Florida Chamber’s 30th Annual Environmental Permitting Summer School 2016

Practical Considerations in Environmental Mitigation And Mitigation Banking

Beverly F. Birkitt, Kelly Sands, Debbie Wegmann, Tim Rach, Edward Cole, Esq.
Mitigation and Mitigation Banking
Course Overview

- Beverly Birkitt – Birkitt Environmental Services, Inc.
  - Mitigation Bank Development Process
  - USACE and Florida Permit Process

- Kelly Sands – Westervelt Ecological Services
  - National Perspective
  - Mitigation Service Areas

- Debbie Wegmann – USACE
  - Federal Update
  - Current Issues

- Tim Rach – FDEP
  - State Update
  - Current Issues

- Edward Cole – Akerman, LLP
  - Legal Considerations

Tampa Bay Mitigation Bank
# Mitigation Bank – State/Federal Permitting Process

## USACE Process

<table>
<thead>
<tr>
<th>Step</th>
<th>Timeframe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Application</td>
<td></td>
</tr>
<tr>
<td>Pre-application meeting</td>
<td></td>
</tr>
<tr>
<td>Prospectus</td>
<td>30 Days</td>
</tr>
<tr>
<td>Public notice</td>
<td>30 Days</td>
</tr>
<tr>
<td>IRT and Public comment</td>
<td>30 Days</td>
</tr>
<tr>
<td>Evaluation letter provided</td>
<td>30 Days</td>
</tr>
<tr>
<td>Draft Mitigation Bank Instrument</td>
<td>90 Days</td>
</tr>
<tr>
<td>IRT comments</td>
<td>30 Days</td>
</tr>
<tr>
<td>Resolve Issues</td>
<td>60 Days</td>
</tr>
<tr>
<td>Final Instrument Submitted</td>
<td></td>
</tr>
<tr>
<td>Notification of intent to approve/not approve</td>
<td>30 Days</td>
</tr>
<tr>
<td>Dispute resolution process</td>
<td>15 Days</td>
</tr>
<tr>
<td>Approved/not approved</td>
<td></td>
</tr>
</tbody>
</table>

**Estimated Time:** 225 Days with time for issue resolution - 12-18 months

## State Process

<table>
<thead>
<tr>
<th>Step</th>
<th>Timeframe</th>
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</thead>
<tbody>
<tr>
<td>Pre-Application</td>
<td></td>
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<tr>
<td>Pre-app submitted and reviewed</td>
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</tr>
<tr>
<td>No Prospectus Process</td>
<td></td>
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<tr>
<td>Participation in IRT Review</td>
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<tr>
<td>ERP Application Submitted</td>
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<tr>
<td>1st Request for Additional Information (RAI)</td>
<td>14-30 Days*</td>
</tr>
<tr>
<td>1st response to RAI</td>
<td>45 Days</td>
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<tr>
<td>2nd RAI</td>
<td>4-30 Days*</td>
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<tr>
<td>2nd response to RAI</td>
<td>45 Days</td>
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<tr>
<td>ERP Application Complete</td>
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<tr>
<td>Notification of Intent to Issue/Deny</td>
<td>30-90 Days</td>
</tr>
<tr>
<td>Approved/not approved</td>
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</tbody>
</table>

**Estimated Time:** 145 - 240 Days with time for issue resolution - 12-18 months
Mitigation Bank – State/Federal Permitting Process - Issues

- Conservation Easement (CE) language
  - Operating Agreements include draft CE language
  - Often agencies disagree with approved language

- Financial Assurance (FA requirements language)
  - General agreement on language
  - Initiation of short-term vs long-term FA varies

- Credit evaluation approach
  - Functional Assessment Method
    - Same functional assess method – UMAM
    - Different factors for UMAM
  - Scoring
    - State – scores upland buffers for credits
    - USACE – no separate scoring for upland buffers

- Mitigation Service Area – Different basis
  - HUC 8 starting point for USACE
  - State mitigation basins defined by rule

- Use of mitigation banks
  - Out of basin/MSA
  - Out of kind
National Perspective
Current Issues
Emergence of Banking

- NO NET LOSS – First adopted as national goal by Bush administration in 1988
- 1990 MOA – Articulated requirements for mitigation (on-site)
- FEDERAL GUIDANCE ON MITIGATION BANKS 1995
- THE RULE – Equivalent standards, hierarchy, and watershed-based decisions
- PRESIDENTIAL MEMORANDUM

### 404 Bank Approval Overtime

(RIBITS Bank Summary)

<table>
<thead>
<tr>
<th>YEAR ESTABLISHED</th>
<th>NUMBER OF BANKS</th>
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<tbody>
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<td>2014</td>
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<td>2015</td>
<td>111</td>
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<td>2016</td>
<td>113</td>
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<td>2017</td>
<td>30</td>
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</table>
Emergence of Banking

**Time to Permit**
(ORM Mitigation 2010 to 2015)

<table>
<thead>
<tr>
<th>MITIGATION TYPE</th>
<th>NUMBER OF DAYS</th>
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</thead>
<tbody>
<tr>
<td>Mitigation Bank</td>
<td></td>
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<tr>
<td>In-Lieu Fee</td>
<td></td>
</tr>
<tr>
<td>Permittee Responsible (on-site)</td>
<td></td>
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<tr>
<td>Permittee Responsible (off-site)</td>
<td></td>
</tr>
</tbody>
</table>

- **SP**
- **NWP**
Presidential Memorandum

- Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment

- Memorandum for the Secretary of Defense, the Secretary of the Interior, the Secretary of Agriculture, the Administrator of the Environmental Protection Agency, the Administrator of the National Oceanic and Atmospheric Administration

- Agencies shall each adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve 120 days -2 years from date of memorandum
Revised Mitigation Policy will allow the Service to recommend or require mitigation under the ESA.

Goal to improve (i.e. a net gain) or, at minimum, to maintain (i.e., no net loss).

Emphasis on landscape-level approaches and advance mitigation plans.
Jan. 28, 2016 – NRCS will provide $9 million to help states, local governments or other qualified partners develop wetland mitigation banks that restore, create, or enhance wetland ecosystems, broadening the conservation options available to farmers and ranchers so they can maintain eligibility for other USDA programs.
Trends in the Industry

- Large Private Investments
- Confidence In Markets

The Mitigation Bank Statute, 373.4136
## Service Areas By District

<table>
<thead>
<tr>
<th>District Location</th>
<th>Range (sq. miles)</th>
<th>Average (sq. miles)</th>
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</thead>
<tbody>
<tr>
<td>NWFWMD</td>
<td>427 to 1,630</td>
<td>838</td>
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<tr>
<td>SJRWMD</td>
<td>118 to 2,349</td>
<td>1,078</td>
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<tr>
<td>SWFWMD</td>
<td>361 to 2,274</td>
<td>1,315</td>
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<tr>
<td>SFWMD</td>
<td>410 to 4,387</td>
<td>1,670</td>
</tr>
<tr>
<td>SRWMD</td>
<td>2,537 to 3,322</td>
<td>2,930</td>
</tr>
</tbody>
</table>
Growing supply, finite demand
Considerations

- Coordination between agencies
- Consistency of standards
- California – MOU
- Templates
- Crediting and more importantly debiting
Federal Update & Current Issues
Practical Considerations in Environmental Mitigation and Mitigation Banking

Debbie Wegmann
Chief, North Permits Branch
Jacksonville, Florida
July 20, 2016
 Jacksonville – 24% of all mitigation banks in the US

Current Status:

- 52 Pending
- 74 Approved
- 10 Newly proposed in FY 2016 (Oct 1 – present)
- **Regulatory In-lieu fee and Bank Information Tracking System (RIBITS)**
Practical Considerations in Environmental Mitigation and Mitigation Banking

- Allows online tracking of mitigation bank and ILF activity including:
  - Contacts
  - Service areas
  - Available credits
  - Ledgers
  - Reporting
  - Bank & ILF documents
  - Status
Focus areas:

► Staffing
  • Understaffed (deployments, etc.)
  • Currently addressing

► Consistency
  • Documents
  • Determinations

► Coordination – Financial Assurances and Site Protection
Focus areas (cont.)

► Unauthorized changes
  • New sponsors
  • Changes to financial assurances
  • Other bank changes

► Modifications
► Compliance
► Service areas
► Outreach
Practical Considerations in Environmental Mitigation and Mitigation Banking

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State Update & Current Issues
Mitigation and Mitigation Banking
What’s new with DEP?

On-going Rule Amendments:
- SWERP Phase II (2016)
- Mitigation Bank insurance/escrow option (2016)
- UMAM rule development (continuing into 2017)
Rule Amendments

- SWERP Phase II
  - Rule cleanup and clarifications
  - Revised Joint Application

- Mitigation Bank financial assurance options
  - Insurance instrument
  - Escrow with Dept. of Financial Services

- UMAM (separate presentation this week)
  - Revising worksheets
Permitted Mitigation Banks

- 86 State Permitted Mitigation Banks
- 64 Permitted by WMDs
- 22 Permitted by DEP
Mitigation Bank Service Areas

Service Area additions since 2015

PERMITTED MITIGATION BANKS AND SERVICE AREAS
JULY 2016

Legend:
- Florida Counties
- Mitigation Banks
- 2015 Mitigation Service Areas
- 2016 Mitigation Service Area Additions
DEP Mitigation Banking Website

http://www.dep.state.fl.us/water/wetlands/mitigation/mitigation_bankiing.htm
Mitigation Banking Website

Zoom in and get detailed information (acreage, credits, agency contact, permit links, bank descriptions)
Mitigation Banking Website

Dropdown box to filter by agency, bank, or location

Open and filter table
Mitigation Banking Website

Filtered to show only banks permitted by SJRWMD
Trends

- Increased interest in coastal banks?
  - Salt Marsh
  - Mangroves
  - Seagrass

- Central and Southwest portions of the state have seen an uptick in proposals
Focus your attention on compliance & maintenance

- Timely prescribed fires
- Erosion controls, ditch blocks, low water crossings
- Adequate hydrology
- Exotic vegetation control
- Anticipate and deal with trespass concerns
- Appropriate fencing
- Adaptive management
- Budget and account for routine inspections of the site
Cumulative Impacts

An applicant must provide reasonable assurance that a project does not cause unacceptable cumulative impacts within the same drainage basin.

Mitigation outside the drainage basin:

- Must demonstrate that the mitigation fully offsets the adverse impacts within that drainage basin based upon several factors:
  - Connectivity of waters
  - Hydrology
  - Water quality
  - Habitat range of affected species

- If not fully offset, must provide that there are no unacceptable cumulative impacts to water quality or functions of wetlands or surface waters.

“Cumulative Impacts Analysis”
Consistency/Improvements

- Continued coordination between the State and ACOE regarding financial assurance and conservation easement documentation

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

- What can we do to provide a more consistent and expedition permitting process?
Legal Considerations
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.)
Mitigation Bank – Legal Considerations

- Encumbrances (including mineral interests)
- Financial Assurances (notices to Corps)
- Conservation Easements (notices to Corps and Enforcement rights)
- MBI an Agreement?
- Changes to MBI template
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Thank you!