

THIRD STAKEHOLDER FORUM ON FEDERAL WETLANDS MITIGATION
REVIEW
JULY 29 – 31, 2003

The third stakeholder forum on Federal Wetlands Mitigation was held in Portland, Oregon during the last week of July 2003. The objectives were to: 1) Review progress on the actions set forth in the 2002 National Wetlands Mitigation Action Plan; 2) Solicit feedback on Mitigation Action Plan tasks to be completed in 2003; 3) Solicit input on future Mitigation Action Plan actions and goals for 2004-5.

The forum was attended by representatives from the various regulatory agencies that are involved with wetlands mitigation (USACE, USEPA, USFWS, NOAA-Fisheries, NRCS and Oregon and Washington state regulators), NGO's, in-lieu-fee providers (Oregon Division of State Lands, NC Wetland Restoration Program), environmental organizations (Sierra Club, National Wildlife Federation, American Rivers, Audubon Club) and mitigation bankers. Representing the mitigation banking community were John Ryan, Craig Denisoff and Rich Mogensen from the NMBA and Bob Sockolove and Dick Novitski who are local mitigation bankers but not NMBA members.

The following is a review of the proceedings provided to you by the NMBA representatives who attended. After each session the attendees were given ample time to discuss the topics presented. This provided an excellent opportunity for some great debate and the mitigation bankers were not shy in providing their comments. I have only included the relevant information from the discussions, as they were extensive.

DAY ONE

The first day included a field trip to a Port of Portland mitigation site in the morning and presentations in the afternoon. The first few presentations included a talk about a study done by Washington State and the success of mitigation. As expected, the main points indicated that restoration was the most successful form of mitigation second to creation. Surprisingly, enhancement was found to be the least successful type of mitigation. It will be limited and scrutinized in detail as an acceptable mitigation method in the State of Washington in the future. The next talk was about the mitigation bank that the City of Eugene, OR has developed. It is an interesting municipal owned and operated mitigation bank that seems to be working well and strictly follows the mitigation banking rules and guidelines. The City of Eugene runs the regional bank and sells credits to developers and end-users.

Mary Gray Environmental Protection Specialist from the FHA gave a talk entitled "Guidance on the Use of the TEA-21 Preference for Mitigation Banking to Fulfill Mitigation Requirements Under Section 404 of the Clean Water Act." She explained that the new guidance language was just released and gave some highlights. For projects funded with TEA-21 money there is a preference for the use of mitigation bank credits that are available and effectively mitigate for the impacts. This will be decided by the USACE and other commenting agencies on a case-by-case basis. The FHA is planning a

“scan” (limited study) on mitigation banks in 2004 to evaluate the appropriateness of the use of mitigation bank credits and the overall success of mitigation banks. The USACE and USEPA have both signed off on this guidance and agree with the guidelines.

Michael Rabbe, USACE Headquarters made the next presentation, entitled “Mitigation Regulatory Guidance Letter (RGL 02-2).” The major issues covered in this RGL are as follows: Watershed Approach; Functional Assessment; Stream Mitigation; Mitigation Definitions; Upland Buffers; Mitigation Plans; Success Criteria, NRCS Criteria. These issues/requirements will apply to all forms of mitigation (permittee sponsored, mitigation banks and in-lieu-fee programs). Each issue was discussed in some detail and a brief review follows:

Watershed Approach – A better definition of “watershed” is needed and will be provided once it has been developed. More use of GIS for locating mitigation sites on watersheds will be emphasized.

Functional Assessment – Functional assessment will be required on both the impact site and the mitigation site. It was further clarified that a mitigation bank will not have to provide a new functional assessment for every credit that is sold but it must have one done initially to insure proper use of the credits for future permit impacts. HGM will most likely be the functional assessment tool used in the future and there are plans to finalize models nationwide. Training will be developed for both the regulators and the private sector for the use of HGM. To insure that mitigation will compensate for permitted impacts, a “safety factor” will be used in the ratios for mitigation requirements. Mostly likely a 1.5 to 1 ratio will be the required standard mitigation ratio. No Net Loss of wetland acreages will be less emphasized and functional replacement will be stressed.

Stream Mitigation – Stream impacts will be required to be mitigated for with stream restoration. Again functional replacement will be emphasized. In the future mitigating for stream impacts with wetlands will not be allowed. If functional assessment procedures for stream impacts are not available, stream impacts will need to be mitigated at a 1:1 linear foot replacement ratio.

Preservation – Preservation will be allowed primarily in conjunction with restoration, creation and/or enhancement mitigation. It will only be allowed exclusively for compensatory mitigation in exceptional circumstances with rare or endangered ecosystems (T&E species habitats) and very high quality wetlands.

Upland Buffers – The use of upland buffers in a mitigation package will become more acceptable. They will be allowed to generate minimal mitigation credits but this will need to be justified. They may be used exclusively, but only in rare cases.

Mitigation Plans – A primary goal will be to improve the consistency of acceptable mitigation plans. There will be standardized mitigation checklists developed to help with this goal. Success criteria will be an important component of an acceptable plan.

Success Criteria – Again, HGM was mentioned as the “tool for the future” to help with determining success criteria. We have heard this for about ten years now but it is possible that the current regulatory management is serious about getting this method “functional.” Success criteria will be ecologically driven, more than just getting the plants to survive.

General Comments: Several general items came out of the discussion session. These included the statement that the RGL is out now and should be followed although it was acknowledged that it might take a year to get the word out to the USACE Districts that they need to be implementing it. USACE and USEPA will be putting out joint training for this RGL to the USACE Districts in 2004. Several times during the forum, Mark Sudol mentioned that he is working closely with the Office of Management and Budget (the Federal funding agency) regarding allocating funds to provide the resources for implementing all of the above policies. This may entail hiring more USACE staff or outsourcing some of the work required to get this RGL implemented. This is all great news as it should make permittee driven/onsite mitigation much more difficult and promote the use of mitigation banks (which, for the most part, already follow these requirements).

Palmer Hough, USEPA gave a talk on Grants to Improve Compensatory Mitigation, which just explained the way that the USEPA provides funding to states to improve their compensatory mitigation programs. North Carolina Wetland Restoration Program has been a recipient of these funds.

DAY TWO

John Meaghar, USEPA Wetlands & Waterways Chief gave the opening introduction followed by Steve Purchase from the Oregon Division of State Lands (the state regulatory agency that also acts as the in-lieu-fee program in Oregon).

The first session of the second day was given by **Susan-Marie Stedman, NOAA-Fisheries** and was entitled “Draft Guidance on the Use of Off-Site and Out-of-Kind Compensatory Mitigation Under Section 404 of the Clean Water Act.” This is important to mitigation bankers, as it will update the 1990 MOA guidance that requires onsite mitigation as the preferred choice regardless of the environmental value of other strategies such as mitigation banks. This guidance is still in draft form but will be final by the end of this year. The primary concept in this new guidance is that mitigation should be done in the most environmentally preferable manner. Hopefully, it will help eliminate the blind bias for onsite mitigation. As the most preferable mitigation option, a site should be sustainable in context of adjacent land uses but mitigation sometimes can and should be done in urban settings and/or adjacent to development. Mitigation should: be sustainable in the context of natural processes; provide benefits in addition to aquatic functions; replace impacted aquatic functions; have little or no adverse environmental impacts to adjacent uplands; provide short and long-term benefits; be compatible with existing watershed plans; include good stewardship and long-term protection; provide habitat corridors and provide unique or regionally important habitat functions. Mitigation

is not preferable when there is insufficient hydrology, located in the wrong landscape position or causes substantial adverse impacts to other resources. Other factors that can reduce the preference for mitigation sites include: contaminated sites; sites threatened by external factors and invasive species; sites that threaten non-wetland resources; require extensive maintenance; doesn't replace lost functions; doesn't have long-term protection; has a low likelihood of success; is located in a severely degraded watershed. There was much discussion regarding the factors that reduce the preference because many of these are just the issues that make good mitigation sites (i.e. invasive species control, imminent threats from development, located in degraded areas). So this area of the guidance may be revised before it is final.

Mark Sudol, USACE Regulatory Chief gave the next presentation entitled “Draft Adaptation of NAS Guidelines to the Clean Water Act Section 404 Program.” He just introduced the NWMAP and the schedule for getting the Guidelines completed. Then opened the floor to discussion.

Kathryn Harris, USACE Portland District gave a presentation on the “Model Mitigation Plan Checklist” which is significant to mitigation banking because it will be the checklist that all mitigation projects will have to follow. All items are requirements that mitigation banks already do so it just brings onsite mitigation to the standards of banks. There are several versions, a short one-page checklist for interagency coordination, a one-page checklist for NRCS mitigation and more extensive 3 to 5 page versions.

Mike Rabbe, USACE Headquarters gave a presentation entitled “Technical Guidance on Stream Mitigation Protocols.” This guidance is to be completed in 2004 and is in the early development stage. Key points include the following:

- Develop assessment protocol
- Assign regions and stream types for each protocol
- Calibrate protocol to local conditions
- Identify and analyze field usage
- Evaluate effectiveness of protocol for applicability for Section 404 mitigation requirements

I anticipate more USACE Districts will begin to require specific stream mitigation for like impacts. It should help banks because it will generate another commodity to market.

Palmer Hough, USEPA Headquarters gave the next presentation entitled “Mitigation Site Performance Review and Analysis.” This was a brief talk and there was much discussion about the need for a comprehensive useable functional assessment methodology. The agencies kept stressing that HGM is it. It was noted that this methodology has been out for ten years and still is not being implemented. It needs to be finished and training rolled out or replaced with something industry and agencies can use relatively quickly and easily.

Mark Sudol, USACE Headquarters gave the next talk entitled “Mitigation Site Tracking Database Evaluation.” The USACE is developing a new database program designed specifically to track permits, mitigation requirements and may include monitoring reports and other details. It is called ORM and will be released for comments by the end of 2003. It will not track wetland losses or acreage impacts but you will be able to track permit status online.

From 4:30 to about 8:00 pm, the NMBA with financial assistance from EarthMark, Wildlands and Land & Water Resources sponsored a reception at the Oregon Museum of Science and Industry. It was a successful event and appreciated by all attendees. The NMBA had a booth and may have developed a new member or two. It was an excellent way to do something for the folks who regulate us.

DAY THREE

Jeanette Gallihugh, U.S.F.W.S. gave the first talk entitled “Guidance on the Appropriate Use of Preservation for Compensatory Mitigation.” This is another item that is scheduled to be completed in 2004. Little has been done on this subject other than to gather the existing guidance from other documents. The important considerations are as follows:

- Net loss of acres and functions
- Significance of the resource to be preserved
- Reality of threats to resource
- Importance of regional/watershed
- How to credit? Ratios/Functional lift
- Preference for restoration, enhancement, creation

This document will be done next year and help determine how preservation will be credited for mitigation. Many commentators stated that it should be used only minimally and usually in association with other forms of mitigation.

Susan-Marie Stedman, NOAA-Fisheries gave a talk entitled “Guidance for Protecting Wetlands for which Mitigation, Restoration, or Creation is not Feasible or Scientifically Viable.” Susan began her talk with a question “How big a problem is this?” The consensus was that it was not a significant issue. When difficult to replace wetlands such as fens or bogs or other rare wetland types can’t be avoided the mitigation should be done prior to the impacts and at higher ratios.

Leander Brown, NRCS Headquarters gave a talk entitled “Guidance on the Appropriate Use of Buffers as a Potential Component of Compensatory Mitigation.” His talk was not too relevant and concentrated on agricultural buffers. Guidance will be completed in 2004 and will be similar in scope to the preservation guidance.

Joy Zedler, University of Wisconsin gave the next talk entitled “Compensatory Mitigation and the Watershed Approach”. It was an entertaining talk and made a good

case for looking at entire watersheds to determine where mitigation should be concentrated instead of having the onsite close proximity preference. The watershed concept supports the use of mitigation banks.

Palmer Hough and Mark Sudol finished the forum with a “Final Remarks” talk. They made it clear to the attendees that they were listening and they will be taking the comments they received and any written comments and act on them regarding the various guidance documents that will be coming out in the next two years. The major themes are as follows:

- More public involvement in the mitigation process (to be done primarily via the internet)
- Section 404b(1) Sequencing Guidelines of avoidance and minimization should not be forgotten and should be the first form of mitigation
- Mitigation should be required for all aquatic resources (i.e. streams, waters etc.) not just wetlands
- More communication and guidance from headquarters to districts is needed
- HGM needs to be completed in a usable form and training should be developed
- Fitting it all together, more interagency coordination/interaction
- Performance measures, success criteria and goals need to be established. More funding from OMB to provide resources for all these programs and guidance
- Raising the bar for all forms of mitigation, 2-02 RGL and NWMAP are designed to do this

The specific issues to be addressed include:

- Ability to control water, water rights needs to be a key factor in mitigation plan review
- May need to split functional replacement between more than one mitigation site or proposal (i.e. use more than one site to get full functional replacement)
- Review enhancement mitigation more carefully, not as successful as once thought

This is a complete review of this federally sponsored forum. If you have any questions or comments please feel free to contact me.

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