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Wetland Mitigation Banking

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Background

Wetlands mitigation banking is a new and profitable approach to satisfy wetland and aquatic impact mitigation requirements to obtain a CWA section 404 permit from the Army Corps. The Corps and EPA 2008 Compensatory Mitigation Rule at 33CFR 332 & 40 CFR 230.91 (j) encourages the establishment and appropriate use of mitigation banks. The Corps and EPA Federal Register publication of the mitigation rule is found http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf.

The Rule defines a mitigation bank as “*a wetland stream or other aquatic resource area that has been restored, established, enhanced and/or preserved. The resource area is then set aside to compensate for future impacts to aquatic resources resulting from permitted activities.*” The value of a bank is determined and/or preserved in terms of “credits.” Permittees can acquire these credits to meet their requirements for compensatory mitigation for CWA Section 404 permits. Mitigation banking is both an investment and a means of environmental stewardship that will result in an eventual net gain in environmental quality. Essential components to establish and create a mitigation bank may include the following basic needs:

1. Regulatory requirements
2. Stakeholder involvement
3. Economic and ecological feasibility studies
4. Property and service area selections
5. Credit market analysis
6. Construction
7. Land development plans
8. Permit negotiations
9. Technical evaluations of environmental conditions

Background on Wetland Mitigation Banking

The Corps/EPA mitigation rule sets forth a sequence of mitigation. To obtain a CWA section 404 permit, an applicant must first avoid impacts to aquatic resources to the maximum extent practicable, then minimize those impacts and finally compensate for unavoidable impacts. Mitigation can be performed in three ways:

1. Self-mitigation, a process in which the entity proposing to impact wetlands and other waters of the United States must create another wetland of equal or greater ecological value

in the same “service area” (a term meaning the same ecological region, usually a “watershed” determined by hydrologic data). This is very difficult, costly and time consuming.

2. The purchase of a “credit” or right to an already created or mitigated wetland from a wetland mitigation bank in the same service area.
3. Purchasing credits from an approved In Lieu Fee program (ILF) if no bank site is available in the watershed of impact

Following the establishment of the CWA 404 permit program in 1972, it became clear that self-mitigation was not generally successful. The failure of self-mitigation forced the USCOE and EPA to look for alternatives. This conclusion especially became clear in a National Academy of Sciences Study ¹ In light of documented failure of self-mitigation, the concept of mitigation banking began to emerge. This led to the issuance of mitigation banking guidance in 1995 by the Corps, FWS, NRCS and NOAA ², culminating in the 2008 Mitigation Rule making mitigation banking the preferable approach for compensatory mitigation. The studies demonstrate that mitigation banks have much higher success rate as a result of four main factors:

- Mitigation banks are held to a higher standard, are more thoroughly planned and are continually monitored by the Army Corps, EPA and resource agencies such as FWS.
- Mitigation is usually placed in better locations, that is, they are usually historic wetlands that are being restored, rather than wetlands created in locations that will not usually support them.
- Mitigation banks because of their size, average around 100 acres compared to on-site self-mitigation of 1-2 acres. Banks are more ecologically resilient and robust and therefore are better able to sustain themselves through drought periods. Because of this larger size, mitigation banks also are more ecologically diverse and therefore more ecologically valuable.
- Mitigation banks are put in trust to third parties (land trusts, nonprofits environmental groups) that oversee their health and provide maintenance whose costs are sourced through a maintenance bond.

The essential components of a mitigation bank are:

- Bank Prospectus--the detailed proposal for establishing the Bank
- Bank Instrument-- formal agreement between bank owners and regulators
- Interagency Review Team -- composed of key federal and state agencies with expertise such as the FWS-- they provide regulatory review, approval and oversight
- Service Area-- Geographic area for which permitted impacts can be compensated

The Corps and EPA rule also allow for prospective permittees to pay into an In-Lieu Fee Program (ILF) if an approved mitigation bank is not located within the proposed project's watershed of impact. ILF programs are established by nonprofit or governmental organizations that will conduct wetland, stream, or other aquatic resource creation enhancement or preservation activities under a broad (usually programmatic) agreement with the regulatory agencies. The ILF operator uses ILF payments to establish mitigation projects. ILF programs involve an advance

¹ Compensating for wetlands losses under the Clean Water Act, National Academy Press , Washington D.C. 2001 available at <http://www.mitigationactionplan.gov/>

² Federal Guidance for Establishment, use and Operation of Mitigation Banks, 60 Fed. Reg. 58605-614 (Nov. 28, 1995

planning requirement, a cap on the number of advance credits that can be released for sale before a mitigation plan is approved, financial accounting requirements and interagency and public review.

Since the issuance of the 2008 Mitigation Rule, mitigation banking and ILF programs have taken off around the country. As of August 2013, there were over 1800 bank sites loaded into the USCOE and EPA USACE's Regulatory in Lieu Fee and Bank Information Tracking System (RIBITS), with the most banks and ILF programs in California and Florida. For example, there are over 60 approved mitigation banks in Florida. The Corps and Florida DEP use the Uniform Mitigation Assessment Method (UMAM), a standardized procedure for assessing the ecological functions provided by wetlands and other surface waters, the amount those functions are reduced by a proposed impact and the amount of mitigation necessary to offset that loss. Further, in a recent significant court decision, the U.S. Court of Federal Claims ruled that once the Corps approved a mitigation banking instrument, that creates a binding contract between the Corps and the bank operator and the Corps could not unilaterally reduce the number of credits available for sale. Pioneer Reserve LLC v. the United States, U.S. Court of Federal Claims (No. 14- 376C), Nov. 21, 2014)

Mitigation and Banking in Alaska

The data available on RIBITS <https://ribits.army.mil/ribits> indicates that there are seven listed approved and active wetland mitigation banks in Alaska.³ Of the seven listed, four appear to be actively preserving lands and selling mitigation credits, one represents carry over credits from overage at projects implemented in the Municipality of Anchorage from 1999-2011, and two are intended to provide mitigation for activities on military lands and have received initial credits but have not yet released them for use. Four of these banks are component parts of two projects at Pioneer Reserve (POA-2010-147) and Tanana River Watershed (POA-2009-1211, the military lands bank).

The two most active banks are the Su-Knik Mitigation Bank and the Harmony Ranch Wetland Mitigation Bank. The Su-Knik bank is a combined public/private mitigation bank sponsored by the Matanuska-Susitna Borough in partnership with Sustainable Environments, LLC. This bank purports to have approximately 12,700 acres of land available to provide mitigation credit in three parcels near Big Lake, Alaska. The Su-Knik bank was initially permitted in 2006, released a range of wetland credits in December, 2009, and has subsequently engaged in 16 withdrawal transactions with private and public parties. So far, it has preserved 794.80 acres and received credits for 100% of those acres. It has sold (withdrawn) 173.88 credits, for a total sale to preservation ratio of roughly 22%. The Harmony Ranch bank was formed as a partnership by an individual land owner and the Great Land Trust. It preserves 120 acres of private land in exchange for 30.8 credits, roughly 25% of the acreage preserved. Harmony Ranch has sold (withdrawn) 9.42 credits, for a sale to preservation ratio of roughly 30%. Both of these banks made credits available to mitigate Riverine, Flat, and Slope Wetlands. The two Pioneer Reserve banks have received 235 credits for roughly 268 acres of preserved land, roughly 88% of the

³ These are (1) Great Land Trust (Private nonprofit), Harmony Ranch (Private commercial, Pioneer Reserve – Edgerton (Private Commercial), Pioneer Reserve – Seldon (Private Commercial), Su- knik , Fish Creek Parcel (combination public/ private, Tanana Umbrella bank—Jarvis Block F (public commercial) and Tanana Umbrella Bank – Lower Chena Flats Greenbelt (public commercial)

acreage preserved. Those banks released credits in late 2013, and have since sold less than 2% of their total banked credits. The Pioneer Banks include credits for riverine wetlands, wetlands buffer, and a variety of palustrine wetlands. The two Tanana Watershed banks have initially received (but not yet released) 91 credits for roughly 126 acres of preserved land, roughly 72% of the acreage preserved. The Tanana Watershed Banks have not yet released any credits and have therefore not yet sold credits at this time. The Tanana Watershed Banks will provide credits for palustrine wetlands.

In addition, the Arctic Slope Regional Corporation (ASRC) is currently pursuing approval for an “umbrella” mitigation bank covering Cape Hackett, Upper Colville & Starfish Bluff within the North Slope. If approved, the ASRC Mitigation Bank will be the first in the region. The Bank proposes to supply mitigation credits for all North Slope development especially for villages and oil fields. ASRC submitted its umbrella mitigation bank prospectus to the Corps for review on June 13, 2012 and we understand that preliminary review of the prospectus, public review and comment and initial evaluation are complete.

In addition, there are three ILF programs in Alaska by which fee sponsors invest in land title or conservation easements for compensatory mitigation projects. Permittees then purchase credits from fee sponsors. The three ILF programs are The Conservation Fund (TCF). (Statewide), the Great Land Trust and SEAL Trust. In particular, the Corps in 2013 approved TCF’s state wide program instrument approving the sale of over 50,000 advance credits covering five Service areas. Upon approval of project specific mitigation obligations, the Corps will approve release of certain credits for sale to permittees to meet their mitigation obligations based on a Corps approved release schedule.

A comparison of Mitigation Banks and ILF Programs demonstrate certain similarities and differences

Mitigation Banks

- Land conservation reserves bank site in perpetuity
- Landowner retains ownership
- Set up in a short period of time (1 year or less)
- IRT reviews documents to establish and manage Mitigation Bank
- Landowner sells credits
- Credit value based on value of environmental resources and habitat support

ILF Program

- Land conservation via easement
- Landowner retains ownership
- Operated by 3rd Party Sponsor
- Longer setup (2-4 years)
- IRT reviews documents to establish and manage ILF
- Landowner receives one-time payment for establishing conservation easement
- Payment to landowner based on difference in value of land with and without the conservation easement

Endangered Species Conservation Banking:

The US FWS and NMFS have also developed a conservation banking program to conserve and manage habitat of candidate or listed endangered or threatened species under the federal ESA. Conservation banks may be established through restoration or preservation of existing habitat or in some cases, through habitat enhancement or establishment. Conservation banking programs are intended to result in net conservation benefits for the species. Unlike wetlands banking, these agencies rely on a 2003 guidance and have not yet issued regulations. Conservation banking follows essentially the same approach as wetlands mitigation banking and often both processes work together. However, once a credit is approved for sale at a wetland bank, the same credit may not be used for mitigating impacts to species and their habitat. ⁴To date, USFWS has approved 121 conservation banks in 12 states with the most banks in California (77%). No conservation banks have been approved in Alaska.

⁴ See generally U.S. FWS “ Conservation Banking- Incentives for Stewardship” available at <http://www.fws.gov/endangered/>

Lawrence R. Liebesman Biography

Lawrence R. Liebesman is a nationally recognized environmental lawyer and litigator with more than 30 years of experience. His practice emphasizes wetlands, water pollution, coastal, environmental impact assessment and endangered species law.

Mr. Liebesman represents developers, trade associations, local governments, mining and energy companies on a broad range of environmental issues. He has negotiated Clean Water Act (CWA) and Endangered Species Act permits and approvals for commercial, residential, public works and mining projects and has defended challenges to those permits and approvals in court. Mr. Liebesman represents the National Stone Sand and Gravel Association (NSSGA) on wetlands issues, including developing comments on the Army Corps of Engineers' and the Environmental Protection Agency's proposed revisions to the CWA jurisdictional rule. He also advises clients on storm water permitting. He is very involved in Chesapeake Bay cleanup issues and sits on the Maryland State Water Quality Advisory Committee, where he provides advice to the Maryland secretaries of Environment, Natural Resources and Agriculture on Bay water quality issues.

Mr. Liebesman has participated in landmark Clean Water Act (CWA) and Endangered Species Act (ESA) cases. He has authored *amicus briefs* in seven major environmental cases before the United States Supreme Court. These included briefs in the *Rapanos and Carabell* cases regarding the reach of CWA Jurisdiction over adjacent wetlands, the *South Florida Water Management District v. Miccosukee Tribe* involving the definition of "discharge" under the CWA, *Babbitt v. Sweet Home Chapter of Communities for A Great Oregon*, involving the ESA "take" definition, *Bennett v. Spear* expanding the rights of property owners to sue under the ESA, and *U.S. Environmental Protection Agency v. Defenders of Wildlife* dealing with ESA consideration in EPA's delegation of CWA permitting authority to the states. Mr. Liebesman has testified before the House Natural Resources Committee on proposed legislation to reform the ESA. He is the co-author of the *Endangered Species Act Desk Book: a Guide to Endangered Species Law for the Environmental Law Institute* (2nd Ed., 2010) and authored *The Water Suppliers Guide To Wetlands Regulation and Management for the American Water Works Association* (1996).

Prior to entering private practice, Mr. Liebesman spent 11 years as a senior trial attorney at the Department of Justice (DOJ), including a one-year detail to the President's Council on Environmental Quality during the Carter Administration, helping to develop regulations to implement the National Environmental Policy Act (NEPA). While at the DOJ, he handled landmark cases under Superfund, the CWA, the Clean Air Act (CAA) and NEPA. He was lead counsel in *NRDC v. EPA*, which upheld major portions of the EPA's NPDES program under the CWA, and *Bersani v. EPA*, which upheld EPA's veto authority under Section 404(c) of the CWA. Prior to his DOJ service, he spent two years at EPA's Office of Federal Activities, EPA's NEPA oversight office.

Mr. Liebesman is an adjunct professor at George Washington University Law School, where he teaches a course on wildlife and ecosystem law. He previously taught a course on wetlands law and policy at the University of Baltimore Law School. He has also served as a mentor in the Vermont Law School Semester In Practice Program.

Honors & Awards

- Holland & Knight Public and Charitable Service All-Star, 2014
- *Chambers USA – America's Leading Business Lawyers* guide, Environment Law, 2008-2014
- Washington, D.C. *Super Lawyers* magazine, 2011-2014
- Who's Who Legal, 2011
- Special Achievement and Special Commendations Awards, Department of Justice
- Consultant of the Year, Home Builders Association of Maryland, 1993
- Phi Beta Kappa

Memberships

- National Stone, Sand & Gravel Association
- American Law Institute Course of Study on "Species Protection and the Law," Planning Co-Chair
- American Bar Association Section of Environment, Energy and Natural Resources, Water Quality Committee, Chair
- Environmental Law Institute, Council of Partners
- Maryland State Water Quality Advisory Committee

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