

106TH CONGRESS  
2D SESSION

# S. 2948

To amend the Federal Water Pollution Control Act to establish a program for wetland mitigation banking, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JULY 27, 2000

Mr. INHOFE introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

To amend the Federal Water Pollution Control Act to establish a program for wetland mitigation banking, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “American Wetland  
5 Restoration Act”.

6 **SEC. 2. DECLARATION OF POLICIES AND GOALS.**

7 Section 101(a) of the Federal Water Pollution Con-  
8 trol Act (33 U.S.C. 1251(a)) is amended—

9 (1) in paragraph (6), by striking “and” at the  
10 end;

1           (2) in paragraph (7), by striking the period at  
2 the end and inserting a semicolon; and

3           (3) by adding at the end the following:

4           “(8) it is the national policy to achieve the con-  
5 servation, creation, and restoration of wetland,  
6 through—

7                   “(A) regulatory means that take into ac-  
8 count that 75 percent of the wetland in the con-  
9 tiguous United States is privately owned and  
10 that private property rights should not be un-  
11 reasonably infringed; and

12                   “(B) nonregulatory opportunities involving  
13 all levels of government and supported by pri-  
14 vate initiatives;

15           “(9) the national policy described in paragraph  
16 (8) should be achieved in order—

17                   “(A) to increase the quantity and quality  
18 of the wetland resource base of the contiguous  
19 United States; and

20                   “(B) to meet the interim goal of no overall  
21 net loss for the remaining wetland resource  
22 base of the contiguous United States;

23           “while taking into account the status and trends of  
24 the wetland resource base in particular regions and  
25 areas; and

1           “(10) it is the national policy to foster wetland  
2 mitigation banking as a means to mitigate the un-  
3 avoidable loss of wetland by—

4           “(A) providing a regulatory framework for  
5 the establishment, operation, and use of mitiga-  
6 tion banks;

7           “(B) making appropriate use of successful  
8 programs for mitigation banking that are being  
9 carried out as of the date of enactment of this  
10 paragraph; and

11           “(C) taking into account regional vari-  
12 ations in wetland conditions, functions, and val-  
13 ues.”.

14 **SEC. 3. USE OF MITIGATION BANKS.**

15       Section 404 of the Federal Water Pollution Control  
16 Act (33 U.S.C. 1344) is amended by adding at the end  
17 the following:

18       “(u) USE OF MITIGATION BANKS.—

19           “(1) DEFINITIONS CONTAINED IN FEDERAL  
20 GUIDANCE.—Except as otherwise provided in this  
21 subsection, a term used in this subsection and de-  
22 fined in the Federal Guidance for the Establishment,  
23 Use and Operation of Mitigation Banks, published  
24 on November 28, 1995 (60 Fed. Reg. 58605), shall

1 have the meaning given the term in the Federal  
2 Guidance.

3 “(2) OTHER DEFINITIONS.—In this subsection:

4 “(A) CHARTER.—The term ‘charter’  
5 means a mitigation banking instrument, as de-  
6 scribed in the Federal Guidance, that—

7 “(i) is established by an agreement  
8 between an applicant and the Secretary or  
9 a State (in the case of a State admin-  
10 istering a program under subsection  
11 (h)(2)(A)); and

12 “(ii) has been developed in consulta-  
13 tion with the mitigation bank review team.

14 “(B) FEDERAL GUIDANCE.—The term  
15 ‘Federal Guidance’ means the Federal Guidance  
16 for the Establishment, Use and Operation of  
17 Mitigation Banks, published on November 28,  
18 1995 (60 Fed. Reg. 58605).

19 “(C) MAINTENANCE.—The term ‘mainte-  
20 nance’, with respect to a wetland, means an ac-  
21 tivity carried out to ensure—

22 “(i) viability of the wetland; or

23 “(ii) the accomplishment of a project  
24 goal after a wetland restoration, enhance-  
25 ment, creation, or preservation project (in-

1 including hydrological manipulation and con-  
2 trol of desirable and undesirable plant spe-  
3 cies) has been completed.

4 “(D) MITIGATION BANK.—The term ‘miti-  
5 gation bank’ means—

6 “(i) 1 or more specified wetland re-  
7 source restoration, enhancement, creation,  
8 or preservation projects (which may in-  
9 clude the preservation of an appurtenant  
10 wetland, upland, or open water resource, to  
11 the extent that the wetland, upland, or  
12 open water resource increases the ecologi-  
13 cal functioning of the mitigation bank); or

14 “(ii) in exceptional circumstances, 1  
15 or more projects, consisting solely of pres-  
16 ervation of wetland, that have been char-  
17 tered by the Secretary under this sub-  
18 section for the purpose of providing mitiga-  
19 tion credits to offset wetland losses author-  
20 ized under permits allowing activities in  
21 the waters of the United States.

22 “(E) SERVICE AREA.—The term ‘service  
23 area’ means the designated area, as described  
24 in the Federal Guidance, in which a mitigation

1 bank may provide compensatory mitigation for  
2 impacts to wetland resources.

3 “(F) WETLAND FUNCTION.—

4 “(i) IN GENERAL.—The term ‘wetland  
5 function’ means an environmental,  
6 hydrological, or other role that a wetland  
7 serves.

8 “(ii) INCLUSIONS.—The term ‘wetland  
9 function’ includes—

10 “(I) flood water storage;

11 “(II) flood water conveyance;

12 “(III) ground water discharge or  
13 recharge;

14 “(IV) erosion control;

15 “(V) wave attenuation;

16 “(VI) water quality protection;

17 “(VII) scenic and aesthetic use;

18 “(VIII) food chain support;

19 “(IX) a fishery;

20 “(X) wetland plant habitat;

21 “(XI) aquatic habitat; and

22 “(XII) habitat for wetland-de-  
23 pendent wildlife.

24 “(3) CHARTER OF MITIGATION BANKS.—

1           “(A) ISSUANCE.—The Secretary, in con-  
2 sultation with the mitigation bank review team,  
3 may issue a charter to a person that, with re-  
4 spect to the wetland project or projects that are  
5 to be included in the scope of the charter, meets  
6 the following criteria:

7           “(i) ASSURANCES.—The person pro-  
8 vides reasonable assurances of success of  
9 the proposed restoration, enhancement,  
10 creation, or preservation project.

11           “(ii) WATER SOURCE.—The person  
12 demonstrates an adequate source of water  
13 to support the wetland.

14           “(iii) LEGAL CONTROL.—The person  
15 demonstrates adequate legal control to  
16 carry out the proposed project, such as a  
17 title, license, contract, or option (contin-  
18 gent on approval of the charter), over the  
19 real property (including necessary upland,  
20 as appropriate) comprising the proposed  
21 project.

22           “(iv) FINANCIAL ASSURANCES.—

23           “(I) IN GENERAL.—The person  
24 demonstrates adequate financial as-  
25 surances to carry out the proposed

1 project, including the design, oper-  
2 ations, and maintenance plan and re-  
3 medial measures.

4 “(II) FORM.—A financial assur-  
5 ance referred to in subclause (I) may  
6 be in the form of—

7 “(aa) a performance bond;

8 “(bb) an irrevocable trust;

9 “(cc) an escrow account;

10 “(dd) casualty insurance;

11 “(ee) a letter of credit;

12 “(ff) a legislatively-enacted  
13 dedicated fund for government  
14 operated banks; or

15 “(gg) another instrument  
16 approved by the Secretary.

17 “(III) AUTHORITY OF SEC-  
18 RETARY.—A financial assurance dem-  
19 onstrated by a person under subclause  
20 (I) shall entitle the Secretary to draw  
21 on the assurance in the event of—

22 “(aa) a substantial failure to  
23 perform the work provided in the  
24 charter; or



1                   “(bb) in any case in which  
2                   mitigation credits based on work  
3                   referred to in item (aa) have al-  
4                   ready been used or sold, a sub-  
5                   stantial failure of the mitigation  
6                   bank to perform as expected in  
7                   the application.

8                   “(IV) TIMING.—A financial as-  
9                   surance described in subclause (I)  
10                  shall be in place before the withdrawal  
11                  by the person of credits.

12                  “(v) PLAN.—The person demonstrates  
13                  an adequate design, operation, and mainte-  
14                  nance plan to ensure continued viability of  
15                  the proposed project after completion of  
16                  construction of the project.

17                  “(vi) LEGAL PROTECTION.—

18                  “(I) IN GENERAL.—The person  
19                  demonstrates adequate legal protec-  
20                  tion, such as easements, covenants  
21                  running with the land, or other appro-  
22                  priate, legally binding undertakings,  
23                  to ensure permanent protection of the  
24                  wetland in the mitigation bank that is  
25                  used as the basis for selling credits.

1                   “(II) TIMING.—Legal protection  
2                   described in subclause (I) shall be in  
3                   place at the time at which the credits  
4                   are withdrawn.

5                   “(B) APPLICATION AND PROCEDURE.—

6                   “(i) IN GENERAL.—An applicant for a  
7                   charter shall submit to the Secretary an  
8                   application and supporting materials  
9                   signed by a responsible official acting on  
10                  behalf of the applicant as certification of  
11                  the accuracy of the information contained  
12                  in the application and materials.

13                  “(ii) INCLUSIONS.—The application  
14                  shall include, at a minimum, information  
15                  concerning the criteria described in sub-  
16                  paragraph (A).

17                  “(iii) NOTICE OF COMPLETION STA-  
18                  TUS.—Not later than 30 days after the  
19                  date on which an application under this  
20                  subparagraph is filed, the Secretary  
21                  shall—

22                         “(I) advise the applicant as to  
23                         whether the application is complete;  
24                         and

1 “(II) if the application is incom-  
2 plete, advise the applicant, in writing,  
3 of any additional materials that must  
4 be submitted to complete the applica-  
5 tion.

6 “(iv) COMMENTS ON APPLICATION.—

7 “(I) IN GENERAL.—On receipt of  
8 a completed application, the Secretary  
9 shall submit, to the affected State and  
10 the heads of appropriate Federal  
11 agencies, a copy of the completed  
12 charter application.

13 “(II) COMMENT PERIOD.—

14 “(aa) IN GENERAL.—Not  
15 later than 60 days after the date  
16 of receipt of a completed applica-  
17 tion under subclause (I), an af-  
18 fected State and the heads of  
19 Federal agencies that received  
20 the application may file written  
21 comments concerning the applica-  
22 tion.

23 “(bb) RECORD.—Written  
24 comments filed under item (aa)  
25 shall be part of the record.

1                   “(cc) NO COMMENTS.—If no  
2                   comments are filed before the  
3                   last day of the period described  
4                   in item (aa), the Secretary may  
5                   presume that the affected State  
6                   and Federal agencies do not ob-  
7                   ject to the charter.

8                   “(C) MITIGATION BANK REVIEW TEAM.—

9                   “(i) IN GENERAL.—The mitigation  
10                  bank review team shall be responsible  
11                  for—

12                   “(I) reviewing charter applica-  
13                   tions;

14                   “(II) reaching consensus on the  
15                   terms of each charter; and

16                   “(III) coordinating, as necessary,  
17                   to ensure effective implementation of  
18                   the terms of each charter.

19                   “(ii) CHAIRPERSON.—The Secretary  
20                   (or the State, in the case of a State admin-  
21                   istering a program under subsection  
22                   (h)(2)(A)) shall—

23                   “(I) serve as Chairperson of the  
24                   mitigation bank review team; and

1                   “(II) assume responsibility for  
2                   making final decisions regarding the  
3                   terms of the charter if consensus can-  
4                   not be reached within the timeframes  
5                   provided by this subsection.

6                   “(D) COORDINATION.—To the maximum  
7                   extent practicable, the Secretary shall coordi-  
8                   nate the processing of a charter application  
9                   under this subsection with the processing of ap-  
10                  plications from the same applicant for other  
11                  permits required under this section to allow de-  
12                  terminations with respect to the permits to be  
13                  made concurrently with the final decision on the  
14                  charter.

15                  “(E) NOTICE.—

16                         “(i) PUBLICATION.—The Secretary  
17                         shall—

18                                 “(I) publish notice of each char-  
19                                 ter application in—

20   “(aa) the Federal Register;  
21   and

22   “(bb) a newspaper of gen-  
23   eral circulation in the proposed  
24   service area in which the mitiga-  
25   tion bank is to operate (including

1 the county in which the project is  
2 to be located); and

3 “(II) make copies of the charter  
4 application and supporting materials  
5 available for public review at appro-  
6 priate convenient locations in the serv-  
7 ice area.

8 “(ii) CONTENTS.—The notice pub-  
9 lished under clause (i)(I) shall—

10 “(I) contain a description of each  
11 project provided in the charter appli-  
12 cation;

13 “(II) contain an explanation of  
14 where supporting materials may be re-  
15 viewed; and

16 “(III) provide a 30-day period  
17 (which may be extended once for an  
18 additional 30 days, on the request)  
19 during which comments on the com-  
20 pliance of the proposed application  
21 may be submitted in accordance with  
22 this subsection.

23 “(iii) PERMIT REQUIREMENTS.—In  
24 any case in which a permit under this sec-  
25 tion is required to construct a mitigation

1 bank, the notice and opportunity for public  
2 comment provided in accordance with the  
3 application for the permit shall satisfy the  
4 public notice and comment requirements of  
5 this paragraph.

6 “(F) DECISION DEADLINE.—Not later  
7 than 90 days after the date on which a com-  
8 pleted charter application is filed, the Secretary,  
9 in consultation with the mitigation bank review  
10 team, shall decide whether to issue a charter.

11 “(G) EXTENSION OF DEADLINE.—If addi-  
12 tional time is needed to file comments or pro-  
13 vide for a hearing, further review of comments,  
14 or a reply to adverse comments, the Secretary  
15 may extend once, for 90 days, the period of re-  
16 view described in subparagraph (F).

17 “(H) DETERMINATION.—

18 “(i) IN GENERAL.—After a review of  
19 public comments and receipt of any reply  
20 from the applicant, the Secretary may, in  
21 accordance with subparagraph (A) and  
22 after appropriate coordination and  
23 consultation—

24 “(I) issue the charter;

25 “(II) deny the charter; or

1                   “(III) issue the charter with  
2                   modifications.

3                   “(ii) BASIS.—A decision of the Sec-  
4                   retary under clause (i) shall be based on  
5                   the public record of the application for the  
6                   charter.

7                   “(I) AMENDMENTS.—

8                   “(i) IN GENERAL.—An additional  
9                   project may be added to a charter by  
10                  amendment.

11                  “(ii) PROCESSING.—An application  
12                  for an amendment to a charter shall be  
13                  processed in the same manner as a charter  
14                  application, except that the Secretary may  
15                  treat any facts established in support of  
16                  the original charter that are confirmed by  
17                  the most recent report required under sub-  
18                  paragraph (J) as established for the pur-  
19                  pose of the amendment application process.

20                  “(J) PERIODIC REPORTS.—

21                  “(i) IN GENERAL.—A person holding  
22                  a charter shall submit to the Secretary re-  
23                  ports in accordance with the charter, on a  
24                  periodic basis to be determined by the Sec-  
25                  retary.



1           “(ii) INCLUSIONS.—A report sub-  
2           mitted under clause (i) shall include—

3                   “(I) information demonstrating  
4                   the success of the proposed restora-  
5                   tion, enhancement, creation, or pres-  
6                   ervation project;

7                   “(II) a demonstration of contin-  
8                   ued compliance with financial assur-  
9                   ance requirements;

10                  “(III) a demonstration of a con-  
11                  tinued, adequate, long-term source of  
12                  water to support the wetland that is  
13                  the subject of the charter;

14                  “(IV) a report on progress ac-  
15                  complishing the construction and de-  
16                  sign, operations, and maintenance  
17                  plan provided in the charter;

18                  “(V) a reconciliation of the num-  
19                  ber of credits sold during the period  
20                  since the date of the last report under  
21                  this subparagraph, the number of  
22                  credits remaining, and any change in  
23                  the number of credits available in ac-  
24                  cordance with this subsection; and

1                   “(VI) information in satisfaction  
2                   of any other reporting requirement of  
3                   the charter.

4                   “(K) RESPONSIBILITY FOR MITIGATION  
5                   BANK SUCCESS.—Subject to the charter, a per-  
6                   son holding the charter shall be responsible for  
7                   ensuring the success of the restoration, en-  
8                   hancement, creation, and preservation activities  
9                   specified in the charter.

10                  “(L) REVOCATION.—A charter—

11                   “(i) shall be revoked by the Secretary  
12                  for—

13                   “(I) a criminal conviction of the  
14                   person holding the charter for making  
15                   material false statements in the char-  
16                   ter application or any annual report;  
17                   and

18                   “(II) a substantial violation of  
19                   law (other than a violation described  
20                   in clause (I)) that demonstrates that  
21                   the holder of the charter is unfit to  
22                   operate the mitigation bank;

23                   “(ii) may be revoked by the Secretary  
24                  for—

1           “(I) a substantial failure of the  
2 mitigation bank to perform as ex-  
3 pected in the charter; or

4           “(II) a substantial failure to  
5 comply with the terms of the charter,  
6 including financial assurances or crit-  
7 ical operating requirements; and

8           “(iii) may be revoked under clause (i)  
9 or (ii) only after an opportunity for a pub-  
10 lic hearing.

11           “(M) STANDARDS AND CRITERIA FOR SUC-  
12 CESS.—The Secretary, in consultation with the  
13 Administrator, shall establish standards and  
14 criteria for the success of mitigation banks  
15 under this subsection.

16           “(4) CREDITS AND DEBITS.—

17           “(A) NUMBER OF CREDITS.—

18           “(i) IN GENERAL.—The number of  
19 credits to which a chartered mitigation  
20 bank is entitled for wetland restoration,  
21 enhancement, creation, and preservation  
22 shall be based on the methodology con-  
23 tained in the charter, consistent with the  
24 approach identified in the Federal Guid-  
25 ance.

1           “(ii) LIMITED CREDITS.—A limited  
2           credit may be granted, consistent with the  
3           Federal Guidance, for the inclusion of up-  
4           land, open water, or preserved wetland  
5           areas within a mitigation bank if the up-  
6           land, open water, and preserved wetland  
7           areas within the mitigation bank increase  
8           the overall ecological functioning of the  
9           bank.

10           “(B) CREDITS BASED SOLELY ON PRESER-  
11           VATION.—

12           “(i) IN GENERAL.—The number of  
13           credits based solely on preservation should  
14           be based on the functions that would be  
15           lost or degraded if the wetland were not  
16           preserved (including the timing of the loss  
17           or degradation) in accordance with the  
18           Federal Guidance.

19           “(ii) DETERMINATION.—In any case  
20           in which the Secretary determines that  
21           preservation of wetland is appropriate as  
22           the sole basis for providing mitigation  
23           credits, the Secretary shall make a deter-  
24           mination that the wetland—

1           “(I) performs physical or biological  
2           functions, the preservation of  
3           which is important to the region in  
4           which the wetland is located; and

5           “(II) is under a demonstrable  
6           threat of loss or substantial degradation  
7           due to activities that might not  
8           otherwise be expected to be restricted  
9           and that are not the consequence of  
10          actions under the control of the holder  
11          of the charter for the mitigation bank.

12          “(C) OFFERING OF CREDITS FOR SALE.—

13           “(i) IN GENERAL.—On receipt of a  
14           charter, a mitigation bank may offer mitigation  
15           credits for sale in accordance with  
16           the charter.

17           “(ii) NUMBER.—The number of credits  
18           that a mitigation bank may offer for  
19           sale shall not exceed the number to which  
20           the mitigation bank is entitled under the  
21           charter.

22           “(iii) LIMITED CREDITS.—As specifically  
23           approved under the charter, and consistent  
24           with the Federal Guidance, limited  
25           credits may be sold before restoration, en-

1           hancement, creation, or preservation activi-  
2           ties have been initiated if—

3                   “(I) adequate financial and legal  
4                   assurances described in paragraph  
5                   (3)(A) are in place to carry out the  
6                   proposed project;

7                   “(II) the likelihood of success of  
8                   the mitigation bank is high; and

9                   “(III) a construction schedule  
10                  has been approved.

11                 “(D) DEBITS.—To the maximum extent  
12                 practicable, the Secretary shall use the same  
13                 methodology to quantify debits as is used to  
14                 quantify credits at a mitigation bank.

15                 “(E) NO REGULATION OF CREDIT  
16                 PRICE.—The Secretary may not regulate the  
17                 price charged for the sale of mitigation credits.

18                 “(5) SERVICE AREAS.—

19                   “(A) ADDITIONAL GUIDANCE.—The Sec-  
20                   retary may provide additional guidance, con-  
21                   sistent with the Federal Guidance, on the size  
22                   and use of the service area (including policies  
23                   regarding linear utility facilities).

24                   “(B) INTERSTATE AGREEMENTS.—If a  
25                   proposed service area or mitigation bank is lo-

1 cated in more than 1 State, the Secretary may  
2 resolve any interstate disagreement.

3 “(6) MITIGATION.—

4 “(A) IN GENERAL.—A mitigation bank ap-  
5 proved under this subsection may, in accord-  
6 ance with this section—

7 “(i) provide compensatory mitigation  
8 for activities requiring authorization under  
9 this section; or

10 “(ii) be used in satisfaction of any in-  
11 junctive relief ordered by the Secretary,  
12 the Administrator, or a court.

13 “(B) IN-KIND AND OUT-OF-KIND.—

14 “(i) IN GENERAL.—Consistent with  
15 the Federal Guidance, the Secretary should  
16 generally require in-kind compensation of  
17 wetland impacts.

18 “(ii) LIMITED ACCEPTANCE OF OUT-  
19 OF-KIND COMPENSATION.—Out-of-kind  
20 compensation of wetland impacts may be  
21 acceptable if the Secretary determines, on  
22 a case-by-case basis, that the out-of-kind  
23 compensation is practicable and environ-  
24 mentally desirable.

1           “(C) EQUIVALENT STANDARDS AND CRI-  
2           TERIA.—

3           “(i) IN GENERAL.—Not later than 1  
4           year after the date of enactment of this  
5           subsection, the Secretary and the Adminis-  
6           trator, in consultation with the heads of  
7           appropriate Federal agencies, shall estab-  
8           lish standards and criteria applicable to  
9           the use of on-site mitigation, in-lieu fees,  
10          and other off-site mitigation as compen-  
11          satory mitigation that are similar to those  
12          standards and criteria applicable to a miti-  
13          gation bank under this subsection.

14          “(ii) SPECIFIC INCLUSIONS.—The  
15          standards and criteria established under  
16          clause (i) shall include—

17                  “(I) a definition of in-lieu fees;  
18                  and

19                  “(II) specific measures to ensure  
20                  that in-lieu fees are used only under  
21                  appropriate circumstances with ade-  
22                  quate controls.

23          “(7) REPORT TO CONGRESS.—

24                  “(A) IN GENERAL.—Not later than 2 years  
25          after the date of enactment of this subsection,



1 the Secretary shall submit to Congress a report  
2 on the effectiveness of wetland mitigation bank-  
3 ing and other forms of compensatory mitigation  
4 in meeting the policy and goals identified in  
5 paragraphs (8) through (10) of section  
6 101(a)(8).

7 “(B) FORM.—

8 “(i) DRAFT REPORT.—The report  
9 under subparagraph (A) shall first be  
10 issued in draft form.

11 “(ii) PUBLIC COMMENT PERIOD.—  
12 During the 60-day period beginning on the  
13 date on which the draft report is issued  
14 under clause (i), the Secretary shall receive  
15 comments from the public concerning the  
16 accuracy of the information contained in  
17 the draft report.

18 “(iii) FINAL REPORT.—Not later than  
19 90 days after the last day of the comment  
20 period described in clause (ii), the Sec-  
21 retary shall—

22 “(I) make any necessary revi-  
23 sions to the draft report, taking into  
24 consideration any public comments re-  
25 ceived under clause (ii); and

1                   “(II) submit to Congress the  
2                   final report.

3                   “(8) EXISTING BANKS.—Nothing in this sub-  
4                   section requires a person operating a mitigation  
5                   bank in existence on the date of enactment of this  
6                   subsection to submit to the Secretary for that miti-  
7                   gation bank an application for a charter under this  
8                   subsection.

9                   “(9) MITIGATION BANKING APPROVED UNDER  
10                  STATE PROGRAMS.—A State that operates a pro-  
11                  gram under subsection (h)(2)(A) may administer a  
12                  wetland mitigation banking program in accordance  
13                  with procedures established by State law (including  
14                  regulations) if the banking program is approved by  
15                  the Administrator as part of the approved program  
16                  of the State under that subsection.”.

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