



PERMITTING EFFICIENCY AND THE CLEAN WATER ACT



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NEBA

Preface

This report highlights suggestions for improving the Clean Water Act permitting process across the nation. These recommendations should be applied to all mitigation projects regardless of the regulatory agency or the particular impact.

These suggestions will help promote investment in environmental restoration by private industry and were compiled by experienced mitigation bankers with many decades of experience on behalf of The National Environmental Banking Association (NEBA), the largest organization in the space, representing hundreds of mitigation bankers across the U.S.

NEBA represents small businesses committed to high standards for environmental restoration and preservation of our wetlands and natural habitats through the use of ecosystem service banks. The Association's members have established and operated mitigation, conservation and other banks throughout the United States since the early 1990's. NEBA members know that under consistent, common sense government policy, private investment offers the most effective avenue to address the growing number of environmentally damaged resources, resulting in a net gain for the environment in many cases.

NEBA advocates for private sector solutions and involvement in implementing environmental and habitat conservation in a manner that supports economic growth.

Restoration and conservation investments need consistency to attract innovative third-party capital sources while providing certainty to consumers of compensatory mitigation credits.

NEBA is committed to promoting high standards for compensatory mitigation while simultaneously streamlining permitting.

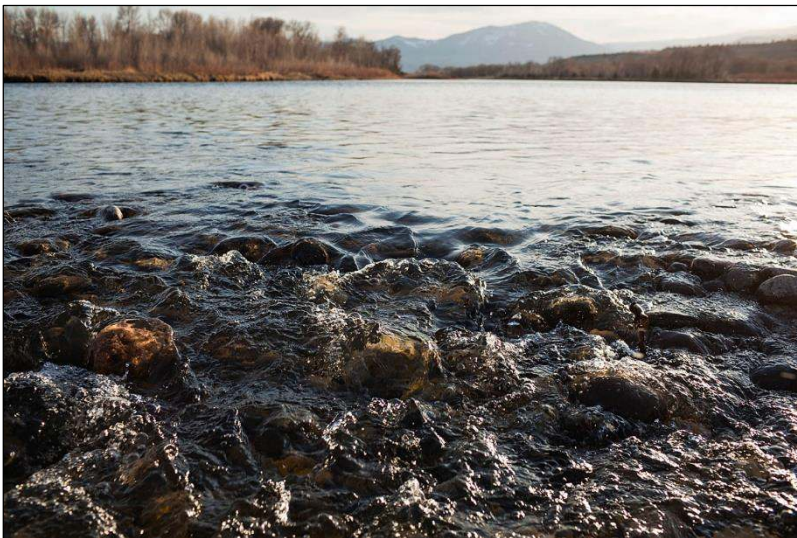
Market-based solutions to environmental issues involve mutually willing buyers and sellers of compensatory mitigation credits. Understandably, absent a consistency of high standards, permittees will opt for the cheapest available mitigation option, irrespective of any true ecological value, just to meet their compliance.



Introduction

The National Environmental Banking Association (NEBA) believes the following recommendations will improve the permitting process for impacted ecosystem values. We further believe these proposals will promote investment in environmental restoration by private industry.

private investment in environmental restoration, and contribute to increased job growth in the private sector. We have listed the existing issues, along with suggested remedies that will greatly increase the efficiency of the permitting process.



Mitigation banking is well established with a basic regulatory framework firmly in place. Because Banks are advance mitigation, they are virtually 100% successful in providing permanent, high quality replacement of impacted resources. They also drastically reduce oversight expense by regulatory staff while consistently speeding permitting times by at least 50%.

NEBA believes that consistent, transparent enforcement of existing rules, with just a few added clarifications, will vastly improve permitting times, trigger substantial



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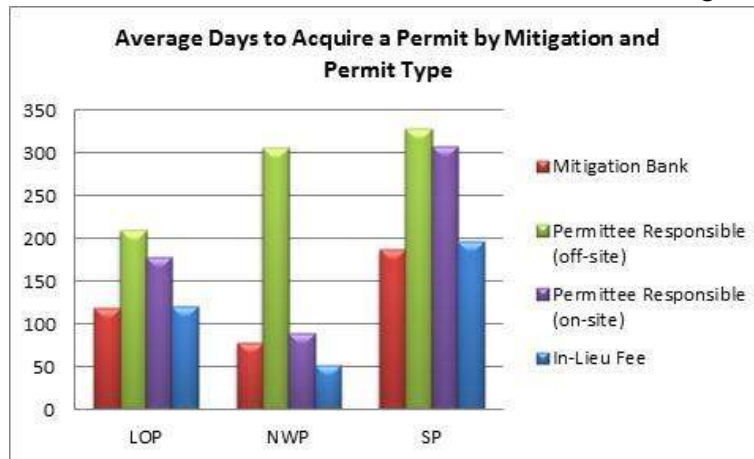
The consistent, transparent enforcement of existing rules, with just a few added clarifications, will vastly improve permitting times, trigger substantial private investment in environmental restoration, and contribute to increased job growth in the private sector.

Enforcement of 2008 Mitigation Rule

Hierarchy

The 2008 Rule contains a hierarchy which places mitigation banks No. 1 in recommended solutions for compensation of permitted impacted resources. Option No. 2 is In-Lieu-Fee (ILF's). Option No. 3 is Permittee-responsible mitigation (PRM's) under a watershed approach. Option No. 4 is On-site and/or in-kind permittee responsible mitigation. Finally, Option No. 5 is Off-site and/or out-of-kind permittee responsible mitigation.

Unfortunately, mitigation banks are too often by-passed in favor of lower-ranked, to be built in the future options. In addition to being in direct violation of the hierarchy rule, choosing these less reliable options does not provide the quality or long-term protection that advance mitigation banks do.



Graph showing the average number of days to permit for different mitigation types MB = Mitigation bank; PRM OFF = Offsite Permittee-Responsible Mitigation; PRM ON = Onsite Permittee Responsible Mitigation) and by permit types (LOP = Letter of Permission; NWP = Nationwide Permit; PGP = Programmatic General Permit; RGP = Regional General Permit; SP = Standard Permit).

This also chills private investment in the industry, as it reduces the probability that the time, energy and funds expended on a bank will be rewarded with predictable credit sales.

We recommend that these standards be applied across the nation to all permits requiring mitigation.

The Federal Highway Administration mandates the use of mitigation banks where available. We recommend that this standard be applied across all Federal agencies nationwide to all permits requiring mitigation. In addition to banks significantly streamlining permitting times, their broader use will entice major investment in environmental restoration by reducing the significant risk that investors in this

industry face. Job creation in the private sector will also drastically increase with both direct and indirect employment.

Discretion

Traditionally, regulators have been granted broad latitude to require mitigation offsets of their choosing. This discretion too often results in bypassing the mitigation hierarchy creating an unacceptable level of uncertainty for both existing mitigation banks and any potential investment in future banks.

Differing opinions and preferences, staff turnover, and bias against private industry operating in environmental restoration all result in unmanageable risk for existing bankers and potential investors. In these cases, the mitigation allowed may be of lesser quality and offer inferior long-term protection. Furthermore, potential developers have no idea what they will be facing when they apply for a permit and regulatory staff time is significantly increased to insure that those other options are ultimately successful.

We recommend that discretion only be allowed when significant environmental harm would result if a mitigation bank were used, and that decision should be backed up by science and transparency. These rules should be known in advance for permittees, and every applicant should receive identical treatment. As mentioned, this would greatly boost economic development, job creation, and will streamline permitting.

In Lieu Fees

The 2008 Rule did not intend or allow In-Lieu-Fee (ILF) projects to compete with mitigation banks. Early on, ILF documents stated that they were not allowed to compete in the same service area as approved banks. These clauses are rarely included now and ILF's are expanding into the market in direct competition with banks. ILF's are non-profit and governmental organizations so they are either directly or indirectly subsidized by taxpayers. They don't have the same requirements or some of the same costs as banks. If allowed to compete directly, they are a serious threat to the long-term survival of private industry and investment in the restoration space. ILF's receive funds in advance of restoration and too often fall short of funding to complete the required offsets. This has resulted in large unfunded mitigation liabilities for some

projects, as well as increased oversight expenses to taxpayers. Now, some states are creating statewide ILF's, which may negatively impact any private sector participation.

The private sector is at a disadvantage when state government regulators have a conflict of interest arrangement, not only controlling all sides of the equation, but also having a vested interest in padding their own coffers.

We recommend that ILF's not be allowed to compete with mitigation banks, as originally intended in the 2008 Rule. They are clearly the No. 2 option in the hierarchy and should only be allowed to advance to the first choice when privately funded banks do not exist in the service area in question. In addition, if an ILF is used they should direct the funds to private habitat restoration efforts and private landowners through the use of open and transparent "Request for Proposals" (RFP) processes, similar to the North Carolina ILF program.

Twelve Requirements

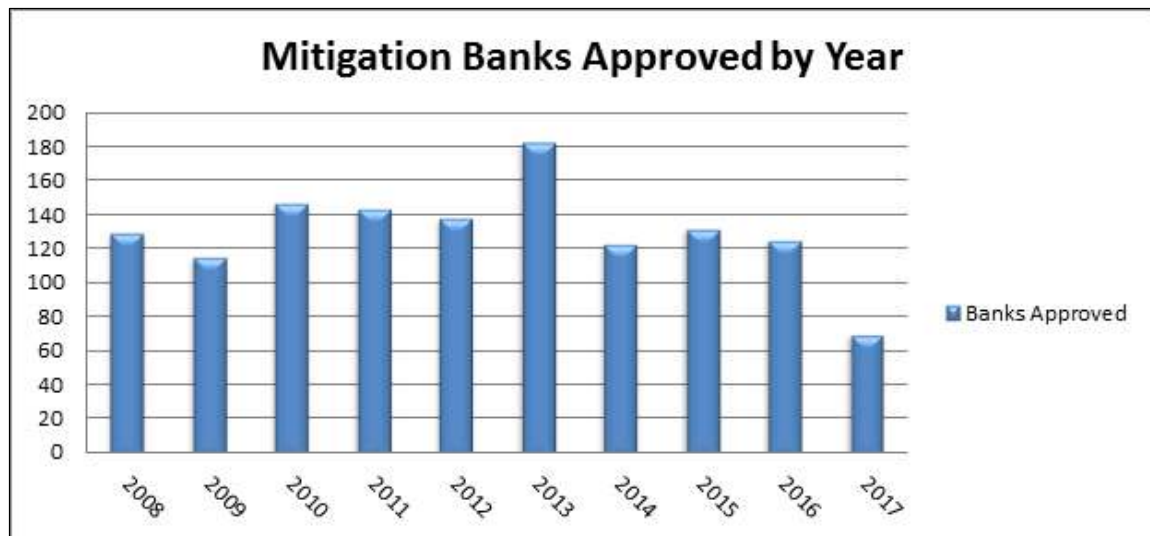
The 2008 Rule includes 12 requirements for every permit. The 12 requirements are:

1. Objectives
2. Site Selection
3. Site Protection
4. Baseline Information
5. Credit Determination
6. Work Plan
7. Maintenance Plan
8. Performance Standards
9. Monitoring Requirements
10. Long Term Management
11. Adaptive Management Plan
12. Financial Assurances

While Mitigation banks must comply with all 12 requirements, too often permits are issued to non-bank offset projects that do not require all 12 elements. This results in less expensive mitigation, which creates inferior offset projects prone to significant long term failure. Adding insult to injury, these less effective offset projects cause increased regulatory oversight costs, as they require repeated monitoring visits and enforcement actions. In many cases, budgetary restrictions prevent sufficient oversight to insure the success of these projects. This contributes to the annually reported ongoing loss of wetlands. This not only causes financial losses to existing banks but also deters private investment in new banks.

The 2008 Rule embraces the investment of time and resources by the Interagency Review Team by requiring extensive submittals, review of all 12 requirements, and comment on mitigation bank instruments, as well as success requirements being met before compensatory offset credits are released and available, all in advance of permitted impact. The result of all of this effort is reliable success of mitigation banks.

We recommend that all 12 requirements be strictly and transparently enforced. This equal playing field will result in dependable advance mitigation bank creation, as well as a surge in economic development and private industry job creation.



We recommend that no benefits of any kind be allowed to accrue to any government agency as a result of permits that are issued for impacts to environmental resources.

Competition

Government Competition

In some cases, government agencies have chosen to require donations of cash, land or conservation easements in exchange for mitigation. This is another clear conflict of interest that directly results in economic losses to mitigation banks. It siphons substantial funds and jobs from the private sector while growing government. Understandably, investors are hesitant to take the significant risks involved with mitigation banks when the agencies who issue permits are directly benefitting from providing the offsets themselves. In many cases, the same regulatory agency personnel participating as members of the Interagency Review Team are also the same agency personnel advocating for special permit conditions that favor his or her respective agencies – a clear conflict of interest. Once again, this constitutes a direct subsidy from taxpayers, both for the initial projects, as well as the long term obligations for maintaining mitigation sites.

In Lieu Fee's

As stated above, ILF's are often indirectly subsidized by taxpayers and constitute a potential threat to mitigation banks; and their long term results may be inferior to banks. ILFs should not be approved when banks are able to provide offsets for any project. If an ILF is used they should direct the funds to private habitat restoration efforts and private landowners through the use of open and transparent 'Request for Proposals' (RFP) processes, similar to the North Carolina ILF program.

Donation of Preservation Lands

Too often, mitigation requirements are satisfied in exchange for preserving land donated to either non-profit land trusts or government agencies. In addition to this creating serious unfair competition for approved existing mitigation banks, it also discourages investors from taking the risk to build banks. Strikingly, it neither meets the requirements of the Clean Water Act nor the 2008 Rule, including

the hierarchy and the 12 requirements. Furthermore, it creates unfair competition which discourages potential investors, and directly impacts the viability of approved banks. It also siphons jobs from the private sector and creates uncertainty in the permitting process.

We recommend that simple land preservation not be allowed to substitute for any actual mitigation banks or credits. This exclusion would not apply to preservation lands that are part of the creation of a mitigation bank. While land trusts have an important place in mitigation banking by holding conservation easements with endowment funds for long term management, they have no statutory authority to replace mitigation banks.

***We
recommend
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Permittee Responsible Mitigation (PRM)

Because most PRM's are not required to meet all 12 conditions in the 2008 Rule, they have a high rate of failure which requires ongoing significant regulatory oversight. While they are less expensive in the beginning, these inferior projects rarely provide for long-term maintenance and protection. Costs attempting to remediate these failures can go on and on, burdening taxpayers

with significant long term costs for continual monitoring and remedial actions. PRMs have significantly longer permitting times than mitigation banks while creating significant risk to private investment.

We recommend that all permits, including PRM's, be required to meet all 12 conditions in the 2008 Rule, including advance mitigation.



Miscellaneous

Transparency

After the comment period expires for permit related public notices, the process goes completely dark. Comments received from public notices and the applicant's responses to those comments should always be publicly available throughout the permit review and approval process. Final permit terms and conditions become a mystery to the public in the absence of a FOIA request. This gaping loophole has allowed the transfer of mitigation funds from the private sector into government, with no oversight or accountability.

We recommend that all permits be made transparent and public in a timely fashion to insure fidelity to underlying legislation and mitigation requirements.

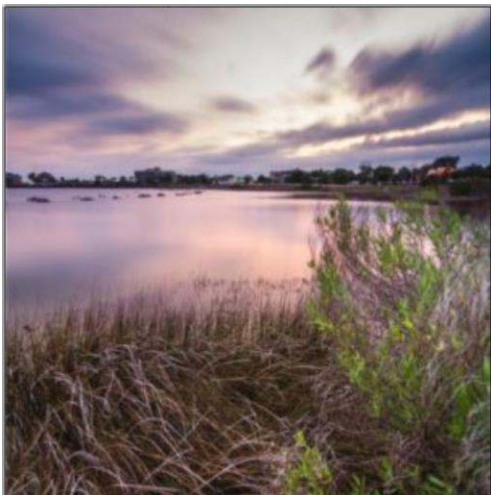
Piece-mealing

Evidence suggests that large projects are being purposely broken into smaller pieces expressly to avoid mitigation requirements. Piece-mealing project impacts under Clean Water Act permits are still being done routinely in some states.

Future

Sometimes, future credit releases from approved banks are not considered over other options that have proven to be less successful. An approved mitigation bank is more likely to produce projected credits than any other mitigation option.

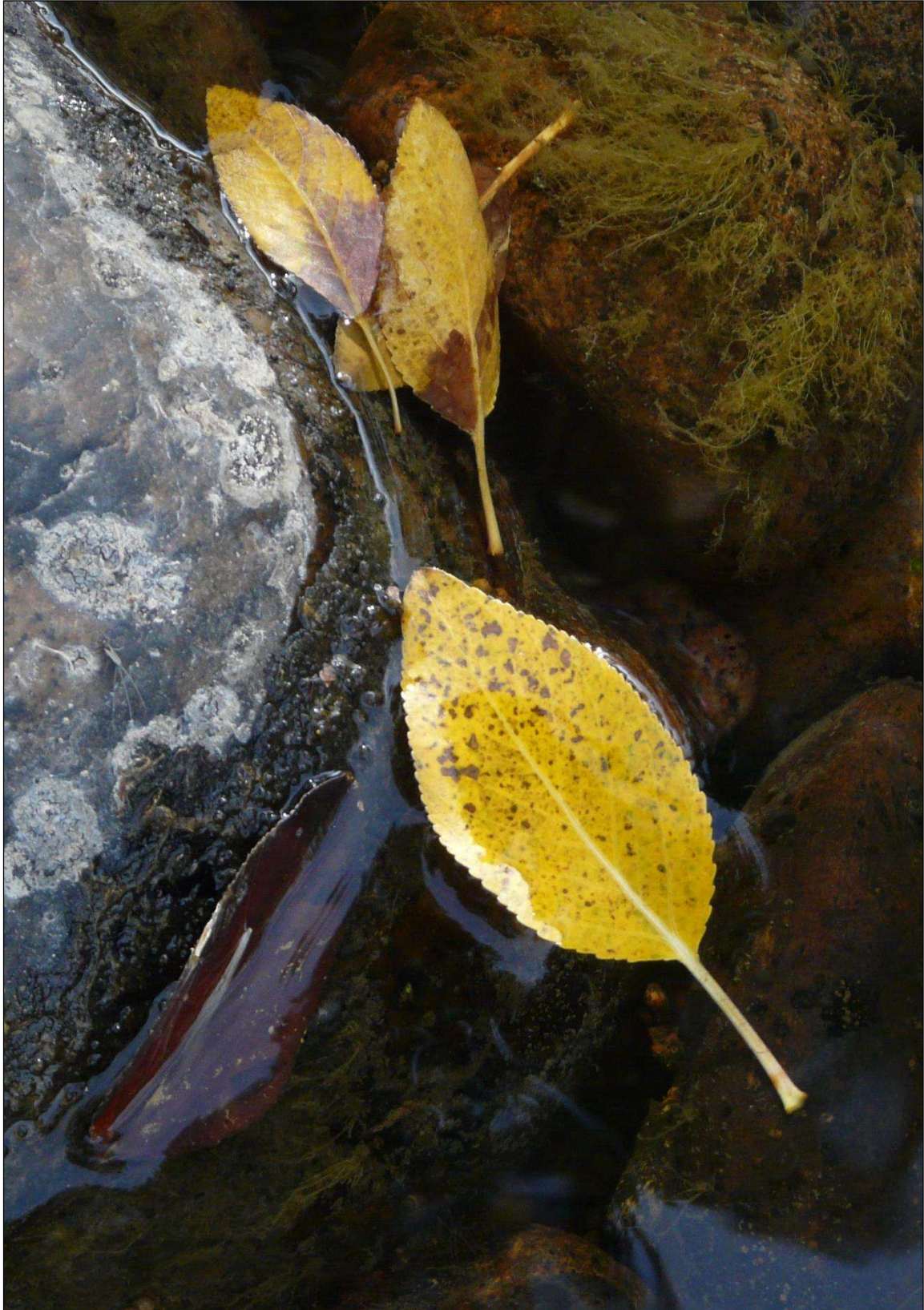
We recommend that future credit releases from approved mitigation banks be considered ahead of other options, in the spirit of the hierarchy in the 2008 Final Rule. Mitigation banks are clearly listed as the first option because they have consistently been proven more successful than any other mitigation option.



Summary

A solid framework of rules, protocols, and directives from the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency are currently in place to help ensure that ecosystem services lost to unavoidable impacts are offset with equivalent and durable restoration projects. Without question, the overwhelming reason that mitigation projects fail can be traced to regulatory and project sponsor decisions that either deviate from these proven procedures or by-pass their intent.

Private environmental mitigation investments and firms stand ready to offset our nation's unavoidable environmental impacts with quality projects that slash development permitting times while simultaneously creating good jobs.



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