

NMBA NEWS

DECEMBER 2002

A QUARTERLY NEWSLETTER FROM
THE NATIONAL MITIGATION BANKING ASSOCIATION

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PRESIDENT'S CORNER

Hello once again. This is the last Newsletter for 2002. It has been a very busy year for the Association and for myself personally.

First, the Association has had an eventful and challenging year. Although the Board of Directors has worked hard this year we find ourselves struggling with keeping the membership consistent and the dues paid. It is difficult to continue the good fight with limited resources but much work still needs to be done. SWANCC has hurt some members and guidance is needed; the mitigation banking guidance needs updating desperately; and the In-Lieu-Fee Guidance (that we worked so hard for) has had limited implementation. In an effort to keep and grow the Association, the Board has accepted a proposal from past-president Lew Lautin to become Executive Director of the Association. His main focus initially will be to convince present and former members to stay with the Association and also to generate new members. Please join me in welcoming Lew to his new position with the NMBA. One of the issues that we will be discussing this spring in San Diego will be the fee structure. It may be that the \$5,000 annual dues are too much to maintain and grow the NMBA; this will be revisited at our Annual Meeting. I hope you all can make it. It should be another excellent conference with information on conservation banking as well as wetlands and streams.

As far as my situation, (like you care!), I have changed companies and joined the EarthMark Companies group. I leave Marsh Resources Inc. with sadness as I established that company as a subsidiary of The Williams Companies, Inc., named it, developed all of its projects and really enjoyed my time there. Unfortunately it was time to move on to bigger and hopefully better opportunities in this wonderful industry we call mitigation banking. EarthMark has developed some very successful mitigation projects in Florida including the Big Cypress Mitigation Bank and the pending Treasure Coast Mitigation Bank. I'm looking forward to developing many new and successful projects along the eastern seaboard and elsewhere. See you in San Diego!

Rich Mogensen
President, NMBA

DEVELOPMENT OF A UNIFORM WETLAND MITIGATION ASSESSMENT METHOD

**Constance Bersok, Environmental
Administrator**

*Florida Department of
Environmental Protection
Tallahassee, Florida*

The Florida landscape has seen a dramatic change in the last two centuries.

The state lost approximately 9.3 million acres of wetlands between 1780 and the 1980s through residential, agricultural and commercial development. Both Florida and the federal government have regulated wetlands since the late 1970s, including mitigation to offset adverse impacts. However, a study conducted by the state, resulting in the “Report on the Effectiveness of Permitted Mitigation” in 1991, found a low rate of compliance and mitigation success. To address some of the issues raised by the study, the state legislature authorized the establishment of mitigation banking in 1993, directing mitigation banks to “emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems” (Chapter 373.4135(1), Florida Statutes).

The creation of a mitigation banking program required a standard unit of measure, or “currency,” which is termed a credit and is based on the degree of improvement in ecological value expected to

result from the establishment and operation of the mitigation bank. When the state’s Office of Program Policy Analysis and Governmental Accountability was directed by the state legislature to “study mitigation options and...consider the effectiveness and costs of the current mitigation options in offsetting adverse effects to wetlands and wetland functions” (Section 373.414(18)(b), F.S., 1999), it found past tracking of wetland acres impacted and acres of mitigation did not address the question of whether the mitigation is sufficient to offset the loss of wetland functions from the permitted impacts. That report recommended the development of a statewide assessment methodology that would include functional assessments of both impacted wetlands and mitigation sites and address mitigation factors such as time lag, risk and location of mitigation. That recommendation is now state law (Chapter 373.414(18), F.S.).

In reality, mitigation banks had been using some form of functional assessment since the mid-1990s to determine how many credits a bank might be able to accrue. Some assessment methods were developed specifically for mitigation bank sites (e.g., W.A.T.E.R. for a site near Biscayne Bay); other banks used WRAP – the Wetland Rapid Assessment Procedure that was informally adopted for use the U.S. Army Corps of Engineers.

State law directs the Department of Environmental Protection and the regional water management districts to develop the uniform mitigation assessment method, along with input from local governments and the U.S. Army Corps of Engineers. The resultant method will be in the form of a rule that all state agencies would then apply. Once this method is adopted by rule, it will be the exclusive and consistent process to determine the mitigation needed to offset adverse impacts. In addition, it will be the

sole means to determine the awarding and use of mitigation bank credits. However, mitigation banks that have received a state mitigation bank permit prior to the adoption of the method have two options: (1) The bank may choose to continue to use the credit assessment method that was applied during the bank permit review when using the bank's credits to offset wetland impacts; or (2) the bank may elect to have the credits re-determined using the adopted uniform method and thereafter apply that same method for the deduction or use of credits.

The goal is to have a method that is a uniform means of determining the amount of mitigation needed to offset impacts. The method does that by assessing specified functions provided by wetlands and surface waters of both proposed impact and mitigation sites. Because this method is to be used within the tight regulatory time frames of permit review, it uses three major *indicators* of wetland functions (location, water environment and community structure) to assess the relative function of a site, rather than direct measurement of function. The method is intended to be used statewide for all types of wetlands and other surface waters that are regulated, ranging from seepage slopes and pitch plant bogs to riverine floodplain and mangrove communities. As a result, the new method relies on current scientific knowledge and the application of reasonable scientific judgment rather than providing criteria for each type of community to be assessed.

The assessment method compares the before-project and after-project conditions to determine the anticipated loss of function at impact sites (impact delta) and the anticipated gain of function at the mitigation site (mitigation delta). The method not only accounts for wetland functions, but must address two components of mitigation that affect the amount of mitigation needed: time lag and risk. Time lag means the period of time between when the functions

are lost at an impact site and when those functions are replaced by the mitigation. In general, the time lag varies by the type and timing of mitigation in relation to the impacts. For the purposes of this method, the time lag, in years, is related to a numerical factor to reflect the additional mitigation needed to account for the deferred replacement of wetland functions. There is no time lag if the mitigation fully offset the anticipated impacts prior to or at the time of impact. Mitigation risk is assessed, using six ecological factors, to account for the degree of uncertainty that the proposed conditions will achieve, resulting in a reduction in the ecological value of the mitigation assessment area.

The method concludes with calculations for determining mitigation amount and mitigation bank credits and debits. Those formulas are based on the relative degree of gain and loss of wetland function. The relative gain of functions provided by a mitigation area is adjusted for time lag and risk using the following formula: $\text{Relative functional gain} = \text{mitigation delta} / (\text{risk} \times \text{t-factor})$. The loss of functions provided by impact areas is determined using the following formula: $\text{Functional loss} = \text{impact delta} \times \text{impact acres}$.

The current draft method has evolved over time as a result of input from four series of public workshops on four earlier versions and a field testing exercise that included over 200 participants. It will no doubt continue to be "tweaked" and adjusted in response to additional testing and comments from the public up to the point of rule adoption.

For more information and to keep up with the progress and status of the draft rule, see the Department's webpage: <http://www.dep.state.fl.us/water/wetlands/mitigate/uwmam2.htm>

LEGISLATIVE UPDATE

Contributed by Venable, LLC

On the Hill. During the Washington visit, NMBA members also met with a legislative aide for Senator Russ Feingold to discuss S.2780 (the Clean Water Authority Restoration Act of 2002), which Senator Feingold had sponsored this past term to close the jurisdictional gaps left in the wake of the *SWANCC* decision. The bill will be reintroduced in the new Congress in 2003. Senator Feingold's office urged the Association and its members to support the legislation.

Members should write to their Senators and Congressmen asking that they support the Feingold bill by becoming co-sponsors.

The latest session of Congress closed without any movement on the Jones Bill (H.R. 1474), which would have essentially codified the wetland mitigation banking program. However, the Water Resources Development Act and the Supplemental Transportation Appropriations Bill passed with a preference for mitigation banking (over other forms of compensatory mitigation) intact.

At the Agencies. Several NMBA members spent two days in Washington, D.C., in early December to forward the interests of mitigation banking with agency and Congressional personnel.

Dr. Mark Sudol, recently appointed Chief of the Regulatory Branch for the U.S. Army Corps of Engineers, expressed his support for mitigation and mitigation banking. He explained that providing more consistent standards for mitigation is one of his priorities. Your Association leadership emphasized that many policies are still not being followed in the field. Dr. Sudol was

sympathetic and requested more information to help clear roadblocks.

Chip Smith, from the Office of Assistant Secretary of the Army, Civil Works, explained the status of several policy initiatives. The Administration is close to releasing an additional opinion on the scope of the "isolated wetlands" issues raised by the Supreme Court opinion in *Solid Waste Management of Northern Cook County (SWANCC)*. The opinion will say that there will be proposed regulations to further define the extent of tributaries and other waters. When this is released, the Administration will also announce a Wetlands Action Plan, identifying various parts of the wetlands program (including mitigation policy) that should be reviewed and perhaps revisited.

John Goodin, Chief of EPA's Wetlands Office, also described the upcoming Wetlands Action Plan in greater detail. Among the significant items is a review of the "on site" preference expressed in the 1990 MOA on Mitigation. John explained that the Administration hopes to address items covered by Wetlands Action Plan over the next year or two through a process that will include stakeholder forum sessions and other opportunities for input from the public. He invited the Association to participate in that process.

Dr. Len Shabman, with Resources for the Future, discussed his draft proposal for privatization of wetland mitigation. Dr. Shabman, formerly a Professor at Virginia Tech, is working on several wetland mitigation research and policy projects in his new position.

In the Courts. While the agencies continue to draft *SWANCC* guidance at the behest of Congress, now nearly two years after that landmark decision, the courts continue to examine cases concerning the scope of Clean Water Act (CWA) jurisdiction.

The U.S. Supreme Court heard oral arguments in the *Borden Ranch* case in early December, a case examining whether discharges of soil into intermittent drainages and a vernal pool, resulting from deep ripping of the soil (in an effort to convert farmland into a vineyard), amount to a regulated discharge. Experts hope to glean insight from the Court's eventual opinion in this case that would help to clarify CWA jurisdictional lines in general.

During early December, the Fourth Circuit heard oral arguments in the *Deaton* case, examining whether wetlands adjacent to a drainage ditch some eight miles from the nearest navigable water fall within CWA jurisdiction. The defendants in that case are seeking to overturn the U.S. District of Maryland's ruling that the wetlands were jurisdictional.

VIDEO HIGHLIGHTS BENEFITS OF MITIGATION BANKING

NMBA is moving forward to complete a video about the benefits of mitigation banking which is being produced by the American Environmental Review Series and WJMK, Inc. Hosted by Morley Safer of the 60 Minutes news program, and part of a series that features stories on various technologies, products, or services that have significantly contributed to a better environment, the segment will be aired on public television. WJMK will also provide our association with an expanded tape for promotional, educational and political advocacy use.

Production is well underway with the primary shooting already completed. Active members will receive a copy within the next month or two.

Location of the shoot was the Pembroke Pines Mitigation Bank (near Ft. Lauderdale, FL) on a beautiful day in November. A family of wild pink flamingos happened to be passing through and made for some great "Kodak moments." Speakers included Rich Mogensen, President of NMBA, Alex Fekete, Mayor of Pembroke Pines, Lew Lautin, Executive Director of NMBA, Michael Rosen of Big Cypress Mitigation Bank (for the Corporate Demo section) and Professor Royal Gardner, Associate Dean of the Stetson University of Law, a well-known advocate of mitigation banking.

Photo: NMBA President, Rich Mogensen, explains the merits of mitigation banking at Florida Wetlandsbank™, in Pembroke Pines, Florida. Filming also took place at Big Cypress Mitigation Bank in Collier County, Florida.



EXECUTIVE DIRECTOR NAMED

NMBA President Rich Mogensen is pleased to announce that **Lew Lautin**, President of The Lautin Company, has filled the Association's new position of Executive Director. Mr. Lautin's primary goals are to increase membership, boost the Association's visibility, improve communication with members, and advance the Association's national legislative priorities under the direction of the Board of Directors.

NEWS & EVENTS

Robert Kessler recently left Foster Wheeler Environmental Corporation for a new position with CH2M HILL in West Palm Beach, Florida, as their Director of Mitigation Banking. You can contact Bob at (561) 515-6643 or via email at rkessler@ch2m.com.

Rich Mogensen, formerly with Marsh Resources (and President of NMBA), took a new position with EarthMark as the Managing Director of the EarthMark Mid-Atlantic Division in Concord, NC. Rich can be reached at (704) 782-4133 or via email at richmogensen@earthmark.net

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

ATTENTION! NMBA Members receive a significant savings on registration for the 6th National Mitigation & Conservation Banking conference. Access the registration form at www.mitigationbankingconference.com.

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