



Wetlands Mitigation Banking *Putting Your Wetlands To Work For You And The Environment*

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As populations increase and economically developable lands become more scarce, real estate developers frequently find themselves faced with developing land with less-than-ideal characteristics. The land may have inadequate infrastructure, insufficient zoning, or wetlands or natural aquatic features protected by federal, state, and/or local regulatory programs.

Why the Need?

When faced with the latter of those characteristics, developers may need, as part of their proposed development plan, to adversely impact some or all of the wetlands and aquatic features located on the land. Such impacts will typically require local, state, and/or federal permits. In order to obtain the necessary impact permit, the developer may be required to replace the wetlands or aquatic features and their natural functions with replacement wetlands or aquatic features. This replacement requirement is known as “compensatory mitigation.” Historically, compensatory mitigation was achieved by restoring, creating, enhancing, or preserving wetlands or aquatic features on the site where the impact was to take place.

A more recent alternative is off-site compensatory mitigation, which may take the form of mitigation banking (discussed below), in-lieu-fee mitigation (developer contributes a fee to an approved third party who will use the funds to restore, create, enhance, or preserve off-site wetlands or aquatic fea-

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tures), and project-specific off-site mitigation (a case-by-case approach requiring the developer to perform certain off-site activities). In past years, these off-site compensatory mitigation activities were not typically available since the supporting market infrastructure was not in place.

However, with the release of the 1995 *Federal Guidance on the Establishment, Use and Operation of Mitigation Banks* by the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers (USACE), and three other federal agencies, the use of off-site mitigation banking has become widespread. This collaborative work established a procedural framework for local, state, and federal agencies to review, approve, and manage mitigation banks. In 1992, there were less than 50 approved mitigation banks nationwide. That number rose to 219 in 2002 and approximately 500 in 2005 based on a study by the USACE. Approximately 60 of those 500 banks were sold out of credits by the end of 2005.

What is a Mitigation Bank?

A mitigation bank is a wetland, stream,

or other aquatic resource area that has been created, restored, enhanced, or preserved in accordance with governmental requirements for the purpose of providing replacement compensation in advance of adverse impacts to existing wetlands, streams, or aquatic features. Typically, the bank creator is not the developer seeking the permit to disturb the existing wetlands, streams, or aquatic features, but an unrelated party.

A mitigation bank may be created by governmental agencies, corporations, nonprofit organizations, or any other landowner by implementing one or more of the following practices:

- Restoration: Re-establishing wetlands and/or aquatic resources and functions at a site where they have ceased to exist, or exist in a substantially degraded state.
- Creation: Establishing wetlands and/or aquatic resources where they did not formerly exist.
- Enhancement: Conducting activities in existing wetlands and/or other aquatic resources that increase one or more of the ecological aquatic functions.
- Preservation: Protecting ecologically important wetlands and/or other aquatic resources in perpetuity through implementation of appropriate legal and physical mechanisms.

Source: *Federal Guidance on the Establishment, Use and Operation of Mitigation Banks*

The creation of wetland banks is usually overseen by the USACE in conjunction





with other federal and state agencies. The first step in the process is to submit a “prospectus” to the overseeing authority that provides sufficient information about the site so as to allow the overseeing authority to initiate its review. The prospectus will be the basis for the “mitigation banking instrument,” which provides detail as to the physical and legal characteristics of the proposed bank and how the bank will be established, operated, and maintained.

Both the prospectus and banking instrument phases allow feedback and comments from the overseeing authority, and typically require several redrafts of each. In addition to review by the overseeing authority, the banking instrument will also be subject to public review and comment.

In conjunction with the banking instrument, the overseeing authority will typically require legal restrictions on the use of the banking area in the form of a publicly recorded conservation easement or declaration of restrictions. Because of the engineering and legal complexities involved in creating the bank, it is advisable to obtain the assistance of both an environmental engineer and attorney experienced in this area.

Once the banking instrument has passed muster, the bank creator is responsible for implementing the plan set forth in the banking instrument and operating and maintaining the bank for a minimum of five years.

How does a Mitigation Bank Work?

As the plan set forth in the banking instrument is implemented and wetlands and/or aquatic features are restored, created, enhanced, and/or preserved, the bank creator receives “credits.” The number of credits to be received is established by the banking instrument. These credits are recognized by regulatory agencies as providing suitable compensation or replacements for wetlands or aquatic features adversely impacted by developers.

Credits may be used by the bank creator for its own developing activities, sold directly to third-party developers or sold to intermediary mitigation credit vendors, who in turn will sell the credits to third-party developers. One restraint on the sale of these credits worthy of note is that regulatory agencies typically require that credits only be applicable as compensation for impacts in the same service area. For the most part, service areas are based on watersheds and hydrologic areas, but these can be surprisingly large in size (e.g., the Upper Savannah Service Area covers most of Northeast Georgia).

What are the Benefits of a Mitigation Bank?

To the developer, buying mitigation credits is typically preferred, since on-site compensation often requires the developer to buy additional land for the on-site mitigation, takes more time for approval, and requires the developer to retain additional professional assistance. Off-site wetlands banks and the associated credits provide a convenient and economical solution, as evidenced by the growth in banks and the number of banks that have exhausted their credits.

To the bank creator, the benefits are two-fold. The creation, restoration, enhancement, or preservation of wetlands provides a variety of natural func-

tions, including water purification, flood storage, sediment trapping, groundwater recharge, and waterfowl habitat. In addition to the significant ecological contributions, the bank creator receives a financial benefit from the sale of the credits. With credit prices being market-driven, markets being confined to geographic service areas, and real estate development continuing to expand, a bank creator can make a previously unusable piece of his property profitable.

It's not too late! The 65th Annual Forest Landowners Conference is April 26–28 in San Antonio, Texas, and pre-registration is open until March 7. You can also register onsite beginning April 26 at 8:00 AM. The conference will feature dynamic speakers such as Beauregard Turner of Turner Industries, Marshall Thomas of F&W Forestry, Harry Haney of Virginia Tech, and the author of this *Legal Issues* article, Enrique Anderson. Go to www.forestlandowners.com or page xx for a registration form.