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H. R. 1290

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

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 1997

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 1997”.

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
7 rare and endangered species;

8 (B) fish and shellfish habitat;

9 (C) water storage, including natural flood
10 and drought control and aquifer recharge;

11 (D) the enhancement of water quality;

12 (E) the provision of recreational, edu-
13 cational, and research opportunities; and

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 with-
6 in 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 toward attainment of the
11 goal of no net loss of the Nation's wetlands by
12 preserving existing wetlands when appropriate
13 and providing opportunities to compensate for
14 authorized impacts;

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

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

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

3 (9) the adoption of Federal enabling legislation
4 providing for binding Federal standards governing
5 wetlands mitigation banking will foster economic
6 growth and environmental protection by providing
7 the public, the regulated community, State and local
8 governments, and potential investors reasonable as-
9 surance about the technical capabilities, financial
10 soundness and integrity, and overall performance of
11 large-scale wetlands mitigation banks and about the
12 environmental acceptability of desirable projects re-
13 lying on such banks to mitigate their unavoidable
14 adverse effects on wetlands.

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.—As used with re-
23 spect to wetlands, the term ‘maintenance’
24 means an activity undertaken to ensure con-
25 tinuation of a wetland or the accomplishment of

1 a project goal after a wetland restoration, en-
2 hancement, creation, or preservation project has
3 been completed, including hydrological manipu-
4 lation and control of desirable and undesirable
5 plant species.

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

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

1 “(I) RESTORATION.—The term ‘restora-
2 tion’ means an activity undertaken to return
3 wetlands, former wetlands, or other aquatic re-
4 sources from a disturbed or altered condition
5 with lesser wetland acreage or fewer wetland
6 functions to a previous condition with greater
7 wetland acreage or wetland functions.

8 “(J) SERVICE AREA.—As used with respect
9 to a mitigation bank, the term ‘service area’
10 means a designated watershed or hydrologic
11 unit within a State, or a designated watershed
12 crossing State lines, wherein the bank can rea-
13 sonably be expected to provide appropriate com-
14 pensation for impacts to wetlands resources.

15 “(K) WETLAND FUNCTION.—The term
16 ‘wetland function’ means an environmental or
17 hydrological role that the wetland serves, in-
18 cluding flood water storage, flood water convey-
19 ance, ground water discharge or recharge, ero-
20 sion control, wave attenuation, water quality
21 protection, scenic and aesthetic use, food chain
22 support, fisheries, wetland plant habitat, aquat-
23 ic habitat, and habitat for wetland-dependent
24 wildlife.

25 “(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 cataloging unit
23 of the ‘Hydrologic Unit Map of the United
24 States’ (United States Geological Survey
25 1980). If the watershed crosses State lines,

1 the Secretary is strongly encouraged to re-
2 solve any interstate disagreement.

3 “(iii) Reliable assurances of an ade-
4 quate source of water to support the wet-
5 land.

6 “(iv) Adequate legal control over the
7 real property (including necessary uplands)
8 in the proposed project to carry out the
9 proposed work.

10 “(v) Adequate financial assurances to
11 carry out the proposed project, including
12 the operation and maintenance plan. Such
13 financial assurances shall be in the form of
14 irrevocable letters of credit, performance
15 bonds, surety bonds, trust funds, corporate
16 guarantees by guarantors which meet fi-
17 nancial criteria set by regulations issued by
18 the Secretary, or a combination of such in-
19 struments and other financial undertak-
20 ings. Such financial assurances shall enti-
21 tle the Secretary to draw upon them in the
22 event of a substantial failure to perform
23 the work provided in the mitigation bank
24 charter where mitigation credits based on
25 such work have already been used or sold.

1 “(vi) An adequate operations and
2 maintenance plan to assure continued via-
3 bility of the proposed project after comple-
4 tion of construction of the project.

5 “(vii) Adequate legal protection, in-
6 cluding easements, covenants running with
7 land, or other appropriate, legally binding
8 undertakings, to assure permanent protec-
9 tion of the wetlands in the mitigation bank
10 that are used as the basis for selling cred-
11 its. Such legal protections shall be in place
12 at the time that the credits are withdrawn.

13 “(C) ANNUAL REPORTS.—Persons holding
14 a mitigation bank charter shall report annually
15 to the Secretary. The report shall include—

16 “(i) an independent audit of the fi-
17 nancial assurances on which the charter is
18 based and a demonstration of continued
19 compliance with financial assurance re-
20 quirements;

21 “(ii) a demonstration of a continued
22 adequate long-term source of water to sup-
23 port the wetland;

24 “(iii) a progress report in accomplish-
25 ing the construction and operation and

1 maintenance plan provided in the charter;
2 and

3 “(iv) a reconciliation of the number of
4 credits sold during the previous years, the
5 number of credits remaining, and any
6 credits added in accordance with the re-
7 quirements of this subsection and imple-
8 menting regulations.

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

20 “(E) PROCEDURE WITH RESPECT TO AP-
21 PPLICANT AND OTHER AGENCIES.—The Sec-
22 retary shall advise the applicant within 30 days
23 of filing whether the application is complete and
24 advise the applicant in writing at that time of
25 any additional materials which must be submit-

1 ted in order to complete the application. The
2 Secretary shall also transmit a copy of the com-
3 plete charter application to the affected State,
4 and to the Fish and Wildlife Service, the Envi-
5 ronmental Protection Agency, the National Re-
6 sources Conservation Service, and the National
7 Marine Fisheries Service, each of which shall
8 have 90 days, to run concurrently, in which to
9 file written comments, which shall be part of
10 the record. If no comments are filed within 90
11 days, these entities shall be presumed not to ob-
12 ject to the charter.

13 “(F) NOTICE.—

14 “(i) PUBLICATION.—The Secretary
15 shall publish notice of the charter applica-
16 tion in the Federal Register and in a news-
17 paper of general circulation in the pro-
18 posed service area in which the mitigation
19 bank is to operate (including the county in
20 which the project is to be located), and
21 shall make copies of the charter application
22 and supporting materials available for pub-
23 lic review at appropriate convenient loca-
24 tions in the service area.

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

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

18 “(H) PUBLIC HEARING.—Upon a showing
19 of a contested factual issue about the compli-
20 ance of the proposed application with this sub-
21 section, the Secretary shall provide notice and
22 opportunity for a public hearing on the record
23 with respect to the application.

24 “(I) EXTENSION OF DEADLINE.—The Sec-
25 retary may extend the time for review once for

1 90 days, if additional time is needed to file
2 comments, to provide for a hearing, to provide
3 for further review of comments, or to provide
4 for a reply to adverse comments.

5 “(J) AMENDMENTS.—Additional projects
6 may be added to a mitigation bank charter by
7 amendment. Amendment applications shall be
8 processed in the same fashion as charter appli-
9 cations, but the Secretary may treat the facts
10 established in support of the charter and con-
11 firmed by the most recent annual report as es-
12 tablished for the purpose of the amendment ap-
13 plication process.

14 “(K) STATE APPROVALS.—The Secretary
15 shall give substantial weight to State approvals
16 of mitigation bank projects if the State pro-
17 grams under which such projects are approved
18 require a careful review of the long-term oper-
19 ation and maintenance of the project, including
20 provision of an adequate long-term source of
21 water to support the wetlands and legal control
22 over the real property in question and otherwise
23 require similar conditions to those in this sec-
24 tion.

1 “(L) COORDINATION.—The Secretary shall
2 coordinate the processing of a mitigation bank
3 application under this subsection with the proc-
4 essing of applications by such applicant for
5 other permits and authorities under this Act so
6 that determinations with respect to such other
7 permits and authorities may be made concur-
8 rently with the final decision on the bank char-
9 ter.

10 “(M) REVOCATION.—A mitigation banking
11 charter may be revoked by the Secretary at any
12 time (i) for substantial failure to comply with
13 financial assurance, long-term water source, or
14 other critical operating requirements, (ii) for a
15 criminal conviction for making material false
16 statements in the charter application or annual
17 report, or (iii) for other substantial violations of
18 law which demonstrate the unfitness of the
19 holder of the charter to operate the mitigation
20 bank. The charter may only be revoked after an
21 opportunity for a public hearing on the record
22 within the meaning of chapter 5 of title 5,
23 United States Code.

24 “(3) CREDITS.—

1 “(A) OFFERING CREDITS FOR SALE.—
2 Upon receipt of its charter, a mitigation bank
3 may offer mitigation credits for sale. The maxi-
4 mum number of credits which a mitigation
5 bank may offer for sale shall not exceed the
6 number to which it is entitled based on the
7 number of acres of wetlands the bank has com-
8 pleted restoring, enhancing, and in exceptional
9 circumstances, preserving or creating and pro-
10 vided financial assurance for their long-term op-
11 eration and maintenance.

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

1 and to mitigation banks in neighboring Army
2 Corps of Engineers districts which have over-
3 lapping service areas.

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

20 “(D) INCREASE IN CREDITS.—The number
21 of mitigation credits to which a mitigation bank
22 is entitled may only be increased if the bank
23 makes a factual showing in its charter applica-
24 tion, or in an amendment application, that it is
25 entitled to more credits under the objective cri-

1 teria set by the Secretary by regulation or used
2 by the Secretary in the exercise of best profes-
3 sional judgment in chartering or amending the
4 charter of another mitigation bank in the same
5 State or a neighboring State.

6 “(E) DEBITS.—If a permit issued by the
7 Secretary to conduct activities in waters of the
8 United States authorizes unavoidable impacts
9 on wetlands and relies on a mitigation bank to
10 offset such impacts, the Secretary shall use the
11 same objective criteria to determine the wet-
12 lands mitigation debits from such permitted ac-
13 tivity as is used to determine the wetlands miti-
14 gation credits at the relevant mitigation bank.

15 “(F) RESPONSIBILITY OF BANK SUC-
16 CESS.—The mitigation bank is responsible for
17 assuring the success of the restoration, cre-
18 ation, enhancement, and preservation activities
19 that are subject to the transaction.

20 “(G) 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.—

24 “(A) DEADLINES FOR REGULATIONS.—
25 Within 1 year after the date of the enactment

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 benefit to the water-
19 shed and there is a threat to the wetlands and
20 creation of wetlands where there is a high likeli-
21 hood for ecological success with adequate finan-
22 cial undertakings, long-term source of water,
23 and appropriate legal control of the realty to
24 assure their long-term maintenance and viabil-
25 ity.

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 service area. Such regulations
16 shall establish a preference for using a mitiga-
17 tion bank to mitigate an activity which is part
18 of a single and complete project which disturbs
19 less than 35 acres of wetland.

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 shall be ac-
24 ceptable only if it is not reasonably feasible to
25 provide in-kind compensation.

1 “(E) IMPLEMENTATION STRATEGY.—

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

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

20 “(iii) IDENTIFICATION OF WET-
21 LANDS.—In developing the strategy, the
22 Secretary shall seek to identify, in con-
23 sultation with the appropriate agency of
24 each State, substantial acreage of degraded
25 wetlands which need significant physical

1 alteration to the current hydrology in order
2 to substantially recover their natural wet-
3 lands functions. Of the tracts of wetlands
4 so identified, the study shall identify those
5 where physical restoration work through
6 mitigation banking could begin in the next
7 3, 5, and 10 years. These findings shall be
8 made available to the public.

9 “(iv) TRIENNIAL REPORTS TO CON-
10 GRESS.—Not later than 4 years after the
11 date of the enactment of this subsection,
12 and every 3 years thereafter, the Secretary
13 shall make a written report to Congress
14 about the progress of restoring the tracts
15 of degraded wetlands identified in the ini-
16 tial report. The progress report shall first
17 be issued in draft form, and the Secretary
18 shall receive comments from the public
19 about the accuracy of the information con-
20 tained in the draft progress report, for 60
21 days. The final version of the progress re-
22 port shall be revised after consideration of
23 the public comments and submitted to

1 Congress not later than 90 days after the
2 close of the comment period.”.

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