

BILL ANALYSIS

RESOURCES AGENCY

DEPARTMENT California Coastal Commission	AUTHOR Lempert	BILL NUMBER AB 642
SPONSORED BY National Audubon Society	RELATED BILLS	DATE LAST AMENDED 4/5/99
SUBJECT Wetland Mitigation Banking		

SUMMARY

This bill would establish the California Coastal Wetlands Mitigation Banking and Restoration Act of 2000 which would require the Resources Agency, in cooperation with other responsible federal, state, and local agencies, to adopt regulations that establish standards and criteria for a mitigation bank site qualification process in the coastal zone, the evaluation of wetlands acreage and habitat values created at bank sites, and the operation of wetland mitigation bank sites.

The Commission voted to remain neutral on AB 642 and to continue to work with the author to address specific concerns.

ANALYSIS

History: This bill is similar to AB 2160 (Lempert), which was vetoed by Governor Wilson last session.

Existing Law: Existing law requires the State Coastal Conservancy to implement and administer various programs designed to conserve and protect lands, including wetlands, in the coastal zone. Section 404 of the federal Clean Water Act requires that a permit be obtained for any activity that discharges fill material into or requires the excavation of material from "waters of the United States", including wetlands. The permit process requires mitigation such as potential wetland restoration, creation, enhancement or preservation for unavoidable impacts to wetlands.

The Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993 establishes a voluntary wetlands mitigation banking program for the Central Valley to ensure that no net loss of wetland acreage or habitat values occurs as a result of fill activities permitted under the federal Clean Water Act.

Changes Proposed by this Bill: AB 642 would establish a voluntary wetlands mitigation program, allowing the proponents of development projects with unavoidable wetland impacts to contribute to the cost of creating, restoring or enhancing wetlands elsewhere. The site where a new wetland is created is referred to as a "bank site;" a developer's payment is referred to as "purchasing bank credits." The bill would require the developer to demonstrate to all appropriate agencies that it cannot avoid all significant impacts to wetland resources and that it is infeasible to mitigate impacts on the proposed project site, despite good faith efforts.

DEPARTMENTS THAT MAY BE AFFECTED

California Coastal Commission, Fish and Game, Coastal Conservancy

STATE MANDATE

GOVERNOR'S APPOINTMENT

DEPARTMENT DIRECTOR

- S O
 SA OUA
 N NP
 NA NAR
 DEFER TO _____

AGENCY SECRETARY POSITION

- S O
 SA OUA
 N NP
 NA NAR
 DEFER TO _____

GOVERNOR'S OFFICE USE

- Position approved.....
 Position disapproved
 Position Noted

DEPARTMENT DIRECTOR

AGENCY SECRETARY

BY _____

DATE _____

AB 642 declares that it is the *intent* of the Legislature that any wetlands mitigation credits may only be sold for small coastal water-dependent projects, that may otherwise be approved under existing federal or state statutes, or local ordinances, impacting not more than two acres of wetlands, incidental public service projects, as defined in the Coastal Act Section 30233(a), and water-dependent coastal projects that impact deepwater habitat.

Specifically, this bill requires the Resources Agency (Agency) to adopt regulations that establish standards and criteria for a process to qualify particular areas as wetland mitigation bank sites, which are to be used to offset wetland losses from development in the same watershed or hydrologic unit. These regulations must require, among other things, the sale of credits at a ratio that will ensure that lost wetland acreage and habitat functions are fully replaced at a bank site. Developers must purchase credits from a mitigation bank in the same watershed or hydrological unit as, and in close proximity to, the proposed development site. Moreover, the Agency must also find that the designated operator of the bank site demonstrates an ability to create, administer, manage, and protect the site in its enhanced state in perpetuity. This bill mandates that no mitigation credits may be sold to a permittee until the site has been established and functioning in a manner equivalent to a naturally occurring wetland system for a period of at least five years.

On or before January 1, 2001, and annually thereafter, the Agency is required to report to the Legislature a description and evaluation of each mitigation bank site approved, including, but not limited to, the number of wetlands acres and habitat functions created, the number of credits issued, an assessment of the biological productivity of the created wetlands, a comparison of the wetlands acreage, habitat functions that were created at the bank site and those that were lost as a result of permitted projects for which credits were obtained, and any recommendations for improving the bank site program.

The bill would also require the State Coastal Conservancy, on or before January 1, 2001, in cooperation with wetlands scientists, joint ventures, government agencies, and other interested parties, to prepare a study to determine the amount of wetlands restoration potential that exists in the coastal zone.

Discussion: Mitigation banking provides a mechanism for offsite mitigation by establishing a qualified bank site from which a project proponent can buy credits to satisfy its mitigation obligation. The "bank credit" purchased is actually a financial commitment to assist in the development and maintenance of a qualified wetland mitigation bank site, in exchange for the right to adversely impact a wetland on the proposed development project area. If operating correctly, mitigation banking can provide an effective process for mitigating the adverse impacts to wetlands, while streamlining the permitting process. More importantly, it also has the potential to allow for the creation, restoration, or enhancement of large-scale wetlands, rather than the piecemeal mitigation that takes place under existing law.

According to the Department of Fish and Game, mitigation banks are typically designed to consolidate the acquisition of individual mitigation sites into large and biologically meaningful parcels. The number of credits required to be purchased or the replacement ratio depends on the level of development activity in a region, the uniqueness of the biological resources in a particular bank, and the amount of competition from other banks in the area. In theory, when demand for mitigation credits is high, banks can quickly sell out their credits. When all credits in a particular bank are sold, the property is managed in perpetuity as a wildlife preserve. The long-term management is funded by an endowment established through the sale of the credits.

Exiting mitigation efforts

The type of project-by-project mitigation encouraged by current policies often results in smaller, fragmented wetlands rather than larger, self-sustaining wetland ecosystems that have a greater potential to support fish and wildlife and their habitat for the long term. Early attempts at establishing wetlands mitigation bank sites resulted in systems that were costly and unsustainable, because they were focused on a single species, or failed to recognize the impacts resulting from small parcels that cannot ecologically sustain themselves. Trying to preserve an area of wetlands amidst development also presents difficulties. It can be biologically impractical or impossible to maintain small, isolated wetland parcels around encroaching human development. A mitigation banking program has the potential to consolidate wetlands from isolated sites in order to provide a larger buffer from surrounding development, and to better sustain or enhance wetland functions.

Issues to consider

Proponents of this bill state that a successful mitigation bank must, of necessity, accept credits from projects that cause regional impacts. A lost wetland of one type in a particular region is not truly "replaced" or "mitigated" by the creation and maintenance of another type in another region. The wetlands may serve to protect different types of flora and fauna, as well as offer different types of beneficial functions, such as flood control, water quality, or groundwater recharge. For example, a coastal wetland is substantially different from a wetland near an inland body of fresh water. Requiring that a development project proponent purchase mitigation credits from a bank in the same watershed or hydrological unit and in close proximity to the project, as this bill requires, may ensure that the wetlands secured at the bank site are biologically similar to those being lost.

However, due to the spatially restrictive nature of the requirements, large mitigation banks would probably not be created and the potential for use would probably be relatively small except for a few large watersheds. Such a strict requirement in the coastal zone may render this bill ineffective or inoperative. Moreover, the provision that requires a developer to purchase credits from a bank "in close proximity" to the proposed development is ambiguous and unclear. A more feasible approach may be to expand the banking confines by establishing various biogeographical regions in the coastal zone and to allow the purchase of credits within these regions.

What happens after a mitigation bank site is established?

This bill gives the Resources Agency substantial authority to create mitigation banks, but it does not clarify what authority the Commission will have once a bank is created. Specifically:

- It is unclear whether the Commission or local governments implementing a certified LCP will have the discretion to "opt out" of a mitigation banking program that is consistent with the Resources Agency's standards and approved bank sites. AB 642 establishes the process for the Resources Agency to designate mitigation sites, establish standards, etc. but does not indicate how any of that is related to the duties of a permitting agency. Specifically, it does not dictate what an agency must or may do once those standards and designated bank sites are established or when a project applicant comes forward and represents that they qualify to mitigate according to the standards and at the designated site.

- The bill is unclear whether or not the Commission or local governments implementing a certified LCP are bound by the mitigation banking standards set forth by the Resources Agency. For example, it appears that the Resources Agency would preempt other agencies with respect to establishing such details as mitigation ratios. The Agency is required, pursuant to proposed section 31442 (a) and (b), to “adopt regulations that establish standards and criteria...for the evaluation of wetlands acreage and habitat values...[which] shall require the sale of credits at a ratio that will ensure that lost wetland acreage and habitat functions are fully replaced.” This provision appears to give the Resources Agency the authority to establish binding mitigation ratios. Thus, it may follow that if the Commission is either required or chooses to participate in the mitigation banking program, it could be foreclosed from establishing more stringent mitigation ratios for projects subject to the bill.

Other Comments:

- Although past Commission practice has generally been to require in-kind (identical or similar habitat) and on-site mitigation, the Commission may want to preserve an option to consider the ecological benefits of out-of-kind mitigation on a case-by-case basis. For example, out-of-kind mitigation may be desirable for unavoidable small or minor impacts, if used within the context of regional habitat goals.
- Section 31445(a)(1) requires anyone who proposes to establish a bank site to apply to the Resources Agency and obtain all relevant permits from appropriate state agencies. This section is silent, however, regarding any permit requirements of local governments. Thus, as written, local governments with certified local coastal programs do not have jurisdiction over proposed banks sited in their city or county.

FISCAL IMPACT

No fiscal impacts to the Coastal Commission are anticipated.

POSITION

The Commission voted to remain neutral on AB 642 and to continue to work with the author to address specific concerns.

For more information contact Jeff Stump, Legislative Coordinator, at (415) 904-5266.