

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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HOUSE BILL 1251

Short Title: Wetlands Mitigation and Funds.

(Public)

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Sponsors: Representatives Nichols; Culp, Mitchell, and Tolson.

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Referred to: Appropriations.

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May 20, 1996

A BILL TO BE ENTITLED

1 AN ACT TO DIRECT THE APPROPRIATE STATE DEPARTMENTS HOW TO  
2 EXERCISE THE STATE'S AUTHORITY UNDER THE CLEAN WATER ACT, TO  
3 ESTABLISH THE WETLANDS RESTORATION PROGRAM AND FUND, AND  
4 TO APPROPRIATE FUNDS TO IMPLEMENT THE PROGRAM AS  
5 RECOMMENDED BY THE LEGISLATIVE STUDY COMMISSION ON  
6 WETLANDS.  
7

8 The General Assembly of North Carolina enacts:

9 Section 1. G.S. 143B-282(a)(1) reads as rewritten:

10 "(a) There is hereby created the Environmental Management Commission of the  
11 Department of Environment, Health, and Natural Resources with the power and duty to  
12 promulgate rules to be followed in the protection, preservation, and enhancement of the  
13 water and air resources of the State.

14 (1) Within the limitations of G.S. 143-215.9 concerning industrial health  
15 and safety, the Environmental Management Commission shall have the  
16 following powers and duties:

17 a. To grant a permit or temporary permit, to modify or revoke a  
18 permit, and to refuse to grant permits pursuant to G.S. 143-215.1  
19 and G.S. 143-215.108 with regard to controlling sources of air  
20 and water pollution;

- 1           b.     To issue a special order pursuant to G.S. 143-215.2(b) and G.S.  
2           143-215.110 to any person whom the Commission finds  
3           responsible for causing or contributing to any pollution of water  
4           within such watershed or pollution of the air within the area for  
5           which standards have been established;  
6           c.     To conduct and direct that investigations be conducted pursuant  
7           to G.S. 143-215.3 and G.S. 143-215.108(b)(5);  
8           d.     To conduct public hearings, institute actions in superior court,  
9           and agree upon or enter into settlements, all pursuant to G.S.  
10          143-215.3;  
11          e.     To direct the investigation of any killing of fish and wildlife  
12          pursuant to G.S. 143-215.3;  
13          f.     To consult with any person proposing to construct, install, or  
14          acquire an air or water pollution source pursuant to G.S. 143-  
15          215.3 and G.S. 143-215.111;  
16          g.     To encourage local government units to handle air pollution  
17          problems and to provide technical and consultative assistance  
18          pursuant to G.S. 143-215.3 and G.S. 143-215.112;  
19          h.     To review and have general oversight and supervision over local  
20          air pollution control programs pursuant to G.S. 143-215.3 and  
21          G.S. 143-215.112;  
22          i.     To declare an emergency when it finds a generalized dangerous  
23          condition of water or air pollution pursuant to G.S. 143-215.3;  
24          j.     To render advice and assistance to local government regarding  
25          floodways pursuant to G.S. 143-215.56;  
26          k.     To declare and delineate and modify capacity use areas pursuant  
27          to G.S. 143-215.13;  
28          l.     To grant permits for water use within capacity use areas pursuant  
29          to G.S. 143-215.15;  
30          m.     To direct that investigations be conducted when necessary to  
31          carry out duties regarding capacity use areas pursuant to G.S.  
32          143-215.19;  
33          n.     To approve, disapprove and approve subject to conditions all  
34          applications for dam construction pursuant to G.S. 143-215.28; to  
35          require construction progress reports pursuant to G.S. 143-  
36          215.29;  
37          o.     To halt dam construction pursuant to G.S. 143-215.29;  
38          p.     To grant final approval of dam construction work pursuant to  
39          G.S. 143-215.30;  
40          q.     To have jurisdiction and supervision over the maintenance and  
41          operation of dams pursuant to G.S. 143-215.31;  
42          r.     To direct the inspection of dams pursuant to G.S. 143-215.32;

- 1 s. To modify or revoke any final action previously taken by the  
2 Commission pursuant to G.S. 143-214.1 and G.S. 143-215.107;  
3 ~~and~~  
4 t. To have jurisdiction and supervision over oil pollution pursuant  
5 to Article 21A of Chapter ~~143-~~ 143; and  
6 u. To administer the State's authority under 33 U.S.C. § 1341(a) of  
7 the federal Clean Water Act."

8 Sec. 2. G.S. 143-215.3 is amended by adding the following subsections to  
9 read:

10 "(c1) General Exercise of Powers Granted Under Section 401 of the Federal Clean  
11 Water Act. – The Commission may require that an applicant for certification pursuant to  
12 33 U.S.C. § 1341 shall include in its application to the Commission data and information  
13 necessary to determine compliance with applicable provisions of sections 1311, 1312,  
14 1313, 1316, and 1317 of Title 33 of the United States Code, regarding the activity for  
15 which a federal license or permit is sought.

16 (c2) Certification of Applications for Certain Permits Under Section 404 of the  
17 Clean Water Act. – For the purpose of subsections (c2), (c3), (c4), and (c5) of this  
18 section, the term 'certification' shall mean certification pursuant to section 1341 of Title  
19 33 of the United States Code for applications to the Secretary of the United States Army  
20 or the Administrator of the United States Environmental Protection Agency for permits  
21 for dredge or fill activities conducted in wetlands, other than coastal wetlands as defined  
22 at G.S. 113-229(n)(3), or wetlands within Areas of Environmental Concern established  
23 by the Coastal Resources Commission. For the purposes of this section, 'wetlands shall  
24 mean those areas that are inundated or saturated by an accumulation of surface or  
25 groundwater at a frequency and duration sufficient to support, and that under normal  
26 circumstances do support, a prevalence of vegetation typically adapted for life in  
27 saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and  
28 similar areas. For the purpose of this section, 'wetlands' shall include only those areas  
29 meeting the foregoing definition which also meet the definition of 'waters of the United  
30 States' at 33 C.F.R. § 328.3. With respect to applications for certification for a federally  
31 issued permit for an activity regulated under 33 U.S.C. § 1344:

32 (1) Except as provided in subsection (c3) of this section, the Commission  
33 shall consider only whether the discharge to waters of the United States  
34 will comply with the applicable provisions of sections 1311, 1312,  
35 1313, 1316, and 1317 of Title 33 of the United States Code, and shall  
36 comply with the provisions of 33 U.S.C. § 1341(a);

37 (2) The Commission shall not adopt any criteria which purport to  
38 implement 33 U.S.C. § 1344(b)(1), nor shall the Commission condition  
39 the issuance of any certification upon a review of guidelines  
40 implementing 33 U.S.C. § 1344(b)(1);

41 (3) In considering applications for certification, the Commission shall  
42 consider only the activity for which the permit under 33 U.S.C. § 1344  
43 is sought; the Commission shall consider each application for

1           certification as a separate activity and shall not aggregate activities  
2           except where the District Engineer of the Corps of Engineers has elected  
3           to aggregate such activities for the purpose of issuance of a permit, or  
4           authorization under a nationwide or general permit, under 33 U.S.C. §  
5           1344;

6           (4) For the purpose of delineation of wetlands areas, the Commission shall  
7           defer to delineations approved or performed by the Corps of Engineers;

8           (5) The Commission may issue one certification applicable to all  
9           applications for permits under 33 U.S.C. § 1344 for which the Secretary  
10           of the United States Army has issued a nationwide or general permit  
11           pursuant to the provisions of 33 U.S.C. § 1344(e);

12           (6) The Commission shall grant, grant with conditions, or deny certification  
13           within 45 days of the date an application is received, except that the  
14           Commission and the applicant may agree to extend the review period  
15           for additional 30-day periods; in the event the Commission fails to act  
16           on a certification application within 45 days, or within the period as  
17           extended with applicant's consent, certification shall be deemed to be  
18           waived by the Commission.

19           (c3) Exercise of Certification Authority for Activities Eligible for Federal  
20           Nationwide or General Permits. – With respect to an application for certification for an  
21           activity eligible for inclusion within a nationwide or general permit issued pursuant to 33  
22           U.S.C. § 1344(e), the Commission may condition its certification to require  
23           compensatory mitigation for loss of wetlands and wetlands functions according to the  
24           type of wetlands, as described in subsection (c4), which will be lost as a direct result of  
25           the permitted activity, in accordance with subsection (c5) of this section. Provided  
26           however, that the Commission shall not condition its certification where the District  
27           Engineer of the United States Army Corps of Engineers elects to issue an individual  
28           permit in lieu of the nationwide or general permit.

29           (c4) Wetlands Types. – Wetlands types set forth in subdivisions (1) through (4) of  
30           this subsection shall apply to all wetlands except coastal wetlands defined in G.S. 113-  
31           229(n)(3) or wetlands within Areas of Environmental Concern established by the Coastal  
32           Resources Commission pursuant to G.S. 113A-113. For the purposes of this subsection,  
33           'perennial water body' shall mean a body of navigable waters, as that term is defined at 33  
34           U.S.C. § 1352(7), (i) which has been designated on the most recently published version  
35           of the United States Geological Survey 1:24,000 (7.5 minute) scale topographic map, (ii)  
36           which has an estimated mean annual flow of greater than 0.5 cubic feet per second, and  
37           (iii) which has an estimated 7-day, 10-year low flow of greater than 0.1 cubic feet per  
38           second; provided, that if the water body has been designated as described in (i), it shall be  
39           presumed to be a 'perennial water body', subject to rebuttal by the applicant upon a  
40           showing that either of the criteria set forth in (ii) and (iii) are not satisfied. 'Perennial  
41           water body' shall not include man-made drainage features or conveyances.

- 1           (1) 'Type I wetland' means that portion of any wetland contiguous to and  
2 located within 50 feet of the mean high waterline or normal water level  
3 of any perennial water body.
- 4           (2) 'Type II wetland' means that portion of any wetland contiguous to and  
5 located greater than 50 feet but less than 100 feet from the mean high  
6 waterline or normal water level of any perennial water body.
- 7           (3) 'Type III wetland' means that portion of any wetland contiguous to and  
8 located greater than 100 feet but less than 150 feet from the mean high  
9 waterline or normal water level of any perennial water body.
- 10          (4) 'Type IV wetland' means any wetland not classified as a Type I, II, or III  
11 wetland.

12          (c5) Commission Criteria Regarding Issuance of Certification. – The Commission  
13 shall adopt rules governing the criteria for issuance of a certification pursuant to 33  
14 U.S.C. § 1341 for federal permits under 33 U.S.C. § 1344. For the purposes of this  
15 subsection, the term 'compensatory mitigation' shall mean replacement of wetlands  
16 functions lost as a result of the conversion of wetlands pursuant to a proposed permit  
17 under 33 U.S.C. § 1344, and such replacement shall be of functionally similar  
18 soil/hydrologic regime, but that aquatic life shall be allowed to develop naturally over  
19 time. Compensatory mitigation includes restoration of areas which had previously been  
20 converted from wetlands, creation of wetlands, enhancement of degraded wetlands to  
21 restore wetlands functions, and preservation of areas providing wetlands functions.  
22 Compensatory mitigation also includes contributions in cash or in kind to the Wetlands  
23 Restoration Program established in G.S. 143-214.8, or to comparable mitigation banks  
24 operated privately or by federal or local governments. For the purposes of this  
25 subsection, compensatory mitigation shall be calculated on an acre-to-acre basis, acres of  
26 wetlands restored, created, or enhanced to wetlands converted under the proposed permit  
27 under 33 U.S.C. § 1344, except that for compensatory mitigation accomplished by  
28 preservation, the compensatory mitigation shall be calculated on the basis of one acre  
29 converted under the proposed permit under 33 U.S.C. § 1344 to two acres of wetlands  
30 preserved. The rules adopted pursuant to this subsection shall provide:

- 31           (1) That the Commission shall unconditionally grant the certification for  
32 any application for an activity that will cause the loss of less than one  
33 acre of any wetlands;
- 34           (2) That the Commission shall unconditionally grant the certification for  
35 any application for an activity that will cause the loss of greater than  
36 three acres of wetlands if it determines that the federal permit issued  
37 under 33 U.S.C. § 1344 will comply with the provisions listed in 33  
38 U.S.C. § 1341(a);
- 39           (3) That the Commission shall grant certification for any application for an  
40 activity that will cause the loss of between one and three acres of  
41 wetlands if it determines that the federal permit issued under 33 U.S.C.  
42 § 1344 will comply with the provisions listed in 33 U.S.C. § 1341(a), if  
43 the requirements in this subdivision are met:

- 1           a.     For a Type I wetland: the applicant agrees to provide  
2           compensatory mitigation for loss of Type I wetlands resulting  
3           from the activity permitted under 33 U.S.C. § 1344 on a three-to-  
4           one ratio, acres mitigated to acres of Type I wetlands lost;  
5           b.     For a Type II wetland: the applicant agrees to provide  
6           compensatory mitigation for loss of Type II wetlands resulting  
7           from the activity permitted under 33 U.S.C. § 1344 on a two-to-  
8           one ratio, acres mitigated to acres of Type II wetlands lost;  
9           c.     For a Type III wetland: the applicant agrees to provide  
10          compensatory mitigation for loss of Type III wetlands resulting  
11          from the activity permitted under 33 U.S.C. § 1344 on a one-to-  
12          one ratio, acres mitigated to acres of Type III wetlands lost, if the  
13          Commission finds that the loss of wetlands caused by the activity  
14          permitted under 33 U.S.C. § 1344 will likely result in a violation  
15          of water quality standards.  
16          d.     For a Type IV wetland: the applicant agrees to provide  
17          compensatory mitigation for loss of Type IV wetlands resulting  
18          from the activity permitted under 33 U.S.C. § 1344 on a one-to-  
19          one ratio, acres mitigated to acres of Type IV wetlands lost, if the  
20          Commission can demonstrate that the loss of wetlands caused by  
21          the activity permitted under 33 U.S.C. § 1344 will result in a  
22          violation of water quality standards;

- 23           (4)    The Commission shall unconditionally grant certification for any project  
24           that involves dredge or fill activities conducted in any wetlands that: (i)  
25           are inadvertently created on or after October 18, 1972, through any  
26           construction, mining, agricultural, silvicultural, or other activities, and  
27           (ii) are subject to the provisions of 33 U.S.C. § 1344.

28           (c6)   Commission Rules Regarding Wetlands Classifications. – It is the intent of the  
29           General Assembly that projects involving the deposit of dredged or fill material in  
30           wetlands which require permits under 33 U.S.C. § 1344 shall be certified provided that  
31           the provisions of 33 U.S.C. § 1341(a) are met. The Commission shall not adopt a  
32           separate classification and standards for wetlands under G.S. 143-214.1, except as the  
33           classifications and standards are supplementary and pertain to the maintenance of water  
34           quality standards in the surface streams downstream of the wetlands and to which the  
35           wetlands are tributary.

36           (c7)   Coordination with Wetlands Restoration Program. – Applicants required under  
37           subsection (c3) of this section to provide compensatory mitigation may satisfy such  
38           requirement by donation to the Wetlands Restoration Program established pursuant to  
39           G.S. 143-214.8, provided that the Department shall not require participation in the  
40           Wetlands Restoration Program for this purpose. Nothing in this subsection nor G.S. 143-  
41           214.8 shall prohibit the use or establishment of private mitigation banks or other means  
42           of satisfying the requirements for compensatory mitigation established in this  
43           subsection."

1           Sec. 3. Article 21 of Chapter 143 of the General Statues is amended by adding  
2 the following new sections to read:

3 **"§ 143-214.8. Wetlands Restoration Program: established.**

4       The Wetlands Restoration Program is established within the Department of  
5 Environment, Health, and Natural Resources. The Wetlands Restoration Program shall be  
6 developed by the Department as a nonregulatory statewide wetlands restoration program  
7 for the acquisition, restoration, enhancement, and creation of wetland and riparian  
8 resources that contribute to the protection and improvement of water quality, flood  
9 prevention, fisheries, wildlife habitat, and recreational opportunities. The Wetlands  
10 Restoration Program shall consist of the following components:

- 11           (1) Restoration of wetlands.
- 12           (2) Development of restoration plans.
- 13           (3) Landowner contact and land acquisition.
- 14           (4) Evaluation of site plans and engineering studies.
- 15           (5) Oversight of construction and monitoring of restoration sites.
- 16           (6) Landownership and management.
- 17           (7) Mapping, site identification, and assessment of wetlands functions.

18 **"§ 143-214.9. Wetlands Restoration Program: purposes.**

19       The purposes of the Program are as follows:

- 20           (1) To restore wetlands functions and values across the State to replace  
21 critical functions lost through historic wetlands conversion and through  
22 current and future permitted impacts. It is not the policy of the State to  
23 destroy upland habitats unless it would further the purposes of the  
24 Wetlands Restoration Program.
- 25           (2) To provide a consistent and simplified approach to address mitigation  
26 requirements associated with permits or authorizations issued by the  
27 United States Army Corps of Engineers under 33 U.S.C. § 1344.
- 28           (3) To streamline the wetlands permitting process, minimize delays in  
29 permit decisions, and decrease the burden of permit applicants of  
30 planning and performing compensatory mitigation for wetlands losses.
- 31           (4) To increase the ecological effectiveness of compensatory mitigation.
- 32           (5) To achieve a net increase in wetland acres, functions, and values in each  
33 major river basin.
- 34           (6) To foster a comprehensive approach to environmental protection.

35 **"§ 143-214.10. Wetlands Restoration Program: development and implementation**  
36 **of basinwide restoration plans.**

37       Develop basinwide restoration plans. – The Department shall develop basinwide plans  
38 for wetlands and riparian area restoration with the goal of protecting and enhancing water  
39 quality, flood prevention, fisheries, wildlife habitat, and recreational opportunities within  
40 each of the 17 major river basins in the State. Beginning July 1, 1997, the Department  
41 shall develop and begin implementing a basinwide restoration plan for each of the 17  
42 river basins in the State in accordance with the basinwide schedule currently established  
43 by the Division of Environmental Management.

1 **"§ 143-214.11. Wetlands Restoration Program: compensatory mitigation.**

2 (a) Definition. – For purposes of this subsection, the term 'compensatory  
3 mitigation' means the restoration, creation, enhancement, or preservation of wetlands or  
4 other areas required as a condition of a federal section 404 permit issued by the United  
5 States Army Corps of Engineers.

6 (b) Department of Environment, Health, and Natural Resources to Coordinate  
7 Compensatory Mitigation. – All compensatory mitigation required by permits or  
8 authorizations issued by the United States Army Corps of Engineers under 33 U.S.C. §  
9 1344 shall be coordinated by the Department consistent with the basinwide plans for  
10 wetlands restoration and rules developed by the Environmental Management  
11 Commission. All compensatory wetlands mitigation whether performed by the  
12 Department or by permit applicants, shall be consistent with the basinwide restoration  
13 plans.

14 (c) Mitigation Emphasis on Replacing Ecological Function Within Same River  
15 Basin. – The emphasis of mitigation is on replacing functions within the same river basin  
16 unless it is demonstrated that restoration of other areas would be more beneficial to the  
17 overall purposes of the Wetlands Restoration Program.

18 (d) Compensatory Mitigation Options Available to Applicant. – An applicant may  
19 satisfy compensatory wetlands mitigation requirements by the following actions, if those  
20 actions are consistent with the basinwide restoration plans and also meet or exceed the  
21 requirements of the United States Army Corps of Engineers:

22 (1) Payment of a fee established by the Department into the Wetlands  
23 Restoration Fund established in G.S. 143-214.6.

24 (2) Donation of land to the Wetlands Restoration Program or to other public  
25 or private nonprofit conservation organizations as approved by the  
26 Department.

27 (3) Participation in a private wetlands mitigation bank.

28 (4) Preparing and implementing a wetlands restoration plan.

29 (e) Payment Schedule. – A standardized schedule of per-acre payment amounts  
30 shall be established by the Environmental Management Commission. The monetary  
31 payment shall be based on the ecological functions and values of wetlands permitted to  
32 be lost and on the cost of restoring or creating wetlands capable of performing the same  
33 or similar functions, including directly related costs of wetlands restoration planning,  
34 long-term monitoring and maintenance of restored areas.

35 **"§ 143-214.12. Wetlands Restoration Program: Wetlands Restoration Fund.**

36 (a) Wetlands Restoration Fund. – The Wetlands Restoration Fund is established  
37 as a nonreverting fund within the Department. The Fund shall be treated as a special trust  
38 fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2  
39 and G.S. 147-69.3. The Wetlands Restoration Fund shall provide a repository for  
40 monetary contributions and donations or dedications of interests in real property to  
41 promote projects for the restoration, enhancement, preservation, or creation of wetlands  
42 and riparian areas and for payments made in lieu of compensatory mitigation as described  
43 in subsection (b) of this section. No funds shall be expended from this Fund for any



1 purpose other than those directly contributing to the acquisition, enhancement,  
2 restoration, or creation of wetlands and riparian areas in accordance with the basinwide  
3 plan as described in subsection (a) of this section.

4 (b) Authorized Methods of Payment. – A person subject to a permit or  
5 authorization issued by the United States Army Corps of Engineers under 33 U.S.C. §  
6 1344, may contribute to the Wetlands Restoration Program, to comply with conditions to,  
7 or terms of, the permit or authorization, if participation in the Wetlands Restoration  
8 Program will meet the mitigation requirements of the United States Army Corps of  
9 Engineers. The Department shall, at the discretion of the applicant, accept payment into  
10 the Wetlands Restoration Fund in lieu of other compensatory mitigation requirements of  
11 any authorizations issued by the United States Army Corps of Engineers under 33 U.S.C.  
12 § 1344 if the contributions will meet the mitigation requirements of the United States  
13 Army Corps of Engineers. Payment may be made in the form of monetary contributions  
14 according to a fee schedule established by the Environmental Management Commission  
15 or in the form of donations of real property provided that the property is approved by the  
16 Department as a suitable site consistent with the basinwide wetlands restoration plan.

17 **"§ 143-214.13. Wetlands Restoration Program: reporting requirement.**

18 The Department of Environment, Health, and Natural Resources shall report annually  
19 to the Environmental Review Commission regarding its progress in implementing the  
20 Wetlands Restoration Program and its use of the funds in the Wetlands Restoration Fund.  
21 The report shall document statewide wetlands losses and gains and compensatory  
22 mitigation performed under G.S. 143-214.8 through G.S. 143-214.12. The report shall  
23 also provide an accounting of receipts and disbursements of the Wetlands Restoration  
24 Fund and analysis of the per-acre cost of wetlands restoration. The Department shall also  
25 send a copy of its report to the Fiscal Research Division of the General Assembly."

26 Sec. 4. The Department of Environment, Health, and Natural Resources is  
27 directed to negotiate and enter into a Memorandum of Agreement with the United States  
28 Army Corps of Engineers regarding the restoration, creation, enhancement, and  
29 preservation of wetlands and the compensatory mitigation required of permit applicants  
30 under 33 U.S.C. § 1344. The purpose of the Memorandum of Agreement is to ensure that  
31 the State's implementation of the Wetlands Restoration Program with regard to mitigation  
32 of wetlands satisfies the United States Army Corps of Engineers and that the standards  
33 developed by the State to which the State's and other mitigation banks must adhere is  
34 acceptable to the Corps for purposes of federal section 404 mitigation requirements.

35 Sec. 5. There is appropriated from the General Fund to the Wetlands  
36 Restoration Fund in the Department of Environment, Health, and Natural Resources the  
37 sum of two million dollars (\$2,000,000) for the 1996-97 fiscal year. These funds shall be  
38 used for the Neuse River Basin. It is the intent of the General Assembly that the sum of  
39 two million dollars (\$2,000,000) be appropriated to the Wetlands Restoration Fund each  
40 fiscal year for the next 16 years so that each of the 17 river basins of the State has a two  
41 million dollar (\$2,000,000) appropriation dedicated for use in that particular basin.

42 Sec. 6. There is appropriated from the General Fund to the Department of  
43 Environment, Health, and Natural Resources the sum of seven hundred fifty thousand

1 dollars (\$750,000) in recurring funds for the 1996-97 fiscal year to support 10 staff  
2 positions and for administrative and other expenses to implement the Wetlands  
3 Restoration Program.

4           Sec. 7. This act becomes effective July 1, 1996.