

Taking on the Long-Term Stewardship of Wetlands Mitigation Sites

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Land trusts can play a valuable role in the federal wetlands program. Partnering with land trusts in the long-term stewardship of mitigation sites will not only assist the federal agencies in improving their track record with compensation projects, but may provide land trusts with unique conservation opportunities and additional sources of funding.

The Congaree Land Trust saves scenic open spaces, forests, and waterways in its home state of South Carolina. But recently, like other land trusts across the country, Congaree has also accepted requests to protect wetlands compensation sites, which have been restored or preserved under the federal wetlands regulatory program.

Among the pioneering land trusts in this work are the Great Land Trust in Alaska and The Nature Conservancy Mississippi Chapter, both of whom have opted to play a more complex role in the wetlands program by sponsoring an in-lieu fee mitigation program or a mitigation bank. Although separated by more than 4,000 miles and four time zones, all three organizations are well versed in the complicated workings of wetland compensatory mitigation through their experience with the federal program.

Somewhere in the range of 40,000 to 60,000 acres of wetland compensation is required through the federal wetlands regulatory program each year. Per federal guidance, these compensation sites should be protected in perpetuity; however, recent independent evaluations by the Government Accountability Office¹ and the National Research Council² have shown that federal natural resource agencies are not adequately ensuring that mitigation sites are effectively managed and protected. Thus, federal agencies are increasingly turning to third-party land conservation organizations to hold easements on or accept titles to compensation sites. The realization is dawning that professional stewardship organizations—land trusts—are in the best position to provide the long-term protection of these important resources and to ensure that they are indeed protected forever.

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Roles for Land Trusts in Compensation

Land trusts can play a variety of roles in the federal wetland program. They may agree to accept an easement on or title to a property on which a compensatory mitigation project (permittee-responsible, mitigation bank, or in-lieu fee mitigation) has been conducted and thereby become the long-term steward of the site. Alternatively, land trusts can enter into an agreement to be a partner in a mitigation project or opt to sponsor a wetland mitigation bank or in-lieu fee program. Or, land trusts may enter into some creative combination of the above. The role a land trust chooses to play must, of course, be evaluated against the backdrop of the organization's mission statement, the comfort level of the group's board of directors, its technical expertise, and the opportunities and potential liabilities that come with involvement in compensatory mitigation projects.

Long-Term Steward

The long-term steward is the entity that assumes control over, and legal responsibility for, a mitigation site after the ecological performance standards and administrative requirements have been met and the U.S. Army Corps of Engineers has certified that the project is in compliance. The steward is accountable for implementing all of the long-term management responsibilities identified in the mitigation site's long-term management plan and real estate instrument (e.g., conservation easement, deed restriction or fee simple title).

The basic long-term stewardship responsibilities—monitoring site visits, site maintenance, and easement defense—for a compensatory mitigation site can be similar to those required of a donated easement. However, mitigation projects often require a land trust to assume responsibilities that go above and beyond those required of traditional easements. And, because most mitigation sites have been restored or enhanced to some degree, they may require more intense long-term management (such as fire management or invasive species control) than typical easement sites. The long-term management plan may also define specific monitoring and reporting schedules that are required of the site steward in perpetuity.

The Congaree Land Trust first became involved with the long-term stewardship of wetlands mitigation sites when a local family asked the organization to hold an easement on one of their

mitigation properties. Congaree currently holds nine easements on properties on wetland compensation sites—both project-specific and wetland mitigation bank sites.

Accepting an easement or title on mitigation lands can provide land trusts, such as Congaree, with unique opportunities for adding to the portfolio of land in their target conservation area. In addition, because stewardship endowments are often part of the agreement for taking on the long-term responsibilities for a mitigation project, playing this role may also serve to increase the financial and professional capacity of the organization. However, becoming a long-term steward of a mitigation site can lead to unforeseen management expenses, public relations problems, permitting and legal hassles, staff burnout and mission drift—all potential problems that must be considered before taking on the project.

Project Partner

For some projects, a land trust may partner with an in-lieu fee sponsor or other mitigation provider to perform restoration work or assume permittee's required monitoring responsibilities. As a partner, the land trust should detail all its restoration or management responsibilities in a formal management agreement with the mitigation provider and regulatory agencies. Although the mitigation provider frequently retains liability for the success of the site (i.e., meeting performance standards), the land trust can be held accountable for the responsibilities outlined in this agreement.

The responsibilities and liabilities taken on by the project partner can vary widely with the site, the mitigation requirements, and the capability of the land trust. Some land trusts may have the capacity to partner with an in-lieu fee provider to implement an entire restoration project. In this context, the land trust may be responsible for site selection, restoration or enhancement activities, or monitoring, among other responsibilities. Alternatively, a land trust may choose to solely assume the permittee's required monitoring responsibilities of the mitigation site.

Project partnership can strengthen the land trust's ability to take on a mitigation project. In addition, a trust's input on site selection and direct role in the restoration activities can ultimately influence the success of the site itself. However, the trust may find that the project leads to unanticipated expenses, board/staff burnout, or even public relations and legal problems if the project fails. Each land trust needs a process for fully evaluating and addressing potential risks.

Mitigation Sponsor

In some cases, land trusts have opted to become mitigation providers, either by sponsoring a mitigation bank or an in-lieu fee

program. Under such arrangements, the land trust works with the relevant state and federal agencies to secure approval for the bank or program (mitigation bank or in-lieu fee agreement), secures the site, carries out the mitigation activities, and assumes full liability for the success of the mitigation site.

According to a recent survey of Corps districts, almost 60% of all of the nation's 42 approved in-lieu fee programs are sponsored by private, nonprofit conservation organizations, such as land trusts.³ Land trusts sponsoring an in-lieu fee program may use the fees collected to acquire and restore wetlands in areas that are a geographic priority or under significant threat of development.

For example, the Great Land Trust in Alaska entered into an in-lieu fee agreement with the Corps and is now focused on protecting the wetland resources associated with a local creek under severe

development pressure in the Anchorage region. Since the program's inception, the trust has collected approximately \$3 million in mitigation fees. The funds have primarily been used to support large wetland restoration and acquisition projects in the trust's target areas of interest.

Few land trusts or conservation organizations have the capacity or resources to establish a mitigation bank. However, in November 1996, The Nature Conservancy's Mississippi Chapter acquired over 1,700 acres of converted loblolly pine commercial for-

est to establish the Old Fort Bayou Mitigation Bank. The carefully restored bank site now features several habitat types including wet pine savanna, bottomland hardwood, and emergent marsh. In addition to the Old Fort Bayou bank, TNC also manages the Red Creek Consolidated Mitigation Project. Together, TNC's wetland and stream mitigation banking efforts have helped preserve and maintain important aquatic resources of South Mississippi.

Although the Great Land Trust and TNC Mississippi examples may seem enticing to other land trusts—free money to preserve and manage priority lands—mitigation funding carries with it significant liabilities, not to mention the time, staff, and resource investments that must be devoted to the process.

The Key Elements

Despite the time commitment, early involvement by the land trusts in a prospective project can help ensure that the land trust plays a more significant role in project design, which in turn will increase the likelihood that the project will meet the organization's protection priorities.

Before agreeing to play a role in any mitigation project, land trusts should formally lay out all of their responsibilities and endowment expectations in a long-term stewardship or management

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and funding agreement. The mitigation provider, regulatory agencies, and the land trust should sign the agreement. In addition, the land trust should build an effective system to track all of its mitigation responsibilities and deferred mitigation expenses.

For all potential mitigation projects, land trusts should conduct an initial site visit to document baseline site conditions. All of the relevant mitigation documents should also be reviewed thoroughly to assess the terms of the real estate instrument employed, the extent of the trust's management responsibilities, and the group's financial and legal liabilities.

Mitigation Plans

Navigating the labyrinth of regulatory permits and mitigation plans can be overwhelming for a land trust. However, for these organizations, the key sections of a mitigation plan or permit are the site protection provisions, contingency plans, monitoring and maintenance plans, and financial assurances.

Site Protection Provisions: This section of the mitigation plan lays out the type of real estate provision (title transfer, conservation easement, deed restriction, or declaration of restriction), the entity to whom the real estate provision will be transferred, and the date or milestone for transfer.

Contingency Plans: The mitigation plan should include provisions for responding to unanticipated site conditions or changes. If, for example, the site is not in compliance with the terms of its permit or mitigation agreement, this section will lay out who is responsible and how remedial measures will be funded.

Monitoring and Maintenance Plans: Monitoring provisions may stipulate the responsible parties and their roles, the data that must be collected, the assessment tools used to monitor progress toward performance standards, and the reporting format, frequency, recipients, and schedule. Maintenance provisions set forth the long-term responsibilities that may transfer to the long-term steward. This section should also specify the entity that will take over long-term management responsibilities from the provider, the source of the endowment, and the time frame for management activities.

Financial Assurances: Financial assurances come in two distinct flavors and come into play at different stages of mitigation projects. Contingency funds can be required during the "active phase" of the mitigation project and typically last until either the end of the monitoring period or after all of the credits have been sold. Contingency funds may be up to 10% of the annual operating budget. Long-term management funds are required after the monitoring period is over or after the mitigation bank's credits have been sold. The mitigation provider and the easement holder should establish an agreement that in-

cludes and identifies a financial assurance mechanism, a financial entity that will manage the funds, a date or milestone for the transfer of funds, a schedule by which financial assurances may be reviewed, and limitations on how the funds can be spent.

For permittee-responsible mitigation sites, the key elements may be found in the permit itself, included as a mitigation plan attached to the permit or in a mitigation plan yet to be submitted. For a mitigation bank, the key elements can be found in the mitigation banking agreement, which includes a detailed mitigation plan. For in-lieu fee mitigation sites, the key elements may be found in the in-lieu fee agreement, but may also be found in the specific in-lieu fee project plan/proposal that is drafted for each individual project conducted with the collected fees.

It is important to note, however, that mitigation plans differ significantly from Corps district to Corps district and mitigation project to mitigation project. It is therefore important that the land trust know whom to ask for information and what information to ask for. The district Corps office is the place to start for tracking down this information. The agency provides direct links to the district regulatory programs from one central webpage: www.usace.army.mil/cw/cecwo/reg/district.htm.

Calculating Long-Term Stewardship Costs

A National Research Council report on compensatory mitigation emphasizes that third-party organizations taking on the long-term stewardship of compensation sites must receive adequate funding to provide for the long-term management needs of compensation sites under their care.⁴ This is especially important because the costs for mitigation endowments can be many times higher than the costs for a regular donated conservation easement. Many land trusts calculate stewardship costs using either stewardship calculators or a computerized database methodology, such as the Property Analysis Record developed by the Center for Natural Lands Management.

Stewardship Calculators

Stewardship costs for compensation sites can be calculated using a worksheet that includes line items for one-time costs, such as a baseline documentation report and easement preparation, as well as ongoing stewardship costs. The latter may include estimates to cover staff salary and benefits, travel time, on-the-ground monitoring, landowner relations, meetings with town officials and community groups, direct costs for maps and supplies, overhead and office expenses, expert assistance such as foresters or wetland ecologists, capital purchases and additional insurance.

The cost of defending an easement can be significant and should be carefully evaluated when determining the endowment. Easement enforcement costs can be calculated using the following approach: (1) assume that there will be, on average, one violation and enforcement action every eight years; (2) estimate a cost (in time or in dollars) for the enforcement action; and (3) add one-eighth of the total cost to the annual estimate. The cost of an enforcement action may be determined based on a reasonable estimate for the

hourly rate of legal representation and staff multiplied by the estimated number of hours that would be required for the action.

Both the stewardship endowment and easement enforcement endowment must generate sufficient funds—based on a reasonable rate of return after inflation—to support annual stewardship activities and cover the costs of an easement defense should it arise.

Property Analysis Record

The Center for Natural Lands Management has developed the Property Analysis Record (PAR).⁵ The PAR is a computerized database methodology that is extremely effective in helping land managers to calculate the costs of land management for a specific project. It helps analyze the characteristics and needs of the property from which management requirements and costs are derived. It helps pinpoint management tasks and estimates their costs as well as the necessary administrative costs to provide the full cost of managing any property. The PAR generates a concise report, which serves as a well-substantiated basis for long-term funding.

Conclusion

With adequate preparation, land trusts can be uniquely qualified to take on the long-term stewardship responsibilities of wetland mitigation sites. Partnering with land trusts in the long-term stew-

ardship of compensation sites will not only assist the federal resource agencies in improving their track record with compensation projects, but may provide land trusts with unique conservation opportunities and additional sources of funding with which to pursue their land preservation missions. However, each land trust should carefully consider all of the opportunities and liabilities associated with mitigation before taking on the long-term stewardship responsibilities of a mitigation site. ■

ENDNOTES

¹ U.S. Government Accountability Office. September 2005. Wetlands Protection: Corps of Engineer Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring. Available at www.epa.gov/owow/wetlands/pdf/GAO05898.pdf.

² National Research Council Board on Environmental Studies and Toxicology. 2006. Compensating for Wetland Losses Under the Clean Water Act. Available at <http://www.nap.edu/books/0309074320/html/>.

³ Wilkinson, J. and J. Thompson. 2006. *2005 Status Report on Compensatory Mitigation in the United States*. Washington, D.C.: Environmental Law Institute.

⁴ National Research Council Board on Environmental Studies and Toxicology. 2001. Compensating for Wetland Losses Under the Clean Water Act. Available at <http://www.nap.edu/books/0309074320/html/>.

⁵ Center for Natural Lands Management, *PAR-Property Analysis Record*, at http://www.cnlm.org/cms/index.php?option=com_content&task=view&id=21&Itemid=155 (last visited Apr. 2, 2007).

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²⁹ Between FY 1999 and FY 2006 the Corps Regulatory Program budget increased from 106 million dollars per year to 160 million dollars per year. Energy And Water Development, 1999 Appropriations, Pub. L. No. 105-245, 112 Stat 1838, 1842 (Oct. 7, 1998); Energy And Water Development Appropriations Act of 2006, Pub. L. No. 109-103, 119 Stat 2247, 2251 (Nov. 19, 2005); see also U.S. Army Corps of Engineers, Corps Regulatory Program, *Regional Regulatory Conference June 2006* (PowerPoint Presentation, on file with the author).

³⁰ A number of districts are using on-line permit applications now, but increased usage is anticipated to expedite processing and save time with data entry. Telephone Interview with David Olson, U.S. Army Corps of Engineers (Mar. 15, 2007). Once the OMBIL Regulatory Module (ORM) (an automated information system to collect regulatory information and track regulatory actions including impact acreage, wetland type and acreages, and mitigation type and acreages, see National Wetlands Mitigation Action Plan, *Initial Deployment of ORM*, <http://www.mitigationactionplan.gov/OMBILdatabase.html> (last visited Mar. 8, 2007)), is up and running all districts will have access to on-line permit applications.

³¹ The "lead district" approach is directed at streamlining activities in states with more than one Corps district. Appointing a "lead district" is designed to minimize conflicts and simplify applicant's confusion on regional issues (such as programmatic general permits). Telephone Interview with David Olson, U.S. Army Corps of Engineers (Mar. 15, 2007).

³² Corps regulatory guidance letters can be found on-line at U.S. Army Corps of Engineers, *Regulatory Guidance Letters*, <http://www.usace.army.mil/cw/cecwo/reg/rglindx.htm> (last visited Mar. 15, 2007).

³³ See *supra* note 30.

³⁴ Russ Kaiser from Corps Headquarters reports that:

To further aid the decision-making process, several new Regulatory Guidance Letters (RGLs) are being prepared. One RGL will identify practices and documentation requirements to support jurisdictional determinations; another RGL will clarify the exemptions for irrigation and drainage ditches; yet another RGL will provide guidance on writing special conditions. Additional RGLs will be developed to support wetland delineations. Regional supplements are being prepared to supplement the 1987 Wetland Delineation manual. Finally, RGL 05-05 was developed to identify the physical indicators supporting an ordinary high water mark. Districts will be encouraged to publish requirements for jurisdictional determinations that would generally support the decision being made without a site visit.

Additionally, ORM v2.0 will provide a streamlined, step by step process that will assist in the evaluation of jurisdiction. Embedded GIS resources will support timely reviews of aerial photography, topographic mapping, and existing national wetland inventories and will provide for quick references to jurisdictional determinations already conducted. Use of GIS and geo-location tools will support data populations of standard geographical location, such as State, County, watershed and drainage basins. Users will be able to document the nearest waterway and any large scale river network automatically by establishing the location of the project site. Users will identify the size and type of each aquatic resource on site and then document the jurisdiction or lack thereof for each aquatic resource. The jurisdictional module of ORM v2.0 will be developed to include the required documentation for establishing or declining jurisdiction and will support electronic notification to the EPA and posting of the documentation on district web pages.

Email from Russell L. Kaiser, U.S. Army Corps of Engineers, "RE: Help with More Data (UNCLASSIFIED)" (Mar. 9, 2007). In a telephone interview David Olson with the Corps Regulatory Program headquarters office also pointed to the new Nationwide Permitting Program as intended to increase efficiency by making those general permits easier to understand. Telephone Interview with David Olson, U.S. Army Corps of Engineers (Mar. 15, 2007). See also Reissuance of Nationwide Permits; Notice, 72 Fed. Reg. 11092 (Mar. 12, 2007), available at http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_2007_final.pdf (the "Corps proposal is intended to simplify the NWP program while continuing to provide environmental protection . . . " *Id.*).

³⁵ The latest statistics available on-line are from FY 2002 and FY 2003. U.S. Army Corps of Engineers, *US Army Corps of Engineers Regulatory Program* (2003), available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf>. They show that in 2002, there were 128 denials of the 81,302 permits applied for (0.16%), and in 2003, there were 299 denials of the 86,177 (0.35%) permits applied for. This means that in those two years an average of 0.25% of permits applied for were denied.

³⁶ For an interesting discussion about the power of (and dangers of) rhetoric, see Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City Of New London, Babbitt v. Sweet Home, And Other Tales From The Supreme Court*, 75 U. CINN. L.R. 101 (2006).

³⁷ *Rapanos v. United States*, 126 S. Ct. 2208, 2214 (2006).