



POSITION STATEMENT

Bill: HB 991 - Natural Resources – Forest Mitigation Banks – Qualified Preservation

Position: SUPPORT W/ AMENDMENTS (PROPONENT) **Date:** February 22, 2021

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What The Bill Does: This bill will overcome the impact of a recent [Opinion of the Attorney General](#) and restore a *status quo* that – for decades until now – has given an option to use conservation of existing forests as one of several tools to achieve offsite mitigation that reduces the loss of forest cover from homeowner, developer and government construction projects.

Why We Propose/Support: The Maryland-National Capital Park and Planning Commission (“Commission”) has the local responsibility for regulating development and forest conservation approvals across almost 1,000 square miles in Montgomery and Prince George’s counties. Our agency’s role includes planning and actively enhancing forests and tree cover to protect the quality of life for 2 million people who call our bi-county region their home. Environmental stewards on our staff take this work very seriously. In that regard, the Commission administers two county-level programs that implement [Maryland’s Forest Conservation Act](#) (the “FCA”), which requires developers and other public and private builders to offset the impact of trees lost during construction or clearing according to state-wide mitigation standards. The bill is necessary to restore a proper balance between smart conservation policies and the civic lifeblood of economic development.

Disruption of Prevailing Practice

Historically, the Commission’s forest/woodland conservation programs in both counties have included an option for homeowners, developers and government agencies to satisfy their FCA requirements by using credits from offsite mitigation banks. Property owners would voluntarily create mitigation banks by encumbering existing forests to comply with strict Department of Natural Resources (“DNR”) forest conservation regulations. After a mitigation bank is established, the homeowner, developer, or government agency that must eliminate trees for a project was able to offset or replace the area they disturbed by purchasing credits from the mitigation property owner – the “banker” – who owns the encumbered forested land.

Mitigation banks established from existing forested areas never offered mitigation credits at the same rate as other banks for which forest is “created” though planting – that is, afforested or reforested. Specifically, under all of the local programs working prior to the [opinion](#), existing forest historically would yield only half (50%) of the per area credit allowed for afforestation or reforestation. This

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differential credit follows a long-standing statewide policy preference that favors onsite preservation and new plantings offsite. As amended, the bill maintains – and, for the first time, codifies – that preference for banking existing forest lands.

As required under the FCA, DNR has approved the Commission’s local programs bi-annually without serious disruption for almost 30 years. But the Attorney General’s [opinion](#) portends to upend that history by concluding as follows:

“[A]lready-forested land does not qualify... as a ‘mitigation bank’ unless the land had been intentionally afforested or reforested for the express purpose of creating a mitigation bank... Thus, the placement of a protective easement on already-existing forest, as opposed to intentionally-created-or-restored forest, would not qualify as mitigation banking under the [Forest Conservation] Act.”

Why Passing HB 991 Matters

Enacting HB 991 to restore the *status quo* is essential to avoid a bundle of very serious consequences.

- Homeowners and developers who relied on mitigation credits from existing forest banks for pending/approved construction plans are at risk of projects with void or voidable permits.
- Banking existing forest land is sometimes the best (only) practicable way to preserve really large tracts of tree cover because comparable afforestation/reforestation requires such a significant cash investment.
- Forest owners who already created tree banks to sell credits for existing forests are saddled with a now worthless encumbrance on their property – creating pressure for them to release forested land from protection to develop it.
- Some local jurisdictions will have no offsite mitigation options – including Montgomery and Prince George’s counties – for an indefinite period of time into the future.
- Without offsite options for existing forest, counties and municipalities will face extra costs for park and school projects because they already invested in banks that are disqualified by the opinion, and/or must now pay for new offsite options that are both more scarce and more expensive. The same is true for homeowners and developers in those jurisdictions.
- Eliminating the option of conserving existing forest can effectively create a preference for fees in lieu of mitigation. This collateral consequence of the [opinion](#) runs in direct contradiction to the whole purpose and spirit of 2019 SB 237 (Sen. Young), enacted as 2019 Md. Laws Ch. 602. The impetus of that bill (cross-filed as 2019 HB 272) was to disfavor fees in lieu. Because some jurisdictions will have no viable offsite options, fees in lieu will be the only option for certain projects – which presumes incorrectly that local programs allow fees in all such cases.
- Eliminating conservation of existing forest banks makes planted forests relatively more valuable and is already leading to pressure that will result in a loss of farmland and other agricultural uses which our General Plans (comprehensive plans) in each county are adopted with a serious commitment to protect. The prevailing balance should be restored.

Bi-County Impacts

One local effect of the [opinion](#) has been to trigger a precipitous depletion of any offsite mitigation options for both public or private projects. Since it was issued, like other jurisdictions across the state, our planning departments have suspended granting credits for existing forest which, as a result, has prompted a “run” on the credits from the few planted – afforested or reforested – forest mitigation banks.

Today, there are no remaining offsite credits available in Montgomery County. And the remaining acreage for credits available in Prince George’s County has been almost cut in half – from over 100 acres in October – just since the [opinion](#) was issued. Our planners have received inquiries from at least one property owner thinking about abandoning their farming uses in an agricultural area, as well as another who owns existing forests and is now considering whether to withdraw their worthless protective easements.

The impact on our schools and other public infrastructure projects also will be profound. For example, a preliminary report by the Montgomery County DOT indicates that it will need to spend another \$4 million to replace tree mitigation areas it already purchased to offset its plans for county road construction projects. The Commission is still assessing the full impact of the change on its entire capital improvements program and anticipates a need for significant budget revisions as a result.

For these reasons, the Commission urges a favorable report and passage of the bill as amended.

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