

AGRICULTURE COMMITTEE - WETLANDS BANK BACKGROUND MEMORANDUM

Section 1 of 2017 Senate Bill No. 2245 directs the Legislative Management to study the desirability and feasibility of creating a state wetlands bank. The study must include consultation with stakeholders to examine land parcels under the control and management of the state, which are suitable for wetlands mitigation.

BACKGROUND Study Directive

Senate Bill No. 2245, as introduced, would have created a new section in North Dakota Century Code Chapter 20.1-02, regarding the Game and Fish Department, to identify land parcels that may qualify for use as wetland mitigation on lands under the jurisdiction, management, or control of either the Game and Fish Department or the Department of Trust Lands, and submit the list to the Agriculture Commissioner. The bill would not have created a wetlands bank. The bill would have only identified land parcels, under the control of various state agencies, which may be suitable for wetlands mitigation. The bill was amended to include the United States Department of Agriculture's Natural Resources Conservation Service and the Army Corps of Engineers in the consultation process. The amendment also included consideration of lands remediated by the Department of Mineral Resources through the abandoned oil and gas well plugging and site reclamation fund. The standing committee minutes for Senate Bill No. 2245 indicate there were concerns that creating wetlands on state owned property could take away from farmers who are renting the land from the state. The bill was amended in the House to eliminate the statutory provisions, and direct a Legislative Management study.

According to the United States Department of Agriculture's Natural Resources Conservation Service, wetland mitigation banking is the "restoration, creation or enhancement of wetlands for the purpose of compensating for unavoidable impacts to wetlands at another location. Wetland mitigation banking is commonly used to compensate for wetland impacts from development, but it is also used for impacts from agriculture."

Federal Guidelines

In 1970, under Public Law 91-559 (84 Stat. 1468-1471), Congress enacted the Water Bank Act. The Act authorized the Secretary of Agriculture, in coordination with the Secretary of the Interior, to enter contracts with landowners to preserve wetlands through the use of annual payments.

In 1980 the United States Environmental Protection Agency (EPA) finalized regulations and criteria used in evaluating activities regulated under Section 404 of the Clean Water Act. In 1990, pursuant to a Memorandum of Agreement established between the EPA and the United States Department of the Army, policies and procedures were developed to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act Section 404 guidelines. The policies and procedures were used to avoid adverse impacts to aquatic resources, minimize the impacts if they cannot be avoided, and practice compensatory mitigation when unavoidable impacts occur. Methods for compensatory mitigation under the policies and procedures include restoration, establishment, enhancement, and preservation of wetlands.

There are three main mechanisms for compensatory mitigation. Permittee-responsible mitigation entails the restoration, establishment, enhancement, or preservation of wetlands undertaken by a permittee to compensate for wetland impacts from a specific project. Mitigation banking is a wetland area restored, established, enhanced, or preserved and set aside to compensate for future conversions of wetlands for development activities. In-lieu-fee mitigation occurs when a permittee provides funds to an in-lieu-fee sponsor (public agency or nonprofit organization). The sponsor collects funds from multiple permittees to pool resources to build and maintain a mitigation site. In 2008 the EPA and the Army Corps of Engineers, through joint rulemaking, expanded the Clean Water Act Section 404 guidelines to include standards for all three mechanisms for providing compensatory mitigation.

The Food Security Act of 1985 included provisions prohibiting United States Department of Agriculture program benefits to agricultural producers who convert wetlands to croplands. In 1995 the United States Department of Agriculture, Army Corps of Engineers, United States Fish and Wildlife Service, and EPA published the *Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*.

PAST AND PRESENT NORTH DAKOTA CENTURY CODE PROVISIONS REGARDING "WETLANDS"

Section 4.1-01-15 directs the Agriculture Commissioner to create and maintain an electronic database of wetland credits available for purchase by an agricultural landowner.

Chapter 20.1-02 addresses the Game and Fish Department. Sections 20.1-02-18.4, 20.1-02-18.5, and 20.1-02-18.6 were enacted in 1987, and repealed in 1997 by House Bill No. 1056. The repealed sections related to a Wetlands Mediation Advisory Board. Under the law, the advisory board met at the call of the Governor and included the Governor, the Agriculture Commissioner, the president of the North Dakota Farmers Union, the State Engineer, and the regional director of the United States Fish and Wildlife Service. The purpose of the advisory board was to mediate disputes or conflicts by persons aggrieved by a decision of the United States Fish and Wildlife Service pertaining to wetlands.

During the 1995-96 interim, the Government Organization Committee conducted a study of the membership, duties, and responsibilities of all boards, councils, committees, and commissions of state government. One of those boards was the Wetlands Mediation Advisory Board. The committee received testimony indicating that since the creation of the advisory board in 1987, the board had never met and that the federal government likely would not be bound by a decision of the board due to the Supremacy Clause in the United States Constitution. Therefore, the committee recommended House Bill No. 1056 to abolish the board

Section 20.1-02-18 gives the state's consent, subject to the Governor's approval, to the federal government's acquisition of land or water to establish migratory bird reservations pursuant to the federal Migratory Bird Conservation Act.

Section 20.1-02-18.1 requires the Governor to submit proposed acquisitions--along with detailed impact analysis from the federal agency involved--of land, wetland, and water areas by the United States for waterfowl production areas, wildlife refuges, or other wildlife or waterfowl purposes--to the board of county commissioners of the county in which the land, wetland, or water areas are located for the board's recommendations.

Section 20.1-02-18.2 provides a landowner may negotiate with the United States Department of the Interior, or its agencies, for leases, easements, or wetland areas sought by the federal government for use as waterfowl production areas, wildlife refuges, or other wildlife purposes.

Sections 57-02-08.4 and 57-02-08.5 address property tax exemptions for owners of wetlands. Under Section 57-02-08.4, a landowner may qualify for a property tax exemption if the landowner annually files, with the county director of tax equalization, a legal description of the wetland for which the exemption is claimed and an agreement to not drain, fill, pump, or concentrate water in the wetland basin or alter the physical nature of the wetland in any manner that reduces the wetland's ability to function as a natural system during the year for which the exemption is claimed. Section 57-02-08.5 requires the County Auditor to certify to the Tax Commissioner the total amount of property tax which would have been due on the exempt property within the county.

Chapter 61-32 addresses drainage of water in the state. Section 61-32-01, which was enacted in 1987 and repealed in 1995, stated the intent of the chapter, and provided agriculture was of great concern in the state and agricultural concerns must be accommodated through wetlands protection. Section 61-32-05, which was enacted in 1987 and repealed in 1995, directed the State Engineer and the Director of the Game and Fish Department to establish a wetlands bank. The section required the State Engineer to keep a record of acres of replacement wetlands debited from and credited to the wetlands bank.

Chapter 61-31 creates a waterbank program under the guidance and rulemaking authority of the Agriculture Commissioner. The chapter was enacted in 1981. The chapter authorized the commissioner to enter 5- or 10-year agreements with landowners for the conservation of wetlands. The chapter requires landowners, after any agreement is reached, to place eligible wetlands into the program and to not drain, burn, fill, or destroy the area. Section 61-31-04 prevents landowners from using the area for agricultural purposes. Section 61-31-05 requires the Agriculture Commissioner to make annual payments to the landowner under the agreement and provide advice and practices regarding conservation and development of wetlands. Section 61-31-09, which was repealed in 1993, required the State Engineer to notify the Agriculture Commissioner of any drainage permit denied by the State Engineer. The section required the commissioner to investigate the wetland area proposed to be drained and see if the area was eligible for inclusion under the state waterbank program.

OTHER STATES

Minnesota and South Dakota have taken action to implement wetland mitigation banking.

In 1991 Minnesota enacted the Wetland Conservation Act to protect wetlands not covered under the Department of Natural Resources public waters permit program. Rules for administering the Act are adopted by the Minnesota Board of Water and Soil Resources. Under the Act, wetlands cannot be drained or filled unless replaced by restoring or creating wetland areas of at least equal public value under an approved replacement plan. A replacement plan

under Minnesota law must demonstrate wetland impacts have been avoided as much as possible, that impacts have been minimized as much as possible if they cannot be avoided, and unavoidable impacts have been replaced by the restoration or creation of new wetlands of equal or greater public value elsewhere. Replacement plans require specifics as to the location, size, and type of replacement wetlands. In addition, rather than restoring or creating a wetland, a replacement plan may provide for the use of credits purchased from the state wetland bank operated by the Board of Water and Soil Resources. The amount of wetland bank credit is related to the extent of functional improvement and ranges from 0.5 to 1.0 credits per acre of restored or created wetland in 1 of 10 wetland bank service areas in the state which are based on watershed boundaries. The credits can be purchased and held for later use or resale.

In 2016 the South Dakota Farm Bureau received a \$1 million grant from the United States Department of Agriculture to establish an agriculture wetland mitigation bank in the state, under the Wetland Mitigation Banking Grant Program created in the Agricultural Act of 2014. The farm bureau used the money, in collaboration with several other entities and the United States Department of Agriculture's Natural Resources Conservation Service, to create the South Dakota Wetland Exchange.

SUGGESTED STUDY APPROACH

In conducting this study, the committee may desire to receive testimony from interested parties, including:

- The Agriculture Commissioner;
- The United States Department of Agriculture State Conservationist;
- The Game and Fish Department;
- The State Water Commission; and
- Private sector entities working in wetland mitigation banking.

The committee may desire to define any issues that need addressing after receipt of information from the interested parties and, if appropriate, receive testimony regarding best practices in other states.