

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.

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

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 degrada-
7 tion 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 miti-
15 gation credits for sale in accordance with
16 the charter.

17 “(ii) NUMBER.—The number of cred-
18 its 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 specifi-
23 cally approved under the charter, and con-
24 sistent 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.”.

○