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Mitigation Banking Under the Florida Environmental Reorganization Act of 1993

The Florida Environmental Reorganization Act of 1993¹ introduced "mitigation banks" standards to offset the adverse impacts of activities regulated under Part IV of F.S. Ch. 373.² Mitigation banks are lands set aside to be used as mitigation for future projects that would adversely affect wetlands. The legislature found that mitigation banks could minimize mitigation uncertainty and provide ecological benefits, in directing the Department of Environmental Protection and the state's five water management districts "to participate in and encourage the establishment of private and public regional mitigation areas and mitigation banks."³ Finally, the legislature directed the department and the water management districts to adopt rules governing the use of mitigation banks.⁴

To meet this statutory mandate, staff representatives from the department and the water management districts formed a committee to draft consistent rules to be adopted by the agencies. The committee drafted model mitigation banking rules which were substantially adopted by the department and the water management districts. This article provides a brief overview of these mitigation banking rules.

The mitigation banking rules provide criteria for the creation and use of mitigation banks to offset adverse impacts of activities regulated under Part IV of F.S. Ch. 373.⁵ The mitigation banking rules do not supersede the permit review criteria and requirements of any other rules promulgated under Part IV of F.S. Ch. 373, or the mitigation requirements set forth in any mitigation bank permit or agreement existing prior to the effective date of the mitigation banking rules.⁶ A

When establishing a mitigation bank, rules adopted by the Department of Environmental Protection and the five water management districts should be carefully reviewed

by Eric T. Olsen

substantial modification of a mitigation bank previously established by agreement or permit under the former Warren S. Henderson Wetlands Protection Act⁷ or Part IV of F.S. Ch. 373, however, must comply with the mitigation banking rules.⁸ Additionally, the mitigation banking rules do not bar a permit applicant from proposing "project-specific, pre-construction mitigation, or off-site mitigation" without establishing a mitigation bank.⁹

Establishing a Mitigation Bank

The mitigation banking rules define a mitigation bank as "a project undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts."¹⁰ The entity that creates, operates, manages, or maintains a mitigation bank is defined as a "banker."¹¹ To establish a mitigation bank, the banker must apply for a mitigation

bank permit.¹² The mitigation bank permit application also constitutes an application for any permit required pursuant to Part IV of F.S. Ch. 373 to construct the bank.¹³

The banker must provide reasonable assurance that the proposed mitigation bank will:

- (a) improve the ecological conditions of the regional watershed;
- (b) provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
- (c) be effectively managed in the long term;
- (d) not destroy areas with high ecological value;
- (e) achieve mitigation success; and
- (f) be adjacent to lands which will not adversely affect the long-term viability of the [m]itigation [b]ank due to unsuitable land uses or conditions.¹⁴

As part of the mitigation bank permit, a "mitigation service area" is set for the bank.¹⁵ With limited exceptions, the mitigation service area is the geographic limit within which mitigation credits may be withdrawn to offset adverse impact activities regulated under Part IV of F.S. Ch. 373.¹⁶ The mitigation service areas of two or more banks may overlap, and multiple mitigation service areas can be approved for a regional watershed.¹⁷

Before any mitigation credits can be used from a mitigation bank, the land on which the bank is located must either be conveyed in fee simple to the agency permitting the bank, or be encumbered with a conservation easement grant to both the department and the water management district in which the bank is located.¹⁸ The banker must submit a survey of the mitigation bank property and certain title information before the conservation easement or deed conveying fee interest is

recorded.¹⁹ A banker conveying a fee interest must submit a Phase I environmental audit of the property.²⁰

The banker must also establish certain financial responsibility mechanisms to insure the construction and long-term management of the mitigation bank.²¹ The financial responsibility mechanism insuring the construction of the bank must consist of either guarantee bonds, performance bonds, insurance certificates, irrevocable letters of credit, trust fund agreements, or securities.²² The financial responsibility mechanism insuring the long-term management of the mitigation bank must be a trust fund agreement.²³ When the bank is deemed completely constructed, implemented, and headed toward success according to the permit, the financial responsibility mechanism insuring construction of the bank must be released.²⁴

Mitigation Credits

A proposed mitigation bank is evaluated to determine the number of mitigation credits to be awarded.²⁵ A mitigation credit is "a unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities."²⁶ One mitigation credit equals the ecological value gained by successfully creating one acre of wetland.²⁷ A restoration, enhancement, preservation, or creation activity producing the same ecological value as the successful creation of one acre of wetland is awarded one mitigation credit.

The number of mitigation credits awarded to a bank is based on a list of factors which generally relate to the quality and quantity of wetland and upland restoration, enhancement, preservation, or creation; the extent to which the bank restores natural hydrologic and ecological conditions; the bank's proximity to other regionally significant ecological resources or habitats; the bank's fish and wildlife features; and the current level of environmental protection afforded the property within the bank.²⁸ The mitigation bank permit lists the number and type of mitigation credits awarded to the bank.²⁹

To use mitigation credits from a permitted mitigation bank, it must be shown that use of the credits would offset the adverse impacts of the pro-

ject, and either on-site mitigation opportunities cannot be expected to have comparable long-term viability, or using the mitigation bank will provide greater improvement in ecological value than on-site mitigation.³⁰ Some mitigation credits can be withdrawn before meeting all the performance criteria specified in the mitigation bank permit based upon the nature of the performance criteria for the bank, and the success criteria for each mitigation activity.³¹ No credits are available for freshwater wetland creation until the success of the created wetlands is demonstrated.³²

The banker can use mitigation credits from a permitted mitigation bank for its own projects, or can sell or transfer mitigation credits in whole or in part to third parties.³³ The marketplace determines the price of mitigation credits. The agency permitting the mitigation bank maintains a ledger of the mitigation credits available, and deducts credits from the ledger upon receiving notice that the agency permitting the impact has approved the use of the bank.³⁴

In addition to, or in lieu of, purchasing mitigation credits from a mitigation bank, a permit applicant may also contribute land to a bank to mitigate for a project's adverse impacts.³⁵ The contributed land must offset the adverse impacts of the project, and the adverse impacts must be within the mitigation service area of the bank.³⁶ Additionally, the land must be adjacent to or become an approved mitigation bank, must improve the ecological value of the bank, and must either be conveyed in fee simple to the agency permitting the bank, or be encumbered with a conservation easement grant to both the department and the water management district in which the bank is located.³⁷

An estimate of the potential value of a proposed mitigation bank can be obtained by applying for a mitigation bank conceptual approval.³⁸ The mitigation bank conceptual approval estimates the potential mitigation credits which could be awarded, the information necessary to evaluate a mitigation bank permit application, and the legal and financial requirements for the proposed mitigation bank.³⁹ The mitigation bank conceptual approval does not authorize the use or withdrawal of any mitigation credits or any construction

within the bank.⁴⁰ A mitigation bank conceptual approval is valid for five years.⁴¹

Agencies Permitting Mitigation Banks

Both the department and the water management districts can permit mitigation banks. The agencies accordingly entered into operating agreements dividing mitigation bank permitting responsibilities. Under operating agreements between the department and the St. Johns River, South Florida, and Southwest Florida water management districts, respectively, if 50 percent or more of the credits from a proposed mitigation bank are intended to be used to offset adverse impacts from an activity for which the department would process and take action on applications for other permits required under Part IV of F.S. Ch. 373, the department processes and takes action on the mitigation bank permit application.⁴² Examples of these activities would be mining, hazardous waste facilities, and landfills.⁴³ The St. Johns, South Florida, and Southwest Florida water management districts process and take action on all other mitigation bank permit applications within their respective jurisdictions.⁴⁴ Under the operating agreements between the department and the Northwest Florida and Suwannee River water management districts, the department processes and takes action on all mitigation bank permit applications.⁴⁵

Conclusion

The mitigation banking rules are the first codified procedure for establishing and operating mitigation banks under Part IV of F.S. Ch. 373, and must be read in concert with the environmental resource permit program rules adopted to meet the mandate of F.S. subsection 373.414(9). The mitigation banking rules may be subject to change as the environmental resource permit program is implemented, and the agencies gain experience operating under the new rules. Additionally, while the mitigation banking rules adopted by the department and the five water management districts are similar and consistent, they are not identical. Persons seeking to establish a mitigation bank should carefully review the rules of the agency which will be permitting their mitigation banks. □

¹ 1993 Fla. Laws 213. For an overview of the Environmental Reorganization Act of 1993, see Fumero, *Permit Streamlining: A New Age for Environmental Regulation in Florida*, 67 FLA. B.J. 62 (Nov. 1993).

² FLA. STAT. §373.4135 (1993).

³ *Id.*

⁴ *Id.* The department's and the water management district's mitigation banking rules were to address 11 items:

1) Circumstances under which litigation banking would be appropriate or desirable.

2) Provisions by which governmental, nonprofit, or for-profit private entities, with sufficient legal or equitable interest in the property proposed for mitigation banking, could establish mitigation banks.

3) Procedures for the review of mitigation banking proposals in a timely manner pursuant to Ch. 120.

4) A framework to determine a mitigation bank's value considering the bank's ecological value compared to the area where wetland or surface water adverse impacts are proposed.

5) Procedures to administer bank credits so that accounting responsibilities would not be unnecessarily duplicated between the department and a water management district.

6) Requirements for ensuring financial responsibility of nongovernmental entities proposing mitigation banks.

7) Measures to ensure the long-term management and protection of mitigation banks.

8) Criteria for withdrawing mitigation credits within or outside the regional watershed where the bank is located.

9) Criteria for contributing funds or land to an approved mitigation bank.

10) Criteria for withdrawing credits by parties other than the party who created the mitigation bank.

11) Provisions to consider creation, restoration, enhancement, and preservation of wetlands and uplands as part of a mitigation bank. *Id.* §373.4135(1)-(11).

⁵ FLA. ADMIN. CODE r. 17-342.100 (1994). The mitigation banking rules adopted by the department and the five water management districts are substantially similar. Therefore, except where differing provisions exist, citation shall be to the department's rules only. The mitigation banking rules of the South Florida Water Management District can be found in Appendix 8, *Basis of Review for Surface Water Permit Applications*, adopted by reference in FLA. ADMIN. CODE r. 40E-4.091 (1994); those of the Southwest Florida Water Management District in Appendix 6, *Basis of Review for Surface Water Permit Applications*, adopted by reference in FLA. ADMIN. CODE r. 40D-4.091 (1994); those of the St. Johns River Water Management District in §16.1.6 of the *Applicant's Handbook: Management and Storage of Surface Waters*, adopted by reference in FLA. ADMIN. CODE r. 40C-4.091 (1994); those of the Suwannee River Water Management District in FLA. ADMIN. CODE r. 40B-1.106 (1994); and those of the Northwest Florida Water Management District in FLA. ADMIN. CODE r. 40A-1.003 (1994).

⁶ FLA. ADMIN. CODE r. 17-342.100 (1994).

⁷ 1984 Fla. Laws 79.

⁸ FLA. ADMIN. CODE r. 17-342.100 (1994).

⁹ *Id.*

¹⁰ FLA. ADMIN. CODE r. 17-342.200 (1994).

¹¹ *Id.*

¹² FLA. ADMIN. CODE r. 17-342.450 (1994).

¹³ *Id.*

¹⁴ FLA. ADMIN. CODE r. 17-342.400 (1994).

A mitigation bank can be implemented in phases if each phase can independently meet these requirements. *Id.*

¹⁵ FLA. ADMIN. CODE r. 17-342.600 (1994).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ FLA. ADMIN. CODE r. 17-342.650 (1994).

¹⁹ *Id.*

²⁰ *Id.* The St. Johns River Water Management District's mitigation banking rules require that a Phase I environmental audit be submitted with all mitigation bank permit applications regardless of whether a fee interest or conservation easement is conveyed. APPLICANT'S HANDBOOK: MANAGEMENT AND STORAGE OF SURFACE WATERS §16.1.6.5, adopted by reference in FLA. ADMIN. CODE r. 40C-4.091 (1994).

²¹ FLA. ADMIN. CODE r. 17-342.700 (1994).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ FLA. ADMIN. CODE r. 17-340.470 (1994).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ FLA. ADMIN. CODE r. 17-342.300 (1994).

³¹ FLA. ADMIN. CODE r. 17-342.470 (1994).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ FLA. ADMIN. CODE r. 17-342.500 (1994).

³⁶ *Id.*

³⁷ *Id.*

³⁸ FLA. ADMIN. CODE r. 17-342.750 (1994).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *First Amendment to August 28, 1992, Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between the St. Johns River Water Management District and Department of Environmental Regulation*, adopted by reference in FLA. ADMIN. CODE r. 40C-4.091 (1994); *First Amendment to August 28, 1992, Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between the South Florida Water Management District and Department of Environmental Regulation*, adopted by reference in FLA. ADMIN. CODE r. 40E-4.091 (1994); *First Amendment to August 28, 1992, Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between the Southwest Florida Water Management District and Department of Environmental Regulation* (on file with the Southwest Florida Water Management District). The department and these water management districts have previously entered into operating agreements dividing the permitting and enforcement responsibilities for activities regu-

lated under Part IV of FLA. STAT. Ch. 373. See *infra* note 43. The department and these water management districts are expected to enter into new operating agreements when they adopt the rules mandated by FLA. STAT. subsection 373.414(9).

⁴³ See *Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between the St. Johns River Water Management District and Department of Environmental Regulation*, adopted by reference in FLA. ADMIN. CODE r. 40C-4.091 (1994); *Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between the Southwest Florida Water Management District and Department of Environmental Regulation*, adopted by reference in FLA. ADMIN. CODE r. 40D-4.091 (1994); and *Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between the South Florida Water Management District and Department of Environmental Regulation*, adopted by reference in FLA. ADMIN. CODE r. 40E-4.091 (1994). See also Mennella, Fumero & Olsen, *Activity Based Consolidation*, 15 FLA. BAR ENVTL. & LAND USE L. SEC. REP. 20 (March 1993).

⁴⁴ See sources cited *supra* note 42.

⁴⁵ See *Operating Agreement Concerning Mitigation Banking Between Northwest Florida Water Management District and Department of Environmental Protection*, adopted by reference in FLA. ADMIN. CODE r. 40A-1.003 (1994); *First Amendment to February 2, 1993, Operating Agreement Concerning Management and Storage of Surface Waters Regulation Between the Suwannee River Water Management District and Department of Environmental Regulation*, adopted by reference in FLA. ADMIN. CODE r. 40B-1.106 (1994).

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