

NMBA NEWS

SEPTEMBER 2002

A QUARTERLY NEWSLETTER FROM
THE NATIONAL MITIGATION BANKING ASSOCIATION

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PRESIDENT'S CORNER

Hello again. There have been some interesting new developments with the Association and with the industry overall.

One exciting initiative that the NMBA is currently working on is a video production in association with the American Environmental Review Series and WJMK, Inc. This video will be hosted by Morley Safer (of 60-Minutes fame) and will be shown on public television networks across the country. It will explain the benefits of mitigation banking and show video clips from one of our members' banks (to be determined). In addition to the video that will be shown on public television, the NMBA will get an extended "Corporate Demo Tape" that we can copy and use for promotional and educational purposes. I expect that we will be able to distribute one copy to every active member of the NMBA. This should be completed before the end of the year. Stay tuned!

Shifting gears, there have been some significant developments in regards to the SWANCC decision and the "isolated" wetlands issue. First, an interesting new legislation called the "Clean Water Authority Restoration Act of 2002" was recently introduced which is aimed to "Restore the Intent of the Clean Water Act of 1972." It was introduced by U.S. Senator Russ Feingold (D-Wi), Representatives James Oberstar (D-Mn) and John Dingell (D-Mn). It may be difficult for any new environmental legislation to make it all the way through to law, this is at least a first step. The NMBA Board will be discussing the pros and cons of supporting this legislation in the new future. In addition to this new legislation, the Department of Justice recently filed a brief in a federal appeals case laying out an extremely narrow interpretation of the SWANCC decision. This is a strong signal that the government is still going to aggressively defend the CWA jurisdiction over most wetlands. Hopefully, the federal agencies will follow this lead and issue the long awaited guidance on isolated wetlands and the definition of adjacency so we all know what is and what isn't a jurisdictional wetland.

Finally, we have been told that a working group is being assembled in Washington, DC to evaluate both the October 31, 2001 USACE RGL about mitigation and the 1995 Mitigation Banking Guidance. This working group will be made up of representatives of the USACE, US EPA, USFWS and NMFS. The NMBA has been assured that we will have a voice in this re-evaluation process. As this effort evolves we will keep you all informed.

Until next time,

Rich Mogensen
President, NMBA

Have an article you'd like to contribute? Please send a brief summary or outline to info@mitigationbanking.org or call NMBA at (703) 549-3311.

LEGISLATIVE UPDATE

Contributed by Venable, LLC

On the Hill. Virtually identical House and Senate bills (H.R. 5194 and S.2780), entitled "Clean Water Authority Restoration Act of 2002," were introduced in late July, proposing to undo the U.S. Supreme Court's *SWANCC* decision and restore federal jurisdiction over "isolated waters" (including wetlands). The bills would amend the Federal Water Pollution Control Act by replacing all references to "navigable waters" with the much more broadly defined phrase "waters of the United States" (borrowed from the longstanding definition of waters in Army Corps regulations). The bills assert numerous Constitutional grounds (the Commerce, Property, Treaty, and Necessary and Proper Clauses) and public interests (protection of water quality, public safety, and wildlife) as legal bases for the amendments. While both bills have been referred to their respective committees (and subcommittees) for consideration, no further activity has been scheduled on either bill at this time. **Copies of these bills can be obtained at www.mitigationbanking.org.**

On a related note, Representative Doug Ose (R-CA), the Chairman of the Government Reform Committee's subcommittee on

energy policy, natural resource & regulatory affairs, has scheduled an oversight hearing on September 19, 2002 to examine the failure of the Corps, EPA, and DOJ officials to reach consensus on *SWANCC* guidance in the aftermath of the Supreme Court's controversial decision more than a year and a half ago. Chairman Ose hopes to encourage the prompt development and release of clearcut guidance that will stem the growing split among the federal courts in their interpretation of Clean Water Act jurisdiction.

In addition, the Supplemental Transportation Appropriations Bill passed the House and Senate in late July, leaving fully intact the existing preference for mitigation banking (over other forms of compensatory mitigation) when mitigating wetlands impacted by federally funded transportation projects.

At the Agencies. The Army Corps of Engineers has selected Dr. Mark Sudol to be the Regulatory Chief at Corps Headquarters in Washington, DC. Dr. Sudol, who is currently the Regulatory Chief for the Los Angeles District and is generally known as a supporter of mitigation banking, is slated to fill his new post around October 1. NMBA board members intend to schedule an introductory meeting with Dr. Sudol this fall to discuss NMBA's general concerns about the state of wetlands mitigation.

In addition, NMBA has been invited to participate in an "interagency working

group” (that includes representatives from the Corps, EPA, CEQ, and FWS) to evaluate the standards governing compensatory mitigation, including the 1995 Mitigation Banking Guidance. To that end, the Board submitted comments on the 1995 Guidance to the federal regulators in mid-July, providing numerous suggestions on how to (1) improve and accelerate the MBRT process; (2) level the playing field between mitigation banks and other less stringently regulated forms of compensatory mitigation; and (3) achieve greater success for compensatory mitigation in general. The working group should begin moving forward on these issues sometime this fall, as well.

Finally, NMBA responded in June to a shocking proposal by the San Francisco District of the Army Corps of Engineers that would limit the sale of mitigation banking credits to developments of less than three acres. As its rationale, the San Francisco District flatly stated that banks are not being approved quickly enough and that, as a result, it needed to preserve the limited number of banking credits available for use only by small developers (who are ill-equipped to perform their own mitigation). NMBA argued that the best long-term solution was to cure delays in the bank approval process, rather than to establish a policy that would create artificial market conditions and discourage growth in the mitigation banking industry over the long-term. EPA has also weighed in on the proposal, essentially adopting the position of the NMBA. **Obtain NMBA’s comments & responses at www.mitigationbanking.org.**

In the Courts. Despite initial indications to the contrary, the Department of Justice has appealed the decision of the United States District Court for the Eastern District of

Michigan in *Rapanos*, which vacated the defendant’s conviction in light of *SWANCC*. The District Court opinion held that the wetlands at issue, though hydrologically connected to navigable-in-fact waters some twenty miles away, were not jurisdictional because they were not directly adjacent to navigable-in-fact waters. Federal prosecutors are arguing to the Sixth Circuit that (1) the Supreme Court’s 1985 decision in *Riverside Bayview Homes* (which involved wetlands directly adjacent to navigable-in-fact waters) does not establish the outer limit of Clean Water Act jurisdiction; and (2) the Supreme Court’s 2001 decision in *SWANCC* intended only to strike down “migratory bird” jurisdiction over isolated waters (leaving jurisdiction intact for wetlands that are “tributary” to navigable waters or “adjacent” to such tributary waters). Further briefing of this appeal should be completed this fall. **Visit www.mitigationbanking.org for a copy of these appeals.**

The Department of Justice is also appealing (on similar bases) the decision of the United States District Court for the Eastern District of Virginia in *Newdunn*, which held that the wetlands at issue were not jurisdictional, even though (1) they were formerly hydrologically connected by natural means with a navigable tributary only two miles away; and (2) they continue to be hydrologically connected with that navigable tributary by a man-made ditch that flows intermittently (though routinely enough that it leaves an ordinary high water mark) along a newly constructed highway that permanently disconnected the natural surface hydrology between the wetlands and the navigable tributary. Further briefing of this appeal should be completed this fall, as well.

NEWS & EVENTS

People in the News

NMBA is pleased to welcome **Dr. Mark Sudol** as the new Headquarters' Regulatory Chief of the U.S. Army Corps of Engineers. Due to arrive at his new post the first week in October, Dr. Sudol is currently Regulatory Chief for the Los Angeles District. His Ph.D. thesis was on mitigation successes and he is known as a supporter of mitigation banking.

Jack Chowning, Program Manager for the Corps' Regulatory Branch at Headquarters is planning to retire October 14. We will miss his contribution to our efforts and wish him and his family all the best as they head for Oklahoma!

Lisa Morales, formerly involved in mitigation and conservation banking with U.S. EPA, has taken a new position in the Legislative Management Branch of the U.S. Army Corps of Engineers. Her new number is 202/761-4492. Palmer Hough, Environmental Specialist, is currently filling in for Lisa at EPA; his number is 202/566-1374.

April 23-25, 2003 6th National Mitigation Banking Conference, San Diego, CA. Initial Announcement available at www.mitigationbankingconference.com. Program to be posted soon. Or contact Carlene Bahler at 703/837-9763

Available Now! The NMBA web site -- www.mitigationbanking.org – is now available. All members were 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.

**THE NMBA NEWS IS A QUARTERLY PUBLICATION OF THE NATIONAL
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