

Department of Legislative Services  
Maryland General Assembly  
2022 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 960 (Delegate Kerr)  
Environment and Transportation

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

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This bill alters the definition of “qualified conservation” under the Forest Conservation Act (FCA) as it relates to forest mitigation banks by removing the requirement that the conservation of all or a part of an existing forest must have been approved *on or before December 31, 2020*; in accordance with current law, the use of qualified conservation terminates June 30, 2024. The bill also extends the timeframe (by three years or three growing seasons) for (1) the Department of Natural Resources (DNR) to accomplish the reforestation and afforestation for which funds are deposited into the State Forest Conservation Fund and (2) unused funds to remain in the State Forest Conservation Fund before they must revert to the entity who provided the funds. **The bill takes effect July 1, 2022.**

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Fiscal Summary

**State Effect:** Although the bill extends the timeframe for DNR to expend funds from the 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 operations or finances.

**Local Effect:** In general, the bill restores the historical interpretation of what qualifies as a forest mitigation bank under FCA (until the provisions terminate in accordance with current law). As a result, local finances may be affected, as discussed below.

**Small Business Effect:** Potential meaningful.

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## Analysis

### 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. 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 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 allows 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 issuance of credits for planted forest.

To restore the historical interpretation and allow retention mitigation banks (conservation of existing forest), Chapter 645 of 2021 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 may be completed in a forest mitigation bank to 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 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.

**Local/Small Business Effect:** Chapter 645 restored DNR’s interpretation temporarily (through June 30, 2024) to enable local governments to use retention mitigation banks (conservation of existing forest) approved before January 1, 2021. By altering the definition of “qualified conservation” under the bill, local governments may resume the use of such conservation activities approved on or after January 1, 2021, to meet FCA requirements (until these provisions terminate in accordance with current law). Accordingly, potential impacts on local forest conservation programs, costs related to mitigation, the value of existing mitigation banks, farmers and other landowners, and related economic development are avoided.

## **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** SB 651 (Senator Young) - Education, Health, and Environmental Affairs.

**Information Source(s):** Anne Arundel, Baltimore, Charles, Frederick, Montgomery, and Somerset counties; Department of Natural Resources; Department of Legislative Services

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