

HOUSE BILL REPORT

HB 2339

As Reported By House Committee On:
Government Reform & Land Use
Appropriations

Title: An act relating to wetlands mitigation banking.

Brief Description: Authorizing wetlands mitigation banking.

Sponsors: House Committee on House Government Reform & Land Use (originally sponsored by Representatives Thompson, Mulliken, Pennington, Gardner, Romero, Chopp, Anderson, Boldt and Lantz).

Brief History:

Committee Activity:

Government Reform & Land Use: 1/14/98, 1/22/98 [DPS];
Appropriations: 2/4/98, 2/7/98 [DP2S(w/o sub GRLU)].

HOUSE COMMITTEE ON GOVERNMENT REFORM & LAND USE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Reams, Chairman; Cairnes, Vice Chairman; Sherstad, Vice Chairman; Romero, Ranking Minority Member; Lantz, Assistant Ranking Minority Member; Bush; Mielke; Mulliken and Thompson.

Minority Report: Do not pass. Signed by 2 members: Representatives Fisher and Gardner.

Staff: Joan Elgee (786-7135).

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 (DOE) that the project meets state water quality standards. (Some limited wetlands activity does not require individual Clean Water Act permits.) DOE also has some permit authority to regulate wetlands under the Shoreline Management Act.

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 & 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. At least 10 states have adopted mitigation banking statutes.

Summary of Substitute Bill: Wetlands mitigation banking is specifically authorized. 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 provisions apply to both public and private banks.

The Department of Ecology (DOE) may certify banks meeting the requirements of the chapter. Certification is accomplished through a banking instrument, which documents the agency and bank sponsor concurrence on the objectives and administration of the bank. State agencies may approve use of a bank for any compensatory mitigation of a wetland impact required under a permit issued or approved by that state agency.

DOE must approve use of a particular bank on a project-specific basis. Sequencing is required, so that before authorizing use of a bank, DOE must assure that all appropriate and practicable steps have been undertaken to first avoid and then minimize adverse impacts to wetlands. DOE may approve use of 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.

Using a collaborative process, DOE must adopt rules. Before adopting the rules, DOE must submit the rules to the appropriate standing committees of the Legislature. The rules must address:

- 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 release of credits before all of the performance standards have been 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.

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

Substitute Bill Compared to Substitute Bill: The substitute bill adds language stating that it is not the Legislature's intent to create any new authority for regulating wetlands beyond what is provided in the chapter.

Several changes are made with respect to rule-making: Instead of adopting rules in consultation with state and federal agencies, DOE is to use a collaborative process involving interested public and private entities. General rule-making authority is eliminated, and the topics the rules are to address is expanded. Rules regarding credits must authorize the use and sale of credits and the release of credits before all performance standards have been met. Rules are also to address performance standards. Existing statutory authority is to be used for the public involvement in the certification of banks.

The requirement that the service area generally be the watershed and the criteria for modifying the service area to be other than the watershed are eliminated. Instead, DOE is to establish criteria for determining service areas for each bank.

The provision stating that certification shall be accomplished through a banking instrument is added, as well as related definitions.

The provisions stating that the requirements shall not affect operating banks is eliminated.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: Mitigation banks are a "win-win." You know what you are getting up front, so costs for development should be less, and we will see some excellent large wetlands restored. This bill provides the certainty that bank developers need to take the risk to develop a bank and provides assurances that the ecological benefits of banks will be realized.

Testimony Against: (concerns only) Concerns were expressed about the need to ensure no net loss of wetland functions and acreage. The suggestion was made that the Legislature move cautiously because problems could occur if banks are not carefully implemented and protections provided.

Testified: (Pro) Representative Bill Thompson, Prime Sponsor; Gordon White, Department of Ecology; Andy McMillan, Department of Ecology; Rico Baroga, Washington State Department of Transportation; Charles Newling, Wetland Science Applications, Inc.; Eric Johnson, Washington Public Ports Association; Peter Birch, Washington Department of Fish and Wildlife; Doug Levy, City of Everett; Dave Williams, Association of Washington Cities; John Woodring, Washington Association of Realtors, Bill Garvin, Washington State Farm Bureau; and Paul Parker, Washington State Association of Counties.

(Neutral) Ron Schultz, National Audubon Society; Elsa Gruber; and Jodi Walker, Building Industry Association of Washington.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on House Government Reform & Land Use. Signed by 29 members: Representatives Huff, Chairman; Alexander, Vice Chairman; Clements, Vice Chairman; Wensman, Vice Chairman; H. Sommers, Ranking Minority Member; Doumit, Assistant Ranking Minority Member; Gombosky, Assistant Ranking Minority Member; Benson; Carlson; Chopp; Cody; Cooke; Crouse; Grant; Keiser; Kenney; Kessler; Linville; Lisk; Mastin; McMorris; Parlette; Poulsen; Regala; D. Schmidt; Sehlin; Sheahan; Talcott and Tokuda.

Staff: Jeff Olsen (786-7157).

Summary of Recommendation of Committee on Appropriations Compared to Recommendation of Committee on Government Reform & Land Use: The Department of Ecology's authority to establish the service area is removed. The bill defines the service area for mitigation banks as a county, except in certain cases where the bank is within 20 miles of the impact and the county in which the bank is located approves. If specific funding is not provided in the omnibus appropriations act, the bill is null and void.

Appropriation: None.

Fiscal Note: Available.

Effective Date Ninety days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.

Testimony For: This proposal helps developers, regulators, and the environment. Certifying banks will help streamline the process, cut costs, and take the risk out of mitigation.

Testimony Against: None.

Testified: Representative Bill Thompson, prime sponsor; and Jodi Walker, Building Industry Association of Washington.