Florida Chamber’s 29th Annual Environmental Permitting Summer School 2015

Practical Considerations in Environmental Mitigation And Mitigation Banking
Mitigation and Mitigation Banking Course Overview

- Mitigation Banking - 101
  - Preference
  - Availability
  - No banks? Other options

- Mitigation Bank Development
  - Feasibility assessment
  - Market demand and competition
  - Pro forma/risk

- Regulatory Processes – Federal Update
  - New Prospectus & MBI Templates
  - Current Issues & Guidance

- Regulatory Processes – State Update
  - Upcoming Rule Changes
  - Current Issues and Guidance

- Discussion/Case Studies (as time permits)
Mitigation Banking 101

- Preference
- Availability
- No banks? Other options
Regulatory Preference – Mitigation Banks

Federal – April 2008 Compensatory Mitigation for Losses of Aquatic Resources; Final Rule

- 33 CFR Parts 325 and 332
  - Officially states preference for use of mitigation banks
  - If not using bank, need justification

DEP and WMD Applicant’s Handbook

- FAC 62. 342.300
  - WMDs – previously preference for on-site
  - Most agencies now focused on mitigation banks as first choice for consistency with the USACE
Mitigation Banks - Availability

- Over 80 permitted banks (state, federal)
- Mitigation Service Area - MSA
- Appropriate type

- Web sites:
  - Federal – RIBITS
  - State – DEP and WMDs

- Agency contacts; specialized companies; FAMB
Mitigation Options

If no Mitigation Bank available or you want to use another option:

- There may be no Mitigation Banks available or appropriate (type) – flexibility
  - Federal RGL – justification
  - Cumulative Impact Study – state requirement (e.g. SWFWMD Applicant’s Handbook 10.2.8) – impacts outside drainage basin
  - TBEP Freshwater Wetlands Master Plan – herbaceous vs forested wetlands in Tampa Bay Basin
- On-site or other permittee responsible mitigation may be more cost effective or beneficial to applicant or required by local government
  - USACE now requiring site protection and financial assurance comparable to mitigation banks – may be dependent on mitigation acreage
- In lieu fee programs
Mitigation Options - Criteria

**Criteria for Mitigation**

- Within same watershed - unless cumulative impact assessment completed
- Similar habitat/functions; in-kind preferred
- UMAM scores for mitigation – equal or exceed UMAM functional loss (or alternative assessment method)
- Special provisions for linear projects (State)
- Uplands mitigation and wetlands preservation generally not acceptable for USACE; except for buffers

- Other federal criteria include: Woodstork Core Foraging Area
- Other state criteria include: Class II Waters
Mitigation Elements

- **Federal Rule has 12 Elements for Determining Mitigation**
- **Same Elements are Part of the Mitigation Process for the State**

1. Project objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information (impact and mitigation)
5. Credit determination methodology
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances
Mitigation Bank Development

- Feasibility assessment
- Market demand and competition
- Pro forma/risk
Choosing a site or evaluating existing land holdings - Business investment opportunity

- Location, Location, Location!
- Potential MSA
- Market demand/competition/MSA
- Size
- Ecological lift opportunity
- Cost considerations
- Regional significance – ecological, regional goals, other
Mitigation Bank – Feasibility Analysis

- **Technical Feasibility** – likelihood of achieving ecological lift and potential number of credits

- **Regulatory Feasibility** – likelihood of obtaining permits in reasonable time frame

- **Legal Feasibility** (Ownership and Encumbrances)

- **Financial Feasibility** – preliminary pro forma
  - Market Demand/Competition
  - Cost of enhancement activities, maintenance and monitoring
  - Permitting/compliance costs
  - Potential MSA
  - Potential credit value
  - Other hidden costs or other considerations (e.g., SSL)
Mitigation Bank – Feasibility Analysis

**Technical Feasibility**

- Does site provide important ecological functions?
  - Restorable hydrology
  - Connectivity to other preservation or significant lands
  - Habitat for T/E species
  - Improvements to water quality
  - Compatibility with adjacent lands

- Number and type of potential credits?

- Mitigation Service Area
Mitigation Bank – Feasibility Analysis

Regulatory Feasibility

➢ Is the IRT likely to conclude site “has potential?”

➢ Will state and federal agencies require a lot of convincing? Or are benefits obvious?
Mitigation Bank – Feasibility Analysis

Legal Feasibility

- Adequate Ownership (Fee Simple)
- Encumbrances must not adversely affect ecological viability
  - Mineral Interests
  - Rights of Way and Access Easements
  - Contractual Rights (hunt leases, timber leases)
- Title Insurance (Existing Policy & New Commitment)
  - Identifies encumbrances
- Survey – identifies extent of ownership and location of encumbrances
- Resolve (clear title, design around, adjust credit scoring, etc.)
Financial Feasibility

- Understand the Market and Competition within Target Basin
  - CIP, FDOT, and other public projects
  - Projected population growth; economic conditions
  - Other banks? MSA, credits remaining; type of credits; adsorption history
Mitigation Bank – Feasibility Analysis

Financial Feasibility – Pro forma

- Pro forma based on realistic costs and credit absorption
  - Realistic Revenue Projections (amount and timing)
  - Realistic Costs Estimate (amount and timing)

- Land
- Permitting/Design/Legal
- Construction
- Monitoring/Maintenance
- Financial Assurances
- Sales Costs
Mitigation Bank – Feasibility Analysis

Financial Feasibility – Pro forma

➢ Other considerations

• Sources of financing – equity? debt?
• Partnership with landowner
• Partnership with Consultant/Contractor
• Sales (in-house or outside)
• Residual Value of Bank at Closure
• Other revenue sources
  o Species mitigation
  o Hunting (if part of plan)
  o Timber harvesting (if part of plan)
## Mitigation Bank – Feasibility Analysis

### Assumptions

<table>
<thead>
<tr>
<th>Assumption</th>
<th>Value</th>
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<tbody>
<tr>
<td>Credit Price</td>
<td>$100,000</td>
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<tr>
<td>Acres</td>
<td>1200</td>
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<tr>
<td>Number Credits</td>
<td>200</td>
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<tr>
<td>Land Cost</td>
<td>$5,000/ac</td>
</tr>
<tr>
<td>Absorption</td>
<td>25/yr.</td>
</tr>
<tr>
<td>Permitting</td>
<td>3 years</td>
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<tr>
<td>Sales Cost</td>
<td>6%</td>
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<tr>
<td>Closure</td>
<td>7 years</td>
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</table>

### Revenue

<table>
<thead>
<tr>
<th>Year</th>
<th>Revenue</th>
<th>Expenses</th>
<th>Cumulative (Rev.-Expense)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>$600,000</td>
<td>$6,000,000</td>
<td>-$6,200,000</td>
</tr>
<tr>
<td>2015</td>
<td></td>
<td>$100,000</td>
<td>-$6,300,000</td>
</tr>
<tr>
<td>2016</td>
<td>$2,500,000</td>
<td>$1,200,000</td>
<td>-$8,800,000</td>
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<tr>
<td>2017-2024</td>
<td>$20,000,000</td>
<td>$400,000</td>
<td>-$10,695,000</td>
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<tr>
<td>Total</td>
<td>$20,000,000</td>
<td>$400,000</td>
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</tr>
</tbody>
</table>

### Expenses

<table>
<thead>
<tr>
<th>Expense</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017-2024</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land</td>
<td>$6,000,000</td>
<td></td>
<td></td>
<td></td>
<td>$6,000,000</td>
</tr>
<tr>
<td>Permitting/Design</td>
<td>$200,000</td>
<td>$100,000</td>
<td>$100,000</td>
<td></td>
<td>$400,000</td>
</tr>
<tr>
<td>Construction</td>
<td>$300,000</td>
<td>$300,000</td>
<td></td>
<td></td>
<td>$600,000</td>
</tr>
<tr>
<td>Short Term F.A.</td>
<td>$600,000</td>
<td></td>
<td></td>
<td></td>
<td>$600,000</td>
</tr>
<tr>
<td>Long Term F.A.</td>
<td>$600,000</td>
<td></td>
<td></td>
<td></td>
<td>$600,000</td>
</tr>
<tr>
<td>Maint./Monitoring</td>
<td>$55,000</td>
<td>$55,000</td>
<td></td>
<td></td>
<td>$445,000</td>
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<tr>
<td>Total Expense</td>
<td>$6,200,000</td>
<td>$100,000</td>
<td>$1,715,000</td>
<td>$355,000</td>
<td>$8,705,000</td>
</tr>
<tr>
<td>Cumulative</td>
<td>-$6,200,000</td>
<td>-$100,000</td>
<td>-$1,115,000</td>
<td>$1,995,000</td>
<td>$10,695,000</td>
</tr>
</tbody>
</table>
Mitigation Bank Development Risks

_Sounds good; but, what about the risks?_

- Regulatory – delays, issues, future rule changes
- Hidden costs – legal, easement filings
- Construction unknowns
- Meeting Success Criteria – when and if?
- Market needs and timing; competition; credit value
- Financial assurance
- Long Term Management
## Mitigation Bank – Feasibility Analysis

<table>
<thead>
<tr>
<th>Credit Price</th>
<th>8 Years</th>
<th>12 Years</th>
<th>20 Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>$150,000.00</td>
<td>26%</td>
<td>20%</td>
<td>11.00%</td>
</tr>
<tr>
<td>$100,000.00</td>
<td>16%</td>
<td>12%</td>
<td>4%</td>
</tr>
<tr>
<td>$50,000.00</td>
<td>3%</td>
<td>2%</td>
<td>-4%</td>
</tr>
</tbody>
</table>
Permitting Process

DIFFERENCES BETWEEN STATE AND FEDERAL PROCESS

**USACE 33 CFR 332.8**
- Prospectus – Letter of Potential
- Mitigation Banking Instrument (MBI)
  - Design Details
  - Success Criteria
  - MSA Justification
  - Credit Ledger
  - Financial Assurance
- IRT Review (including state agencies)

**DEP/WMD 62-342 FAC**
- ERP application (same considerations as MBI)
- State commenting agencies
Mitigation Bank - After Permitting

- Conservation easement
  - Appraisal
  - Recording
  - Requirements

- Financial Assurance - Changes
  - Construction/Implementation
  - Long term financial assurance funding
  - Perpetual Management and Maintenance
  - 100% funding with 1st credit release or partial funding
  - Other options?

- Meet success criteria – Obtain credit releases from agencies

- Selling credits - Ledger updates
  - Process
  - Responsibilities
Regulatory Updates

- Federal Updates
Federal Review Process

Compensatory Mitigation Rule
Timeline for Bank or ILF Instrument Approval*

<table>
<thead>
<tr>
<th>Event</th>
<th># of Days**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Optional Preliminary Review of Draft Prospectus</td>
<td>30</td>
</tr>
<tr>
<td>DE provides copies of draft prospectus to IRT and will provide comments back to the sponsor within 30 days.</td>
<td></td>
</tr>
<tr>
<td>Sponsor Prepares and Submits Prospectus</td>
<td></td>
</tr>
<tr>
<td>- DE must notify sponsor of completeness within 30 days of submission</td>
<td></td>
</tr>
<tr>
<td>Day 1** Complete Prospectus Received by DE</td>
<td>30</td>
</tr>
<tr>
<td>Day 30</td>
<td>30</td>
</tr>
<tr>
<td>Day 60</td>
<td>15</td>
</tr>
<tr>
<td>Day 90</td>
<td>30</td>
</tr>
<tr>
<td>DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.</td>
<td></td>
</tr>
<tr>
<td>Phase II</td>
<td></td>
</tr>
<tr>
<td>Day 90</td>
<td>60</td>
</tr>
<tr>
<td>Day 90</td>
<td>90</td>
</tr>
<tr>
<td>Sponsor Considers Comments, Prepares and Submits Draft Instrument</td>
<td></td>
</tr>
<tr>
<td>- DE must notify sponsor of completeness within 30 days of submission</td>
<td></td>
</tr>
<tr>
<td>Day 1** Complete Draft Instrument Received by IRT Members</td>
<td>30</td>
</tr>
<tr>
<td>Phase III</td>
<td></td>
</tr>
<tr>
<td>Day 90</td>
<td>60</td>
</tr>
<tr>
<td>Day 90</td>
<td>90</td>
</tr>
<tr>
<td>Sponsor Prepares Final Instrument</td>
<td></td>
</tr>
<tr>
<td>- Sponsor provides copies to DE and all IRT members</td>
<td></td>
</tr>
<tr>
<td>Day 1** Final Instrument Received by DE &amp; IRT</td>
<td></td>
</tr>
<tr>
<td>Phase IV</td>
<td></td>
</tr>
<tr>
<td>Day 90</td>
<td>30</td>
</tr>
<tr>
<td>Day 90</td>
<td>45</td>
</tr>
<tr>
<td>Day 90</td>
<td>15</td>
</tr>
<tr>
<td>DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.</td>
<td></td>
</tr>
<tr>
<td>IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.</td>
<td></td>
</tr>
<tr>
<td>Day 90</td>
<td></td>
</tr>
<tr>
<td>Day 90</td>
<td></td>
</tr>
<tr>
<td>INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED</td>
<td></td>
</tr>
</tbody>
</table>

Total Required Federal Review (Phases II-IV): 225 Days
*Timeline also applies to amendments
**The timeline in this column uses the maximum number of days allowed for each phase.
Prospectus

Federal review begins with complete prospectus

- Required information:
  - Objectives
  - Establishment and operation
  - Service area
  - General need and technical feasibility
  - Ownership & long-term management
  - Sponsor qualifications
  - Ecological suitability
Mitigation Banking Instrument

- Developed after submission of prospectus and finding of potential.
- Instrument based on prospectus and describes in detail the physical and legal characteristics of the proposed mitigation bank and how it will be established and operated.
- Draft instrument must be determined complete before review by IRT begins.
Mitigation Banking Instrument

Draft instrument must include:

- Mitigation plan (12 components)
- Credit release schedule
- Service area
- Accounting procedures
- Default and closure provisions
- Reporting protocols
- Provision stating legal responsibility for mitigation lies with sponsor once permittee secures credits
Post Issuance Activities

**Initial Credit Release**
- Conservation easement
- Financial assurances (Implementation/Long-term)

**Monitoring Reports**

**Credit Release Requests**
- Based on criteria established in approved MBI

**Credit Sales**
- Associated with COE permits
- RIBITS
- Letter/form accepting responsibility

**Modifications**
Corps Bank Team Focus

- Organizational changes
- Review timelines and process
- Communication – internal and external
- Continued education
- Predictability and reliability
Regulatory Updates

- State Regulatory Changes
Mitigation and Mitigation Banking
What’s new with DEP?

State Regulatory and Policy Updates:
- UMAM rule development (still ongoing)
- Mitigation Bank insurance/escrow option (ongoing)
- SWERP Phase II (still ongoing)
UMAM Rule Development

DEP is in active rule development and has established seven workgroups to help develop revised field worksheets.

http://www.dep.state.fl.us/water/wetlands/mitigation/umam/index.htm

Field testing has been occurring as well as further edits to the worksheets.
Reference Materials

- You Tube videos
- Comments regarding rulemaking
- Delineation manual, etc.
Permitting Mitigation Banks

82 State Permitted Mitigation Banks

60 Permitted by WMDs

22 Permitted by DEP
Mitigation Bank Service Areas

PERMITTED MITIGATION BANKS AND SERVICE AREAS
JULY 2015
Mitigation Banking Website

http://www.dep.state.fl.us/water/wetlands/mitigation/mitigation_banking.htm

View larger map

Video Quick Start Guide
Mitigation and Mitigation Banking
New Website

Dropdown box to filter by agency, bank, or location

Open and filter table
Mitigation and Mitigation Banking
New Website

Filtered to show only banks permitted by SJRWMD
Insurance and/or Escrow option

- Department has initiated rule development to allow the use of an insurance policy for construction financial assurance.

- A revised notice of Rule Development will add the ability to set up an escrow account with the Department of Financial Services as an additional option.

- We are currently seeking input from mitigation bankers and the insurance industry regarding this rulemaking.

- Currently a variance is required if you want to use an insurance policy.
Future Rulemaking

- Larger Mitigation Bank rulemaking cleanup
- “Coastal Basin” rulemaking
- Additional cleanup of Statewide ERP rules?
Trends

- Has there been an increased interest in coastal banks?
  - Salt Marsh
  - Mangroves
  - Seagrass

- The Department is currently reviewing two possible banks that involve some of these communities
Consistency/Improvements

- Continued coordination between DEP/WMDs and ACOE

- Develop a “State Template” for Mitigation Bank applications modeled after Federal MBI template

- Develop more state templates regarding Hunting Plans, Monitoring Plans, Long Term Management Plans, Fire Management, etc.

- What can we do to speed up the reviews and improve consistent feedback from the state?
Contact Information

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Thank you!