

# NMBA NEWS

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A QUARTERLY NEWSLETTER FROM  
THE NATIONAL MITIGATION BANKING ASSOCIATION

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## PRESIDENT'S CORNER

Greetings! This is the first time the National Mitigation Banking Association's Newsletter has included a "Presidents Corner," so I feel honored. I was preceded by two very successful and accomplished past presidents, Lew Lautin of Wetlandsbank, Inc., and our immediate past president, John Ryan of Land and Water Resources, Inc. Both of these gentlemen did a great deal for the Association and for the mitigation banking industry during their tenure. I hope that I can fill their ample shoes and continue to help the Association grow and improve the mitigation banking industry.

I feel obligated to provide an update of the Association's activities in my initial column. Although this may seem a little dry, I hope future columns will not only educate our readers, but also entertain with some real life experiences in the mitigation banking business.

The Association had our annual meeting at Terrene's 5<sup>th</sup> National Mitigation Banking Conference in Washington D.C., earlier this year. The new Board of Directors elected at that time: Stephen Collins of Florida Power and Light, Everglades Mitigation Bank, as Secretary; Michael Rosen of Big Cypress Mitigation Bank, Heron's Glen, as Treasurer; Craig Denisoff of Wildlands, Inc., as Vice President; and myself of Marsh Resources Inc. as President. John Ryan and Lew Lautin will continue to serve on the Board as Immediate Past-President and Ex-Officio Board Member, respectively.

The conference was a great success with many impressive presentations and excellent guest speakers, including Congressman Walter Jones of North Carolina and Congressman Sherwood Boehlert of New York (both spoke highly of mitigation banking). There were interesting field trips to local Virginia mitigation banks operated by Michael Rolband of Wetland Studies and Solutions and great networking opportunities as usual. I recommend that you attend next year's conference not only because of the wonderful learning opportunities, but because it will be in San Diego at a lovely time of year!

More recently, the NMBA met in Washington with Chip Smith, Assistant for Environment, Office of the Assistant Secretary of the Army (Civil Works); Congressman John Duncan (R-Tenn), Bill Leary, Associate Director for Natural Resources, White House Council on Environmental Quality; and the folks at Venable, Baetjer, Howard & Civiletti, our legal counsel. This was an interesting and productive trip with our first opportunity to meet with new players in the Bush Administration (see Legislative Update).

To wrap this up, I think the mitigation banking industry is at an exciting stage. It is no longer an infant but not yet an adolescent. We all have a great opportunity to shape and grow the industry much like a young child is taught to become a responsible member of society. Let's not stop now. One of the best ways to help is to continue your support through membership in the Association. When you get your membership information, please renew or join as early as possible.

Thanks for your attention and continued support.

Rich Mogensen  
President, NMBA

# CONSERVATION BANKING: AN EMERGING MARKET

*Contributed by Craig Denisoff, Vice President, Wildlands, Inc., Citrus Heights, California*

Most people are familiar with the Endangered Species Act (ESA) as the law that helped save the bald eagle, the grizzly bear and the gray whales from extinction. Others are familiar with the highly publicized case of a giant dam project being delayed due to a small isolated population of fish called the snail darter. However, what many people don't realize is that the ESA also applies to all threatened and endangered species, including plants and insects along with the fish and mammals.

Given the large number of species that are included under the ESA, many project developers are faced with having to address potential impacts to listed species in implementing their projects. As in wetland mitigation, development projects that destroy or threaten endangered species habitat may have to mitigate for impacts to these species. This problem has been especially acute in the fast-growing western states such as Arizona, California, Nevada, Oregon and Washington. To provide a solution for both the development community and the regulators, "endangered species banks" or "conservation banks" have been established.

A conservation bank is similar to a wetland mitigation bank in that it conserves and protects a large piece of habitat in advance of proposed impacts and then allows individual project proponents the ability to mitigate for the impacts to listed species at an off-site location. Conservation banks are required to have many of the same legal (conservation easement, deeds of trust), financial (letters of credits, surety bonds, endowment accounts), and biological guarantees (biological monitoring, long-term

stewardship) that wetland mitigation banks have. The primary difference between a wetland bank and endangered species bank is that the focus of the mitigation is on preservation of existing habitat for the particular species versus creation or restoration of new habitat to meet the no-net-loss policy for wetlands.

## **Regulatory Framework**

The legal or regulatory driver for conservation banks is the Endangered Species Act. Under the ESA, protection is given to various "listed" species, which can range from birds, fish and mammals to plants and even insects. The habitat on which these species depend can also be afforded protection under the ESA. Thus, under certain take or harm provisions within the ESA, project proponents can mitigate for impacts to those species. State and local agencies or regulatory bodies also may have laws that protect and require mitigation for specific species.

The lead agency for the ESA is the U.S. Fish and Wildlife Service (FWS). The Service and the state wildlife authority are typically the two agencies that will approve and administer both the ESA and the establishment of conservation banks.

The term "conservation bank" was coined by the state of California in 1996 when it issued policy guidelines for the establishment of mitigation banks for endangered species. The Conservation Banking policy, similar to the 1995 federal wetlands guidance document, is a guide to what components should be included in the establishment of a conservation bank. While the federal government has not yet formerly adopted guidelines or a policy for

endangered species banks, the FWS has been working on guidelines for the last couple of years.

The recently appointed Assistant Secretary for the Interior, Judge Craig Manson, has stated the Interior Department is supportive of habitat trading systems similar to those found in wetland banks and hopes to issue a guidance document in the fall of 2002 to promote conservation banking. Formerly the chief legal counsel of California's Department of Fish and Game, Assistant Secretary Manson was instrumental in the creation and implementation of the California policy on conservation banking.

To date, California leads the nation in the number of conservation banks with over 90 endangered species banks. Southern California has the most banks, especially in San Diego and Orange counties where population growth is the greatest and there are a number of listed species found in the non-wetland areas of those counties. However, it is relatively easy to understand why California leads the nation in conservation banks, given that California has over 250 threatened and endangered species, second only to Hawaii. There are also a number of endangered species banks on the east coast and a few in the development phase in Colorado.

#### **Establishing a Conservation Bank**

The primary considerations in setting up a conservation bank, similar to a wetland bank, are:

1. land costs and availability;
2. site suitability in terms of species present;
3. potential market area for species (range of habitat);
4. potential market demand in regard to proposed development in species habitat;
5. regulatory agencies' willingness to accept some impact to the listed species and support the use of an off-site mitigation; and

6. cost and logistics of the proposed site for the long-term sustainability of the species

One of the big advantages to existing bankers is that conservation banks can be another income producer for wetlands banks if the banker can demonstrate or create ESA habitat on the upland portions of the site, thus increasing marketable credits and customer base. However, before you run right out and try to establish a conservation bank it's important to keep in mind the overall status of the listed species. For example, if the species in your region is on the brink of extinction, then it is highly unlikely that the wildlife regulators will allow any impact or loss of that species and its habitat, even with mitigation.

#### **Advantages and Disadvantages of Conservation Banks**

Conservation banking offers several potential benefits to those mitigation bankers who have endangered or listed species in their states. The primary benefits to bankers from conservation banks are:

- endangered species mitigation offers a whole new market or potential ability to sell credits for some of the upland or non-wetland portions on existing bank sites;
- conservation banks have lower upfront costs since the focus is on preservation and thus construction costs are often not necessary; and
- fewer agencies are involved in the review and permitting process (typically only the two federal and state wildlife entities).

Unfortunately, conservation banks also have some drawbacks. The primary concerns are:

- returns on investment may be less than wetland banks since there is less opportunity to provide an improved good or product;

- species ranges and hence the service areas can be smaller and more variable than wetland banks (e.g., some endangered species are composed of many sub-populations); and
- most conservation banks require species to be present on the site before credits will be provided.

Finally, in lieu fees, one of the great threats to wetland mitigation, has also popped up in endangered species mitigation in the form of Habitat Conservation Plans. HCPs are cooperative agency, local government, developer and environmental efforts that develop regional habitat plans that allow for some development while identifying areas for habitat protection.

While HCPs can offer substantial ecological and regulatory benefits in theory, implementation is a different story. These programs often function as elaborate in lieu fee programs in which project proponents can pay fees into an account, typically at a price far below the actual cost of acquisition and management of lands, without any certainty or timelines for habitat acquisition and stewardship.

In addition, since HCPs are often coordinated or implemented in conjunction with the local permitting or regulatory entities, potential clients are directed to pay into these HCP funds rather than go to previously established private conservation banks. Thus, conservation banks established prior to the creation of centralized HCPs have and are losing sales and market share to these public efforts.

#### **Future of Conservation Banking**

With population growth in various regions of the United States expected to continue, one can expect the threat to various species will increase. Thus, the listing of species will also continue to grow in the United States and hence, conservation banking opportunities as well. In addition, the current

Administration has shown an interest in supporting private sector initiatives to implement conservation efforts.

#### **The National Mitigation Banking**

**Association** will be providing comments on the proposed federal conservation banking guidelines. Some of the topics we are asking to be included within the proposed guidelines are:

- timelines for conservation bank review;
- no arbitrary or non-biologically supported limitations on the size of impacts that can go to an approved conservation bank;
- inclusions of all existing conservation banks in newly created HCPs;
- recognizing the value of and supporting restoration of habitat in conservation banks; and
- the establishment of an “MBRT” type process to ensure regular and timely coordination between the bank permitting agencies.

*If any members have other issues that you would like included in our comment letter please contact Craig Denisoff, Vice President, NMBA at [cdenisoff@wildlandsinc.com](mailto:cdenisoff@wildlandsinc.com) or (916) 331-8810.*

**Have an article you'd like to contribute? Please send a brief summary or outline to [cbahler@erols.com](mailto:cbahler@erols.com) or call NMBA at (703) 549-3311.**

# LEGISLATIVE UPDATE

*Contributed by Venable, LLC*

**On the Hill.** NMBA Board members and the Venable legislative team met with multiple members and staff of the House and Senate committees during a jam-packed visit on May 22 and 23. Highlighting the visits was a warm welcome for mitigation bankers from Congressman John Duncan (R-Tenn.), Chair of the Water Resources Subcommittee of the House Transportation and Infrastructure Committee. Rep. Duncan is a strong supporter of mitigation banking.

The Board also met with Senate Environment and Public Works Committee staff and nine House and Senate offices to solidify support for banking. The Board worked hard to assure that the preference for mitigation banking stays in laws that federally fund significant construction activities. NMBA will continue to protect the preference for mitigation banking in TEA-21 as the new Transportation Bill (TEA-3) works its way through Congress.

Despite highly supportive hearings before the Water and Resources Subcommittee of the House Transportation and Infrastructure Committee last fall, the Jones Bill, H.R. 1474 (to codify the wetland mitigation banking program), has yet to move toward markup or vote. Federal wetland legislation, like many other programs, is taking a back seat to national security and budget issues on the Hill this year.

**At the Agencies.** Visiting agencies in D.C. on May 22 and 23, the Board Members heard a willingness to improve mitigation banking policy. The Board met with Chip Smith of the Office of Assistant Secretary of the Army who agreed that improving mitigation banking policy warranted



NMBA Board members meet with Congressman John Duncan (R-Tenn) in Washington, D.C. in May  
From left: Stephen Collins, John Ryan, Congressman John Duncan, Richard Mogensen, Michael Rosen.

revisiting the 1995 Mitigation Banking Guidance. NMBA agreed to cooperate with these efforts.

When the Board spoke with Bill Leary at the Council on Environmental Quality, he also said the Bush Administration was interested in revisiting mitigation banking policy to develop a suite of improvements that would help mitigation banking. NMBA will work with the Army, the Corps and CEQ as well as EPA, FWS and NOAA as this process goes forward. We expect that we will soon have a schedule for this interagency review.

Board Members were told that the long awaited post-SWANCC guidance is in near final stages of interagency review. Chip Smith advised the Corps and EPA may issue an additional joint legal opinion. The agencies seem to feel that certain technical issues should be determined through notice and comment rulemaking rather than field guidance. These include addressing "adjacent waters," where tributaries begin and end, and jurisdictional treatment of some artificial conveyances such as collector systems. NMBA members urged that the government move quickly to get post-SWANCC information out to the field to provide greater certainty to the regulated community.

**In the Courts.** Clean Water Act jurisdiction over "isolated waters" and wetlands remains controversial and unsettled. For more than a year after the U.S. Supreme Court's *SWANCC* decision in January 2001, courts across the country almost uniformly have interpreted the High Court's decision very narrowly, leaving intact all previously recognized jurisdiction (including "adjacent" and "tributary" jurisdiction) and striking down only jurisdiction over isolated waters based solely upon the Migratory Bird Rule.

While the EPA, Corps and CEQ have yet to issue the long awaited *SWANCC* Guidance, regulators may actually be losing ground. The tide in the courts seems to have shifted as several of the most recent decisions have interpreted the Supreme Court's opinion in

*SWANCC* (coupled with its earlier opinion in *Riverside Bayview Homes*) to mean that Clean Water Act jurisdiction requires a "significant nexus" between the wetland and navigable waters and that a hydrological connection may not be enough to satisfy this test in all cases. Two recent decisions in the Eastern District of Virginia (*Newdunn* and *RGM Corp.*) and one in the Eastern District of Michigan (*Rapanos*) have found that wetlands connected to a navigable-in-fact waterway via numerous manmade and/or intermittent streams covering a substantial distance (anywhere from several to 20 miles) were not within CWA jurisdiction. For more information about these court decisions, contact Peggy Strand or Greg Braker at Venable (202) 962-4800.

## **NEWS & EVENTS**

April 23-25, 2003 **HOLD THE DATE -- 6<sup>th</sup> National Mitigation Banking Conference**, San Diego, CA. Initial Announcement & Call for Presenters available at [www.mitigationbankingconference.com](http://www.mitigationbankingconference.com). Or contact Carlene Bahler at 703/837-9763.

**Available Soon!** We're working to complete the new NMBA web site, [www.mitigationbanking.org](http://www.mitigationbanking.org). Our goal is for the site to be completed this month, at which time each member will be provided a password for entry into the *Members Only* section where you can gain access to current and past newsletters, a complete member listing & more.

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