development of a forest conservation plan for the site defining how forest area will be retained and/or afforestation or reforestation will be undertaken. If afforestation or reforestation requirements cannot be reasonably accomplished on site or off site (which can include use of off-site forest mitigation banks), payment may be made into the applicable forest conservation fund (fee-in-lieu payments) to be spent by the State or the local government on reforestation and afforestation, maintenance of existing forest, and achieving urban canopy goals.

Interpretation of What Constitutes Forest Mitigation Banking

Historically, local forest mitigation banking programs have provided credits to developers who preserve existing forested lands by recording restrictive easements that run in perpetuity. However, in October 2020, the Office of the Attorney General (OAG) issued an [opinion](#) addressing whether FCA allowed off-site forest mitigation banks that were established to preserve existing forest. In its opinion, OAG concluded that the placement of a protective easement on an *already-existing* forest, as opposed to *intentionally created or restored forest*, would not qualify as mitigation banking under FCA. As a result, at least some local governments suspended the granting of credits for existing forest.

To restore the historical interpretation and allow retention mitigation banks (conservation of existing forest), Chapter 645 altered the definition of “forest mitigation banking” to mean the intentional restoration, creation, or *qualified conservation* of forests undertaken expressly for the purpose of providing credits for afforestation or reforestation requirements with enhanced environmental benefits from future activities.

Qualified Conservation

Pursuant to Chapter 645, “qualified conservation” means the conservation of all or a part of an existing forest that (1) was approved *on or before December 31, 2020*, by the appropriate State or local forest conservation program for the purpose of establishing a forest mitigation bank and (2) is encumbered in perpetuity by a restrictive easement, covenant, or another similar mechanism recorded in the county land records to conserve its character as a forest.

Qualified conservation completed in a forest mitigation bank may be used, by a State or local forest conservation program, as a method in establishing standards for meeting afforestation or reforestation requirements under FCA. The afforestation or reforestation credit granted for qualified conservation completed in a forest mitigation bank may not

exceed 50% of the forest area encumbered in perpetuity. Credits in a mitigation bank may not be approved for debiting until qualified conservation of the mitigation bank is complete.

The forest mitigation banking provisions of Chapter 645 terminate June 30, 2024.

Forest Conservation Fund

The State Forest Conservation Fund holds funds associated with projects reviewed by the State, and local forest conservation funds are associated with local forest conservation programs. DNR must accomplish the reforestation or afforestation for which funds are deposited into the fund *within two years or three growing seasons* after receipt of the funds. Deposited funds must remain in the fund for a period of *two years and three growing seasons*, after which any portion of the funds that have not been used must be returned to the person who provided the funds to be used for documented tree planting.

State/Local Fiscal Effect: State special fund revenues and local government revenues may decrease, beginning in fiscal 2024, as a result of reduced fee-in-lieu payments made to the State Forest Conservation Fund and local forest conservation funds to the extent the bill allows for greater use of forest mitigation banks to meet afforestation and reforestation requirements (lessening the need for fee-in-lieu payments), under its provisions related to qualified conservation. The extent of any decrease in revenues cannot be reliably estimated.

Although the bill extends the timeframe for DNR to expend funds from the State Forest Conservation Fund before they revert to the entity who provided the funds, based on information provided by DNR, the bill is not anticipated to materially affect State special fund expenditures.

Small Business Effect: Small businesses engaging in construction activity and those that own forest mitigation banks may be positively affected to the extent the bill allows for greater use of forest mitigation banks to meet afforestation and reforestation requirements.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Baltimore, Frederick, and Montgomery counties; Maryland-National Capital Park and Planning Commission; Department of Natural Resources; Department of Legislative Services

Fiscal Note History: First Reader - February 28, 2023

rh/lgc Revised - Correction - June 14, 2023

Analysis by: Scott D. Kennedy

Direct Inquiries to:

(410) 946-5510

(301) 970-5510