

SENATE BILL REPORT

E2SHB 2339

As Reported By Senate Committee On:
Agriculture & Environment, February 26, 1998
Ways & Means, March 2, 1998

Title: An act relating to wetlands mitigation banking.

Brief Description: Authorizing wetlands mitigation banking.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Thompson, Mulliken, Pennington, Gardner, Romero, Chopp, Anderson, Boldt and Lantz).

Brief History:

Committee Activity: Agriculture & Environment: 2/25/98, 2/26/98 [DPA-WM].
Ways & Means: 3/2/98 [DPA (AE)].

SENATE COMMITTEE ON AGRICULTURE & ENVIRONMENT

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Morton, Chair; Swecker, Vice Chair; Fraser, McAuliffe, Oke and Rasmussen.

Staff: Kari Guy (786-7437)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Agriculture & Environment.
Signed by Senators West, Chair; Deccio, Vice Chair; Strannigan, Vice Chair; Bauer, Fraser, Hochstatter, Kohl, Long, Loveland, McDonald, Rossi, Schow, Snyder, Spanel, Swecker, Thibaudeau and Zarelli.

Staff: Kari Guy (786-7437)

Background: A number of federal, state, and local laws govern wetlands. Generally, proposals to drain, fill, or otherwise modify wetlands require a permit from the Army Corps of Engineers under Section 404 of the Clean Water Act. Section 404 permits require a Section 401 Certification from the Department of Ecology that the project meets state water quality standards. Some limited wetlands activity does not require individual Clean Water Act permits.

Under the Hydraulic Code, wetlands work that affects the bed or flow of state waters requires a Hydraulic Project Approval for the protection of fish life from the Department of Fish and Wildlife.

Under the Growth Management Act, cities and counties must adopt regulations protecting critical areas, including wetlands. Most cities and counties require permits for activities in or near wetlands. Local governments also have some permitting authority for wetlands covered by the Shoreline Management Act.

When a landowner proposes a project for which an impact to wetlands is authorized, generally the landowner must compensate for the impact to the wetlands. Mitigation banking is one form of compensation for wetlands impacts.

Typically, a wetlands "banker" develops a bank of functioning wetlands by restoring previously drained or filled wetlands. Units of the banked wetlands are then calculated as a certain number of "credits" based on the function or value of the wetlands in the bank. If approved by regulatory agencies, these credits can be withdrawn to offset wetland impacts, or "debits" at a development site. Banks may be public banks, sponsored by public entities impacting wetlands, or may be private entrepreneurial banks, in which a bank sponsor, with regulatory approval, may sell credits in the bank to a developer to compensate for impact of the developer's project. Wetland banking is contrasted with project-specific replacement, where the project sponsor does specific restoration or other mitigation to replace a particular wetland that is to be impacted.

At the federal level, an Interagency Working Group on Federal Wetlands Policy has issued guidance on mitigation banks. In Washington, the state and local governments may approve mitigation banks under their general authority to regulate wetlands, but there is no specific statutory authorization for banks. A number of Washington cities and counties have adopted or are considering local ordinances on mitigation banks.

Summary of Amended Bill: Wetlands mitigation banking is specifically authorized. A state agency or local government may approve use of credits from a bank for mitigation required under a permit issued or approved by the agency or local government. A mitigation bank is a site where wetlands are restored, created, enhanced, or in exceptional circumstances, preserved, to provide compensatory mitigation in advance of authorized impacts to similar resources.

The Department of Ecology may certify banks meeting the requirements of the chapter. Certification is accomplished through a banking instrument, which documents agency and bank sponsor concurrence on administration of the bank, including defining the credits to be used and the service area for which the bank may provide compensation.

Before Ecology authorizes use of credits from a bank to mitigate under an Ecology issued or approved permit, Ecology must assure that all appropriate and practicable steps have been undertaken to first avoid and then minimize adverse impacts to wetlands. Ecology may approve use of credits from a bank when there is no practicable opportunity for on-site compensation, or when use of a bank is environmentally preferable to on-site compensation, and when the credits represent the creation or restoration of wetlands of like kind and in close proximity to the wetlands being mitigated.

Using a collaborative process, Ecology must adopt rules addressing:

- Certification, operation, and monitoring of banks. Priority is to be given to banks restoring former wetlands. Banks involving creation and enhancement of wetlands may be certified only where there are adequate assurances of success and that the bank will result in an overall environmental benefit. Banks involving the preservation of wetlands or associated uplands may be certified only in limited circumstances.
- Determination and release of credits from banks. The credit procedures must authorize the use and sale of credits to offset adverse impacts and the phased release of credits as the performance standards are met.
- Public involvement in the certification of banks, using existing statutory authority.
- Coordination of governmental agencies.
- Establishment of criteria for determining service areas for each bank. The service area is the geographic area in which a bank can reasonably be expected to provide appropriate compensation for wetland impacts.
- Performance standards.
- Long-term management, financial assurances, and remediation for certified banks.

Ecology must submit a report to the Legislature before January 30, 1999 on its progress in developing rules. Before adopting rules Ecology must submit proposed rules to the Legislature.

The interpretation of the chapter and the rules must be consistent with applicable federal guidance.

If specific funding is not provided in the Omnibus Appropriations Act, the bill is null and void.

Amended Bill Compared to Substitute Bill: A phased release of credits is allowed as different levels of performance standards are met, rather than allowing release of credits before standards are met. The definition of "practicable" is expanded to include consideration of the functions and values of wetlands, as well as consideration of cost, technology, and logistics. The Department of Ecology may approve use of credits from a bank when the credits represent the creation or restoration of wetlands of like kind and in close proximity to the wetlands being mitigated.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For (Agriculture & Environment): Use of mitigation banking can cut mitigation costs by up to 50 percent and take the guesswork out of mitigation. Rules governing mitigation banking will increase predictability for local governments and developers. This will also benefit regulators who would have to monitor fewer, large sites. The bill was developed through an inclusive process, and stakeholders will continue to be involved in the development of rules.

Testimony Against (Agriculture & Environment): The bill does not require in-kind exchanges, which could lead to a loss of salt-water habitat needed for salmon. The bill could create the opportunity to rush to mitigation rather than first attempting avoidance. Advance credits should not be allowed until all performance standards are met. Preservation should not be allowed to qualify as mitigation.

Testified (Agriculture & Environment): Bruce Wishart, People for Puget Sound; Tom Mark, Ecology (pro); Ron Shultz, National Audubon Society (concerns); Jodi Walker, BIAW (pro); Peter Birch, WA Dept. of Fish and Wildlife (pro); John Dohrmann, Puget Sound Water Quality Action Team (pro); Jerry Alb, WSDOT (pro); Elsa Gruber, private citizen.

Testimony For (Ways & Means): Mitigation banking provides the highest and best use of mitigation dollars. Collaborative rule-making will ensure a balanced approach. The bill will not undermine environmental protection.

Testimony Against (Ways & Means): None.

Testified (Ways & Means): PRO: Representative Bill Thompson, prime sponsor; Jerry Alb, DOT; Jodi Walker, BIAW; Mark Triplett, Triplett & Associates, Inc.