

---

## Government Reform and Land Use Committee

---

### BILL ANALYSIS

HB 2339

**Title of the Bill:** Wetlands mitigation banking.

**What this Bill Does:** Specifically authorizes mitigation banking as a way to mitigate wetlands impacts.

**Sponsors:** Representative Thompson and Representative Mulliken

**Hearing Date:** January 14, 1998

**Fiscal Note:** Requested 1/7/98

**Analysis Prepared By:** Joan Elgee, 786-7135

---

#### **BACKGROUND:**

**General wetlands regulatory framework.** 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 Shorelines Management Act.

**Mitigation banking overview.** When a landowner proposes a project for which an

impact to a wetland is authorized, generally the landowner must compensate for the impact to the wetland. Mitigation banking is one form of compensation for wetlands impacts.

Typically, a wetland "banker" develops a bank of functioning wetland areas by restoring previously drained or filled wetlands. Units of the banked wetland 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 If approved by regulatory agencies, these credits can be withdrawn to offset wetland impacts, or "debits" at a development site.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 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 their development. Wetland banking is contrasted with project-specific replacement where the project sponsor does the restoration or other mitigation to specifically replace a wetland that is to be impacted.

**Existing regulation of mitigation banks.** 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:***

**Specific authorization for banking.** Mitigation banking is specifically authorized. Provisions on banking are modeled after the federal guidance. 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.

**Bank certification by Department of Ecology.** DOE is directed to adopt rules for:

- Certifying, operating, and monitoring banks;
- Determining credits and release of credits from banks; and
- Public involvement in the certification of banks.

DOE must authorize use of a bank on a project-specific basis. DOE and other state agencies may approve use of a bank for any compensatory mitigation of a wetland impact.

*Credits.* DOE must establish credits and a schedule of release of credits for each bank. A credit that has been released may be sold. DOE may allow a portion of the credits to be released before all of the performance criteria have been met.

*Service area.* DOE must establish a service area for each bank. The service area is the geographic area in which a bank can reasonably be expected to provide compensation for wetland impacts. Generally, the service area is the same watershed as the bank, although the service area can be extended beyond the watershed and also limited to an area smaller than the watershed under specified circumstances.

**Use of banks.** A bank may be used when there is no practicable opportunity for on-site compensation, or when use of a bank is environmentally preferable to on-site compensation.

*Sequencing.* Sequencing is required, so that all appropriate steps have been undertaken to

first avoid and then minimize adverse impacts, before a use of a bank is approved.

*Priorities.* DOE must give priority to banks providing for restoration of degraded or former wetlands. Banks involving creation and enhancement of wetlands may only be certified where there are adequate assurances of success and that the bank will result in an overall environmental benefit. Banks involving the preservation of wetland or associated uplands may be certified only in limited circumstances.