

Committee on Transportation and Infrastructure
"Listening Session"
February 22, 2011

Remarks for the Record from Craig Denisoff
For the National Mitigation Banking Association
March 22, 2011

Introduction

MY NAME IS CRAIG DENISOFF. I AM VICE PRESIENT OF WESTERVELT ECOLOGICAL SERVICES A HABITAT RESORATION AND MITIGATION BANKING COMPANY LOCATED HERE IN CALIFORNIA AND THE SOUTHEASTERN U.S. WE HAVE MITIGATION PROJECTS THROUGHOUT THE CENTRAL VALLEY OF CALIFORNIA AND IN THE SOUTHEAST INCLUDING MITIGATION BANKS IN THE CHAIR'S STATE OF FLORIDA.

I AM HERE TODAY REPRESENTING THE NATIONAL MITIGATION BANKING ASSOCIATION.

The National Mitigation Banking Association

THE NATIONAL MITIGATION BANKING ASSOCIATION IS COMPRISED OF COMMERCIAL BUSINESS, LAND OWNERS AND PRIVATE ENTITIES COMMITTED TO THE RESTORATION AND PRESERVATION OF OUR NATION'S WETLANDS AND NAUTRAL HABITATS THROUGH THE ESTABLISHMENT OF MITIGATION AND CONSERVATION BANKS. OUR MEMBERS HAVE BEEN ESTABLISHING AND OPERATING MITIGAITON BANKS SINCE THE EARLY 1990'S. WE ARE A GROWING INDUSTRY, COMPOSED MAINLY OF SMALL BUSINESSES, WITH OVER 500 WETLAND MITIGATION BANKS IN 42 STATES AND CLOSE TO 100 CONSERVATION BANKS.

Mitigation Banking is a Proven, Private Sector Provider of Wetland Mitigation

WETLAND MITIGATION BANKS ARE AUTHORIZED TO PROVIDE COMPENSATORY MITIGATION FOR IMPACTS TO WETLANDS FOR IMPACTS ALLOWED BY CORPS OF ENGINEERS PERMITS ISSUED UNDER SECTION 404 OF THE CLEAN WATER ACT. WETLAND MITIGATION BANKS PROVIDE A

"WIN WIN" FOR ECOLOGY AND FOR STREAMLINING THE REGULATORY PROCESS.

MITIGATION BANKS ARE LARGE SITES ON WHICH WETLANDS ARE RESTORED AND/OR ENHANCED, GENERATING ECOLOGICAL IMPROVEMENTS. UNDER REGULATORY AUTHORITY OF THE CORPS AND OTHER FEDERAL AGENCIES, IN RETURN FOR THE RESTORATION (AND AFTER PROVIDING CERTAIN BIOLOGICAL, LEGAL AND FINANCIAL ASSURANCES) THE MITIGATION BANKER IS ALLOWED TO SELL MITIGATION CREDITS TO DEVELOPERS WHO NEED TO OFFSET THEIR WETLAND IMPACTS. FOR EXAMPLE, WHEN A HIGHWAY PROJECT OR OTHER INFRASTRUCTURE PROJECT IMPACTS WETLANDS, IT WILL BE REQUIRED TO PROVIDE COMPENSATORY MITIGATION FOR UNAVOIDABLE IMPACTS. THE PROJECT SPONSOR CAN EITHER DO THE MITIGATION ITSELF, AT GREAT COST, TIME AND BEARING THE LIABILITY OF ENSURING SUCCESS. ALTERNATIVELY, THEY CAN GO TO A PRE-APPROVED MITIGATION BANK AND BUY WETLAND CREDITS TO SATISFY THEIR COMPENSATORY MITIGATION REQUIREMENT.

BANK CREDITS ARE TYPICALLY CHEAPER (DUE TO ECONOMIES OF SCALE) AND TAKE LESS PERMITTING TIME THAN HAVING A PROJECT SPONSOR CONDUCT ITS OWN MITIGATION. BUT MOST IMPORTANTLY, PURCHASE OF CREDITS FROM APPROVED MITIGATION BANKS TRANSFERS ALL OF THE MITIGATION LIABILITY FROM THE PROJECT SPONSOR TO THE BANK. THIS ALLOWS PROJECT SPONSORS, LIKE DEPARTMENTS OF TRANSPORTATION OR HOUSING DEVELOPERS, TO DO WHAT THEY DO BEST, LIKE BUILDING ROADS, HOUSES, POWER LINES OR LEVEES. THE WETLAND MITIGATION BANKER, WHO HAS THE JOB TO "BUILD WETLANDS", BEARS THE LIABILITY FOR THE MITIGATION.

IN ADDITION, THE MITIGATION BANKING INDUSTRY PROVIDES A PRIVATE INVESTMENT SOLUTION TO STREAMLINE PROJECT DELIVERY. WE DO NOT USE ANY PUBLIC MONIES IN THE ESTABLISHMENT OF THESE BANKS.

MITIGATION BANKING IS NOT ONLY VERY PRACTICABLE, BUT AS IMPORTANTLY, HAS BEEN SHOWN TO BE THE PREFERRED ECOLOGICAL APPROACH TO MITIGATION WETLAND IMPACTS. IN 2001, THE NATIONAL ACADEMY OF SCIENCES RELEASED A STUDY, *COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT*, WHICH SHOWED THAT THE OLD PRACTICE OF ON-SITE MITIGATION WAS NOT VERY EFFECTIVE AND THAT MITIGATION BANKS OFFERED MANY ADVANTAGES OVER OTHER MITIGATION APPROACHES. IN 2004, THE SOCIETY OF WETLAND SCIENTISTS ALSO EXPRESSED SUPPORT FOR THE MITIGATION BANKING AS THE BEST WAY FOR THIS COUNTRY TO MEET ITS MANDATE OF NO NET LOSS OF WETLANDS.

Mitigation Banking is Preferred Under Law

IN FACT, RECOGNIZING THE BENEFITS OF WETLAND MITIGATION BANKING, CONGRESS PROVIDED A PREFERENCE FOR USE OF MITIGATION BANKS TO PROVIDE COMPENSATORY MITIGATION WHEN FEDERAL MONIES ARE SPENT ON SURFACE TRANSPORTATION PROJECTS (TEA-21), UNDER THE WATER RESOURCES DEVELOPMENT ACT AND FOR MILITARY DEFENSE PROJECTS. FOR THIS, I NEED TO THANK THIS COMMITTEE AND CONGRESSMAN MICA FOR HIS SUPPORT OF THIS INDUSTRY. THE CORPS OF ENGINEERS AND THE ENVIRONMENTAL PROTECTION AGENCY ALSO CODIFIED A PREFERENCE FOR MITIGATION BANKING IN 2008 REGULATIONS ADDRESSING COMPENSATORY MITIGATION.

Despite its Benefits, Mitigation Banking Faces Excessive Regulatory Burdens

EVEN WITH ALL THE SCIENTIFIC AND CONGRESSIONAL SUPPORT OUR INDUSTRY HAS ENJOYED, APPROVAL OF MITIGATION BANKS AND APPROVAL OF USE OF MITIGATION BANKS HAS GOTTEN BOGGED DOWN IN A REGULATORY ENVIRONMENT THAT IS TOO HEAVY AND COMPLEX, AND OFTEN IS DISCOURAGED BY THE VERY REGULATORS THAT OUR PROJECTS SERVE.

WE MUST OBTAIN APPROVAL FROM THE CORPS OF ENGINEERS TO OPERATE A MITIGATION BANK. THE PROCESS IS GOVERNED BY THE 2008 MITIGATION REGULATIONS. THE NATIONAL MITIGATION BANKING ASSOCIATION SUPPORTED THESE REGULATIONS, AS THEY ESTABLISHED CLEAR PROCEDURES AND TIME LINES FOR REGULATORY APPROVALS. MITIGATION BANKERS KNOW THAT THEY ARE SUBJECT TO REGULATORY APPROVAL AND ARE PREPARED TO SUBMIT EXTENSIVE INFORMATION TO SUPPORT THEIR MITIGATION BANKS.

HOWEVER, THE REGULATIONS ARE BEING IMPLEMENTED IN AN INCONSISTENT MANNER NATIONALLY. MOST OFTEN, THE DELAY DOES NOT ARISE BECAUSE OF ECOLOGICAL CONCERNS. RATHER, ADMINISTRATIVE ISSUES ARE GENERALLY RESPONSIBLE. TOO OFTEN MITIGATION BANKERS MUST WAIT YEARS TO HAVE MITIGATION BANKS APPROVED. THE CORPS MUST COORDINATE WITH OTHER FEDERAL AND STATE AGENCIES, WHICH CAN INTRODUCE DELAYS. THE NATIONAL ASSOCIATION CONTINUES TO WORK WITH THE CORPS TO ADDRESS THESE PROBLEMS. INDIVIDUAL MITIGATION BANKERS, HOWEVER, MAY LOSE FINANCING, LAND OPTIONS AND PERSONNEL CRITICAL TO MAKE MITIGATION BANKING A SUCCESS IF THE DELAYS ARE EXCESSIVE.

We ask the Committee for Assistance

1. CONTINUE SUPPORT FOR THE PREFERENCE FOR MITIGATION BANKS WHEN FEDERAL FUNDS ARE EXPENDED FOR MITIGATION RELATED AS CURRENTLY PROVIDED IN THE SURFACE TRANSPORTATION LAWS AND THE WATER RESOURCES DEVELOPMENT ACT. SIMILAR PREFERENCE PROVISIONS SHOULD BE INCLUDED IN SIMILAR LAWS, SUCH AS AVIATION AND RAIL BILLS. WE ALSO ASK THAT YOU CONTINUE TO SUPPORT PRIVATE MITIGATION BANKS SINCE THIS IS A GROWING SMALL BUSINESS INDUSTRY THAT DOES NOT TAKE PUBLIC SUBSIDIES AND ACTUALLY BRINGS IN PRIVATE CAPITAL TO ASSIST IN THE IMPLEMENT OF OUR STATE AND FEDERAL LAWS.

2. WE ASK FOR A CLAIRIFICATION AND FAIR TREATMENT UNDER THE TAX CODES. IN THE 111TH CONGRESS, LEGISLATION WAS INTRODUCED TO CLARIFY TAX TREATMENT OF MITIGATION CREDIT SALES. CURRENTLY WHILE OUR PROJECTS ARE LAND BASED IN THAT THE LAND IS ECOLOGICALLY IMPROVED THROUGH RESTORATION OR ENHANCEMENT, THERE IS UNCERTAINTY AS TO WHETHER RECEIPTS FROM SALE OF THE MITIGATION CREDITS SHOULD BE TREATED AS CAPITAL GAINS OR ORDINARY INCOME. THE LEGISLATION WOULD CLARIFY TREATMENT AS CAPITAL GAINS. SENATORS MARY LANDRIEU AND MIKE CRAPO SPONSORED THE SENATE BILL IN THE 111TH CONGRESS, WHILE REPRESENTATIVES MELANCON, TANNER AND BOUSTANY INTRODUCED THE BILL IN THE HOUSE. WE HOPE AND EXPECT THAT THE LEGISLATION WILL BE REINTRODUCED IN THIS 112TH CONGRESS.

WE URGE THE SUPPORT OF THE MEMBERS OF THIS COMMITTEE FOR CLARIFYING TAX TREATMENT. THIS SIMPLE STEP WOULD ENCOURAGE ADDITIONAL PRIVATE INVESTMENT IN MITIGATION BANKING.

3. AS BRIEFLY SUMMARIZED ABOVE, THE REGULATORY BURDEN ON MITIGATION BANKING IS UNDULY HEAVY. WE ALSO ASK FOR OVERSIGHT OF THE IMPLEMENTATION OF THE CLEAN WATER ACT MITIGATION REGULATIONS. YOUR WATER RESOURCES SUBCOMMITTEE HAS JURISDICTION TO ASSURE THAT THE FEDERAL AGENCIES IMPLEMENT CLEAN WATER ACT REGULATIONS APPROPRIATELY. MEMBERS OF THE NATIONAL MITIGATION BANKING ASSOCIATION WOULD GLADLY ASSIST IN SUCH OVERSIGHT EFFORTS.

4. FINALLY, IN CALIFORNIA AND MANY OTHER STATES, THE ENDANGERED SPECIES ACT PRESENTS A MAJOR CHALLENGE FOR ECONOMIC DEVELOPMENT PROJECTS. CONSERVATION BANKING IS A SYSTEM SIMILAR TO WETLAND MITIGATION BANKING, WHICH PROVIDES A STEAMLINED AND COST EFFECTIVE MANNER TO ADDRESS IMPACTS TO

SPECIES AND THEIR HABITATS. THE NATIONAL MITIGATION BANKING ASSOCIATION REPRESENTS BUSINESSES THAT DEVELOP CONSERVATION BANKS. CONSERVATION BANKS ARE REGULATED THROUGH A POLICY GUIDANCE OF THE U.S. DEPARTMENT OF THE INTERIOR. HAVING CONSERVATION BANKS AVAILABLE TO HELP MINIMIZE IMPACTS TO ENDANGERED SPECIES CAN HELP TO STREAMLINE PERMITTING OF FEDERAL INFRASTRUCTURE PROJECTS.

MANY STEPS COULD BE TAKEN TO ENHANCE THE USE OF CONSERVATION BANKS AND MAKE THIS IMPORTANT TOOL MORE WIDELY AVAILABLE. THE PRIVATE SECTOR WILL INVEST IN AND DEVELOP SPECIES CONSERVATION BANKS IF IT KNOWS THAT REGULATORS WILL ALLOW USE OF CONSERVATION BANK CREDITS TO RESOLVE PERMITTING ISSUES. FEDERAL STATUTES OR REGULATIONS COULD PROVIDE A PREFERENCE FOR CONSERVATION BANKS, SIMILAR TO MITIGATION BANKS. FEDERAL STATUTES OR REGULATIONS COULD SPECIFICALLY AUTHORIZE USE OF CONSERVATION BANK CREDITS IN PROGRAMS SUCH AS HABITAT CONSERVATION PLANS, SPECIES RECOVERY PLANS OR ENDANGERED SPECIES ACT PERMITS. WHILE THE ENDANGERED SPECIES ACT FALLS UNDER THE JURISDICTION OF A DIFFERENT COMMITTEE, THE ROLE OF CONSERVATION BANKS IN ASSISTING THE NATION'S TRANSPORTATION AND INFRASTRUCTURE IS CLEARLY WITHIN YOUR PURVIEW.

I WOULD AGAIN LIKE TO THANK THE COMMITTEE FOR CONVENING THIS SESSION AND ESPECIALLY THANK THE COMMITTEE FOR ITS SUPPORT OF OUR INDUSTRY.

THANK YOU.