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Committee: Education, Health, and Environmental Affairs
Testimony on: HB991 – “Forest Mitigation Banks – Qualified Conservation”
Position: Oppose
Hearing Date: March 31, 2021

The Maryland Sierra Club strongly opposes HB991 as currently drafted. However, if the Senate amends the bill to **sunset the effective life of the new forest mitigation banking program** proposed by the bill, we would agree that a “favorable with amendments” report is appropriate.

The proposal to enact a new, permanent mitigation banking program threatens to substantially undermine the state’s Forest Conservation Act (FCA), and is a significant change to existing law.

Moreover, enacting this now as a permanent change is completely at odds with the bill’s separate requirement that a broad study of forest policy – including mitigation banking – be undertaken to determine what changes may be needed to the FCA. Indeed, the Senate is on record since 2017 that a comprehensive FCA study is needed, which includes a review of forest mitigation banking. Making a permanent change now to mitigation banking improperly puts the legislative cart far in front of the horse.

Mitigation Banking -- Background

HB991 would amend the FCA, whose purpose is to protect the state’s valuable forests by mitigating the impacts of development on forested areas. The Act seeks to do this by requiring developers whose project sites include forested land to take certain prescribed steps to offset the impact of their development on the state’s forests. The preferred approach is for developers to retain forests located on-site. However, if that cannot be done within the parameters of the Act, developers then must take measures off-site to offset the on-site impacts.

One of the several off-site measures available to developers under the FCA is forest mitigation banking. The Act defines mitigation banking as follows: “the intentional restoration or creation of forests undertaken expressly for the purpose of providing credits for afforestation or reforestation requirements with enhanced environmental benefits from future activities.”

As explained in a legal opinion issued by the Attorney General last year, this statutory language means that a mitigation bank only may be applied to land “intentionally afforested or reforested for the express purpose of creating a mitigation bank,” in other words, to land on which trees were planted to create the mitigation bank. 105 Op. Att’y 66.¹

The key point is that, under the FCA as written, and as explained by the Attorney General, mitigation banking does not include “the placement of a protective easement on already-existing forest.” *Id.*

This limitation on mitigation banking makes eminent sense. For example, if a developer places a protective easement on already-forested land and that forest has little or no risk of being cut down,

¹ <https://www.marylandattorneygeneral.gov/Opinions%20Documents/2020/105oag066%20.pdf>. The opinion includes a very detailed and comprehensive discussion of FCA provisions relating to mitigation banking, and the legislative history of these provisions.

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counting that easement as mitigation banking would say that the developer has thereby offset the destruction of forest located on the development site when, in reality, no offset has occurred.

Notwithstanding the clear requirements of the FCA regarding mitigation banking and the sound policy concerns that underlie these requirements, some localities, supported by the Department of Natural Resources, have over time allowed developers to offset the impact of their developments on forested areas by establishing mitigation banks which place “a protective easement on already-existing forest.” In other words, there apparently has been a longstanding series of FCA violations.

Recent Legislative Efforts to Review and Strengthen the Forest Conservation Act

The past few years have seen a vigorous and ongoing debate regarding the adequacy of the FCA, and whether it should be strengthened to better protect Maryland’s forests. Mostly as a result of development, the state is losing about 3,000 acres of forest every year. Forests are a crucial and invaluable state resource – they protect water quality, provide wildlife habitats, sequester carbon, improve air quality, and reduce flooding.

In 2017, the Senate passed a bill to undertake a comprehensive study of the FCA. However, the bill was not passed by the House.²

In 2018, this Committee reported favorably with amendments a wide-ranging bill to strengthen the FCA. The bill was amended on the floor to instead institute a study, and the Senate passed the bill in that form. The House passed the bill with somewhat different study provisions, and the session ended before the two versions could be reconciled.³

In 2019, the General Assembly finally did enact legislation to require a comprehensive study of the status of Maryland’s forests and the state’s forest protection efforts.⁴ The study was to be completed by December 1, 2019, but was not done.

The 2019 study, according to the legislation, was to include “a review of forest mitigation banking in the State.” The 2017 and 2018 study bills also sought a review of forest mitigation banking.

HB991

This legislation would do three things. First, it would retroactively validate all forest mitigation banks previously granted for already-existing forest so long as “they were approved in good faith.” Second, it would permanently amend the Forest Conservation Act to specify that forest mitigation banks may include the placement of “a restrictive easement, covenant, or another similar mechanism” on land that already is forested. Third, it would revive the forest study legislated in 2019, specifying that it now

² Introduced by Senator Young and Delegate Healey, the bill in its original form sought to make certain targeted substantive changes to strengthen the FCA (SB365/HB599).

³ This bill also was introduced by Senator Young and Delegate Healey, and began as a comprehensive reform bill (SB610/HB766).

⁴ The 2019 legislation was sponsored by Senator Guzzone and Delegate Healey). Ch. 405, SB729 (2019).

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should be completed by December 1, 2023 (four years after the original completion date). The study again is to include “a review of forest mitigation banking in the State.”

With regard to the retroactive validation of past FCA violations, we do not object to this provision. Our view is based on the extent to which there apparently was a general – although mistaken – understanding that mitigation banks could be placed on already-forested land, and the problems that would occur if one were to try to now revisit the developments that made use of unlawful mitigation banks.

We also agree it is important that the long-delayed forest study be undertaken. However, we do not agree that it is necessary or appropriate to allow for another two and a half years for the study to be completed. As noted above, the 2019 legislation sought to have the study done in about six-months time.

On the other hand, we strongly object to a permanent modification of the FCA that would allow forest mitigation banks to include the protection of already-forested land. This is bad policy, and is wrong as a matter of legislative process.

Notwithstanding that the practice has been to permit the banking of already-forested land, that was not what the FCA was written to allow. Accordingly, this bill would make a major change to the FCA. And, as discussed above, this change may substantially undermine the ability of the FCA to achieve its mission since it would allow developers to obtain what essentially are “sham” offsets by protecting forests which are at little or no risk of being cut down. This is exactly the wrong direction to go when the state already is losing forests every year, and the FCA is not adequately protecting them.

Furthermore, it is inappropriate to make this permanent change at the same time that the General Assembly is requiring a forest study, which is to include a study of forest mitigation banking. Indeed, as recounted above, the Senate is on record since 2017 that no changes to the FCA should be made until a comprehensive FCA study is prepared, including a study of forest mitigation banking.

In short, the FCA study should precede a permanent change to forest mitigation banking, not come after the change has been legislated.

Given that mitigation banking of already-forested land has been an ongoing practice, and the General Assembly is not in a position to undertake a comprehensive review of the FCA in this session, we would not object to a relatively short validation of that practice going forward. In other words, we urge that if this practice is to be legislated going forward, we strongly believe that it should be sunsetted.

For these reasons, we oppose the bill as currently written, but agree that that bill may go forward if amended to sunset the new forest mitigation banking provisions.

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