

**House Bill 5151**

**Sponsor: Rep. John Moolenaar**

**Committee: Conservation and Outdoor  
Recreation**

**Complete to 10-13-03**

**A SUMMARY OF HOUSE BILL 5151 AS INTRODUCED 10-9-03**

House Bill 5151 would amend the Natural Resources and Environmental Protection Act to allow for the creation of a mitigation bank in order to buy, sell, or use mitigation credits in order to develop and preserve wetlands.

Definitions. The bill would define 15 terms, including “mitigation banking” which means that process of restoring or creating self-sustaining functioning wetlands, or, in exceptional circumstances, preserving high-quality and threatened wetlands, as prior replacement of chemical, physical, and biological wetland functions for wetlands that are expected to be unavoidably impacted by development within a watershed or eco-region. In addition, the bill would define “in-kind mitigation” to mean replacement of unavoidably lost wetland with created, restored, or, in exceptional circumstances, preserved wetlands of a similar physical and biological type, with the goal of replacing as fully as possible the functions of the lost wetland. “Unavoidably lost” wetland would mean an area impact which has been approved by the department in accordance with permit review criteria under this section of the law. The bill also would define “mitigation banking agreement” to mean a formal written agreement between a mitigation bank sponsor and the department that identifies all relevant establishment, operation, and management considerations of a wetland mitigation bank.

Creation of mitigation bank. Under the bill, any person would be able to establish a mitigation bank, and then buy, sell, or use mitigation credits, as approved by the Department of Environmental Quality. The department could authorize the use of credits from an approved mitigation bank to satisfy all or a part of the wetland mitigation requirements associated with any permit application in accord with the statutory criteria. However, the department could authorize the use of credits only to offset the unavoidable loss of wetlands; and, before approving the use of a mitigation bank, the department would be required to determine that the applicant had taken all feasible and prudent steps to avoid the loss of wetland resources, and had used all practical means to minimize impacts to wetlands. The bill specifies that the establishment or purchase of credits would not eliminate the need to comply with the permit review criteria.

Replacement on site. Under the bill, site-specific functions would be replaced on-site where that was practical and where the department had determined that on-site replacement was environmentally preferable. In these circumstances, mitigation banking could not be used.

Purpose. The bill specifies that a mitigation bank be maintained in perpetuity. To the extent possible, it would provide multiple chemical, physical, and biological functions. For example, single function, low-quality wetlands—such as wastewater ponds—would not qualify as mitigation banks. The bill requires that the department quantify the wetlands in a bank as

mitigation credits that would be available for use by the bank sponsor, or by other people, to compensate for adverse impacts.

Credits based on acreage. Generally, the department would base the number of mitigation credits in a bank upon the acres of created and restored wetland in the mitigation bank, after monitoring by the bank sponsor demonstrated that wetland functions had been established. However, in exceptional circumstances, the preservation of certain existing wetlands could also contribute to the number of mitigation credits. Not more than 15 percent of the total wetland acreage in any bank could be for the preservation of existing wetlands.

Under the bill, the department could grant mitigation credit for preserved wetlands, only if all of the following applied: a) the preserved wetlands performed exceptional physical or biological functions that were essential to the preservation of the natural resources of the state, or the preserved wetlands were an ecological type that were rare or endangered; b) the preserved wetlands were under a demonstrable threat of loss, or substantial degradation due to human activities that were not under the control of the mitigation bank sponsor, and that were not otherwise restricted by state law; and, c) inclusion of the preserved wetlands in a bank and implementation of other actions identified in the mitigation bank plan would serve to protect functions associated with the wetlands that would otherwise be lost.

Calculation of credits. Mitigation credit granted for preserved wetlands would be at a rate of 0.1 credit for each acres of preserved wetland.

Bank sites. A mitigation bank would be planned and managed in a watershed, or an eco-region context, or both, and would include restored, created, or, in exceptional circumstances, preserved wetlands that would provide functions that met the needs of the watershed and eco-region.

A mitigation bank could be set up on either public or private land. However, a mitigation bank could be established on public lands only if it furthered the management objectives already in place that had been defined by the agency responsible for management of the public land, and with the approval of that agency.

Ten-acre wetland minimum. The bill specifies that a mitigation bank must provide at least 10 acres of new wetland. The new wetland could consist of multiple sites, if the sites were a minimum size of one acre each, and were administered under a single mitigation banking agreement.

Voluntary use. The bill specifies that the creation and use of a mitigation bank would be voluntary. A permit applicant would have the option of providing compensatory mitigation for a single permitted action at the time of permit issuance. A person who chose to operate a bank would enter into a written agreement with the department before construction of the bank, or before any sale or use of credit from the bank. The agreement would define the size of the bank, the ecological type of wetlands to be included, wetland functions to be provided, the area to be served by the bank, and the requirements for creation, operation, and long-term maintenance by the bank sponsor.

Mitigation bank agreement. The sponsor would be required to provide the department with all the information needed to prepare the agreement, and that agreement would have to include all of the following elements and provisions:

- a legal identification of and authorized signature for the mitigation bank sponsor;
  - the bank's location and size, including a legal description of the property;
  - ownership of the site and documentation that the bank sponsor was authorized to use the property. If the owner was not the bank sponsor, then the owner would also be required to sign the agreement;
  - mitigation bank goals and objectives, and the geographic area to be served, with the goal statement to indicate the types of wetlands to be developed and the types of wetland losses for which the bank was to be used;
  - an analysis of the ability of the site to support a diverse wetland system;
  - consistency with existing watershed or eco-region management plans;
  - long-term development trends in the area, and their potential impact on the long-term viability of the mitigation bank;
  - a description of baseline conditions at the proposed bank, including delineation of all existing surface waters or wetlands;
  - the mitigation bank development plan;
  - a long-term mitigation bank management plan, and if the person responsible for the ongoing management was not the bank sponsor, then that person also would be required to sign the agreement;
  - the accounting procedures to be used to track the availability, sale, and use of mitigation credits, and the procedures for notifying the department of the sale or use of credits;
  - performance standards for determining mitigation bank success and certification of credits;
  - a monitoring plan to evaluate the achievement of the performance standards, and reporting protocol;
  - provisions for financial assurances to be used to complete remedial action in the event of mitigation bank default or failure, and provision for the release of financial assurances once an approved mitigation bank was determined by the department to be self-sustaining;
  - provisions for the protection of the site in perpetuity, such as through a conservation easement or deed restriction;
  - assumption of liability for construction and operation by the mitigation bank sponsor;
- and,

- if the mitigation bank would also be used to meet mitigation requirements of another agency—whether federal, state, or local—the signature of an authorized official of the agency.

Submission of mitigation banking proposal. Before submitting a mitigation banking proposal to the department, the mitigation bank sponsor would be required to notify all affected local units of government, and all adjacent property owners of the proposal mitigation bank, and take reasonable steps to address any objections to the project. The bank sponsor would also be required to provide copies of any comments received, and documentation of efforts to resolve local issues, to the department, together with the proposal. The sponsor also would be required to obtain all necessary construction permits for the alteration of existing wetlands or surface waters, and all other required federal, state, or local approvals. The permit review criteria in the law would be applied when an application to construct a mitigation bank was reviewed. However, the bill specifies that this would not pre-empt any requirements to obtain local approval for construction of a wetland mitigation bank, under a local zoning ordinance, or other local regulation.

Determining eligibility. The bill specifies that when making a determination about whether mitigation credits from a bank can be used to meet the requirements of the legislation, the department would be required to consider all of the following factors: a) the location of the mitigation bank relative to the permitted wetland impact; b) the wetland types represented in the mitigation bank; c) the sustainable wetland functions provided by the mitigation bank; and, d) the area of wetland provided as mitigation relative to the impact.

In-kind and out-of-kind mitigation. The bill also specifies that in-kind mitigation would be required, unless the department determined that it was not practical, or that in-kind mitigation was not essential, and that out-of-kind wetland mitigation would provided a greater benefit to the wetland resources of the state. The department could consider the use of out-of-kind mitigation, based upon one or more of the following criteria: a) the types of wetlands restored or created in the mitigation bank helped to restore the historic balance of wetland types within the watershed or eco-region; b) the mitigation bank provided particular wetland functions that met defined resource management needs and goals articulated in an established watershed or ecosystem plan, and would contribute to the overall health of the ecosystem; c) the mitigation bank supported a diverse wetland complex that offset cumulative primary and secondary impacts within the watershed; and d) the mitigation credits would be used to offset the loss of wetland types that could not readily be recreated in a manner that was consistent with the permit review criteria.

Defining mitigation bank service area. Under the bill, the service area of a mitigation bank would be appropriate to the functions provided, and the department would be required to use all of the following criteria to define the service area: a) functions that were dependent upon the location of the wetland in the sub-watershed would have to be replaced by mitigation credits from a bank, or other site within the same sub-watershed; b) wetland functions which were watershed-dependent, but which were not specific to a sub-watershed, would have to be replaced in the same watershed as the impact; c) wetland function, such as migratory bird habitat, that were not dependent upon location in the watershed would have to be replaced either within the same watershed, or within the same eco-region; and d) the mitigation required by an individual permit would be split so that location-specific wetland functions were replaced on site or within

the same sub-watershed area, while other functions would be replaced through a mitigation bank that had a larger defined service area.

Mitigation ratio. The bill specifies that when credits from a mitigation bank were used, the mitigation ratio would be determined based upon the nature of the permitted wetland loss, in accordance with R 281.925 of the Michigan Administrative Code.

Monitoring parameters. Before the use of mitigation credits, the bank sponsor would be required to assess the establishment of wetlands, in accord with a monitoring program that was defined in the mitigation banking agreement, and then certify the extent to which performance standards defined in the agreement had been met. The design of the monitoring program would measure the achievement of the standards associated with the targeted wetland functions. Monitoring would begin at least one year before use of credits. Once mitigation credits in the bank were used, monitoring would continue on an annual basis until performance standards for the full establishment of the bank were met. The monitoring parameters would include all of the following: a) hydrology; b) plant community structure; c) animal community structure; d) design acreage; and e) other measures as defined in the mitigation banking agreement.

Report to the department. The bill requires that the mitigation bank sponsor certify that appropriate wetland functions have been established in the bank under the banking agreement, by submitting a report to the department. That report would include all data collected during the monitoring program; an evaluation of the status of wetlands in the mitigation bank, as compared to design criteria; and a list of the number and type of mitigation credits for which approval had been requested. The department would be required to approve or disapprove the certification within 60 days. It could determine that mitigation credits could not be approved because the wetland had not achieved design wetland functions, or because of a lack of adequate information to document wetland functions. Its evaluation could include an on-site inspection of the bank. If the department determined that wetland conditions had been established in accord with the mitigation banking agreement, then the department would issue a letter to the mitigation bank sponsor approving the number and type of wetland credits that were available for use, and list the approved credits in the bank registry.

Schedule of credit use. The bill specifies that the department authorize the use of approved mitigation credits from the bank, in accord with the following schedule:

- the use of 50 percent of the credits would be allowed after the department determined that construction had been completed in accord with plans in the agreement, and design hydrology had been achieved and maintained for at least one calendar year;
- the use of an additional 25 percent of the credits would be allowed when the bank wetland plant community achieved 50 percent of design cover based on performance standards defined in the agreement; and,
- the use of the final 25 percent of credits would be allowed when the created and restored wetlands in the bank were fully functional and met performance standards defined in the agreement.

Audit and inspection. The bill authorizes the department to audit a mitigation bank at any time to evaluate the status of the wetlands in the bank, and confirm the number of credits available. In addition, the department could inspect a mitigation bank at any reasonable time.

Mitigation bank registry. The bill requires the department to maintain a mitigation bank registry, and to provide information to the public about the availability of credits. The registry would include all of the following information for each bank: a) a general description; b) the total number of credits (acres) in the bank, the number previously used to meet mitigation requirements, the number offered for sale by the sponsor, and the number sold; c) the number of acres of each major ecological type of wetland; d) the defined service area of the mitigation bank; e) the name and address of the mitigation bank sponsor; f) the date the bank was established by the banking agreement, and the date of approval of mitigation credits; and, g) an identification code.

Sales and per credit sale price. Within 60 days of the sale of approved mitigation bank credits, the bank sponsor would be required to report that sale and the per credit sale price to the department. The sale price could not be included in the mitigation bank registry.

Uplands. The department would list approved mitigation credits in the bank registry, and the bill encourages uplands in mitigation bank plans. However, generally, uplands could not be included in the mitigation credits available in the bank.

Public information. The bill specifies that all the information contained in the mitigation bank registry must be readily available to the public.

Bank in perpetuity and long-term management. Under the bill, a mitigation bank sponsor would be required to assure (through legally binding instructions including leases, contracts, deed restrictions, or conservation easements) that the mitigation bank would be maintained in perpetuity. Restrictive covenants that provided for long-term management would have to be included in any lease, sale, or other conversion, and would run with the property.

The bill specifies that long-term management would be the responsibility of the sponsor, and that it would include site maintenance, monitoring of wetland conditions, remedial action needed to fully establish and maintain wetland characteristics in accord with permit requirements, as well as notification of subsequent owners of the limitations on the property. The bank sponsor would submit a long-term management plan, as part of the agreement, and responsibility for the management of the bank could be transferred through the sale or lease of the property, or through an agreement with another person if the department approved the transfer, and if the banking agreement were amended accordingly. Under the bill, a bank sponsor could enter into a legal agreement with a state or local agency, or a nonprofit resource management organization to manage the bank, as defined in the banking agreement, and an authorized official of such an agency would be required to sign the mitigation banking agreement.

Performance bond. Before the use of any credits from an approved mitigation band, the sponsor would be required to provide financial assurances in the form of a performance bond, an irrevocable letter of credit, or an equivalent legal instrument that was sufficient to guarantee the bank's creation, monitoring, and if necessary, remedial action (carried out in accord with the

agreement). The agreement would define the form and amount of the financial assurances, and also define the time limits on the assurances, tied to the achievement of performance standards that define the establishment of a fully functional, self-sustaining wetland. If the wetland, by design, was not self-sustaining, because maintenance was required for dikes, dams, water control structures, or other components essential to the preservation of functional wetlands on the site, then the sponsor would be required to make financial provisions for perpetual management and maintenance.

The bill specifies that a state agency that sponsored a mitigation bank could enter into a formal interagency agreement with the department to guarantee long-term protection and management of the bank, instead of providing financial assurances.

DEQ and DNR priority restoration areas. Under the bill, the Department of Environmental Quality and the Department of Natural Resources could designate priority wetland restoration areas in large former wetland complexes which had experienced a significant historic loss or degradation of wetlands, and which had a high potential for successful wetland restoration. Areas designated in this manner could include either public or private lands, but would have to have the potential to provide the public with vital wetland functions after ecologically sensitive restoration.

The bill requires the Department of Environmental Quality to develop a management plan for each priority wetland restoration area, and when doing so to consider the concerns of the DNR, as well as the potential of the area to provide critical wetland for any of the following: habitat; wildlife and fish production; flood control; water quality protection; groundwater recharge; and recreation. Priority wetland restoration area management plans that had an impact on lands administered by the DNR would be subject to the approval of the DNR.

Further, the Department of Environmental Quality could enter into partnership with other state agencies, local units of government, or private parties to promote the restoration and protection of wetlands within a priority wetland restoration area, in accord with the management plan. Under the bill, the department could provide funding or in-kind services to the partnership, in order to support the plan.

The bill also specifies that any person could establish a mitigation bank within a priority wetland restoration area, and the department could assist by identifying state lands suitable for use in the mitigation bank, or by providing technical assistance.

The Department of Environmental Quality could establish a mitigation bank within a priority wetland restoration area, if a bank had not been established by other parties within one year after designation of the restoration area, or if existing banks did not provide adequate capacity, or wetland functions.

Incentives. A mitigation bank within a priority wetland restoration area could utilize one or more of the following incentives, if approved by the Department of Environmental Quality, in the banking agreement.

- Up to 15 percent of planned wetland credits could be used before the establishment of wetland conditions, if the department had approved the site plan and signed the banking

agreement, the sponsor had obtained all state and local permits and approvals required for construction of the mitigation bank, as well as provided adequate financial assurances.

- The department could approve partial mitigation credit for uplands within the priority wetland restoration area mitigation bank if they were vital to the successful functioning of the wetlands in the bank. (The condition of these uplands would have to be protected under a conservation easement or equivalent instrument. Further, the banking agreement would have to specify the credit received for uplands, based on the extent to which the uplands directly enhanced or maintained the integrity of the aquatic ecosystem, but not more than 0.5 credits could be authorized for each acre. Finally, not more than 10 percent of the total acreage for which mitigation credit was given in a bank could be upland).

- The department could approve mitigation credit for the preservation of certain existing wetlands which provided exceptional functions, or which represented rare wetland types, such as lakeplain wet prairie. However, not more than 25 percent of the wetland acreage approved in a priority wetland restoration area mitigation bank could be for the preservation of existing wetlands.

Analyst: J. Hunault

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.