

## LAW &amp; POLICY

## A Decade of Uncertainty: *Precon*, Leaked Guidance, and Where to Go From Here?

As of early 2011, wetlands stakeholders have lived with *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) for more than a decade, and *Rapanos v. United States*, 547 U.S. 715 (2006) for half a decade. These U.S. Supreme Court decisions have increased uncertainty as to when the federal government is in charge of certain activities in waters of the United States. Yet, before *SWANCC* and *Rapanos* (in fact, immediately after the 1972 passage of the Clean Water Act (CWA)), professionals working with wetlands and other waters of the United States faced similar vexing questions: where does the authority to regulate begin and end? Should there be a change in that authority? How is that authority, wherever it begins and ends, best implemented? A few recent developments have brought these questions to the forefront in new and different ways.

First, last November saw a serious shake-up on Capitol Hill. As we entered the 112th Congress this January, we were missing a number of historic champions of legislative reform of the CWA, particularly Rep. James Oberstar (D-Minn.) in the U.S. House of Representatives and Sen. Russell Feingold (D-Wis.) in the U.S. Senate. Many experts inside the beltway and out were convinced that, lacking key leadership at this time, continued efforts to pass the America's Commitment to Clean Water Act (formerly known as the Clean Water [Authority] Restoration Act) needed to be put on hold for a few years. This leaves (at least temporarily) protections for waters of the United States up to the other branches of government.

Meanwhile, adding to the diverse body of post-*SWANCC*/*Rapanos* case law, in January, the U.S. Court of Appeals for the Fourth Circuit issued an interesting ruling in an appeal concerning whether the CWA

applied to 4.8 acres of wetlands owned by the *Precon* Development Corporation in Chesapeake, Virginia (*Precon Development Corp. v. Army Corps of Engineers*, No. 09-2239 (4th Cir. Jan. 25, 2011)). Reversing a lower court decision that upheld the U.S. Army Corps of Engineers' (the Corps') 2007 jurisdictional determination and subsequent denial of a CWA permit, the Fourth Circuit remanded and directed reconsideration of the Corps' significant nexus determination.

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In an opening assessment of the fractured *Rapanos* opinions, the *Precon* court noted that because the four-vote dissent “found both the [Justice Antonin] Scalia and [Justice Anthony M.] Kennedy tests ‘too stringent . . . [i]t thus suggested that in the future, jurisdiction should be established if either the plurality’s or Justice Kennedy’s test is met.’” Slip op. at 15. The Fourth Circuit also stated that compliance with Justice Kennedy’s “significant nexus” test should be treated as “a question of law . . . and reviewed for compliance de novo.” *Id.* at 17-18. In other words, what many had previously viewed as a fact-specific determination (the consideration of whether there is a significant nexus) was, in the Fourth Circuit’s view, a legal question that instead should receive only limited deference. *Id.* at 29.

In reaching its remand decision, the Fourth Circuit examined in detail: (1) whether the agency decision to determine jurisdiction by aggregating as “similarly situated” 448 acres of surrounding wetlands was permissible (concluding yes); and (2) whether there was sufficient evidence of a significant nexus through the connection between these adjacent wetlands via a human-made ditch to the Northwest River. Acknowledging that a significant nexus analysis is a “flexible ecological inquiry,” *id.* at 23, the court found “that [the administrative record] contains insufficient information to allow us to assess the Corps’ conclusion that these wetlands have a significant nexus with the Northwest River” and so remanded for Corps reconsideration of its significant nexus determination. *Id.* at 24. The court concluded that flow had not been appropriately demonstrated, and despite a record containing “other physical observations about the wetlands and adjacent tributaries,” it found “no documentation in the record that would allow us to review [the] assertion that the functions that these wetlands perform are ‘significant’ for the Northwest River.” *Id.* at 26-27. In support of its focus on “significance,” the court identified recent cases in the U.S. Court of Appeals for the Ninth and Sixth Circuits as “good examples of the types of evidence—either quantitative or qualitative—that could suffice to establish ‘significance.’” *Id.* at 28-29 (citing authority from other circuits).

*Precon* shows that uncertainty as to how to apply the Supreme Court-created “tests” remains high, even five years after the *Rapanos* decision and a full decade after *SWANCC*. One key comment in the decision was in footnote 10, where the Fourth Circuit stated that lower deference was owed “because—although it could—the Corps has not adopted an interpreta-

tion of 'navigable waters' that incorporates this concept through notice-and-comment rulemaking, but instead has interpreted the term only in a non-binding guidance document" (citing *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)). As it happens, despite such calls for formal rulemaking, the U.S. Environmental Protection Agency (EPA) and the Corps have been working on the preliminary step of revised guidance, with formal rulemaking evidently to follow.

Recently, a draft of this new guidance, marked as "Deliberative Process; Confidential," was leaked to *Inside EPA*. This draft guidance proposes to supersede EPA's and the Corps' December 2008 *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.*, as well as the 2003 "Joint Memorandum." The 2010 draft guidance notes "the Agencies expect that the numbers of waters found to be subject to CWA jurisdiction will increase significantly compared to practices under the 2003 SWANCC guidance and the 2008 Rapanos guidance."

If the issued guidance is the same or similar to the leaked version, it would represent a significant shift from current practices, and potentially establish a framework for rulemaking. Decisions would be more ecosystem-based, with broader concepts of aggregation. The guidance would apply to all CWA programs, not just §404. It would define key terms, such as "navigable" and "significant nexus," more broadly. It would also change interpretations with respect to tributaries and other waters. Public comment would be sought on the guidance as well (not a typical approach), while, at the same time, it would propose a future rulemaking. This draft seems a sincere attempt to more fully reflect the *Rapanos* decisions in light of lessons learned over the past five years. Nevertheless, it is clearly just a first step in what promises to be a long process.

As I contemplate recent developments, I must acknowledge that *SWANCC* and *Rapanos* reverberate in a special way for me personally. I became pregnant with my now-nine-year-old daughter while working on a proposed South Carolina

legislative response to the *SWANCC* decision in spring 2001 through the University of South Carolina Environmental Law Clinic (which was not passed). Five years later, I worked on an amicus brief on behalf of various members of the U.S. Congress for *Rapanos* with my newborn (now-five-year-old) son sleeping on my lap. As I have grown into my parenting duties, I have come to appreciate the necessity of flexibility and adaptation for some things. But I have also come to value the power of predictable and protective rules

grounded in caution and foresight. Surely, even in the midst of uncertainty on the statutory front, the agencies can develop administrative rules that will both protect wetlands and other waters, while helping stakeholders navigate the quagmires more easily. We need both practical and protective wisdom to prevail as we enter the second post-*SWANCC* decade. ■

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## CONSERVATION

# Translating the *Rapanos* Ruling Into Practice

From an ecological perspective, wetlands rarely exist in isolation, but when it comes to interpreting laws and establishing policies, they may become lonely in their regulated isolation. In most landscapes, they are hydrologically linked to other wetlands or waterbodies through surface water and groundwater connections. In *Rapanos v. United States* (consolidated with *Carabell v. United States*, 126 S. Ct. 2208 (2006)), the U.S. Supreme Court decided, in part, where the federal government can apply the Clean Water Act (CWA) provisions for determining whether a wetland or tributary is connected to a "water of the United States." The impact of this decision was felt nationwide, but particularly in states that do not have substantial wetland protection statutes. So, five years later, in 2011, we consider how the guidance is being practically applied during permitting activities, and how practitioners are coping with the ambiguity of the ruling.

The *Rapanos* case involved wetlands that were connected to (adjacent to, in the *Carabell* case) tributaries, ditches, or drains connecting to navigable waters. The Justices issued five separate opinions, with no single opinion reflecting the majority of the Court. The respon-

sible agencies were left to provide guidance for their personnel, other practitioners, and the public on how to interpret the Court's highly nuanced opinions. Much attention was directed toward Justice Anthony M. Kennedy's opinion, which stated, in part, "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'" (*Rapanos*, 126 S. Ct. at 2248). Subsequent guidance issued jointly a year later by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps), described how such a determination should be made (see EPA-Corps memorandum, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (June 5, 2007) and the Corps' *Jurisdictional Determination Form Instructional Guidebook*).

EPA's Office of the Inspector General issued a report in 2009 demonstrating that lingering uncertainty about the *Rapanos* ruling had curtailed hundreds of enforcement cases. The number of cases

increased to over 1,500 by 2010, raising concerns about EPA's ability to protect the nation's water quality, especially safe drinking water. As discussed by Libesman et al. (see recent issues of the *National Wetlands Newsletter*), lower federal courts have been busy interpreting the reach of *Rapanos*, including the sufficiency of ecological evidence needed to demonstrate that a significant nexus occurs between wetlands at issue and navigable waters, e.g., *Precon Development Corp. v. U.S. Army Corps of Engineers*, No. 09-2239 (Jan. 25, 2011), which Libesman et al. describe as a "continuum of evidentiary proof . . ." So, to comply with the Court's decision and the agencies' guidance, what information should be collected, and by whom?

To establish wetland connectivity for any purpose, it is necessary to examine the landscape surrounding a targeted site to understand where the water comes from and to follow flow paths that provide hydrologic and ecologic connectivity to other components of an aquatic ecosystem. Decisions by the Court, e.g., *SWANCC*, *Rapanos*, and *Precon*, are requiring applicants to address issues, such as isolation, adjacency, navigability, and jurisdiction from a federal perspective before they can proceed with an application for a permit. Having requirements to document the multidimensional questions of jurisdiction and a significant nexus can be an imposition on both the regulated community and the regulators. It does, however, encourage practitioners to delve a little deeper to understand how a wetland is situated in a landscape.

Since *Rapanos*, approved jurisdictional determinations are rarely conducted in the planning stages of a project. In the Corps' Baltimore District, the typical process for a project begins with a wetland delineation using the appropriate regional manual and forms. Applicants usually request a pre-permit application field visit with the Corps, and possibly with the state. If the applicant and the Corps both agree on the boundaries of the delineation, the applicant can fill out a Preliminary Jurisdictional

Determination form. If the applicant disagrees, they can apply for an Approved Jurisdictional Determination. At this point, the eight-page Approved Jurisdictional Determination form should be completed for each aquatic feature and submitted to the Corps. This process should lead to a clear significant nexus decision. By this time, however, project planning and design is already complete, making it difficult to redesign a project to avoid further impacts to aquatic resources.

All of this adds time and expense, even to a routine project. Ephemeral features or wetlands in arid regions add more complexity. This level of uncer-

established, it is necessary to determine if the wetland significantly affects navigable waters. What is needed is a series of standardized methods varying in the level of detail needed to assess each project. Guidance, checklists, data forms, and assessment protocols can assist the practitioner in thinking through a unique situation, collecting appropriate information, and reaching a defensible decision. Collecting a predictable set of information can reduce uncertainty for applicants, and streamline decisionmaking by agencies and the courts.

Parallel efforts by EPA and the states to assess the condition, functions, and health of wetlands and other aquatic

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tainty is not welcomed by much of the regulated community, and rumors of further rule changes only add angst. For practitioners working in multiple states, there are complications. In Maryland and Pennsylvania, for example, state agencies can take jurisdiction over isolated wetlands, but in Delaware, where the state does not have jurisdiction over isolated nontidal wetlands, or in New York, where there is a minimum area threshold, only the federal regulations apply, at which time court decisions, such as *Rapanos*, are invoked.

However an applicant or regulator proceeds, it is critical to follow the water. Where is the nearest traditional navigable water? Is the receiving body a relatively permanent water? What are the hydrologic connections from the wetland to those waters? Have they been altered by authorized or unauthorized activities? Once connections have been

resources may hold promise as sources for the tools needed to implement the Court's interpretation of existing laws and regulations. Under the CWA, states are required to assess their waters, report on their condition, and restore those that are impaired, based primarily on water quality standards approved by EPA. Monitoring approaches, such as rapid assessment protocols, indices of biological integrity, and hydrogeomorphic functional assessment models, should be added to the practitioner's toolbox, if they are not already there. In a future column, we intend to review how these monitoring and assessment approaches can inform decisions about wetlands, both in the field and in the courtroom. ■

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## MITIGATION

# Whither Wetland Mitigation Liability (Part 1)?

The wetland mitigation banking industry is built on the concept of a transfer of liability. While a mitigation banker ostensibly sells a credit, what the permittee is really purchasing is a release from liability. If a permittee fails to provide the compensatory mitigation specified in the permit, it could—in theory—be subject to court-imposed injunctions and fines. However, with the approval of the U.S. Army Corps of Engineers (the Corps) and a signature on a check, the legal responsibility for providing compensatory mitigation shifts from the permittee to the mitigation banker. The permittee now has nothing to worry about (at least from a compensatory mitigation perspective). The mitigation banker has assumed the risk. But do permittees actually face a significant risk of civil judicial penalties in the first place? Until very recently, the answer would have been no.

Enforcement of permit conditions does not appear to be a traditional priority of the Corps. Back in 2001, the National Research Council pointed out that many permits contained unclear performance standards that could complicate enforcement efforts. Moreover, the Corps' Standard Operating Procedures did not encourage compliance inspections and multiple visits to a mitigation site. Not much seems to have changed at the headquarters level. The Corps' Fiscal Year 2010 Work Plan sets a target of inspecting only 5% of active mitigation sites. The target for resolving noncompliance with mitigation requirements is a mere 20%. In contrast, the Corps tries to make 75% of general permit decisions within 60 days and 50% of individual permit decisions within 120 days. Although no net loss is a stated regulatory objective, the Corps' emphasis

remains permit issuance and not necessarily mitigation compliance.

The paucity of judicial cases underscores that point. There are no reported judicial decisions in *Westlaw* in which the Corps or the U.S. Environmental Protection Agency (EPA), through the U.S. Department of Justice (DOJ), has sought civil penalties for failure to meet mitigation conditions. Such cases are simply not brought. With limited agency resources (including at the DOJ), perhaps this is understandable. And unlike Clean Water Act (CWA) §402 permit violations, there is no citizen suit backup. The plain language of the statute does not allow a concerned nongovernmental organization to bring a lawsuit to compel a CWA §404 permittee to meet its compensatory mitigation obligations, e.g., *Northwest Environmental Defense Center v. U.S. Army Corps of Engineers*, 118 F. Supp. 2d 1115 (D. Or. 2000). So it would appear that permittees do not have to worry about court cases and the attendant legal expenses if they do not complete their mitigation projects. But a recent case out of south Florida suggests a new willingness on the part of the government to take vigorous enforcement action for mitigation noncompliance.

In 2003, Century Builders Group (later known as Century Homebuilders, LLC) received a §404 permit to fill and dredge more than 400 acres of melaleuca-dominated wetlands to construct a residential development in Miami-Dade County. Using a wetland rapid assessment procedure, the Corps determined the project would cause the loss of 160.68 functional credits. To offset this loss, the Corps required both on-site and off-site compensatory mitigation. The permittee was expected to enhance approximately 47 acres on-site by removing melaleuca

and planting native vegetation, which would provide 7.79 functional credits. The bulk of the compensatory mitigation, however, would come from 160.34 freshwater credits that the permittee would purchase from the Hole in the Donut Mitigation Bank. The permittee did in fact purchase the credits. It also began—but did not complete—the required on-site enhancement. After the permittee declined to remedy the situation, in December 2009, the DOJ filed a civil action in U.S. District Court against Century Homebuilders and its vice president for land development.

Eventually, in December 2010, the case was resolved through a consent decree. Century Homebuilders agreed to pay to the U.S. Treasury \$400,000 in civil penalties. In addition, Century Homebuilders promised (again) to complete the on-site enhancement work. Finally, Century Homebuilders and the vice president for land development committed to purchasing 1.3 credits (up to \$60,000) from the Hole in the Donut to account for temporal loss (the time difference between when the on-site enhancement was originally supposed to be completed and the date when the site is now expected to satisfy the criteria specified in the consent decree). For further detail, see Consent Decree, *United States v. Century Homebuilders, LLC*, No. 09-22258-CIV-KING (S.D. Fla. Dec. 14, 2010).

Think about this for a moment: A permittee had satisfied the majority of its compensatory mitigation obligations (by purchasing credits), yet the government was using a rarely invoked enforcement tool to seek a court injunction and civil penalties. This is not a case of a violator who flagrantly and intentionally destroyed wetlands without a permit. Rather, the government went after the company and its officer—in federal court—for failure to follow through on its compensatory mitigation obligations. This just does not happen. If compensatory mitigation is wanting, the Corps may work with the permittee to bring it into compliance or hector it by threatening to revoke its permit. Perhaps the Corps might even seek administrative



penalties, but a court action? You would be more likely to see James Franco co-host the Oscars again. Indeed, a search of the *Federal Register*, where the DOJ must publish proposed consent decrees, yields no such case. (If I have overlooked one, please e-mail me.) Accordingly, the Century Homebuilders case is a stunning departure from past practice, and in my view, it is a very welcome development.

A number of lessons can be drawn from this case. First, it sets an important precedent in the efforts to achieve no net loss. Meeting the goal of no net loss requires functioning compensatory mitigation. *Century Homebuilders* stands for the proposition that “almost is not good enough”; permittees can be held responsible to provide the *entire* amount of promised compensatory mitigation. Second, the case demonstrates the importance of specificity with respect to mitigation conditions. The 2003 permit incorporated a very detailed mitigation

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plan. Consequently, the complaint was able to reference with particularity many, many violations of permit conditions, including the failure to complete scraping, remove exotic vegetation and debris, install more than 100,000 wetland plants, and submit monitoring reports. Specificity simplifies enforcement. Third, sometimes permittee-responsible mitigation actually results in a permittee being held legally responsible. Such a possibility might cause permittees to gravitate more

toward purchasing mitigation bank or in-lieu fee credits, as contemplated by Corps and EPA regulations.

But what if the mitigation banker or in-lieu fee sponsor fails to provide an appropriate level of compensatory mitigation? Might they be held liable under the Clean Water Act? Can they be subject to civil penalties? Ah, that is a story for another day. ■

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#### INTERAGENCY REVIEW TEAMS

## Developing Long-Term Management Plans for Mitigation Sites

The April 10, 2008 *Final Rule: Mitigation for Losses of Aquatic Resources* provides joint regulations by the U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (EPA) to address compensatory mitigation requirements for impacts authorized under Clean Water Act §404 permits. The regulations also provide guidance for the development and operation of mitigation banks and in-lieu fee (ILF) mitigation programs. An essential part of any mitigation plan, whether it is for a mitigation bank, an ILF program, or to fulfill permittee-responsible mitigation, is long-term management.

In accordance with 33 C.F.R. §332.7(b), long-term sustainability is required at mitigation sites, and the designated responsible party must provide for this with long-term management and maintenance plans. Long-

term management requirements are further addressed within 33 C.F.R. §332.7(d) of the regulations and allow for long-term management responsibilities to be transferred to an appropriate third-party land stewardship entity with the approval of the Corps.

Integral to a good mitigation plan is a solid and comprehensive long-term management plan that includes stewardship elements such as: designation of a responsible party; establishment and maintenance of specific infrastructure (such as fencing, irrigation, etc.); control of invasive species; maintenance and management of created and/or enhanced habitats; identification of prohibited activities, access control, and authorized users; establishment of notification requirements; site monitoring, inspection, and reporting; and long-term funding.

A long-term management plan is the result of collaborative planning between all parties that might have a role in long-term stewardship. Such parties might include the Corps, the Interagency Review Team (IRT), the landowner, the conservation easement holder, the endowment manager, the long-term site manager, and/or a third party responsible for site compliance. The plan should provide a detailed description of baseline conditions of a site; address specific measurable and realistic goals, objectives, and strategies; and establish specific time frames for updates, revisions, reviews, and approvals. It is also critical that a long-term management plan provide for adaptive management in the event of unexpected occurrences or if the required mitigation fails to meet established performance standards.

**“While implementation of the mitigation plan is extremely important, long-term management of the site will ultimately determine how successful the mitigation is over time. In the past, mitigation site success has been problematic due to the lack of a detailed long-term management plan, the lack of contingency planning, and/or the lack of funding to ensure site stability and productivity in perpetuity.”**

A long-term management plan should answer each of the following questions:

*Have all requirements of the enabling instrument been addressed?* Mitigation banks and ILF programs require an approved enabling instrument that should have specific long-term management requirements.

*Has due diligence been performed on the proposed mitigation site?* Due diligence should identify if the title to the property is clear or if there are any encumbrances. It should include all pertinent historical information and details regarding the surrounding area relevant to the site, such as identification of current and future uses of adjacent lands.

*Have the baseline conditions (physical, biological, hydrological, etc.) of the site been described and documented?* Long-term goals and objectives can neither be established nor progress evaluated if there is no baseline information for the site against which to quantify progress of the implemented mitigation.

*What are the management goals and have attainable and measurable objectives been identified to achieve those goals?* Goals are critical in identifying how the site is to be restored, enhanced, or preserved. Equally important are the objectives designed to achieve those goals. It is imperative to establish objectives that can reasonably be attained for success of the mitigation; additionally, these objectives must be easily measured and quantified to document improved conditions over the established baseline.

*Are specific requirements established regarding monitoring and reporting?* Crucial to the long-term success of a site is the implementation of an approved plan with adequate and appropriate monitoring to ensure the mitigation is meeting all goals and objectives. Biological surveys should be standardized and agreed upon to provide consistency in monitor-

ing and reporting activities. A monitoring plan should be developed that: identifies site-specific sampling methodology; establishes set transect lines, if appropriate; indicates appropriate measurement units (e.g., diameter at breast height, percent canopy cover, etc.); discusses how often monitoring will occur; and provides reporting time lines and requirements.

*Has a funding mechanism been established that addresses long-term stewardship and catastrophic financial requirements?* The funding mechanism should be designed to account for inflation and should provide for a non-wasting endowment for long-term management, a separate non-wasting endowment for catastrophic events, and yet another separate (perhaps short-term or wasting) endowment for legal and administrative fees. The responsible parties should undertake a rigorous, itemized analysis (e.g., a Property Analysis Record or other similar software) of the long-term funding requirements to document and ensure adequate funds for all long-term management needs. The management of a site in perpetuity requires adequate funding for the routine operation and maintenance of the site including: administration of the site; control of invasive vegetation species; maintenance of infrastructure; maintenance of enhanced, created, and/or restored habitats; physical modifications to areas not meeting goals and objectives; surveys for monitoring and reporting the status of the site; payments for insurance; and development and implementation of adaptive management plans.

*Does the plan provide for adaptive management and contingencies?* Adaptive management plans should be designed for a range of contingencies from failure of the creation/enhancement/restoration, to noncompliance with mitigation

requirements, to catastrophic events. Catastrophic events are those events that may occur, such as fires, floods, etc., but can be remediated as opposed to force majeure events, which typically cannot be remedied (e.g., climate change).

*Does the plan designate the stakeholders involved in the long-term management of the site and their specific roles?* There may be several entities with a role in the long-term management of the site, including the landowner, the conservation easement holder (which may be the landowner, a credit owner, or a third party), the endowment manager (which may include a long-term non-wasting endowment manager and/or a short-term wasting endowment manager), the long-term manager of the site who is the responsible party for ensuring all long-term and adaptive management and monitoring/reporting is accomplished, and/or the third party who ensures compliance with and enforcement of all requirements.

While implementation of the mitigation plan is extremely important, long-term management of the site will ultimately determine how successful the mitigation is over time. In the past, mitigation site success has been problematic due to the lack of a detailed long-term management plan, the lack of contingency planning, and/or the lack of funding to ensure site stability and productivity in perpetuity. The 2008 Mitigation Rule provides the Corps and EPA with a solid foundation to stress the importance of long-term management plans to applicants, mitigation bankers, and ILF sponsors. It also provides the agencies, the IRT, and other stakeholders with the tools to design and implement these plans for the overall viability and success of the mitigation site. ■

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