

104TH CONGRESS  
2D SESSION

# H. R. 3692

To promote the restoration, conservation, and enhancement of wetlands through the establishment of a responsible wetlands mitigation banking program.

IN THE HOUSE OF REPRESENTATIVES

JUNE 20, 1996

Mr. JONES introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

# A BILL

To promote the restoration, conservation, and enhancement of wetlands through the establishment of a responsible wetlands mitigation banking program.

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 “Wetlands Restoration  
5 and Improvement Act of 1996”.

## 6 SEC. 2. FINDINGS AND DECLARATION OF POLICIES AND

## 7 GOALS.

8 (a) FINDINGS.—Congress finds that—

1 (1) half of the Nation's wetlands have been de-  
2 stroyed through a failure to understand and appre-  
3 ciate the important environmental, hydrological, and  
4 social functions which wetlands serve, including—

5 (A) essential nesting and feeding habitat  
6 for waterfowl and other wildlife, including many

## Rare and endangered species,

(D) the enhancement of water quality;

12 (E) the provision of recreational, educational, and research opportunities; and  
13

14 (F) opportunities for aesthetic apprecia-  
15 tion;

16 (2) much of the Nation's valuable wetlands  
17 have been significantly degraded, thus necessitating  
18 that activities that destroy wetlands adhere to a  
19 strict mitigation policy that involves sequentially  
20 avoiding impacts, minimizing impacts, and com-  
21 pensating for unavoidable impacts;

22 (3) where impacts are unavoidable, wetlands  
23 mitigation banking restores, enhances, and in excep-  
24 tional cases, preserves and creates ecologically sig-

1 nificant wetlands and provides for long-term restora-  
2 tion and enhancement of these vital resources;

3 (4) wetlands mitigation banking is not only con-  
4 sistent with the important Federal goal of no net  
5 loss of wetlands resources but, when conducted within  
6 the parameters of a thoughtfully designed regu-  
7 latory program, contains the procedural safeguards  
8 necessary to greatly increase the overall number and  
9 quality of wetland resources;

10 (5) wetlands mitigation banks can be particu-  
11 larly effective in restoring, enhancing, creating, and  
12 preserving the valuable environmental functions of  
13 wetlands;

14 (6) mitigation banks often provide greater flexi-  
15 bility, reliability, and effectiveness in meeting mitiga-  
16 tion requirements than on-site mitigation can and  
17 often have significant environmental advantages over  
18 haphazardly placed individual mitigation projects,  
19 such as—

20 (A) maintaining the integrity of a larger  
21 aquatic ecosystem by consolidating compen-  
22 satory mitigation into a single large parcel;

23 (B) bringing together financial resources,  
24 planning, and scientific expertise not practicable

1 to bring to many project-specific compensatory  
2 mitigation proposals;

3 (C) reducing permit processing times and  
4 providing more cost-effective compensatory  
5 mitigation opportunities for projects that qual-  
6 ify;

7 (D) improving regulatory oversight by fo-  
8 cusing regulatory agency resources more effec-  
9 tively; and

10 (E) contributing towards attainment of the  
11 goal of no net loss of the Nation's wetlands by  
12 providing opportunities to compensate for au-  
13 thorized impacts when mitigation might not  
14 otherwise be required, appropriate, or prac-  
15 ticable;

16 (7) wetlands mitigation banking shows consid-  
17 erable promise for preventing and reversing the con-  
18 tinuing net loss of wetlands while accommodating  
19 desirable economic and community growth and, if  
20 implemented on a widespread basis, may result in  
21 further progress toward restoring past losses of criti-  
22 cal wetlands;

23 (8) the absence of Federal enabling legislation  
24 impedes the widespread and effective use of wetlands  
25 mitigation banking, while encouraging needless regu-

1       latory delay, financial uncertainty, and unproductive  
2       litigation; and

15 (b) DECLARATION OF POLICIES AND GOALS.—Sec-  
16 tion 101(a) of the Federal Water Pollution Control Act  
17 (33 U.S.C. 1251(a)) is amended—

18 (1) by striking “and” at the end of paragraph  
19 (6);

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

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

23               “(8) it is the national policy to achieve, through  
24               regulatory and nonregulatory opportunities involving  
25               all levels of government and supported by private

1 initiatives, the conservation and restoration of wet-  
2 lands to increase the quantity and quality of the  
3 wetlands resource base of the United States and the  
4 policy of no overall net loss for the remaining wet-  
5 lands resource base of the United States; and

6 “(9) it is the national policy to foster wetlands  
7 mitigation banking as a means to mitigate the loss  
8 of wetlands and to do so by providing a stable, prac-  
9 tical, and workable regulatory framework for the use  
10 of mitigation banking, making appropriate use of ex-  
11 isting, successful State programs for mitigation  
12 banking, and taking into account regional variations  
13 in wetlands conditions.”.

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.**—In this subsection, the fol-  
20 lowing definitions apply:

21 “(A) **CREATION.**—The term ‘creation’, as  
22 used with respect to wetlands, means an activ-  
23 ity that brings a wetland resource into existence  
24 at a site where wetlands did not exist imme-  
25 diately prior to the activity.

1                   “(B) CREDIT.—The term ‘credit’ means a  
2                   unit of measure that represents the accrual or  
3                   attainment of wetland functions at a mitigation  
4                   bank.

5                   “(C) DEBIT.—The term ‘debit’ means the  
6                   loss of wetland functions at an impact or  
7                   project site. Such losses shall be evaluated  
8                   using the same scientific criteria as are applied  
9                   to evaluate wetlands functions for credit pur-  
10                   poses.

11                   “(D) ENHANCEMENT.—The term ‘en-  
12                   hancement’ means an activity that increases  
13                   any of the wetland functions of a wetland in ex-  
14                   istence prior to the date of enhancement.

15                   “(E) LINEAR UTILITY FACILITY.—The  
16                   term ‘linear utility facility’ means a road, rail-  
17                   road, pipeline (including gathering or distribu-  
18                   tion lines), cable, line (including transmission  
19                   lines) and wire, and appurtenant support equip-  
20                   ment such as towers, poles, pumping equip-  
21                   ment, switches, signals, signs, and substations.

22                   “(F) MAINTENANCE.—The term ‘main-  
23                   tance’, as used with respect to wetlands, means  
24                   an activity undertaken to ensure continuation of  
25                   a wetland or the accomplishment of a project

1                   goal after a wetland restoration, enhancement,  
2                   creation, or preservation project has been com-  
3                   pleted, including hydrological manipulation and  
4                   control of normative plant species.

5                   “(G) MITIGATION BANK.—The term ‘miti-  
6                   gation bank’ means a person, chartered by the  
7                   Secretary under this subsection, to conduct a  
8                   specified wetland resource restoration, enhance-  
9                   ment or, in exceptional circumstances, creation  
10                   and preservation project or projects identified  
11                   in its charter, each project undertaken for the  
12                   purpose of providing mitigation credits to offset  
13                   wetland losses authorized by the terms of per-  
14                   mits allowing activities in the waters of the  
15                   United States.

16                   “(H) PRESERVATION.—The term ‘preser-  
17                   vation’ means the protection of ecologically im-  
18                   portant wetlands in perpetuity through the im-  
19                   plementation of appropriate legal and physical  
20                   mechanisms and may include protection of up-  
21                   land areas adjacent to wetlands as necessary to  
22                   ensure protection or enhancement of the aquat-  
23                   ic ecosystem.

24                   “(I) RESTORATION.—The term ‘restora-  
25                   tion’ means an activity undertaken to return

1           wetlands, former wetlands, or other aquatic re-  
2           sources from a disturbed or altered condition  
3           with lesser wetland acreage or fewer wetland  
4           functions to a previous condition with greater  
5           wetland acreage or wetland functions.

6                             “(J) SERVICE AREA.—The term ‘service  
7                             area’, as used with respect to a mitigation  
8                             bank, means the designated area, typically a  
9                             watershed or hydrologic unit within a State (or  
10                            watershed crossing State lines), wherein the  
11                            bank can reasonably be expected to provide ap-  
12                            propriate compensation for impacts to wetlands  
13                            resources.

24                   “(2) CHARTER OF MITIGATION BANKS.—

1                     “(A) ISSUANCE.—The Secretary shall issue  
2                     a mitigation bank charter to a person whose ap-  
3                     plication satisfies the criteria set forth in this  
4                     subsection.

5                     “(B) APPLICATION.—An applicant for a  
6                     mitigation bank charter shall submit an appli-  
7                     cation and supporting materials signed by a re-  
8                     sponsible official acting on behalf of the appli-  
9                     cant certifying the accuracy of the information  
10                     contained in the application and materials. The  
11                     application shall show, at a minimum, the fol-  
12                     lowing:

13                     “(i) The proposed restoration, en-  
14                     hancement, creation, or preservation  
15                     project or projects which are proposed to  
16                     be included in the scope of the mitigation  
17                     banking charter.

18                     “(ii) The proposed service area for  
19                     each proposed restoration, enhancement,  
20                     creation, or preservation project. The geo-  
21                     graphic designation of the service area  
22                     should be based upon the cataloguing unit  
23                     of the ‘Hydrologic Unit Map of the United  
24                     States’ (United States Geological Survey  
25                     1980). Each such service area shall be

1                   within a single State, unless the watershed  
2                   or hydrologic unit in which the service area  
3                   is located crosses State lines, in which case  
4                   the service area shall be within the same  
5                   watershed. If the watershed crosses State  
6                   lines, the Secretary is strongly encouraged  
7                   to resolve any interstate disagreement.

8                   “(iii) Reliable assurances of an ade-  
9                   quate source of water to support the wet-  
10                  land.

11                  “(iv) Adequate legal control over the  
12                  real property (including necessary uplands)  
13                  in the proposed project to carry out the  
14                  proposed work.

15                  “(v) Adequate financial assurances to  
16                  carry out the proposed project, including  
17                  the operation and maintenance plan. Such  
18                  financial assurances shall be in the form of  
19                  irrevocable letters of credit, performance  
20                  bonds, surety bonds, trust funds, corporate  
21                  guarantees by guarantors which meet fi-  
22                  nancial criteria set by regulations issued by  
23                  the Secretary, or a combination of such in-  
24                  struments and other financial undertak-  
25                  ings. Such financial assurances shall enti-

18                   “(C) ANNUAL REPORTS.—Persons holding  
19                   a mitigation bank charter shall report annually  
20                   to the Secretary. The report shall include—

1                     “(ii) a demonstration of a continued  
2                     adequate long-term source of water to sup-  
3                     port the wetland;

4                     “(iii) a progress report in accom-  
5                     plishing the construction and operation and  
6                     maintenance plan provided in the charter;  
7                     and

8                     “(iv) a reconciliation of the number of  
9                     credits sold during the previous years, the  
10                    number of credits remaining, and any  
11                    credits added in accordance with the re-  
12                    quirements of this subsection and imple-  
13                    menting regulations.

14                    “(D) DECISION DEADLINE.—The Sec-  
15                    retary, in consultation with the Environmental  
16                    Protection Agency, and Federal and State au-  
17                    thorities, as appropriate, shall decide whether to  
18                    issue a mitigation banking charter within 180  
19                    days of the filing of a completed charter appli-  
20                    cation. Prior to the issuance of implementing  
21                    regulations, the Secretary shall do so on the  
22                    basis of best professional judgment concerning  
23                    compliance of the charter application with the  
24                    requirements of this subsection.

1                         “(E) PROCEDURE WITH RESPECT TO AP-  
2                         PLICANT AND OTHER AGENCIES.—The Sec-  
3                         retary shall advise the applicant within 30 days  
4                         of filing whether the application is complete and  
5                         advise the applicant in writing at that time of  
6                         any additional materials which must be submit-  
7                         ted in order to complete the application. The  
8                         Secretary shall also transmit a copy of the com-  
9                         plete charter application to the affected State,  
10                         and to the Fish and Wildlife Service, the Envi-  
11                         ronmental Protection Agency, the National Re-  
12                         sources Conservation Service, and the National  
13                         Marine Fisheries Service, each of which shall  
14                         have 90 days, to run concurrently, in which to  
15                         file written comments, which shall be part of  
16                         the record. If no comments are filed within 90  
17                         days, these entities shall be presumed not to ob-  
18                         ject to the charter.

19                         “(F) NOTICE.—

20                         “(i) PUBLICATION.—The Secretary  
21                         shall publish notice of the charter applica-  
22                         tion in the Federal Register and in a news-  
23                         paper of general circulation in the pro-  
24                         posed service area in which the mitigation  
25                         bank is to operate (including the county in

1 which the project is to be located), and  
2 shall make copies of the charter application  
3 and supporting materials available for pub-  
4 lic review at appropriate convenient loca-  
5 tions in the service area.

6                             “(ii) CONTENTS.—The notice shall de-  
7                             scribe the project or projects provided in  
8                             the charter application, explain where sup-  
9                             porting materials may be reviewed, and  
10                            provide 30 days for the submission of com-  
11                            ments on the compliance of the proposed  
12                            application with this subsection. Upon re-  
13                            quest, the time for comment may be ex-  
14                            tended once for 30 days.

15                             “(G) DETERMINATION.—After a review of  
16                             public comments and any reply by the applicant  
17                             and a determination of whether the application  
18                             complies with this subsection, the Secretary  
19                             may issue the charter, deny the charter, or  
20                             issue the charter with modifications. The Sec-  
21                             retary’s decision shall be based on the entire  
22                             public record, including all public comments.

23                   “(H) PUBLIC HEARING.—Upon a showing  
24                   of a material contested factual issue about the  
25                   compliance of the proposed application with this

1 subsection, the Secretary shall provide notice  
2 and opportunity for a public hearing on the  
3 record with respect to the application.

4 “(I) EXTENSION OF DEADLINE.—The Sec-  
5 retary may extend the time for review once for  
6 90 days, if additional time is needed to file  
7 comments, to provide for a hearing, to provide  
8 for further review of comments, or to provide  
9 for a reply to adverse comments.

10 “(J) REIMBURSEMENT TO EXPEDITE RE-  
11 VIEW.—The Secretary is authorized to accept  
12 reimbursement from a charter applicant for the  
13 direct salary and benefit costs of additional gov-  
14 ernment or contract personnel necessary to ex-  
15 pedite review of a charter application.

16 “(K) AMENDMENTS.—Additional projects  
17 may be added to a mitigation bank charter by  
18 amendment. Amendment applications shall be  
19 processed in the same fashion as charter appli-  
20 cations, but the Secretary may treat the facts  
21 established in support of the charter and con-  
22 firmed by the most recent annual report as es-  
23 tablished for the purpose of the amendment ap-  
24 plication process.

1                     “(L) STATE APPROVALS.—The Secretary  
2 shall give substantial weight to State approvals  
3 of mitigation bank projects if the State pro-  
4 grams under which such projects are approved  
5 require a careful review of the long-term oper-  
6 ation and maintenance of the project, including  
7 provision of an adequate long-term source of  
8 water to support the wetlands and legal control  
9 over the real property in question and otherwise  
10 require similar conditions to those in this sec-  
11 tion.

12                    “(M) COORDINATION.—The Secretary  
13 shall coordinate the processing of a mitigation  
14 bank application under this subsection with the  
15 processing of applications by such applicant for  
16 other permits and authorities under this Act  
17 and under the National Environmental Policy  
18 Act of 1969 so that determinations with respect  
19 to such other permits and authorities may be  
20 made concurrently with the final decision on the  
21 bank charter.

22                    “(N) REVOCATION.—A mitigation banking  
23 charter may be revoked by the Secretary at any  
24 time (i) for substantial failure to comply with  
25 financial assurance, long-term water source, or

1 other critical operating requirements, (ii) for a  
2 criminal conviction for making material false  
3 statements in the charter application or annual  
4 report, or (iii) for other substantial violations of  
5 law which demonstrate the unfitness of the  
6 holder of the charter to operate the mitigation  
7 bank. The charter may only be revoked after an  
8 opportunity for a public hearing on the record  
9 within the meaning of chapter 5 of title 5,  
10 United States Code.

11 “(3) CREDITS.—

12 “(A) OFFERING CREDITS FOR SALE.—  
13 Upon receipt of its charter, a mitigation bank  
14 may offer mitigation credits for sale. The maxi-  
15 mum number of credits which a mitigation  
16 bank may offer for sale shall not exceed the  
17 number to which it is entitled based on—

18 “(i) the number of acres of wetlands  
19 the bank has completed restoring, enhanc-  
20 ing, and in exceptional circumstances, pre-  
21 serving or creating and provided financial  
22 assurance for their long-term operation  
23 and maintenance; plus

24 “(ii) a limited number of the addi-  
25 tional acres of wetlands for which the bank

1                   has provided adequate financial assurance  
2                   that it will—

3                                   “(I) create, restore, enhance, or  
4                                   preserve, and

5                                   “(II) provide long-term operation  
6                                   and maintenance if the Secretary has  
7                                   approved the plans for such work, in-  
8                                   cluding a schedule for construction  
9                                   and there is adequate legal control  
10                                   over the real property to carry out the  
11                                   proposed work; minus  
12                                   “(iii) the number of credits it has pre-  
13                                   viously sold based on the acreage described  
14                                   in clauses (i) and (ii).

15                           “(B) NUMBER OF CREDITS.—The number  
16                                   of credits to which a chartered mitigation bank  
17                                   is entitled based on its acreage and the wet-  
18                                   lands functions served by that acreage shall be  
19                                   determined according to objective criteria set by  
20                                   regulation or, if a completed charter application  
21                                   is filed before regulations are issued, according  
22                                   to objective criteria applied by the Secretary,  
23                                   using best professional judgment as part of the  
24                                   charter decision. The application of the objec-  
25                                   tive criteria applied shall be set forth in detail

1           in the charter decision. The Secretary shall  
2           apply the same criteria to each mitigation bank  
3           in the same State and to mitigation banks in  
4           neighboring States which have overlapping serv-  
5           ice areas.

6           “(C) REDUCTION OF CREDITS.—The num-  
7           ber of mitigation credits to which a mitigation  
8           bank is entitled shall not be decreased except by  
9           sale or upon a showing by the Secretary, after  
10           notice and opportunity for a public hearing, of  
11           the bank’s failure to comply with charter condi-  
12           tions resulting in the Secretary’s decision to  
13           draw on the mitigation bank’s financial assur-  
14           ances for the acreage on which such credits are  
15           based. If the Secretary draws on the mitigation  
16           bank’s financial assurances for all or part of its  
17           acreage, the Secretary may suspend the sale of  
18           credits based on that acreage in order to pre-  
19           vent irreparable harm, provided that notice and  
20           opportunity for a hearing to review the suspen-  
21           sion decision is provided promptly thereafter.

22           “(D) INCREASE IN CREDITS.—The number  
23           of mitigation credits to which a mitigation bank  
24           is entitled may only be increased if the bank  
25           makes a factual showing in its charter applica-

tion, or in an amendment application, that it is entitled to more credits under the objective criteria set by the Secretary by regulation or used by the Secretary in the exercise of best professional judgment in chartering or amending the charter of another mitigation bank in the same State or a neighboring State.

8                             “(E) DEBITS.—If a permit issued by the  
9                             Secretary to conduct activities in waters of the  
10                            United States authorizes unavoidable impacts  
11                           on wetlands and relies on a mitigation bank to  
12                           offset such impacts, the Secretary shall use the  
13                           same objective criteria to determine the wet-  
14                           lands mitigation debits from such permitted ac-  
15                           tivity as is used to determine the wetlands miti-  
16                           gation credits at the relevant mitigation bank.  
17                           Until the issuance of regulations, however, in  
18                           no case shall a ratio of less than 1.5 credits for  
19                           every debit be allowed.

20                   “(F) No REGULATION OF PRICE.—The  
21                   Secretary shall not regulate the price charged  
22                   for the sale of mitigation credits.

23                   “(4) STANDARDS TO BE ESTABLISHED.—

1 of this subsection, the Secretary shall propose  
2 regulations implementing this subsection and  
3 shall promulgate such regulations not later than  
4 18 months after such date of enactment.

5       “(B) CRITERIA FOR CREDITS.—Such regu-  
6       lations shall set forth objective criteria by which  
7       the number of credits to be yielded by a mitiga-  
8       tion banking project may be determined and  
9       shall take into account the wetlands functions  
10      served by the wetlands restored, enhanced, cre-  
11      ated, or preserved by such project, as well as  
12      the environmental benefits served by the adja-  
13      cent uplands included in such mitigation bank-  
14      ing project. Such objective criteria shall also es-  
15      tablish a preference for restoration or enhance-  
16      ment of degraded wetlands but also provide for  
17      the preservation of high quality wetlands if such  
18      preservation results in a demonstrable benefit  
19      to the watershed and there is a demonstrable  
20      threat to the wetlands and creation of wetlands  
21      where there is a high likelihood for ecological  
22      success with adequate financial undertakings,  
23      long-term source of water, and appropriate legal  
24      control of the realty to assure their long-term  
25      maintenance and viability.

## 1                   “(C) CRITERIA FOR SERVICE AREAS.—

2                   Such regulations shall set objective criteria by  
3                   which mitigation bank service areas are to be  
4                   determined, taking into account the need to set  
5                   service areas at a size providing a reasonable  
6                   prospect of vigorous market competition among  
7                   large scale mitigation banks while ensuring that  
8                   the bank effectively mitigates for unavoidable  
9                   wetland impacts. Such regulations shall provide  
10                   that an activity in waters of the United States  
11                   permitted under this section which activity is a  
12                   linear utility facility and is otherwise partially  
13                   within a service area shall be eligible to pur-  
14                   chase mitigation credits from a mitigation bank  
15                   within the same State. Such regulations shall  
16                   establish a preference for using a mitigation  
17                   bank to mitigate an activity which is part of a  
18                   single and complete project which disturbs less  
19                   than 5 acres of wetland in a mitigation bank.

## 20                   “(D) PREFERENCE FOR IN-KIND COM-

21                   PENSATION.—Such regulations shall establish a  
22                   preference for in-kind compensation of wetland  
23                   impacts. Out-of-kind compensation may be ac-  
24                   ceptable only if there is clear demonstration

1                   that it is environmentally preferable to in-kind  
2                   compensation.

3                   “(E) IMPLEMENTATION STRATEGY.—

4                   “(i) DEVELOPMENT.—The Secretary  
5                   shall develop a State-by-State implementa-  
6                   tion strategy and report its findings and  
7                   conclusions to Congress and the public  
8                   within 1 year after the date of the enact-  
9                   ment of this subsection. Such strategy  
10                   shall be used, in part, to assist the Sec-  
11                   etary in proposing and promulgating reg-  
12                   ulations under this subsection.

13                   “(ii) REVIEW.—In developing the  
14                   strategy, the Secretary shall examine the  
15                   progress of pending applications to estab-  
16                   lish mitigation banks under prior guidance  
17                   documents, identify reasons for delay of  
18                   any such application pending for more  
19                   than 6 months, and report alternatives to  
20                   streamline the processing of future applica-  
21                   tions.

22                   “(iii) IDENTIFICATION OF WET-  
23                   LANDS.—In developing the strategy, the  
24                   Secretary shall seek to identify, in con-  
25                   sultation with the appropriate agency of

1 each State, substantial acreage of degraded  
2 wetlands which need significant physical  
3 alteration to the current hydrology in order  
4 to substantially recover their natural wet-  
5 lands functions. Of the tracts of wetlands  
6 so identified, the study shall identify those  
7 where physical restoration work through  
8 private mitigation banking could begin in  
9 the next 3, 5, and 10 years.

“(iv) TRIENNIAL REPORTS TO CONGRESS.—Not later than 4 years after the date of the enactment of this subsection, and every 3 years thereafter, the Secretary shall make a written report to Congress about the progress of restoring the tracts of degraded wetlands identified in the initial report. The progress report shall first be issued in draft form, and the Secretary shall receive comments from the public about the accuracy of the information contained in the draft progress report, for 60 days. The final version of the progress report shall be revised after consideration of the public comments and submitted to

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