

1 AN ACT relating to stream and wetland mitigation and making an appropriation
2 therefor.

3 *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

4 ➔SECTION 1. A NEW SECTION OF KRS CHAPTER 150 IS CREATED TO
5 READ AS FOLLOWS:

6 *As used in Sections 1 to 3, and 4 of this Act:*

7 *(1) "Compensatory mitigation" means the restoration, establishment, enhancement,*
8 *or preservation of aquatic resources for the purposes of offsetting unavoidable*
9 *adverse impacts which remain after all appropriate and practicable avoidance*
10 *and minimization have been achieved;*

11 *(2) "Compensatory mitigation project" means compensatory mitigation implemented*
12 *by the permittee as a requirement of the Department of Army (DA) permit or by a*
13 *mitigation bank or an in-lieu fee program;*

14 *(3) "Compensatory mitigation site" means compensatory mitigation at appropriate*
15 *locations that are acquired and implemented in a single procurement by the in-*
16 *lieu fee program in order to meet the state's obligations to the Department of the*
17 *Army;*

18 *(4) "DA permit" means Department of Army permit;*

19 *(5) "In-lieu fee program" means a program involving the restoration, establishment,*
20 *enhancement, and preservation of aquatic resources through funds paid to a*
21 *governmental or non-profit natural resources management entity to satisfy*
22 *compensatory mitigation requirements for DA permits. An in-lieu fee program*
23 *assumes a liability in exchange for payment from a permittee;*

24 *(6) "In-lieu fee program instrument" means the legal document for the*
25 *establishment, operation, and use of an in-lieu fee program;*

26 *(7) "Mitigation bank" means a site, or suite of sites, where resources are restored,*
27 *established, enhanced, and preserved for the purpose of providing compensatory*

1 mitigation for impacts authorized by DA permits. Mitigation banks sell
2 compensatory mitigation credits to permittees whose obligation to provide
3 compensatory mitigation is then transferred to the mitigation bank sponsor;

4 (8) "Mitigation credit" means a unit of measure representing the accrual or
5 attainment of aquatic functions at a compensatory mitigation site. The measure
6 of aquatic function is based on the resources restored, established, enhanced, or
7 preserved;

8 (9) "Mitigation liability" means a requirement under a compensatory mitigation
9 program for land acquisition and physical and biological improvements for
10 which payment has been received and no associated physical or biological
11 improvements have occurred in accordance with the governing instrument with
12 the United States Army Corps of Engineers; and

13 (10) "Service area" means the geographic area within which impacts can be mitigated
14 at a specific mitigation bank or an in-lieu fee program.

15 ➔SECTION 2. A NEW SECTION OF KRS CHAPTER 150 IS CREATED TO
16 READ AS FOLLOWS:

17 (1) There is established and created in the State Treasury the "Kentucky wetland and
18 stream mitigation fund" for the purpose of restoring, creating, enhancing, or
19 preserving the Commonwealth's wetlands or streams that may be damaged or
20 destroyed due to any project, recovering costs associated with performing these
21 projects, and administering these programs.

22 (2) The fund shall be deemed a trust and agency fund account and made available
23 solely for the purposes and benefits of the Kentucky wetland and stream
24 mitigation projects.

25 (3) The fund may receive state appropriations, gifts, grants, federal funds, revolving
26 funds, and any other funds both public and private. Money deposited in the fund
27 shall be disbursed by the State Treasurer upon the request of the commissioner

1 with the approval of the commission, except that funds representing a mitigation
2 liability shall be subject to subsections (3),(4),(5),(6), and (7) of Section 4 of this
3 Act.

4 (4) Any unallocated or unencumbered balance in the fund shall be invested as
5 provided in KRS 42.500(9), and any income earned from the investments, along
6 with the unallocated or unencumbered balance in the fund, shall not lapse.

7 (5) The Kentucky wetland and stream mitigation fund shall make a report to the
8 Legislative Research Commission by December 1 of each year that describes the
9 in-lieu fee program, the balance of the fund, and the mitigation liability in the
10 service areas across the Commonwealth.

11 ➔SECTION 3. A NEW SECTION OF KRS CHAPTER 150 IS CREATED TO
12 READ AS FOLLOWS:

13 (1) The Commonwealth may hold a legally binding conservation instrument or deed
14 restriction on mitigation sites.

15 (2) Governmental and non-governmental entities performing compensatory
16 mitigation shall demonstrate adequate, dedicated financial surety to provide for
17 perpetual land management and hydrological maintenance of lands which they
18 acquire.

19 ➔Section 4. KRS 150.255 is amended to read as follows:

20 (1) Upon request of any state agency or any other entity, the department may contract
21 with the agency or party to undertake any compensatory mitigation project,
22 including, but not limited to, wetland or stream mitigation.

23 (2) The department may establish and manage wetland or stream compensatory
24 mitigation sites or banks, the purpose of which shall be to restore, create, or
25 enhance wetlands and streams as compensatory mitigation where a state agency or
26 other party is required to provide compensatory mitigation, and where the use of
27 banked mitigation is approved by the agency requiring mitigation. The department

1 may create the bank in advance of requests for banked mitigation credits.

2 (3) Mitigation liabilities of a state or governmental agency or private permittee may
3 be satisfied by the following actions in order of preference:

4 (a) Purchase of mitigation credits from a compensatory mitigation bank that
5 has been approved by the United States Army Corps of Engineers, provided
6 that the department or the United States Army Corps of Engineers approves
7 of the use of the bank for the required compensatory mitigation;

8 (b) Payment of a fee into the Kentucky wetland and stream mitigation fund; or

9 (c) Preparation and implementation of a compensatory mitigation plan.

10 (4) When mitigation liabilities assumed by the in-lieu fee program in a given service
11 area exceed two million dollars (\$2,000,000), the satisfaction of those mitigation
12 liabilities shall be achieved by the in-lieu fee program using the following
13 approaches, listed in the following order of preference:

14 (a) Purchase of mitigation credits from an approved mitigation bank, provided
15 the cost per credit is equal to or less than the in-lieu fee price; or

16 (b) Issuance of a competitive solicitation for a commodity purchase using
17 sealed bids or competitive negotiation under KRS Chapter 45A.

18 (5) The competitive solicitation shall procure compensatory mitigation units utilizing
19 a full-delivery approach. The successful offeror shall complete the following
20 actions with respect to the mitigation site:

21 (a) Locate the site;

22 (b) Acquire the site;

23 (c) Permit the project; and

24 (d) Design and build the project.

25 (6) All compensatory mitigation projects shall go out under a request for proposal
26 issued by the Finance and Administration Cabinet in accordance with KRS
27 Chapter 45A. A compensatory mitigation project may be deemed a capital

1 construction project and the Commonwealth may hold a conservation easement,
2 deed restrictions, or covenant on the project.

3 (7) Responsive bidders may submit proposals to perform compensatory mitigation to
4 satisfy mitigation liabilities in a service area or watershed and receive payment
5 from the Kentucky wetland and stream mitigation fund. Responsive bidders shall
6 have evidence of sufficient financial assurance to secure the project performance
7 and shall rebate to the state the value of any credits not performed by the
8 mitigation.

9 ~~[There is established and created in the State Treasury the "Kentucky Wetland and Stream~~
10 ~~Mitigation Fund" for the purpose of restoring, creating, enhancing, or preserving the~~
11 ~~Commonwealth's wetlands or streams that may be damaged or destroyed due to any~~
12 ~~project, recovering costs associated with performing these projects, and~~
13 ~~administering these programs.~~

14 ~~The fund shall be deemed a trust and agency fund account and made available solely for~~
15 ~~the purposes and benefits of the Kentucky wetland and stream mitigation projects.~~
16 ~~The fund may receive state appropriations, gifts, grants, federal funds, revolving~~
17 ~~funds, and any other funds both public and private. Money deposited in the fund~~
18 ~~shall be disbursed by the State Treasurer upon the request of the commissioner with~~
19 ~~the approval of the commission. Any unallocated or unencumbered balance in the~~
20 ~~fund shall be invested as provided in KRS 42.500(9), and any income earned from~~
21 ~~the investments, along with the unallocated or unencumbered balance in the fund,~~
22 ~~shall not lapse.]~~