

108TH CONGRESS
1ST SESSION

H. R. 2531

To amend the Federal Water Pollution Control Act relating to wetlands mitigation banking, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 19, 2003

Mr. JONES of North Carolina (for himself, Mr. TAUZIN, Mr. BRADY of Texas, Mr. OTTER, Mr. PICKERING, Mr. TAYLOR of Mississippi, and Mr. BAKER) introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

A BILL

To amend the Federal Water Pollution Control Act relating to wetlands 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—

1 (1) by striking “and” at the end of paragraph
2 (6);

3 (2) by striking the period at the end of para-
4 graph (7) and inserting a semicolon; and

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

6 “(8) it is the national policy to conserve, create,
7 and restore wetlands so as to increase the quantity
8 and quality of the wetlands resource base of the con-
9 tiguous United States and to meet the interim goal
10 of no overall net loss for the remaining wetlands re-
11 source base of the contiguous United States while
12 taking into account the status and trends of the wet-
13 lands resource base in particular regions and area
14 and to achieve such goals through regulatory means
15 that take into account that 75 percent of the wet-
16 lands in the contiguous United States are privately
17 owned and that private property rights should not be
18 unreasonably infringed and through nonregulatory
19 opportunities involving all levels of government and
20 supported by private initiatives; and

21 “(9) it is the national policy to foster wetlands
22 mitigation banking as a means to mitigate the un-
23 avoidable loss of wetlands and to do so by providing
24 a regulatory framework for the establishment, oper-
25 ation, and use of mitigation banks, making appro-

1 piate use of existing, successful programs for miti-
 2 gation banking, and taking into account regional
 3 variations in wetlands conditions, functions, and val-
 4 ues.”.

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

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

9 “(u) USE OF MITIGATION BANKS.—

10 “(1) DEFINITIONS CONTAINED IN FEDERAL
 11 GUIDANCE.—Except as otherwise provided in this
 12 subsection, a term used in this subsection shall have
 13 the meaning given such term in the Federal Guid-
 14 ance.

15 “(2) OTHER DEFINITIONS.—In this subsection,
 16 the following definitions apply:

17 “(A) CHARTER.—The term ‘charter’
 18 means a mitigation banking instrument, as de-
 19 scribed in the Federal Guidance. A charter is
 20 an agreement between an applicant for a char-
 21 ter and the Secretary or a State (in the case of
 22 a State administering a program under sub-
 23 section (h)(2)(A)) that has been developed in
 24 consultation with the mitigation bank review
 25 team.

1 “(B) FEDERAL GUIDANCE.—The term
2 ‘Federal Guidance’ means the Federal Guidance
3 for the Establishment, Use and Operation of
4 Mitigation Banks (60 Fed. Reg. 58695 (No-
5 vember 28, 1995)).

6 “(C) MAINTENANCE.—With respect to
7 wetlands, the term ‘maintenance’ means an ac-
8 tivity undertaken to ensure viability of a wet-
9 land or to ensure the accomplishment of a
10 project goal after a wetland restoration, en-
11 hancement, creation, or preservation project has
12 been completed, including hydrological manipu-
13 lation and control of desirable and undesirable
14 plant species.

15 “(D) MITIGATION BANK.—The term ‘miti-
16 gation bank’ means a specified wetland resource
17 restoration, creation, or enhancement project or
18 projects (which may include the preservation of
19 appurtenant wetlands, uplands, or open water
20 resources to the extent that the wetlands, up-
21 lands, or open water resources increase the eco-
22 logical functioning of the mitigation bank) or,
23 in exceptional circumstances, a project or
24 projects consisting solely of preservation of wet-
25 lands that has been chartered by the Secretary

1 under this subsection for the purpose of pro-
2 viding mitigation credits to offset wetland losses
3 authorized by the terms of permits allowing ac-
4 tivities in the waters of the United States.

5 “(E) SERVICE AREA.—The term ‘service
6 area’ means the designated area, as described
7 in the Federal Guidance, in which a mitigation
8 bank may provide compensatory mitigation for
9 impacts to wetlands resources.

10 “(F) WETLAND FUNCTION.—The term
11 ‘wetland function’ means an environmental,
12 hydrological, or other role that the wetland
13 serves, including flood water storage, flood
14 water conveyance, ground water discharge or
15 recharge, erosion control, wave attenuation,
16 water quality protection, scenic and aesthetic
17 use, food chain support, fisheries, wetland plant
18 habitat, aquatic habitat, and habitat for wet-
19 land-dependent wildlife.

20 “(3) CHARTER OF MITIGATION BANKS.—

21 “(A) ISSUANCE.—The Secretary, in con-
22 sultation with the mitigation bank review team,
23 may issue a mitigation bank charter to a person
24 who, with respect to the project or projects that

are to be included in the scope of the mitigation banking charter, meets the following criteria:

“(i) Provides reasonable assurances of success of the proposed restoration, enhancement, creation, or preservation project.

“(ii) Demonstrates an adequate source of water to support the wetland.

“(iii) Demonstrates adequate legal control, such as title, license, contract, or option (contingent upon approval of the charter), over the real property (including necessary uplands, as appropriate) in the proposed project to carry out the proposed project.

“(iv) Demonstrates adequate financial assurances to carry out the proposed project, including the design, operations, and maintenance plan and remedial measures. Such financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively-enacted dedicated funds for government operated banks, or other approved instruments.

1 Such financial assurances shall entitle the
2 Secretary to draw upon the assurances in
3 the event of a substantial failure to per-
4 form the work provided in the mitigation
5 bank charter, or a substantial failure of
6 the mitigation bank to perform as expected
7 in the application, in any case in which
8 mitigation credits based on such work have
9 already been used or sold. Such financial
10 assurances shall be in place prior to the
11 withdrawal of credits.

12 “(v) Demonstrates an adequate de-
13 sign, operations, and maintenance plan to
14 ensure continued viability of the proposed
15 project after completion of construction of
16 the project.

17 “(vi) Demonstrates adequate legal
18 protection, such as easements, covenants
19 running with the land, or other appro-
20 priate, legally binding undertakings, to en-
21 sure permanent protection of the wetlands
22 in the mitigation bank that are used as the
23 basis for selling credits. Such legal protec-
24 tions shall be in place at the time that the
25 credits are withdrawn.

“(B) APPLICATION AND PROCEDURE.—An applicant for a mitigation bank charter shall submit to the Secretary an application and supporting materials signed by a responsible official acting on behalf of the applicant certifying the accuracy of the information contained in the application and materials. The application shall include, at a minimum, information on the criteria contained in subparagraph (A). The Secretary shall advise the applicant, not later than 30 days after the date of filing, of whether the application is complete and advise the applicant, in writing at that time, of any additional materials that must be submitted in order to complete the application. The Secretary shall also transmit a copy of the complete charter application to the affected State, and to the heads of appropriate Federal agencies, each of which shall have 60 days, to run concurrently, to file written comments, which shall be part of the record. If no comments are filed before the last day of such 60-day period, the Secretary may presume that the entities do not object to the charter.

“(C) MITIGATION BANK REVIEW TEAM.—

The mitigation bank review team, as defined in the Federal Guidance, shall be responsible for reviewing charter applications, reaching consensus on the terms of the charter, and coordinating, as necessary, to ensure effective implementation of the terms of the charter. The Secretary or the State (in the case of a State administering a program under subsection (h)(2)(A)) shall be the chair of the mitigation bank review team and have the responsibility for making final decisions regarding the terms of the charter if consensus cannot be reached within the timeframes provided by this subsection.

“(D) COORDINATION.—To the extent possible, the Secretary shall coordinate the processing of a mitigation bank charter application

under this subsection with the processing of applications by such applicant for other permits required under this section, in order that determinations with respect to such permits may be made concurrently with the final decision on the bank charter.

“(E) NOTICE.—

1 “(i) PUBLICATION.—The Secretary
2 shall publish notice of the charter applica-
3 tion in the Federal Register and in a news-
4 paper of general circulation in the pro-
5 posed service area in which the mitigation
6 bank is to operate (including the county in
7 which the project is to be located), and
8 shall make copies of the charter application
9 and supporting materials available for pub-
10 lic review at appropriate convenient loca-
11 tions in the service area.

12 “(ii) CONTENTS.—The notice shall de-
13 scribe the project or projects provided in
14 the charter application, explain where sup-
15 porting materials may be reviewed, and
16 provide 30 days for the submission of com-
17 ments on the compliance of the proposed
18 application in accordance with this sub-
19 section. Upon request, the time for com-
20 ment may be extended once for 30 days.

21 “(iii) PERMIT REQUIREMENTS.—In
22 any case in which a permit is required
23 under this section to construct a mitigation
24 bank, the notice and opportunity for public
25 comment provided in accordance with the

1 application for the permit may satisfy the
2 requirements of this paragraph for public
3 notice and comment.

4 “(F) DECISION DEADLINE.—The Sec-
5 retary, in consultation with the mitigation bank
6 review team, shall decide whether to issue a
7 mitigation banking charter not later than 90
8 days after the date of filing of a completed
9 charter application.

10 “(G) EXTENSION OF DEADLINE.—If addi-
11 tional time is needed to file comments, to pro-
12 vide for a hearing, to provide for further review
13 of comments, or to provide for a reply to ad-
14 verse comments, the Secretary may extend the
15 time for review once for 90 days.

16 “(H) DETERMINATION.—After a review of
17 public comments and any reply by the appli-
18 cant, the Secretary may, in accordance with
19 subparagraph (A) and after appropriate coordi-
20 nation and consultation, issue the charter, deny
21 the charter, or issue the charter with modifica-
22 tions. The Secretary’s decision shall be based
23 on the entire public record.

24 “(I) AMENDMENTS.—Additional projects
25 may be added to a mitigation bank charter by

1 amendment. Amendment applications shall be
2 processed in the same manner as charter appli-
3 cations, but the Secretary may treat the facts
4 established in support of the charter and con-
5 firmed by the most recent report required under
6 subparagraph (J) as established for the purpose
7 of the amendment application process.

8 “(J) PERIODIC REPORTS.—Persons hold-
9 ing a mitigation bank charter shall report to
10 the Secretary in accordance with the charter
11 and on a periodic basis, as determined by the
12 Secretary. The report shall include—

13 “(i) information demonstrating the
14 success of the proposed restoration, en-
15 hancement, creation, or preservation
16 project;

17 “(ii) a demonstration of a continued
18 compliance with financial assurance re-
19 quirements;

20 “(iii) a demonstration of a continued,
21 adequate, long-term source of water to
22 support the wetland;

23 “(iv) a progress report in accom-
24 plishing the construction and design, oper-

1 ations, and maintenance plan provided in
2 the charter;

3 “(v) a reconciliation of the number of
4 credits sold during the previous years, the
5 number of credits remaining, and any
6 change in the number of credits made in
7 accordance with the requirements of this
8 subsection; and

9 “(vi) any other reporting requirement
10 defined in the charter.

11 “(K) RESPONSIBILITY FOR BANK SUC-
12 CESS.—Subject to the terms of the charter, a
13 person holding the charter shall be responsible
14 for ensuring the success of the restoration, cre-
15 ation, enhancement, and preservation activities.

16 “(L) REVOCATION.—A mitigation banking
17 charter—

18 “(i) shall be revoked by the Sec-
19 retary—

20 “(I) for a criminal conviction for
21 making material false statements in
22 the charter application or annual re-
23 port; and

24 “(II) for substantial violations of
25 law (other than violations described in

1 clause (I)) that demonstrate the
2 unfitness of the holder of the charter
3 to operate the mitigation bank; and
4 “(ii) may be revoked by the Sec-
5 retary—

6 “(I) for a substantial failure of
7 the bank to perform as expected in
8 the charter; and

9 “(II) for a substantial failure to
10 comply with the terms of the charter,
11 including financial assurances or crit-
12 ical operating requirements.

13 The charter may be revoked only after an op-
14 portunity for a public hearing.

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

20 “(4) CREDITS AND DEBITS.—

21 “(A) NUMBER OF CREDITS.—The number
22 of credits to which a chartered mitigation bank
23 is entitled for wetlands restoration, enhance-
24 ment, and creation shall be based on the meth-
25 odology contained in the charter, consistent

1 with the approach identified in the Federal
2 Guidance. Limited credits may be granted, con-
3 sistent with the Federal Guidance, for the in-
4 clusion of uplands, open water, and preserved
5 wetlands areas within a bank if the uplands,
6 open water, and preserved wetlands areas with-
7 in the bank increase the overall ecological func-
8 tioning of the bank.

9 “(B) CREDITS BASED SOLELY ON PRESER-
10 VATION.—The number of credits that are based
11 solely on preservation should be based on the
12 functions that would otherwise be lost or de-
13 graded if the wetlands were not preserved, and
14 the timing of such loss or degradation, pursu-
15 ant to the Federal Guidance. In any case in
16 which the Secretary determines that preserva-
17 tion of wetlands is appropriate as the sole basis
18 for providing mitigation credits, the Secretary
19 shall make a determination that the wetlands—

20 “(i) perform physical or biological
21 functions, the preservation of which is im-
22 portant to the region in which the wetlands
23 are located; and

24 “(ii) are under a demonstrable threat
25 of loss or substantial degradation due to

1 activities that might not otherwise be ex-
2 pected to be restricted and that are not the
3 consequence of actions under the control of
4 the bank sponsor.

5 “(C) OFFERING CREDITS FOR SALE.—

6 Upon receipt of its charter, a mitigation bank
7 may offer mitigation credits for sale in accord-
8 ance with the charter. The number of credits
9 that a mitigation bank may offer for sale shall
10 not exceed the number to which the bank is en-
11 titled under the charter. As specifically ap-
12 proved under the charter, and consistent with
13 the Federal Guidance, limited credits may be
14 sold before restoration, enhancement, or cre-
15 ation activities have begun if adequate financial
16 and legal assurances described in paragraph
17 (3)(A) are in place to carry out the proposed
18 project, the likelihood of success of the bank is
19 high, and a construction schedule has been ap-
20 proved.

21 “(D) DEBITS.—To the maximum extent
22 practicable, the Secretary shall use the same
23 methodology to quantify debits as is used to
24 quantify credits at a mitigation bank.

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

4 “(5) SERVICE AREAS.—

5 “(A) ADDITIONAL GUIDANCE.—The Sec-
6 retary may provide additional guidance, con-
7 sistent with the Federal Guidance, on the size
8 and use of the service area, including policies
9 regarding linear utility facilities.

10 “(B) INTERSTATE AGREEMENTS.—If the
11 proposed service area or mitigation bank is lo-
12 cated in more than 1 State, the Secretary is au-
13 thorized to resolve any interstate disagreement.

14 “(6) MITIGATION.—

15 “(A) IN GENERAL.—A mitigation bank ap-
16 proved under this subsection may, in accord-
17 ance with this section, provide compensatory
18 mitigation for activities requiring authorization
19 under this section or provide required injunctive
20 relief in an enforcement action by the Secretary
21 or the Administrator.

22 “(B) IN-KIND AND OUT-OF-KIND.—Con-
23 sistent with the Federal Guidance, in-kind com-
24 pensation of wetlands impacts should generally
25 be required. Out-of-kind compensation may be

1 acceptable if it is determined to be practicable
2 and environmentally desirable on a case-by-case
3 basis.

4 “(C) EQUIVALENT STANDARDS AND CRI-
5 TERIA.—Not later than 1 year after the date of
6 enactment of this subsection, the Secretary and
7 the Administrator, in consultation with the
8 heads of appropriate Federal agencies, shall
9 issue regulations establishing standards and cri-
10 teria applicable to the use of on-site mitigation,
11 in lieu fees, and other off-site mitigation as
12 compensatory mitigation that are similar to the
13 standards and criteria applicable to a mitiga-
14 tion bank under this subsection. Such standards
15 and criteria shall include, consistent with this
16 subsection, a definition of in lieu fees and spe-
17 cific measures addressing selection of wetland
18 mitigation projects, timing for initiation and
19 completion of wetland mitigation projects, and
20 other terms to ensure that such fees are used
21 only under appropriate circumstances with ade-
22 quate controls.

23 “(7) REPORT TO CONGRESS.—Not later than 2
24 years after the date of enactment of this subsection,
25 the Secretary shall transmit to Congress a written

1 report on the effectiveness of wetlands mitigation
2 banking and other forms of compensatory mitigation
3 in meeting the policy and goals identified in section
4 101(a)(8). The report shall first be issued in draft
5 form and, in a 60-day period, the Secretary shall re-
6 ceive comments from the public about the accuracy
7 of the information contained in the draft report. The
8 final report shall be revised after consideration of
9 the public comments and submitted to Congress not
10 later than 90 days after the last day of the comment
11 period.

12 “(8) EXISTING BANKS.—Nothing in this sub-
13 section may be construed to require a person oper-
14 ating a mitigation bank in existence on the date of
15 enactment of this subsection to submit an applica-
16 tion for a charter under this subsection to the Sec-
17 retary for approval.

18 “(9) MITIGATION BANKING APPROVED UNDER
19 STATE PROGRAMS.—A State that operates a pro-
20 gram under subsection (h)(2)(A) may administer a
21 wetland mitigation banking program in accordance
22 with procedures established by State law or regula-
23 tion if the banking program is approved by the Ad-

- 1 ministrator as a part of the State's approved pro-
- 2 gram under such subsection.”.

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