

# HOUSE BILL REPORT

## E2SHB 2339

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### As Passed Legislature

**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 House Committee on Appropriations (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)].

##### **Floor Activity:**

Passed House: 2/12/98, 83-13.  
Senate Amended.  
House Concurred.  
Passed Legislature.

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### 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).

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### 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).

**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 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 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. The instrument documents agency and bank sponsor concurrence on the objectives and administration of the bank and describes the legal and physical characteristics of the bank and how the bank will be established and operated. The local jurisdiction in which the bank is located must also sign the banking instrument.

Before DOE authorizes use of credits from a bank to mitigate under a DOE issued or approved permit, DOE must assure that all appropriate and practicable steps have been undertaken to first avoid and then minimize adverse impacts to wetlands. In determining appropriate steps to avoid and minimize impacts, the department must take into consideration the functions and values of the wetlands, including fish habitat, ground water quality, and protection of adjacent properties. DOE may approve use of credits from a bank when: (1) the credits represent the creation, restoration, or enhancement of wetlands of like kind and in close proximity when estuarine wetlands are being mitigated; (2) there is no practicable opportunity for on-site compensation; or (3) when use of a bank is environmentally preferable to on-site compensation.

Using a collaborative process, DOE 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 release phase of credits as different levels 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.

DOE must submit a report to the appropriate standing committees of the Legislature before January 30, 1999, on its progress in developing rules. Before adopting any rules, DOE must submit the proposed rules to the appropriate legislative standing committees.

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.

**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:** (Government Reform & Land Use) 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.

(Appropriations) 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: (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; Jodi Walker, Building Industry Association of Washington; and Paul Parker, Washington State Association of Counties.

**(Neutral)** Ron Schultz, National Audubon Society; Elsa Gruber.

**Testimony Against:** (Government Reform & Land Use) None.

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