5th Annual Stetson Wetlands Workshop: Using Compensatory Mitigation to Offset Coastal Wetland Impacts

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This presentation represents only the personal opinions of the author; it does not represent the official viewpoint of NOAA or USACE.

Overview

- USACE compensatory mitigation banking program

- NOAA restoration banking guidance

Federal Compensatory Wetland Mitigation Requirements

- USACE Wetland Permitting Program, 33 U.S.C. 1344 (Clean Water Act Section 404) and permitting regulations at 33 C.F.R. Part 320 et seq. require authorization for the discharge of dredged or fill material into waters of the United States, including jurisdictional wetlands
- 2008 EPA and USACE joint rulemaking on Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed.Reg. 19594 (Apr. 10, 2008)
  - USACE, 33 C.F.R. Part 332
  - EPA, 33 C.F.R. Part 230, Subpart J
  - Replaced existing guidance documents dating back to 1995

33 CFR Part 332: Compensatory Mitigation

- Objective= offset unavoidable impacts based on functional analysis (usually greater than 1:1 to account for time lag and risk factors)
- Permit applicants responsible for proposing appropriate compensatory mitigation plan
- Establishes a hierarchy of preferences: credits from mitigation bank and then in-lieu fee generally preferable to permittee-responsible mitigation

SWALLOWS - South of NW 78 Street - Doral, FL - USA

By ACrossbow

Fly to this photo's location

Misplaced?
Inappropriate
Comment it

Mitigation Bank Instrument Approval Process

- Must have a USACE-approved banking instrument prior to USACE accepting credits for compensatory mitigation
- Establishes Interagency Review Team (IRT) consisting of USACE, EPA, FWS, NOAA, NRCS, and others as appropriate to review documentation for establishment and management of banks

1. Sponsor submits prospectus
2. IRT and public review of prospectus
3. USACE makes potential or no potential determination
4. Sponsor submits a draft instrument
5. IRT review of draft instrument
6. Sponsor submits final instrument addressing IRT comments
7. USACE approval/disapproval of instrument (authorization to sell credits to satisfy requirements of USACE permits)

Prospectus (33 C.F.R. 332.8(d)(2))

Overview of proposed bank and basis for public and initial IRT comment

- ✓ Objectives
- ✓ Establishment and operation
- ✓ Proposed service area
- ✓ General need and technical feasibility
- ✓ Proposed ownership
- ✓ Long-term management strategy
- ✓ Sponsor's qualifications
- ✓ Ecological suitability of site
- ✓ Water rights

Bank Instrument (33 C.F.R. 332.8(d)(6))

- Geographic service area (i.e., hydrologic unit code (HUC) watershed(s))
- Credit accounting procedures (ledger, notification to USACE)
- *Legal provision transferring responsibility for providing compensatory mitigation from the permittee to the bank sponsor
- Default and closure provisions
- Reporting protocols (ledger and monitoring reports reviewed by IRT; financial assurances balances)
- Mitigation plan (see 332.4(c)(2)-(14))
- Credit release schedule tied to achievement of milestones

Mitigation Plan (33 C.F.R. 332.4(c)(2)-(14))

- Objectives
- Site selection
- *Site protection instrument
- Baseline
- Determination of Credits
- Mitigation work plan
- Maintenance Plan
- Performance Standards
- Monitoring requirements
- Long-term management plan
- Adaptive management plan
- *Financial assurances

Site Protection (33 C.F.R. 332.7)

- 33 CFR 332.7(a) requires long-term protection through real estate instruments or other available mechanisms, as appropriate, for the aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project
- 33 CFR 332.8(t) requires that banks finalize site protection before any credits can be released
- Type of site protection required varies state to state
- Third-party enforcement rights and notification language for modifications/transfers
- Prohibit uses incompatible with the objectives of the bank (e.g. clear cutting, mineral rights, cattle grazing?)
  - Title evidence to ensure no encumbrances inconsistent with the objectives of the bank
- Specific to coastal wetland mitigation banking from the Preamble to the Mitigation Rule (73 FR 19646 (Apr. 10, 2008):

  "There are other examples of situations where it may not be feasible to require site protection through real estate or legal instruments for compensatory mitigation projects. One potential situation is the construction of oyster habitat or the restoration of sea grass beds in state-owned tidal waters, where the project proponent does not have a real estate interest, but may obtain authorization to conduct those environmentally beneficial activities. Another example may be the restoration of tidal marshes or other coastal resources, since the long-term sustainability of those projects in the dynamic coastal environment cannot be assured because of the natural littoral processes that occur in those areas."

Financial Assurances (33 C.F.R. 332.3(n))

- Must be sufficient to provide a "high level of confidence" that the compensatory mitigation project will be completed in accordance with performance standards
- Factors:
  - Size and complexity of project
  - Degree of completion at time of approval
  - Likelihood of success
  - Past performance
- Form (See IWR guidance; see also required notification language to USACE (323.3(n)(5))):
  - Bonds
  - Escrow accounts
  - Casualty insurance
  - Letters of Credit
  - Legislative appropriations
- Amount: Cost of replacement mitigation (acquisition, planning and engineering, legal, mobilization, construction, monitoring)
- Payable into a standby trust- USACE cannot hold because of Miscellaneous Receipts Act
- Construction financial assurances phased out and long-term funding mechanism kicks in (33 C.F.R. 332.7(d)(3)(non-wasting endowments, trusts, contractual arrangements with future responsible parties)
- For more information, see http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/Financial_Assurance.pdf

Koontz v. SJRWMD, 133 S.Ct. 2586 (Jun. 25, 2013)

- Unconstitutional conditions case; this is why it is important to document mitigation decision!
- Facts: Koontz applied for state wetlands permit; state rejected mitigation proposal; state denied application after Koontz refused to minimize impacts from 3.7 to 1 acre or to pay for off-site mitigation on state-owned land
- US amicus brief argued that no taking can result from a condition that is never imposed due to a permit denial and that monetary demands are not subject to a takings analysis
- Held that a government-imposed condition on a land use permit must satisfy the requirements of *Nollan/Dolan* (nexus and rough proportionality test) even when the government denies the permit and even when the condition involves the payment of money rather than a dedication of property
- Unconstitutional burdens doctrine: a condition subsequent that does not meet the nexus and rough proportionality test of *Nollan/Dolan* is an impermissible burden on the right not to have property taken without just compensation that may warrant money damages depending on the cause of action (but does not warrant just compensation pursuant to the 5th Amendment because not technically a taking)
- Also, a monetary obligation demanded as a condition was distinguishable from a government fee (to which the takings clause does not apply) because burdened the ownership of a specific parcel
- So long as a permitting agency offers the landowner at least one alternative that would satisfy *Nollan/Dolan*, then the landowner has not been subjected to an unconstitutional condition
- Mitigation conditions in compliance with Part 332 satisfy *Nollan/Dolan* standard, but can USACE require an applicant to buy credits from a mitigation bank over permittee-responsible mitigation?

NOAA Damage Assessment, Remediation, and Restoration Program (DARRP) Program

DARRP Overview

- Formally created in 1992 following the Exxon Valdez oil spill
- Consists of :
  - Assessment and Restoration Division, National Ocean Service
  - Restoration Center, National Marine Fisheries Services
  - Natural Resources Section, Office of General Counsel
- Recovered $10.3 B to date to restore environmental harms
- Florida examples: Deepwater Horizon, Mosaic hazardous waste site, Tyndall AFB hazardous waste site, Kerr-McGee hazardous waste site, Raleigh t. Dump hazardous waste site, Mulberry hazardous waste site, Casitas removal hazardous waste site, and Tampa Bay oil spill

Authorities

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(f)
  - National Contingency Plan (40 C.F.R. Part 300)(defines federal, state, tribal, and foreign trustees; response agencies required to notify and coordinate with trustees; general responsibilities of trustees)
  - Natural resource damages regulations (43 C.F.R. Part 11)(DOI responsible)
- Oil Pollution Act of 1990, 33 U.S.C. 2706
  - Natural resource damages regulations (15 C.F.R. Part 990)(DOC-NOAA responsible)
- National Marine Sanctuaries Act, 16 U.S.C. 1443
  - Establishes liability for injuries to sanctuary resources

Natural Resource Damage Assessment (NRDA) Overview

- NRD recoveries used to restore, rehabilitate, replace, or acquire the equivalent of natural resources and services injured
- Entirely compensatory; not punitive
- Not an environmental tort; Congress intended to authorize remedies beyond common law
- NOAA acts as a "trustee" on behalf of the public based on jurisdiction over coastal and marine resources

NRDA Process

- Following release/spill, trustees coordinate with response agencies (e.g., EPA, USCG) to integrate trustee concerns and science into cleanup (protective of HH & E from further harm)
    - Emergency restoration: prior to completion of NRDA planning process to reduce continuing impacts and prevent irreversible loss (i.e., initial corrective measures (ICMs))
    - Cost-effective investigations and development of alternatives that integrate clean-up and restoration
    - Do not want to "undo" a clean up to achieve restoration goal
- Assess injuries (damages residual to clean up; interim losses and residual harm; sites where no clean up action)
    - Early restoration: implemented prior to completion of NRDA planning process to achieve restoration more quickly (e.g. DWH)
- Evaluate and scale restoration alternatives
    - Primary restoration: return resources to baseline
    - Compensatory restoration: compensate for interim resources and services lost (i.e., temporal loss)
        - Earlier the remedy, the less compensatory restoration will be required
- ***Settlement or Litigation***
- Oversee/implement restoration plan

DARRP Program Restoration Banking Guidance

December 1, 2016, NOAA DARRP, Guidance for Recognition and Use of Restoration Banks in Natural Resource Damage Assessments (https://www.darrp.noaa.gov/sites/default/files/NOAA%20NRDA%20Restoration%20Banking%20Guidance%202016%20Final.pdf)

NRDA Restoration Banking Scenarios

1. Natural resource trustees agree to recognize and accept from a settling party restoration credits produced by a third party in lieu of payments of funds by the settling party or promises by the settling party to perform work
2. Natural resource trustees select in the restoration plan to directly purchase restoration credits generated by third party projects using funds recovered from PRPs

Benefits

- Ability to "pool" liability of multiple PRPs to leverage larger restoration projects;
  - more diverse and robust environmental benefits with greater ecological function
  - More durable; less subject to perturbation
  - Increased probability of success
  - Economies of scale
- Limited restoration opportunities due to limited available suitable land
- Facilitate and incentivize multi-party settlements

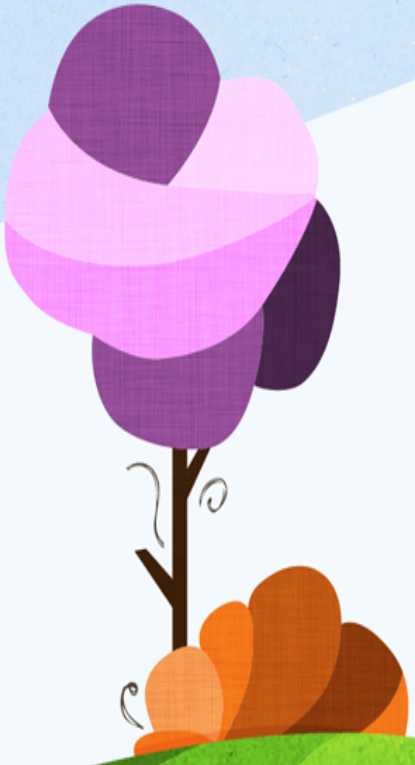
Challenges

- Risk of bank failure
- Delays in settlement negotiation/approval of settlement agreements that can affect credit sales transactions

Process

- Recognition of Bank
  - Agreement between trustees and bank developer
  - Either stand alone or incorporated into settlement agreement
  - Similar requirements to USACE program (defined service area; site protection; project design, performance criteria, and credit calculations; credit release schedule; financial assurances; monitoring and adaptive management plan; long-term management plan and funding; credit accounting)
- Acceptance of Credits
  - Only from recognized banks
  - Only where demonstrable reasonable nexus to the natural resource injuries
  - Must have been produced under trustee oversight (generated after recognition agreement in place)
  - Will not accept credits generated prior to injury
  - Settlement agreement between trustees and PRP(s) or direct transaction between trustees and banker

*** The decision to recognize a restoration bank and accept restoration credits is an exercise of trustee discretion. ***



Questions?