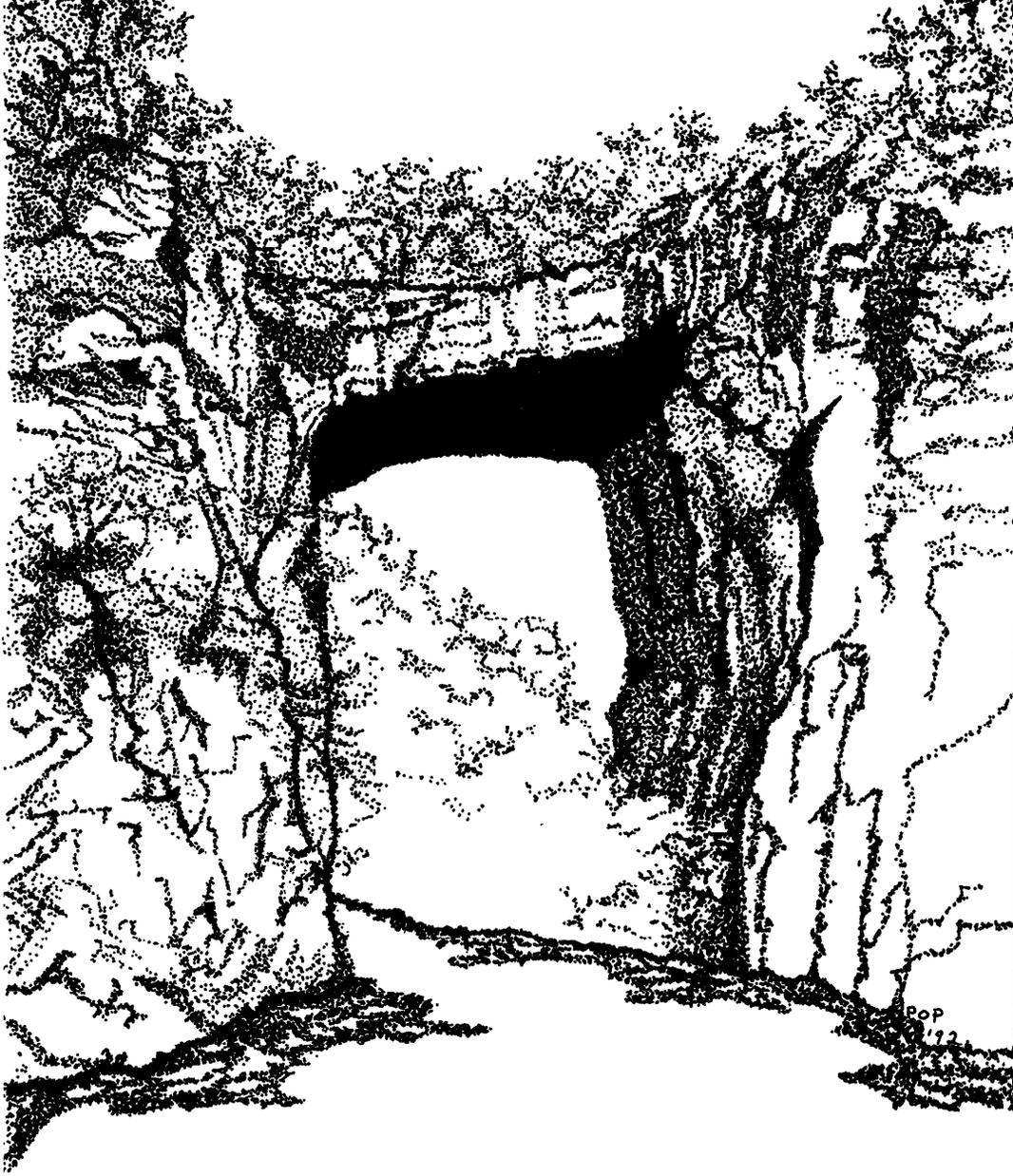


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MONEY FOR NOTHING?  
THE RISE OF WETLAND FEE MITIGATION

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ARTICLES

MONEY FOR NOTHING? THE RISE OF WETLAND FEE MITIGATION

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## I. INTRODUCTION

A cardinal theme of wetland regulatory programs is mitigation.<sup>1</sup> Agencies with a wetland-protection mandate require developers to offset their projects' wetland impacts through compensatory mitigation: restoring a former wetland site, enhancing a degraded wetland, creating a new wetland, or preserving high-quality wetlands. Traditionally, the developer (through its consultants or agents) has implemented the mitigation project concurrent with or after the development project. Unfortunately, many such mitigation efforts failed and wetland functional values were lost.<sup>2</sup>

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<sup>1</sup> Mitigation in the wetland context is usually reduced to three basic steps: avoidance, minimization, and compensation. *See, e.g.*, Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990) [hereinafter Mitigation MOA]. All three steps are commonly involved in the permitting process:

These steps are frequently applied in a sequential manner. First, a party seeking a permit for a project that affects wetlands must demonstrate that the least environmentally damaging alternative will be used. Second, the permit applicant must develop a plan to minimize the environmental harm from unavoidable impacts. For example, the applicant might minimize the impact of a project by scheduling construction in a manner that would reduce interference with spawning or nesting seasons. Finally, the applicant must compensate for or offset any harm done to wetland functions and values which is not avoided or minimized. The applicant satisfies the compensation requirement by enhancing, restoring, creating, or preserving other wetlands that may be located on or off the project site.

Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527, 535-36 (1996) (footnotes omitted). This Article focuses on the third step in the sequence, compensatory mitigation.

<sup>2</sup> *See* FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION 5, 11 (1991) (finding that only four (6.3%) of sixty-three permittees had satisfied their mitigation requirements); UNITED STATES ENVIRONMENTAL PROTECTION AGENCY & UNITED STATES FISH AND WILDLIFE SERVICE, INTERAGENCY FOLLOW-THROUGH INVESTIGATION OF COMPENSATORY WETLAND MITIGATION SITES 15 (1994) [hereinafter EPA/FWS Investigation] (finding only four of seventeen mitigation sites functioning well); KEVIN L. ERWIN, SOUTH FLORIDA WATER MANAGEMENT DISTRICT, AN EVALUATION OF WETLAND MITIGATION IN THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT 3 (July 1991)

In response to widespread mitigation failures, wetland-protection agencies authorized the use of mitigation banking.<sup>3</sup> Mitigation banking typically involves mitigation performed in advance of project impacts.<sup>4</sup> A bank sponsor restores, enhances, creates, or preserves a wetland site, thereby generating mitigation credits.<sup>5</sup> The bank sponsor may then use these credits to compensate for the impacts of its future development projects.<sup>6</sup> Alternatively, in an entrepreneurial mitigation bank, the bank sponsor may sell the mitigation credit it has produced to another developer to satisfy the latter's mitigation needs.<sup>7</sup> In many cases, mitigation banking offers an environmentally preferable option to developer-provided mitigation. An obvious benefit of mitigation banking is

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(identifying problems at twenty-five (62.5%) of forty mitigation sites); G. BERNSTEIN & R.L. ZEPPE, JR., U.S. FISH & WILDLIFE SERVICE, EVALUATION OF SELECTED WETLAND CREATION PROJECTS AUTHORIZED THROUGH THE CORPS OF ENGINEERS SECTION 404 PROGRAM (1990) (concluding that 46 (74%) of 62 mitigation sites in Baltimore, Norfolk, and Philadelphia Districts were failures); Indiana Department of Environmental Management, Section 401 Water Quality Certification Program, Wetland Compensatory Mitigation Study (visited June 25, 1999) <[http://www.state.in.us/idem/owm/planbr/wqs/mitigation\\_monitoring.htm](http://www.state.in.us/idem/owm/planbr/wqs/mitigation_monitoring.htm)> (stating that a "survey of replacement wetlands in other states has shown that for the majority of projects requiring wetland replacement, the replacement wetland was not constructed or was not constructed correctly, and, if constructed correctly many were not successful"); Charlene D'Avanzo, *Long-Term Evaluation of Wetland Creation Projects*, in 2 WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE, 75, 76 (Jon A. Kusler and Mary E. Kentula, eds. 1989) (discussing studies that identify mitigation failures in Washington and California); Julie M. Sibbing, *Mitigator's Role in Wetland Loss*, 19 NAT'L WETLANDS NEWSL. (Env'tl. L. Inst.) 1, 17 (Jan./Feb. 1997) (reporting on study of 32 mitigation projects in Ohio from 1990-95, noting a significant failure in a 70-acre site, and stating that "it is highly likely that at least some other mitigation projects will fail in part or whole and that some will not be implemented as required").

Of course, the rates of success and failure depend in part on location and the type of wetland. See Jon A. Kusler & Mary E. Kentula, *Executive Summary*, in WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE xii (Jon A. Kusler and Mary E. Kentula eds., 1989) (stating that "[p]artial project failures are common" and that "[S]uccess varies with the type of wetland and target functions"); see also Mary E. Kentula, *Wetland Restoration and Creation*, (visited July 14, 1999) <<http://nwcwww.er.usgs.gov/nwsum/WSP2425/restoration.html>> (stating that "since the publication of the book, the general assessment presented still applies").

<sup>3</sup> At the federal level, mitigation banking is defined as "the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources." Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,607 (1995) [hereinafter Federal Mitigation Banking Guidance].

<sup>4</sup> See *id.* at 58,607.

<sup>5</sup> See *id.* at 58,608.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 58,612.

its greater likelihood of environmental success.

Recently, however, wetland-protection agencies have promoted another mitigation option: fee mitigation.<sup>8</sup> In a fee mitigation scenario, the developer writes a check, and the funds typically are deposited in an account that not-for-profit natural resource entities or governmental agencies (or both) manage for environmental purposes.<sup>9</sup> Despite the good intentions of fee mitigation advocates, the use of fee mitigation raises several troubling policy, ethical, and legal issues.

First, from an environmental perspective, fee mitigation may not be a particularly attractive option. Unlike mitigation banking,<sup>10</sup> fee mitigation typically provides mitigation after project impacts. Moreover, fee mitigation often raises a concern about whether the funds will actually be used to compensate for project impacts or whether they will be diverted for other purposes. Because fee mitigation credits may be less expensive on a per-acre basis than credits from mitigation banks, a fee mitigation program may serve to undercut the market for entrepreneurial mitigation banks and effectively discourages the private sector from investing more in wetland mitigation efforts. The rise of fee mitigation programs may interfere with the utility and environmental benefits associated with mitigation banks.

Fee mitigation also raises conflict of interest questions. Regulators may have an interest in promoting fee mitigation over other types of mitigation. The developer may be put in an awkward position when the permitting agency asks the developer to provide money to a fund overseen by the permitting agency. Even when the developer contributes willingly (which no doubt will be the case when fee mitigation is the least-cost alternative), the use of fee mitigation may, at the federal level, amount to an improper augmentation of appropriated funds, thus implicating the constitutional issue of Congress's control over executive branch agencies.

Part II of this Article provides a background on wetland mitiga-

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<sup>8</sup> Fee mitigation is sometimes referred to as in lieu fee mitigation, contribution, or cash donation. *See e.g., id.* at 58,613 (discussing “in-lieu fee, fee mitigation, or other similar arrangements”); N.J. ADMIN. CODE tit. 7, § 7A-14.2(a) (WESTLAW 2000) (distinguishing restoration, creation, enhancement, and contribution); FLA. STAT. ANN. § 373.414(1)(b)2 (WESTLAW 1999) (requiring semiannual reports on “cash donations accepted . . . for wetland mitigation purposes”).

<sup>9</sup> *See* Federal Mitigation Banking Guidance, *supra* note 3, at 58,613.

<sup>10</sup> *See id.* (stating that fee mitigation arrangements “are not considered to meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts”).

tion requirements, focusing on mitigation banks and fee mitigation. Part III examines fee mitigation in practice and reports on the reliance of fee mitigation in federal and state programs. Finally, Part IV discusses the dangers - environmental, ethical, and legal - associated with fee mitigation programs. The Article concludes with a recommendation that legislation or administrative policy heavily circumscribe the use of fee mitigation in the wetland context.

## II. REGULATORY TREATMENT OF MITIGATION BANKS AND FEE MITIGATION PROGRAMS

In state and federal wetland programs, developers are permitted to destroy wetlands in exchange for the promise of compensatory mitigation.<sup>11</sup> It is well-documented, however, that many of the mitigation efforts fail to offset lost wetland functions, especially when the developer is responsible for wetland restoration, enhancement, or creation.<sup>12</sup> In many parts of the country, and under certain constraints, a developer now has additional options; it may choose to rely on mitigation provided through a mitigation bank or a fee mitigation program. As will become apparent, however, regulatory agencies do not treat mitigation bank sponsors and organizations operating a mitigation fund equally.

### *A. Regulatory Framework for Mitigation Banking*

At the federal level, the Clean Water Act and its implementing regulations of the United States Army Corps of Engineers (“Corps”) and the Environmental Protection Agency (“EPA”) are silent on the subject of mitigation banking.<sup>13</sup> The practice initially

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<sup>11</sup> Section 404 of the Clean Water Act vests the United States Army Corps of Engineers with the authority to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands. *See* 33 U.S.C. § 1344 (1994). In 1997, the Corps authorized approximately 36,400 acres of aquatic areas to be destroyed and called on developers to provide over 53,440 acres of compensatory mitigation. *See* Corps of Engineers, Proposal to Issue and Modify Nationwide Permits, 63 Fed. Reg. 36,040, 36,042 (1998) [hereinafter 1998 NWP Proposal].

<sup>12</sup> *See supra* note 2.

<sup>13</sup> Indeed, section 404 of the Clean Water Act does not explicitly require applicants for permits to satisfy any mitigation requirements. Section 404(b)(1) does, however, provide authority for the Environmental Protection Agency to develop guidelines, in conjunction with the Corps, to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. *See* 33 U.S.C. § 1344(b)(1) (1994). Although the guidelines do not employ the term “mitigation,” they do provide a regulatory basis for requiring permit applicants to avoid or minimize the adverse impacts on wetlands of their proposed activities and, where appropriate, to provide compensation for unavoidable im-

received agency imprimatur in a 1990 Corps-EPA memorandum of agreement that suggested in passing that mitigation banks could be an acceptable mitigation alternative if there were “specific criteria designed to ensure an environmentally successful bank.”<sup>14</sup> The agencies followed up with an interim guidance document in 1993.<sup>15</sup> In 1995, the Corps and EPA, along with the Natural Resources Conservation Service (“NRCS”), the U.S. Fish and Wildlife Service (“FWS”), and the National Marine Fisheries Service (“NMFS”), offered detailed instruction on establishing and operating wetland mitigation banks.<sup>16</sup> Congress ratified the agencies’ action, when in 1998, it included a mitigation banking provision in the massive highway bill, the Transportation Equity Act for the 21st Century (“TEA-21”).<sup>17</sup> In TEA-21, Congress expressed its preference that wetland mitigation for federally funded highway projects come from mitigation banks that comply with the framework set forth in the 1995 guidance document.<sup>18</sup> While TEA-21 does not mandate that mitigation banks must be used, the provision sends a strong signal of congressional support for the concept.

The approval process, as specified in the 1995 guidance document, is not simple. The bank sponsor formally begins by submitting a prospectus to the Corps.<sup>19</sup> The prospectus should discuss the need for the bank, its objectives, and its technical feasibility.<sup>20</sup> As

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pacts. Avoidance and the alternatives analysis are discussed in 40 C.F.R. § 230.10(a) (1999) and minimization of impacts is required by 40 C.F.R. § 230.10(d) (1999). Minimization is further explained in 40 C.F.R. §§ 230.70-.77 (1999). In the guidelines, compensatory mitigation is alluded to within the framework of minimization at 40 C.F.R. § 230.75(d) (1999) which states that habitat development and restoration may be required of applicants to compensate for damage their proposed activities will cause to the aquatic ecosystem.

<sup>14</sup> Mitigation MOA, *supra* note 1, at 9212.

<sup>15</sup> See U.S. EPA & U.S. Dep’t of Army, Memorandum to the Field (Aug. 23, 1993) *reprinted in* 60 Fed. Reg. 13,711-12 (1995).

<sup>16</sup> See Federal Mitigation Banking Guidance, *supra* note 3.

<sup>17</sup> See U.S. Pub. L. No. 105-178, 112 Stat. 107 (1998).

<sup>18</sup> See *id.* § 103(b)(6)(M), 112 Stat. at 135. The relevant portion states:

[w]ith respect to participation in a natural habitat or wetland mitigation effort related to a project funded under this title that has an impact that occurs within the service area of a mitigation bank, preference shall be given, to the maximum extent practicable, to the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605 (November 28, 1995)) or other applicable Federal law (including regulations).

*Id.*

<sup>19</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,609.

<sup>20</sup> See *id.*

a practical matter, however, the bank sponsor should meet with interested agencies prior to the formal submission of the prospectus. The federal guidance encourages such “pre-application coordination.”<sup>21</sup>

The prospectus should lead to a “mitigation banking instrument,” a document like a memorandum of agreement, that signifies agency approval of the bank’s establishment and describes how the bank will operate.<sup>22</sup> The banking instrument ordinarily requires the approval of a Mitigation Bank Review Team (“MBRT”).<sup>23</sup> The MBRT may consist of representatives from the Corps, EPA, NRCS, FWS, NMFS, and state and local agencies.<sup>24</sup> The Corps representative serves as the MBRT’s chair,<sup>25</sup> but the chair is, in some respects, only the first among equals. The federal guidance states that “the MBRT will strive to obtain consensus on its actions.”<sup>26</sup> Although the guidance contemplates prompt deci-

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<sup>21</sup> See *id.* The Corps encourages individual permit applicants to seek “pre-application consultation” as well, but in those situations the Corps is responsible for interagency coordination and is the applicant’s single point of contact with the federal government. See U.S. Army Corps of Engineers, Regulatory Guidance Letter 92-1, 60 Fed. Reg. 13,703, 13,704 (1995) (explaining federal agency roles and responsibilities in the Clean Water Act section 404 process). Under the Federal Mitigation Banking Guidance, however, “the Corps appear to abdicate its responsibility to lead the pre-application process, instead thrusting the responsibility back to the bank sponsor.” Gardner, *supra* note 1, at 565 n.223.

<sup>22</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,609-10. The guidance explains that the banking instrument should contain information concerning:

- a. Bank goals and objectives;
- b. Ownership of bank lands;
- c. Bank size and classes of wetlands and/or other aquatic resources proposed for inclusion in the bank, including a site plan and specifications;
- d. Description of baseline conditions at the bank site;
- e. Geographic service area;
- f. Wetland classes or other aquatic resource impacts suitable for compensation;
- g. Methods for determining credits and debits:
- h. accounting procedures;
- i. Performance standards for determining credit availability and bank success;
- j. Reporting protocols and monitoring plan;
- k. Contingency and remedial actions and responsibilities:
- l. Financial assurances;
- m. Compensation ratios;
- n. Provisions for long-term management and maintenance.

*Id.* at 58,609.

<sup>23</sup> See *id.* at 58,610.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> *Id.* Consensus is defined as “a process by which a group synthesizes its concerns and ideas to form a common collaborative agreement acceptable to all members. While the

sion-making (citing “90 days from the date of submittal of a complete prospectus” as a “reasonable timeframe”),<sup>27</sup> in reality the consensus requirement leads to lengthy delays.

The banking instrument explains how a bank generates credits and how these credits may be withdrawn or used as compensatory mitigation.<sup>28</sup> Accordingly, the document must contain a description of the existing conditions at the bank site and set forth performance standards for the mitigation work.<sup>29</sup> When a bank site meets certain milestones, mitigation credits become available for use.<sup>30</sup> The federal guidance makes clear that restoration is the favored compensatory mitigation option.<sup>31</sup> At the other end of the continuum lies preservation. Agencies may give credit for preservation of existing wetlands “in conjunction with restoration, enhancement, or creation activities.”<sup>32</sup> But the guidance emphasizes that “the preservation of existing wetlands in perpetuity may be authorized as the sole basis for generating credits in mitigation banks only in exceptional circumstances . . . .”<sup>33</sup>

The banking instrument will require the bank sponsor to secure adequate funding for the long-term monitoring and maintenance of the site and for remedial actions in the event of mitigation failure.<sup>34</sup> Privately-operated banks are therefore typically required to post a performance bond or provide some other form of financial assurance.<sup>35</sup> Once a bank site has achieved its performance standards and is self-sustaining, the agencies may release the financial assurances.<sup>36</sup> While banks operated by public entities must also have monitoring, maintenance, and contingency plans, they are not required to post performance bonds.<sup>37</sup>

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primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible.” *Id.* at 58,613.

<sup>27</sup> *Id.* at 58,610.

<sup>28</sup> *See id.* at 58,611-12.

<sup>29</sup> *See id.* at 58,609.

<sup>30</sup> *See id.* at 58,612.

<sup>31</sup> *See id.* at 58,608 (stating that “restoration should be the first option considered when siting a bank”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See* Federal Mitigation Banking Guidance, *supra* note 3, at 58,612-13.

<sup>35</sup> *See id.* at 58,613. For example, a bond for the first entrepreneurial bank in Florida was \$10,000 per acre. *See* Gardner, *supra* note 1, at 556 (citing Lew Lautin, Florida Wetlandsbank Bond Release Schedules (May 9, 1995)).

<sup>36</sup> *See* Federal Mitigation Banking Guidance, *supra* note 3, at 58,613.

<sup>37</sup> *See* Gardner, *supra* note 1, at 575 (discussing different treatment for privately and publicly operated mitigation banks).

Once the banking instrument is approved, the mitigation work begins. While a bank sponsor may be able to use or sell a limited amount of credits immediately, most credits may not be withdrawn (and, indeed, are not even produced) until certain milestones have been reached or until the mitigation project is complete.<sup>38</sup> To allow a bank sponsor to withdraw prematurely the credits allocated for the bank at maturity would undermine the environmental justification for mitigation banking. The central premise of mitigation banking, and its advantage over traditional, developer-provided mitigation, is that banking is advance mitigation.

Mitigation banking is environmentally attractive for several reasons. First, of course, advance mitigation alleviates some of the concern about whether a mitigation project will be successful or not.<sup>39</sup> A bank sponsor uses or sells the environmental gain. If the mitigation project is unsuccessful and fails to satisfy the performance standards, little or no credit is produced, and the bank may not be used to offset wetland impacts of development projects. Thus, rather than rely on a developer's promise to implement a mitigation project in the future, regulatory agencies may rely on the present conditions in a mitigation bank site. A bank that offers successful mitigation up front, in advance of developmental impacts, is a vast improvement over the status quo.

Mitigation banking may also be a more successful environmental endeavor because of the consolidation of technical abilities and financial resources.<sup>40</sup> Developers, especially smaller ones, often lack the scientific expertise necessary for mitigation projects or lack the funds to hire and retain qualified environmental consultants.<sup>41</sup> A bank sponsor can more easily bring together the compo-

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<sup>38</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,612 (allowing "limited debiting of a percentage of the total credits projected for the bank at maturity"). Originally, when the agencies submitted the guidance for public comment, it suggested, as an example, that 15% might be an appropriate amount for early debiting. See Proposed Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 12,286, 12,291 (1995). Because some viewed 15% as the maximum for early credit withdrawals and others viewed it as a minimum, the agencies deleted the example from the final product. See Federal Mitigation Banking Guidance, *supra* note 3, at 58,606.

<sup>39</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,607. In addition, advance mitigation from a mitigation bank offers the advantage of "reducing temporal losses of aquatic functions." *Id.* Even if traditional, developer-provided mitigation is successful, there is typically a lag time between project impacts (wetland losses) and functioning mitigation (wetland gains). Mitigation banking can reduce or eliminate this lag time. See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See EPA/FWS Investigation, *supra* note 2, at 16 (concluding that mitigation success

nents necessary for a successful mitigation project. The availability of credits from a mitigation bank could also lead agencies to require compensatory mitigation for projects where, in the past, projects were permitted to proceed with no mitigation.<sup>42</sup> For example, thousands<sup>43</sup> of minor projects are authorized each year under general permits.<sup>43</sup> Prior to mitigation banking, agencies ordinarily did not require compensatory mitigation because it was not practicable. Mitigation banking now provides an avenue to offset the impacts of those small projects, the cumulative effect of which can be environmentally significant.<sup>44</sup>

Moreover, the mitigation provided by a bank offers greater benefits than mitigation provided on a project-by-project basis. Mitigation bank sites are typically larger than traditional mitigation sites and, as such, may provide greater ecological value.<sup>45</sup> The federal guidance recognizes that “[i]t may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels.”<sup>46</sup>

The consolidation of mitigation sites provides benefits to the regulated community and the regulatory agencies as well. Because of economies of scale, mitigation banks can offer a less expensive compensatory mitigation option to developers.<sup>47</sup> A purchaser of mitigation credits also need not worry about possible enforcement actions if the mitigation later fails. The long-term viability of the site is the bank sponsor’s responsibility.<sup>48</sup> As for the regulators, a mitigation bank simplifies agency review and compliance moni-

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depends on human and economic factors, such as technical expertise and financial commitment).

<sup>42</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,607 (noting that mitigation banks can provide “opportunities to compensate for authorized impacts when mitigation might not otherwise be appropriate or practical”).

<sup>43</sup> See Michael L. Davis, *A More Effective and Flexible Section 404*, 17 NAT’L WETLANDS NEWSL. (Env’tl. L. Inst.) 7, 9 (July/Aug. 1995) (reporting that over 39,000 projects were authorized by general permit in fiscal year 1994); Michael L. Davis, Statement Before the Transportation and Infrastructure Subcommittee on Water Resources and Environment (Apr. 29, 1997).

<sup>44</sup> See 1998 NWP Proposal, *supra* note 11, at 36,042 (stating that, in 1997, the Corps authorized by general permits 21,409 acres of waters to be filled).

<sup>45</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,607.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* (observing that mitigation banks may “provide more cost-effective compensatory mitigation opportunities for projects that qualify”).

<sup>48</sup> See *id.* at 58,612 (stating that the bank sponsor is responsible for the bank’s success and emphasizing the need to establish an enforcement mechanism).

toring.<sup>49</sup> A mitigation bank, especially an entrepreneurial bank, reduces the number of mitigation sites a regulator needs to visit. This more efficient use of resources could allow the agencies to focus their energy on ferreting out illegal wetland activities and reducing permit-decision times.<sup>50</sup>

Recognizing the potential benefits of mitigation banking, at least twenty-two states have specifically authorized the practice by statute or regulation.<sup>51</sup> With a regulatory framework in place, the number of mitigation banks has dramatically increased. In 1992, there were only forty-six existing mitigation banks, only one of which was an entrepreneurial bank.<sup>52</sup> As of March 1999, more than 200 banks were operating<sup>53</sup> and several hundred more were in

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<sup>49</sup> See *id.* at 58,607 (recognizing that “a mitigation bank increases the efficiency of limited agency resources in the review and compliance monitoring of mitigation projects). The existence of a mitigation banking system may also provide agencies some protection from regulatory takings claims. See Gardner, *supra* note 1, at 560-61.

<sup>50</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,607 (stating that “mitigation banks may reduce permit processing times”).

<sup>51</sup> See Arkansas Wetland Mitigation Bank Act, ARK. CODE ANN. §§ 15-22-1001 to 1012 (Michie Supp. 1997); Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993, CAL. FISH & GAME CODE §§ 1775-1796 (West Supp. 1998); Resource Mitigation Banking Act, COLO. REV. STAT. §§ 37-85.5-101 to -111 (West Supp. 1996) [repealed on July 1, 1997]; Del. Envtl., Health & Safety Regs., ERM DE Section II, D(10)(a)(6) (WESTLAW 2000); FLA. STAT. ch. 373.4135-.4137, ch. 373.414, ch. 403.9332 (1997); Interagency Wetland Policy Act of 1989, 20 ILL. COMP. ANN. STAT. 830/1-1 to 830/4-1 (West 1993 & Supp. 1997); ILL. ADMIN. CODE tit. 17, §§ 1090.70-.90; KY. REV. STAT. ANN. § 224.16.070 (Michie 1995); State and Local Coastal Resources Management Act, LA. REV. STAT. ANN. § 49:214.41 (West Supp. 1999); LA. ADMIN. CODE tit. 43, § 724 (WESTLAW 2000); ME. REV. STAT. ANN. tit. 38, § 480-Z (West Supp. 1997); CODE ME. R. § 7; MD. REGS. CODE tit. 26, §§ 23.04.01 to -.07; MINN. STAT. ANN. § 103G.2242 (West 1997). Minn. R. 8420.0700-.0760 (WESTLAW 1999); NEB. REV. STAT. § 39-1320 (1995); Freshwater Wetlands Protection Act, N.J. STAT. ANN. §§ 13:9B-13 to -15 (West 1991 & Supp. 1999); N.J. ADMIN. CODE tit. 7, §§ 7A-14.1 to -14.6 (WESTLAW 2000); Current Operations Appropriations Act of 1996, N.C. GEN. STAT. §§ 143.214.8 to .11 (WESTLAW 1999); OHIO ADMIN. CODE § 3745-1-54(D)(2)(b) (WESTLAW 2000); Oregon Wetlands Mitigation Bank Act of 1987, OR. REV. STAT. §§ 196.600-.665 (1991 & Supp. 1998); Or. Admin. R. 141-085-0115, 141-085-0260 to -0650 (WESTLAW 1998); R.I. Envtl., Health & Safety Regs., ERM RI § 300.12(B)(11) (WESTLAW 1998); TENN CODE ANN. § 70-1-302(e) (1995); TEX. NAT. RES. CODE ANN. § 221.001-.048 (Vernon Supp. 1999); 31 TEX. ADMIN. CODE § 16.3(c)(1)(E), § 501.14(h)(1)(E), § 501.14(h)(2); VA. CODE ANN. §§ 28.2-1308, 33.1-223.2:1, § 62.1-44.15:5 (Michie 1997 & Supp. 1999); WASH. REV. CODE ANN. §§ 47.12.330-.360 (West Supp. 2000); Wyoming Wetlands Act, WYO. STAT. ANN. §§ 35-11-308 to -311 (Michie 1999).

<sup>52</sup> See Environmental Law Institute, Wetland Mitigation Banking, Appendix A (listing existing mitigation banks; Fina LaTerre of Louisiana is identified as the only private bank for general use).

<sup>53</sup> See E-mail from Dr. Robert W. Brumbaugh, U.S. Army Corps of Engineers Institute for Water Resources, to Royal C. Gardner (July 7, 1999) (on file with the *Virginia Environmental Law Journal*).

the planning stages.<sup>54</sup> Of the existing banks, approximately ninety are entrepreneurial banks.<sup>55</sup>

As with any innovation, however, mitigation banking has its detractors. Some opposition comes from concern about the concept of compensatory mitigation in general.<sup>56</sup> These critics express worry about the technical feasibility of wetland restoration, enhancement, and creation, and they are right to be wary. Mitigation efforts can be expensive and technically complex. Yet compensatory mitigation is part of the regulatory fabric, and it is politically naïve to believe that mitigation will be jettisoned for an alternative regime, such as one that results in a greater number of permit denials that prevent development activities in privately owned wetlands.<sup>57</sup> While by no means a sure bet, mitigation banking offers the best chance for mitigation success and replication of wetland values within today's regulatory framework.

Some critics point to the dangers regarding possible bank failures.<sup>58</sup> A mitigation bank that failed after all its credits had been debited would be very troubling. In reality, however, that is what presently occurs with much of the developer-provided mitigation. While the traditional mitigation approach has failed to replace lost wetland values, mitigation banking stands in sharp relief. First, most bank credits are not released until some success criteria have

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<sup>54</sup> See Dr. Robert W. Brumbaugh, *Wetland Mitigation Banking: Entering a New Era?*, (visited June 25, 1999) <<http://www.wes.army.mil/el/wrtc/wrp/bulletins/v5n3/brum.html>> (stating that "an additional several hundred may be in the middle or latter stages of planning and design").

<sup>55</sup> See E-mail from Dr. Robert W. Brumbaugh, *supra* note 53, U.S. Army Corps of Engineers Institute for Water Resources to Royal C. Gardner (July 7, 1999). One indicia of the growth of entrepreneurial mitigation banking is the establishment of the National Mitigation Bankers Association, an organization that, *inter alia*, advocates administrative and legislative changes to encourage mitigation banking.

<sup>56</sup> See, e.g., ZYGMUNT J.B. PLATER, ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 1161 (1998) (observing that "mitigation sends the wrong message to the American public, and glosses over the need for humility and restraint with the natural world"); Michael C. Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection*, 9 J. LAND USE & ENVTL. L. 203, 227 (1994) (stating that some objections raised are not "unique to [mitigation] bank[ing]," but "pertain to the woeful state of compensatory mitigation generally").

<sup>57</sup> See Gardner, *supra* note 1, at 562 ("Environmental advocates are fighting a rear-guard action over today's wetland protections.").

<sup>58</sup> See William W. Sapp, *Mitigation Banking: Panacea or Poison for Wetlands Protection*, 1 ENVTL. LAWYER 99, 118 (1994) (reporting that mitigation bank critics point to bank operators' "reliance on unproven wetland creation and restoration techniques"); Michael Lenetsky, Comment, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment?*, 13 TEMP. ENVTL. L. & TECH. J. 81, 83 (1994) (referring to mitigation banking as "a red herring that cannot deliver the promises it makes").

been met.<sup>59</sup> Second, in the event of mitigation failure after credit withdrawal, the financial assurances provided by the bank sponsor can be used to rectify the situation.<sup>60</sup> It is specious to object to mitigation banks because of the possibility of the failure, especially in light of the dismal results of developer-produced mitigation.

Some opposition to mitigation banks flows from discomfort with entrepreneurial banks.<sup>61</sup> The motive of the entrepreneurial banker is not pure. Bankers undertake this effort to make a profit. Some environmentalists (including some regulators) find it difficult to support an enterprise with such a base motive. Yet this supposed negative is actually another strength of mitigation banking. Because there is a possibility for a return on one's investment, the private sector is voluntarily investing in wetland restoration, enhancement, and creation.<sup>62</sup> The development of mitigation banks will no doubt lead to increased data and knowledge that will contribute to the success of future mitigation efforts, whether they are part of a bank or project-specific. Thus, far from being tainted, entrepreneurial banks are an important ingredient in achieving the national short-term goal of no net loss of wetland functions and values, and the long-term goal of net gain.<sup>63</sup>

Despite the obvious benefits offered by mitigation banking, agencies have embarked on a mitigation policy that may undermine the viability of mitigation banks: fee mitigation. Yet, as discussed below, operators of fee mitigation programs are not held to the same standards as mitigation bankers. The rise of fee mitigation may pose a significant threat to mitigation banking, especially entrepreneurial banking.

### *B. Regulatory Framework for Fee Mitigation*

As is the case with mitigation banking at the federal level, the

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<sup>59</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,611-12.

<sup>60</sup> See *id.* at 58,613.

<sup>61</sup> See LEONARD SHABMAN ET AL., NATIONAL WETLANDS MITIGATION BANKING STUDY, EXPANDING OPPORTUNITIES FOR SUCCESS: THE PRIVATE CREDIT MARKET ALTERNATIVE 59, 63 (1994) (reporting that entrepreneurial bankers find resource agencies "unresponsive or even hostile to bank proposals and generally against the concept of commercial banking. . . [and that resource agency staff] are very wary of potential opportunistic prospective bankers who think they may try to profit from land they already own, but who have unsophisticated knowledge of and/or experience with wetlands mitigation").

<sup>62</sup> See *supra* notes 53-55 and accompanying text.

<sup>63</sup> See White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible and Effective Approach 4 (Aug. 24, 1993) (expressing support for an "interim goal of no overall loss of the nation's remaining wetlands, and the long-term goal of increasing the quality and quantity of the nation's wetlands resource base").

Clean Water Act and its implementing regulations do not mention the concept of fee mitigation. Unlike mitigation banking, the Corps and EPA have offered no detailed guidance on the subject. Instead, the authority for fee mitigation is found in a fleeting reference in the 1995 federal mitigation banking guidance and in subsequent Federal Register notices concerning the Corps' nationwide permit program.

Toward the end of the federal mitigation banking guidance in a section titled "Other Considerations," the document acknowledges a critical difference between mitigation banking and fee mitigation. The latter does not provide advance compensatory mitigation. Indeed, the guidance notes that fee mitigation arrangements ordinarily do not even offer "a clear timetable for the initiation of mitigation efforts."<sup>64</sup> While the guidance does state that fee mitigation may be appropriate in some circumstances, those scenarios are not identified.<sup>65</sup> The guidance suggests that, if the Corps intends to rely on fee mitigation, the entity administering the fee mitigation fund and interested agencies should enter into a formal agreement, similar to a banking instrument.<sup>66</sup>

The next federal pronouncement on fee mitigation came in the Corps' Federal Register discussion of its nationwide permit program. Nationwide permits are a type of general permit that is authorized by section 404(e) of the Clean Water Act.<sup>67</sup> General permits may be issued for minor projects that would result, individually and cumulatively, in only minimal adverse impacts.<sup>68</sup> Traditionally, if a project qualified for a general permit, the developer need not provide any compensatory mitigation. Recently, in 1996, the Corps expressly authorized its regulators to consider whether, and to what extent, mitigation might be appropriate and practicable for projects authorized by nationwide permits.<sup>69</sup> The Corps announced that mitigation requirements for nationwide permits could be satisfied by procuring credits from a mitigation bank or by contributing cash "to organizations such as The Nature Conservancy, state or county natural resource management agencies,

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<sup>64</sup> Federal Mitigation Banking Guidance, *supra* note 3, at 58,613.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See* 33 U.S.C. § 1344 (e) (1994).

<sup>68</sup> *See id.*

<sup>69</sup> *See* U.S. Army Corps of Engineers, Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits, 61 Fed. Reg. 65,874, 65,922 (1996) (discussing factors the Corps will consider when making a mitigation determination) [hereinafter 1996 NWP Notice].

where such fees contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.”<sup>70</sup> The Corps’ embrace of fee mitigation represented an intentional step back from advance mitigation. In response to a comment concerning this issue, the Corps stated that “we believe it is more important to have potentially high-quality mitigation, such as can be provided with in lieu fees to states, local interests or land trusts, rather than pushing for mitigation completion before impacts occur.”<sup>71</sup> The Corps also declined the opportunity to define the parameters of fee mitigation, concluding that it would not be “beneficial to explicitly define in lieu fee systems” and that its districts would determine the appropriateness of such arrangements on a case-by-case basis.<sup>72</sup>

In a 1998 Federal Register notice on nationwide permits, the Corps continued to express its support for fee mitigation as a compensatory mitigation option. Asserting that mitigation would ensure that impacts from nationwide permit projects would remain minimal,<sup>73</sup> the Corps recited the three avenues available to a prospective permittee: individual mitigation projects performed by the permittee, mitigation credits from a mitigation bank, or a deposit in a fee mitigation fund.<sup>74</sup> With respect to fee mitigation, the 1998 notice seemed to broaden its applicability. Fee mitigation funds may now be used to protect, enhance, and restore non-aquatic sites, such as riparian corridors and upland buffer areas, that contribute to water quality.<sup>75</sup>

Significantly, the Corps refused to declare a preference that mitigation for nationwide permit projects come from mitigation banks.<sup>76</sup> In doing so, the Corps attempted to equate banking with fee programs, noting that, because each had a great likelihood of

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 65,911.

<sup>72</sup> *Id.* at 65,910.

<sup>73</sup> See 1998 NWP Proposal, *supra* note 11, at 36,042. Indeed, for 1997 the Corps reported that 21,409 acres of waters were filled under general permits, an amount that, if not offset by compensatory mitigation, would be more than minimal. See *id.*

<sup>74</sup> See *id.* at 36,045; see also *id.* at 36,051 (discussing mitigation for proposed nationwide permit for residential, commercial, and institutional activities); *id.* at 36,053-4 (discussing mitigation for proposed nationwide permit for passive recreational facilities).

<sup>75</sup> See 1998 NWP Proposal, *supra* note 11, at 36,063. Some commentators have questioned the Corps’ authority to require upland buffer areas. See Virginia S. Albrecht & Kim Diana Connolly, *Wise Replacements for NWP 26?*, 20 NAT’L WETLANDS NEWSL. (Envtl. L. Inst.) 7, 10 (Sept./Oct. 1998) (stating that “the Corps does not have authority to regulate activities in upland areas, no matter how deeply felt the concerns”).

<sup>76</sup> See 1998 NWP Proposal, *supra* note 11, at 36,063.

success, both were environmentally preferable to developer-provided mitigation.<sup>77</sup> The Corps suggested that this was due to better planning and execution on the part of the bank and fund operators.<sup>78</sup> While true, the Corps failed to acknowledge that banks are more successful because they provide functioning mitigation in advance of projects impacts. Fee mitigation provides mitigation after-the-fact, a point emphasized in the 1995 federal mitigation banking guidance.<sup>79</sup>

The Corps justified its reluctance to establish a mitigation hierarchy favoring mitigation banks by asserting that mitigation bank and fee programs “are not common throughout the country.”<sup>80</sup> Based on the Corps’ own numbers, however, one can certainly argue that mitigation banks, if not common, are becoming more commonplace.<sup>81</sup> Moreover, the purported dearth of banks did not prevent Congress from expressing its preference for mitigation banks to be used to offset federal highway project impacts, a sentiment enacted just three weeks prior to the Corps’ Federal Register notice.<sup>82</sup>

Most disappointing perhaps was the Corps’ response, or lack thereof, to a commenter’s suggestion that the Corps hold fee programs to the same standards applicable to mitigation banks.<sup>83</sup> The commenter contended that “guidance is needed to monitor the funds paid by permittees, monitor the number of acres of wetlands restored as a result of the payment of those fees, provide compensatory mitigation in advance of authorized impacts, and require binding agreements that will ensure that the compensatory mitigation is successful.”<sup>84</sup> Although the Federal Register notice discusses the relationship between mitigation banking and fee programs, the Corps never directly answers the call for similar treatment.

In its July 1999 Federal Register notice on nationwide permits,

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<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,613 (distinguishing between fee mitigation and mitigation banks because the former “do not typically provide compensatory mitigation in advance of project impacts”).

<sup>80</sup> 1998 NWP Proposal, *supra* note 11, at 36,063.

<sup>81</sup> *See supra* notes 53-55 and accompanying text.

<sup>82</sup> The Transportation Equity Act for the 21st Century (“TEA-21”) was enacted on June 9, 1998. *See* 112 Stat. 107. The Corps’ notice was published on July 1, 1998. *See supra* notes 17-18 and accompanying text for a discussion of TEA-21.

<sup>83</sup> *See* 1998 NWP Proposal, *supra* note 11, at 36,063.

<sup>84</sup> *Id.*

the Corps continued to express support for the concept of fee mitigation.<sup>85</sup> The Corps again rejected a call to establish a preference for mitigation bank<sup>86</sup> and refused to limit the use of fee mitigation.<sup>87</sup> Instead, the Corps emphasized the need to provide its regulators and permit applicants with flexibility.<sup>88</sup>

In contrast to the lack of explicit statutory or regulatory authority in the federal program (and the Corps' refusal to issue instructional guidance), at least seven states have formally authorized the use of fee mitigation to offset wetland impacts: Florida,<sup>89</sup> Louisiana,<sup>90</sup> Maine,<sup>91</sup> Maryland,<sup>92</sup> New Jersey,<sup>93</sup> North Carolina,<sup>94</sup> and Pennsylvania.<sup>95</sup> Additional states have acquiesced on an ad hoc basis.<sup>96</sup> In those jurisdictions that have recognized the legitimacy of fee mitigation by statute or regulation, the fees paid by developers are typically deposited into a fund or account managed by the state.<sup>97</sup> The money is then to be expended for wetland mitigation efforts.

Not surprisingly, with no guidance for Corps districts and with an increasing number of state regulatory agencies condoning the practice of fee mitigation, many variations on the theme have emerged. The next Part examines how fee mitigation operates in the field.

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<sup>85</sup> See U.S. Army Corps of Engineers, Proposal to Issue and Modify Nationwide Permits, 64 Fed. Reg. 39,252, 39,368 (1999) (stating that "mitigation banks, in lieu fee programs, and other consolidated mitigation approaches will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate") [hereinafter 1999 NWP Proposal].

<sup>86</sup> See *id.* at 39,272-73.

<sup>87</sup> See *id.* ("We do not agree that in lieu fee areas should be limited to small areas and farmed wetlands.").

<sup>88</sup> See *id.* ("Permittees should have the flexibility to utilize compensatory mitigation methods that are within their means to accomplish and meet the requirements to offset unavoidable losses of waters of the United States.").

<sup>89</sup> See FLA. STAT. ANN. § 373.414(1)(b) (WESTLAW 1999).

<sup>90</sup> See LA. ADMIN. CODE tit. 43, § 724.J.5.a.iii (WESTLAW 2000).

<sup>91</sup> See ME. REV. STAT. ANN. tit. 38, § 480-Z (WESTLAW 1999).

<sup>92</sup> See MD. CODE ANN., ENVIR. § 5-909 (1999 Supp.).

<sup>93</sup> See Freshwater Wetlands Protection Act, N.J. STAT. ANN. § 13:9B-13c (WESTLAW 1999).

<sup>94</sup> See N.C. GEN. STAT. § 143.214.12 (WESTLAW 1999).

<sup>95</sup> See 25 PA. CODE § 105, Appendix O (WESTLAW 2000) (allowing fee mitigation in the limited circumstance of private residential construction on parcels purchased prior to November 22, 1991).

<sup>96</sup> Indeed, in all the Corps jurisdictions that employ fee mitigation, one may assume that state wetland agencies have accepted the practice.

<sup>97</sup> See *infra* notes 190-229 and accompanying text.

### III. FEE MITIGATION IN PRACTICE

At least thirty-one of the thirty-eight Corps of Engineer districts report that they have approved, at least on occasion, the use of fee mitigation to offset wetland impacts.<sup>98</sup> Significantly, many of the Corps districts (and state agencies) that have authorized fee mitigation have a large percentage of the nation's remaining wetland

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<sup>98</sup> The data collected regarding the Corps' use of the fee mitigation are derived from Freedom of Information Act (FOIA) requests sent to 38 Corp districts. The requests asked for fee mitigation documents, including: (1) policy or guidance documents; (2) memoranda of agreement, memoranda of understanding, other agreements; (3) permits that include fee mitigation as a condition; and (4) documents describing how the funds have been disbursed.

The following twelve districts stated that they had no records in response to the FOIA request: Albuquerque (Letter from Dennis A. Wallace, FOIA Officer, to Royal C. Gardner (Mar. 29, 1991)); Detroit (Letter from Gary W. Segrest, Assistant District Counsel, to Royal C. Gardner (Apr. 27, 1999)); Honolulu (Letter from Michael L. Feighny, District Counsel, to Royal C. Gardner (Apr. 2, 1999)); Huntington (Letter from Norman R. Spero, District Counsel, to Royal C. Gardner (June 11, 1999)); Kansas City (Letter from Francis S. Higgins, District Counsel, to Royal C. Gardner (Apr. 14, 1999)); Memphis (Letter from Charles A. Briggs, FOIA Officer, to Royal C. Gardner (June 3, 1999)); New England (Letter from Joseph P. McInerney, Assistant District Counsel, to Royal C. Gardner (June 22, 1999)); Philadelphia (Letter from Mark Dolchin, District Counsel, to Royal C. Gardner (Apr. 26, 1999)); Pittsburgh (Letter from Paul J. Shapiro, Assistant District Counsel, to Royal Gardner (March 30, 1999)); St. Louis (Phone Interview with Danny McClendon, Regulatory Project Manager (Dec. 27, 1999)); St. Paul (Letter from Georgia L. Stanonik, Legal Assistant, to Royal C. Gardner (Apr. 13, 1999)); and San Francisco (Letter from John H. Eft, District Counsel, to Royal C. Gardner (Apr. 7, 1999)).

Five of the no-records responses may be suspect, however. For example, the Huntington District claimed it had no responsive records, but in a 1996 nationwide permit notice Corps headquarters lauded the "very successful" fee mitigation program that the Huntington District initiated in Ohio. 1996 NWP Notice, *supra* note 69, at 65,892. The Corps stated that the "Huntington [D]istrict, in conjunction with the state, established a fee structure for NWP [nationwide permit] 26 authorizations" whereby the Ohio Division of Natural Resources used the money to "acquire, restore and manage former wetlands." *Id.* Similarly, the Pennsylvania Department of Environmental Protection operates a fee mitigation program, the Pennsylvania Wetland Replacement Project, under the auspices of a Corps SPGP. *See infra* note 194. It appears that a number of the completed projects financed by fee mitigation occurred in counties under the jurisdiction of the Pittsburgh and Philadelphia Districts. *See* PENNSYLVANIA DEPT. OF ENVTL. PROTECTION, PENNSYLVANIA WETLAND REPLACEMENT PROJECT STATUS REPORT 1996-98, at 1 (1999) [hereinafter PWRP STATUS REPORT]; *see infra* note 194. Moreover, a 1993 report prepared for the Corps stated that the Memphis District has, on at least one occasion, approved the use of fee mitigation. *See* APGEE RESEARCH, INC., U.S. ARMY CORPS OF ENGINEERS, ALTERNATIVE MECHANISMS FOR COMPENSATORY MITIGATION: CASE STUDIES AND LESSONS ABOUT FEE-BASED COMPENSATORY WETLANDS MITIGATION 4 (Mar. 1993) [hereinafter FEE-BASED MITIGATION CASE STUDIES]. Finally, the New England District recently approved the use of fee mitigation (albeit in a non-wetland context), allowing Bath Iron Works to fill 15 acres of the Kennebec River in exchange for \$2.5 million. *See* Dieter Bradbury, *Many Gain as Activists, Shipyard Collaborate*, PORTLAND PRESS HERALD, July 26, 1998, at 1B. The funds are to be used to remove the Edwards Dam, thereby improving fish passage. *See id.*

base.<sup>99</sup> After reviewing the various approaches of the Corps districts, this Part will consider state fee mitigation programs.

### A. Federal Fee Mitigation

In the absence of national guidance, few Corps districts have issued district-specific guidance or policy statements.<sup>100</sup> Instead, many districts deal with fee mitigation on an ad hoc basis. Others have entered into formal agreements with a conservancy organization or organizations. These agreements describe how fee mitigation may be used in a particular area and contemplate an ongoing relationship. Several districts allow the use of fee mitigation in the context of regional or programmatic general permits.

#### 1. Ad Hoc Approvals

At least a dozen districts have accepted fee mitigation on a case-by-case basis.<sup>101</sup> For example, the Portland District has employed

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<sup>99</sup> The ten states with the largest existing wetland base are: Alaska (170 million acres); Florida (11.038 million acres); Louisiana (8.78 million acres); Minnesota (8.7 million acres); Texas (7.6 million acres); North Carolina (5.69 million acres); Michigan (5.58 million acres); Wisconsin (5.33 million acres); Georgia (5.3 million acres); and Maine (5.2 million acres). See U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERVICE, WETLANDS LOSSES IN THE UNITED STATES 1780'S TO 1980'S 6 (1990). Of those ten, fee mitigation has apparently not been used in Minnesota, Michigan, and Wisconsin.

<sup>100</sup> At least five districts have promulgated such guidance: Charleston (SOUTH CAROLINA MITIGATION BANK REVIEW TEAM, IN-LIEU FEE BASED MITIGATION GUIDELINES (Mar. 1998) [hereinafter CHARLESTON IN-LIEU FEE GUIDELINES]; Chicago (CHICAGO DISTRICT POLICIES FOR THE IMPLEMENTATION OF THE WETLANDS RESTORATION FUND (Dec. 10, 1997) <[www.usace.army.mil/lrc/co-r/wrfpolcy.htm](http://www.usace.army.mil/lrc/co-r/wrfpolcy.htm)> (visited July 6, 1999) [hereinafter CHICAGO DISTRICT POLICIES]); Nashville (NASHVILLE DISTRICT IN LIEU FEE DIRECTORY (1999)); Norfolk (William H. Poore, Jr., Chief, Regulatory Branch, MEMORANDUM FOR REGULATORY BRANCH PROJECT MANAGERS, INTERIM NATIONWIDE PERMIT MITIGATION GUIDANCE (Nov. 25, 1996)); and Fort Worth (COMPENSATORY MITIGATION BY IN-LIEU FEE IN THE FORT WORTH DISTRICT (Mar. 25, 1999)). The Buffalo District has detailed guidance in draft form. See IN LIEU FEE ARRANGEMENT PROGRAM SUMMARY (Oct. 16, 1997) [hereinafter BUFFALO PROGRAM SUMMARY].

<sup>101</sup> Twelve districts report that, thus far, they have accepted fee mitigation only on an *ad hoc* basis; not included in this number are the districts that have formal fee mitigation programs, but nevertheless continue to approve of fee mitigation on a case-by-case basis outside the confines of the formal programs. See, e.g., *infra* note 177 and accompanying text (discussing *ad hoc* approvals by the Jacksonville District).

The following is a summary of fee mitigation activity in those twelve districts:

Charleston District: The district has permitted fee mitigation in accordance with its guidelines. See CHARLESTON IN-LIEU FEE GUIDELINES, *supra* note 100. According to the guidelines, fee mitigation arrangements should be approached “with caution,” and “project objectives must be clearly identified or targeted up-front.” *Id.* at 1-2. Fee mitigation is used primarily for “restoration, enhancement and acquisition,” and the charges for management activities generally may not exceed 15% of the funds available for mitigation.

fee mitigation to compensate for impacts associated with now defunct nationwide permit twenty-six.<sup>102</sup> The district identified “rep-

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*Id.* at 3.

Galveston District: At least six permits, issued from September 1996 to December 1998, relied on fee mitigation. *See infra* notes 116-19 and accompanying text.

Little Rock District: The district has approved the use of fee mitigation, but only when a suitable purchase site has been identified. *See* ENGINEERING AND TECHNICAL SERVICES DIVISION, REGULATORY SECTION, NATIONWIDE PERMIT No. 14741 (May 5, 1998) (authorizing 1.4 acres of impact in exchange for payment of \$3,000 to The Nature Conservancy for purchase and restoration of specific site); Department of the Army Permit No. 11050, at 3 (1993) (authorizing 1.7 acres of impact and requiring restoration of 2.5 acres or payment of \$3,750 to the Delta Land Trust to purchase “a specific approved tract:” no filling authorized until Corps has approved site location). *See also* FEE-BASED MITIGATION CASE STUDIES, *supra* note 98, at 4-7 (discussing earlier *ad hoc* fee mitigation arrangements of the Arkansas Nature Conservancy).

Louisville District: From 1994 to 1998, the district has authorized fee mitigation on at least four occasions. *See infra* notes 109-111 and accompanying text.

Memphis District: Although the Memphis District provided a “no records” response, an earlier Corps report noted that the “Memphis District engineer signed a permit allowing fee-based mitigation in September of 1988.” FEE-BASED MITIGATION CASE STUDIES, *supra* note 98, at 4.

Mobile District: The Mobile District has relied exclusively on The Nature Conservancy. *See infra* note 120.

New York District: The district has employed fee mitigation to compensate for project impacts and to settle enforcement actions. *See* Telephone Interview with Chris Mallory, Chief, Harbor Supervision and Compliance Section (Dec. 30, 1999).

Omaha District: The district provided copies of two mitigation plans that “are the only in-lieu fee mitigation plans in Omaha District.” Letter from Lana M. Olson, Paralegal Specialist, to Royal C. Gardner (Apr. 14, 1999) (enclosing ECO-CENTRICS, MITIGATION PLANS FOR VINTAGE OAKS ADDITION 3 (1997) (stating that “in-lieu fee of \$12,500 will be donated to the Department of Biology, University of Nebraska at Omaha” for wetland enhancement)) and Escrow and Wet Lands Agreement (Jan. 19, 1995) (permittee contributes \$16,200 to the Carrol Soil and Water Conservation District).

Rock Island District: The district has twice authorized as compensatory mitigation payments to the DeKalb County Forest Preserve District. *See* Letter from Steven J. Vander Horn, Chief, Regulatory Division to Sunil Puri 1 (Jan. 12, 1998) (on file with the *Virginia Environmental Law Journal*) (stating that “permit is contingent upon the transfer of payment, in the amount of \$50,000” to the forest preserve district which is to create a 2.5 acre mitigation site); Department of the Army Permit No. CEMVR-RD-339050-1 (requiring agreement between permittee and DeKalb County Forest Preserve).

Seattle District: The district has apparently relied on fee mitigation only one time. *See* Department of the Army Permit No. 98-4-00227, at 2 (Aug. 3, 1998) (provisional permit stating that “[m]itigation will be in the form of ‘in-lieu fees’ paid to the Marshall Community Coalition”).

Tulsa District: The district’s use of fee mitigation is discussed at notes 112-115 and accompanying text.

Walla Walla District: Although the district has employed fee mitigation only two or three times, one contribution was for \$166,000 to the Kootenai National Wildlife Refuge. *See* Department of the Army Permit No. 961101830, at 2 (June 16, 1997) (requiring Burlington Northern Santa Fe Railroad to enter into an agreement with the refuge prior to project impacts); *see also* Department of the Army Permit No. 963200870, at 2 and attachment (Mar. 16, 1998) (payment of \$1,200 to construct fence to protect wetlands from

representative examples of cases in which in-lieu fee mitigation was required.”<sup>103</sup> In 1997-98, seven authorizations permitted a total of 1.44 acres of wetland to be filled.<sup>104</sup> In exchange, permittees were required to contribute approximately \$18,000 to three different entities.<sup>105</sup> The largest project of this group, in terms of both acreage and money, involved the filling of .55 acres for saw mill facilities.<sup>106</sup> Compensatory mitigation consisted of a payment of \$10,000 to the Oregon Division of State Lands, which was to use the funds to create a “Wetland Park” on county-owned, high-quality wetlands.<sup>107</sup> The plans for the park, which would be adjacent to an elementary school, included class staging, discussion, and viewing areas.<sup>108</sup> While environmental education is a laudable governmental objective, one must question whether such a mitigation project truly offsets the destruction of wetlands, especially since the mitigation site is government-owned and thus not likely subject to developmental

grazing); Letter from Caribou County Commissioners to Rob Brochu, Corps of Engineers (Dec. 21, 1998) (offering to provide the United States Forest Service \$3,000 “in equipment and manpower” as compensation for road project that would affect 1.5 acres of wetlands).

<sup>102</sup> Originally, nationwide permit (NWP) 26 authorized the general filling of up to 10 acres of isolated wetlands; unlike all other NWPs, it was not activity-specific. After reducing the acreage limitations to three acres, the Corps announced in 1998 that it would phase out NWP 26 and replace it with activity-specific NWPs. See 1998 NWP Proposal, *supra* note 11, at 36,040. For a brief history of NWP 26, see William T. Gorton, *Replacing Nationwide Permit 26: The Next Battle Over Wetlands Development*, 18 CONSTRUCTION LAWYER 43 (Apr. 1998). NWP 26 was originally scheduled to expire on December 30, 1999. See 1999 NWP Proposal, *supra* note 85, at 39,252. Because of the volume of public comments the Corps received concerning the proposed activity-specific NWPs, the Corps extended NWP 26’s expiration date until April 14, 2000. Set U.S. Army Corps of Engineers, Proposal to Issue and Modify Nationwide Permits, 64 Fed. Reg. 69,994 (2000).

<sup>103</sup> Letter from Janice E. Sorensen, FOIA Officer, to Royal C. Gardner (Apr. 12, 1999).

<sup>104</sup> See Nationwide Permit Verification Case No: 98-1097 (Sept. 1, 1998) (.1 acre filled; \$2,530 donated to the Wetlands Conservancy); Nationwide Permit Verification Case No: 98-745 (Aug. 4, 1998) (.02 acres filled; \$600 donated to the City of Warrenton Wetland Fund); Nationwide Permit Verification Case No: 98-00112 (Feb. 5, 1998) (.04 acres filled; fee mitigation amount to Oregon Division of State Land (ODSL) not specified); Provisional Nationwide Permit Verification Case No: 97-904 (Jan. 6, 1998) (.55 acres filled; \$10,000 donated to the ODSL) [hereinafter Willamette Industries Permit]; Nationwide Permit Verification Case No: 98-380 (Apr. 23, 1998) (.1 acres filled; \$2,913 donated to the City of Warrenton Wetland Mitigation Fund); Nationwide Permit Verification Case No: 97-1053 (Aug. 6, 1997) (.03 acres filled; \$900 donated to the City of Warrenton Tide Gate Mitigation Fund); Nationwide Permit Verification Case No: 97-716 (June 18, 1997) (.033 acres filled; \$990 donated to the City of Warrenton Tide Gate Mitigation Fund).

<sup>105</sup> See *supra* note 104.

<sup>106</sup> See Willamette Industries Permit, *supra* note 104, at 1.

<sup>107</sup> See *id.* Letter from Greg McCoy, Superintendent, Warrenton Sawmill to Clatsop County Parks Advisory Committee (Oct. 23, 1997) (identifying county-owned land as suitable park site).

<sup>108</sup> See Willamette Industries Permit, *supra* note 104, at Figure 3: Proposed Park Infrastructure Development (public trails and outdoor classroom access locations).

pressures.

The Louisville District provides an even more egregious case. In exchange for federal permission to destroy 5 acres of wetlands to construct industrial and distribution buildings, the permittee agreed to contribute \$45,000 to the Louisville Zoo Wetlands Exhibit.<sup>109</sup> The zoo now offers select visitors a wetlands trail that features a  $\frac{3}{4}$ -acre shrub swamp that is an “outdoor ‘living classroom.’”<sup>110</sup> Once again, the funds were used primarily for educational purposes, rather than for mitigating wetland impacts.<sup>111</sup>

Most fee mitigation in these ad hoc cases, however, is not devoted to educational outreach. The emphasis appears to focus on preservation efforts, with title ultimately resting either with a state or the federal government. For example, when authorizing a railroad company to construct a railroad spur and fill 5.82 acres of waters (including 4.44 acres of wetland), the Tulsa District required the company to pay \$110,000 to the Oklahoma Department of Wildlife Conservation (ODWC).<sup>112</sup> The ODWC used the funds to assist in purchasing fee-simple title to a 702-acre site known as the Grassy Slough.<sup>113</sup> The NRCS was negotiating to enroll the site, which consisted of 140 acres of high-quality wetlands and 562 acres of degraded wetland in agricultural production, in the federal Wetland Reserve Program.<sup>114</sup> The purchase of the site by the ODWC simplified mitigation efforts, and the ODWC, NRCS, and FWS agreed to develop a restoration and long-term management

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<sup>109</sup> Letter from William F. Christman, Chief, Regulatory Branch to Kenneth W. Smith, Vice President of Construction, Industrial Developments International, Inc. (July 15, 1996).

<sup>110</sup> *Wetlands: Worlds of Wonder: Lost Worlds, ZOO WAVE, AN EDUCATIONAL NEWSLETTER FROM THE LOUISVILLE ZOO*, at 1.

<sup>111</sup> The Galveston District also provides an illustration of education mitigation, with the funds migrating to a state university. See Permit Application - 20522 (01). Environmental Assessment and Statement of Findings 1 (Sept. 18, 1996) (2.42 acres filled; \$15,000 donation to Center for Coastal Studies, Texas A & M University to fund two projects, one of which was “an ongoing six-year salt marsh reestablishment and estuarine faunal study”) [hereinafter Port of Corpus Christi Authority EA/SOF].

<sup>112</sup> See Department of the Army Permit No. OKR2005804, at 1 & 3 (Apr. 24, 1996) (incorporating Record of Agreement between WFEC Railroad Company and U.S. Army Corps of Engineers and Oklahoma Department of Wildlife Conservation and Natural Resources Conservation Service and U.S. Fish and Wildlife Service (Apr. 1996) [hereinafter WFEC Railroad Record of Agreement]).

<sup>113</sup> See WFEC Railroad Record of Agreement, *supra* note 112, at 2.

<sup>114</sup> See *id.* at 1-2. The NRCS administers the Wetland Reserve Program, which pays farmers to voluntarily restore wetlands and take these areas out of crop production. See 16 U.S.C. § 3837a (1994).

plan.<sup>115</sup> Similarly, the Galveston District permitted 25.9 acres of wetlands to be filled for a housing development so long as the permittee contributed \$300,000 to the National Fish and Wildlife Foundation,<sup>116</sup> a congressionally created, private, not-for-profit organization.<sup>117</sup> The Foundation was to use the money to acquire property in the Brazos River watershed. The permit contemplated that the Foundation would eventually transfer the land to the FWS “for inclusion within the Brazoria National Wildlife Refuge Complex.”<sup>118</sup> Interestingly, another mitigation option under consideration was to purchase credits from the Katy-Hockley Mitigation Bank, but the Corps rejected that alternative based, in part, on the FWS’s comments.<sup>119</sup>

## 2. *Agreements with a Single Conservation Entity*

Several Corps districts that expressly encourage fee mitigation have entered into formal umbrella agreements with single conservation entities.<sup>120</sup> The agreements, which are in accord with the

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<sup>115</sup> See WFEC Railroad Record of Agreement, *supra* note 112, at 2.

<sup>116</sup> See Permit Application - 21184, Environmental Assessment and Statement of Findings 1 (Dec. 22, 1998) [hereinafter Figure Four Partners EA/SOF].

<sup>117</sup> The Foundation receives federally appropriated funds but may not spend them on operating expenses; instead, these funds must be used for projects to conserve fish, wildlife, and their habitat. See National Fish and Wildlife Foundation, <[www.nfwf.org/about\\_nfwf.htm](http://www.nfwf.org/about_nfwf.htm)>. In particular, the Foundation has a Wetlands and Private Land Initiative that financially supports wetland restoration and acquisition efforts. See *id.*

<sup>118</sup> Figure Four Partners EA/SOF, *supra* note 116, at 1.

<sup>119</sup> See *id.*

<sup>120</sup> In addition to the New Orleans, Norfolk, Savannah, and Chicago Districts, discussed below, the Fort Worth and Sacramento Districts have also signed formal fee mitigation agreements. See An Agreement Between The Nature Conservancy and the U.S. Army Corps of Engineers, Fort Worth District, to Establish an In-Lieu Fee Program in the Fort Worth District (Nov. 1998); Agreement Between the Tri-Dam Project and the Regulatory Branch, U.S. Army Corps of Engineers, Sacramento District, to Establish a Fee-Based Compensatory Mitigation Program Under Section 404 of the Clean Water Act (May 1999). Because each agreement recently became effective, there has been little implementation activity.

On occasion, a district engaging in *ad hoc* approvals will repeatedly use a particular conservation entity, even in the absence of a formal agreement. For example, from August 1997 to December 1998, the Mobile District approved the use of fee mitigation in eight permit actions with the funds-going to The Nature Conservancy (or a state chapter) each time. See Department of the Army Permit No. AL98-04100-E, at 2 (Dec. 14, 1998) (requiring Wal-Mart Stores, Inc. to contribute a donation to The Nature Conservancy); Letter from Ronald A. Krizman, Chief, Regulatory Branch, to Antioch Baptist Church (Feb. 25, 1998) (stating that no construction shall commence until “the agreed upon fee mitigation has been accepted by The Nature Conservancy”); Letter from Ronald A. Krizman, Chief, Regulatory Branch, to Ed Trehern, Compton Engineering, P.A. (May 11, 1998) (authorizing work to begin because The Nature Conservancy of Mississippi received a

federal mitigation banking guidance,<sup>121</sup> describe the circumstances under which fee mitigation is appropriate, the types of mitigation projects that the fund may sponsor, and the relationship between the Corps, other agencies, and the fund administrator. In many cases, and in contrast to mitigation banks, the fee mitigation is used for preservation efforts and is available for training and educational activities.

One of the older fee mitigation agreements is a 1992 memorandum of agreement between The Nature Conservancy of Louisiana, the Corps' New Orleans District, and other federal and state agencies.<sup>122</sup> The agreement establishes an account to offset impacts to pine flatwood wetlands in southeastern Louisiana.<sup>123</sup> Since the inception of the account, the New Orleans District has authorized 388 permits based on the condition that the permittee contribute money to the account.<sup>124</sup> The approved development projects resulted in the loss of 1,470 acres, while the account received approximately \$3.67 million.<sup>125</sup> The Nature Conservancy of Louisi-

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contribution); Letter from Ronald A. Krizman, Chief, Regulatory Branch to Tom Howard, USX Corp. (Sept. 30, 1998) (confirming payment of in lieu fee to The Nature Conservancy); Letter from Ronald A. Krizman, Chief, Regulatory Branch, to Larry E. Speaks & Associates, Inc. (Nov. 5, 1998) (conditioning work on in-lieu fee contribution to The Nature Conservancy of Alabama); Letter from Ronald A. Krizman, Chief, Regulatory Branch, to Dogwood Realty (Aug. 20, 1998) (modifying permit to allow for contribution to The Nature Conservancy of Alabama, rather than on-site creation project); Letter from Ronald A. Krizman, Chief, Regulatory Branch, to Dinerstein Companies, Inc. (July 6, 1998) (verifying donation of "in-lieu-fee" to The Nature Conservancy); and Letter from Ronald A. Krizman, Chief, Regulatory Branch, to JVC Magnetics East Warehouse Expansion (Aug. 6, 1997) (requiring contribution to The Nature Conservancy of Alabama).

<sup>121</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,613 (stating that for fee mitigation arrangements "a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the conditions under which its use is considered appropriate").

<sup>122</sup> See Memorandum of Agreement Between U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Louisiana Department of Natural Resources, Louisiana Department of Wildlife and Fisheries and The Nature Conservancy of Louisiana for Establishment and Use of a Pine Flatwood Wetland Mitigation Bank in Southeastern Louisiana (1992) [hereinafter New Orleans MOA]. Despite the use of the term "mitigation bank," the agreement establishes a fee mitigation arrangement because it creates an account into which permittees deposit funds that are used for mitigation that is typically provided after project impacts. See generally Richard Martin, *In-Lieu-Fee Programs Belong Among Mitigation Options*, 21 NAT'L WETLANDS NEWSL. (Env'tl. L. Inst.) 4 (July/Aug. 1999) (explaining how the Pine Wetland Bank operates).

<sup>123</sup> See New Orleans MOA, *supra* note 122, at 1.

<sup>124</sup> See SE Louisiana Pine Wetlands Mitigation Bank Account Status 1-9 (June 8, 1999) (listing 388 permittees).

<sup>125</sup> See *id.* at 9. While most of the permits (221 or approximately 57%) were for projects that affected less than an acre of wetlands, a few involved significant acreage; the largest project filled 103 acres, and the developer contributed \$154,500. See *id.* at 2 (Cross Gates

ana uses the funds to conduct inventory, selection, acquisition, restoration, and management of pine flatwood mitigation sites, and all agencies that are parties to the agreement must concur in the process.<sup>126</sup> The organization may also assess administrative costs, including salaries, so long as those costs do not exceed 15% of the total contributions to the account.<sup>127</sup> Thus far, The Nature Conservancy of Louisiana has acquired 2,565 acres of pine flatwood wetlands.<sup>128</sup> The Nature Conservancy will continue to manage the sites or it will transfer them to another private organization or governmental agency that has a conservation mission.<sup>129</sup>

The Norfolk District has a similar arrangement with The Nature Conservancy. In a 1995 memorandum of understanding (MOU), the Norfolk District and The Nature Conservancy established the Virginia Wetlands Restoration Trust Fund.<sup>130</sup> Permittees may deposit money in the trust fund to compensate for impacts associated with nationwide permits “and in other cases if accepted by all involved parties.”<sup>131</sup> As of February 1999, the Norfolk District has required seventy-two contributions to the trust fund.<sup>132</sup> Most of the contributions came from projects authorized under nationwide permits, although sixteen enforcement actions were settled through use of the trust fund.<sup>133</sup> In exchange for the loss of 72.29 acres of wetlands, the trust fund accumulated over \$2.85 million.<sup>134</sup>

The Norfolk District maintains ultimate control of the trust fund. The Nature Conservancy recommends mitigation proposals to the Corps, which “will approve expenditures from the fund for wetland mitigation.”<sup>135</sup> The MOU sets forth a sliding scale for overhead fees paid to The Nature Conservancy for its acquisition work: “3% of the first \$500,000 of the purchase price . . . , 2% for

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permit).

<sup>126</sup> See New Orleans MOA, *supra* note 122, at 4.

<sup>127</sup> See *id.* at 5; FY 98 End of Year Report (Through June 30, 1998) SE Louisiana Pine Wetlands Mitigation Bank, at 3 (Feb. 2, 1999) (listing \$105,346 in expenses, including \$36,062 for salaries and benefits).

<sup>128</sup> See Martin, *supra* note 122, at 6.

<sup>129</sup> See New Orleans MOA, *supra* note 122, at 5.

<sup>130</sup> See Memorandum of Understanding Between The Nature Conservancy and the U.S. Army Corps of Engineers (1995) [hereinafter Norfolk MOU].

<sup>131</sup> See *id.* at 1.

<sup>132</sup> See Norfolk District, Sheet 1: Accruals as of Fed. 15, 1999 (data sheet listing, *inter alia*, projects, location, wetland impacts, contribution amount) [hereinafter Norfolk Information Sheet].

<sup>133</sup> See *id.* at 1-2.

<sup>134</sup> See *id.* at 3.

<sup>135</sup> Norfolk MOU, *supra* note 130, at 2.

the second \$500,000, and 1% for any amount greater than \$1,000,000 in purchase price.”<sup>136</sup> Thus far, the Norfolk District has committed only 17% of the trust fund (\$561,825) to mitigation projects.<sup>137</sup> The approved projects will provide 39 acres of restored wetlands, 200 enhanced acres, and 942 preserved acres.<sup>138</sup>

Another district having difficulty spending fee mitigation funds is Savannah. In 1997 the Savannah District entered into an agreement with the Georgia Land Trust Service Center and created the Georgia Wetland Trust Fund.<sup>139</sup> The purpose of the fund is to purchase and preserve high-quality wetlands.<sup>140</sup> As of December 1998, the fund contained approximately \$237,000, yet the Center had not acquired any wetlands.<sup>141</sup> The Georgia Land Trust Service Center had, however, deducted over \$13,500 for administrative fees.<sup>142</sup>

The Chicago District also oversees an extensive fee mitigation program, in which a single conservation organization has attained the government’s imprimatur. In 1997, the district and the Corporation for Open Lands, a not-for-profit entity, entered into an agreement that created a Wetlands Restoration Fund to be administered by the corporation.<sup>143</sup> The agreement and other publicly available Corps documents<sup>144</sup> refer to the corporation as “CorLands,” thereby suggesting an even greater identification with the permitting agency. According to a January 1999 report, the Chicago District accepted fee mitigation in 27 cases; 21.66 acres of wetlands were filled, and the fund collected just over \$1.3

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<sup>136</sup> *Id.* at 3. The Nature Conservancy is paid at an hourly rate upon which it and the Corps agree for restoration work. *See id.*

<sup>137</sup> *See* Norfolk District, Sheet 2: Projects (data sheet listing mitigation projects as of February 15, 1999).

<sup>138</sup> *See id.* In addition, the mitigation projects include 49.4 acres of upland buffers areas that are to be preserved and 5 acres of upland buffer that are to be restored. *See id.*

<sup>139</sup> *See* Agreement Between the Georgia Land Trust Service Center and the U.S. Army Corps of Engineers Savannah District (1997) [hereinafter Savannah Agreement].

<sup>140</sup> *See id.* at 5 (stating that the parties’ intent is to “maximize the funds that can be applied directly to the purchase and/or preservation of valuable wetlands” and anticipating that “the majority of the projects selected by the Service Center shall be preservation”).

<sup>141</sup> *See* Georgia Wetlands Trust Fund Interim Report 3 (Dec. 14, 1998). The Service Center did report that it was “actively working” on sites in four counties. *Id.*

<sup>142</sup> *See id.* at 1-3.

<sup>143</sup> *See* Agreement for the Administration of the Wetlands Restoration Fund Between the U.S. Army Corps of Engineers, Chicago District and Corporation for Open Lands (1997) [hereinafter Chicago Agreement].

<sup>144</sup> *See, e.g.,* U.S. Army Corps of Engineers, Chicago District, Offsite Mitigation Options - Apr. 1999 (listing mitigation options including mitigation banks, CorLands, and other site-specific projects) [hereinafter Chicago District Mitigation Options].

million.<sup>145</sup> This money will be used for aquatic restoration, monitoring and research, and education and technical assistance.<sup>146</sup> CorLands is entitled to an “overhead reimbursement” of 2% per deposit in the fund.<sup>147</sup> As is the case with other agreements, the district “retains the full authority to approve the use of fund monies and to approve proposed project parameters, restoration sites, and plans.”<sup>148</sup>

As of March 1999, the Chicago District has authorized the use of the fund for nine projects.<sup>149</sup> Although six projects seem to focus on enhancement and restoration effort,<sup>150</sup> a few emphasize education and monitoring. For example, CorLands will use the fund to pay for educating “members of the Prairie Ridge Homeowners Association and members of the general public as to the conservation value” of a particular high-quality wetland;<sup>151</sup> monitoring soil infiltration rates in prairie restoration projects;<sup>152</sup> and collecting data on stream areas for a future restoration plan.<sup>153</sup> While each of these may be a worthy project, the district’s actions raise questions about the Corps’ legal authority to raise, control, and direct these funds.

### 3. Agreements with Multiple Conservation Entities

Two Corps districts, on opposite sides of the country, have entered into formal fee mitigation agreements with multiple conservation organizations.<sup>154</sup> The Buffalo District is the more estab-

<sup>145</sup> See Chicago District, CorLands Wetlands Restoration Fund (Jan. 15, 1999).

<sup>146</sup> See Chicago Agreement, *supra* note 143, at 1-2.

<sup>147</sup> *Id.* at 3. The agreement suggests that this money “will be used primarily for the routine financial management aspects of the fund including quarterly status reports and an annual audited report.” *Id.*

<sup>148</sup> Chicago District Policies, *supra* note 100, at 1.

<sup>149</sup> See Chicago District, Project List, Wetland [sic] Restoration Fund, Status of Supported Projects (Mar. 1999).

<sup>150</sup> See *id.* (including the Oak Openings Riparian Corridor Restoration (1.7 acres restored); the Turner Lake Wetland Restoration (4.9 acres restored, 3.2 acres enhanced); Project Habitat Survival (.7 acres enhanced); Illinois Beach State Park Wetland Enhancement (19.8 acres enhanced); Redwing Slough Wetland Enhancement (30.9 acres enhanced); and the Indian Boundary Prairies Wetland Restoration Project (22 acres restored)).

<sup>151</sup> See *id.* at 3. Another component of the Prairie Ridge Fen project included 1.9 acres of enhancement. See *id.*

<sup>152</sup> See *id.* at 2. The Chicago District hopes “that conclusions from the analysis of the data may assist in the establishment of appropriate guidelines and permit conditions to improve success rates of wetland mitigation.” See *id.*

<sup>153</sup> See *id.* at 1. The sites studied and intended to be restored are owned by the St. Charles Park District and the Kane County Forest Preserve. See *id.*

<sup>154</sup> See U.S. Army Corps of Engineers - Buffalo District Regulatory Branch, In Lieu Fee

lished of the two and has arrangements with at least a dozen conservation organizations.<sup>155</sup> The Alaska District has agreements with four organizations.<sup>156</sup>

The Buffalo District may have the most comprehensive approach to fee mitigation in the nation. Prior to 1996, the Buffalo District conducted a fee mitigation pilot project that permitted fee mitigation on an ad hoc basis.<sup>157</sup> The Corps arranged for permittees to contribute money to the Ohio Department of Natural Resources and the Ohio and New York chapters of The Nature Conservancy.<sup>158</sup> Although the district concluded that these fee mitigation projects were cost-effective and environmentally beneficial, it was concerned that the ad hoc approach was time-consuming for all involved.<sup>159</sup>

To develop a more efficient program, the district compiled a list

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Arrangement Contribution Sheet (Feb. 12, 1999) [hereinafter Buffalo Contribution Sheet]; Agreement Between Kachemak Heritage Land Trust and the Regulatory Branch, U.S. Army Corps of Engineers, Alaska District to Establish a Fee-Based Compensatory Mitigation Program Under Section 404 of the Clean Water Act (1999) [hereinafter Kachemak Heritage Agreement]; Agreement Between Southeast Alaska Land Trust and the Regulatory Branch, U.S. Army Corps of Engineers, Alaska District to Establish a Fee-based Compensatory Mitigation Program Under Section 404 of the Clean Water Act (1998) [hereinafter SEAL Agreement]; Agreement Between the Great Land Trust and the Regulatory Branch, U.S. Army Corps of Engineers, Alaska District to Establish a Fee-Based Compensatory Mitigation Program Under Section 404 of the Clean Water Act (1998) [hereinafter Great Land Trust Agreement]; Agreement Between The Conservation Fund and the Regulatory Branch, U.S. Army Corps of Engineers, Alaska District to Establish a Fee-Based Compensatory Mitigation Program Under Section 404 of the Clean Water Act (1998) [hereinafter Conservation Fund Agreement]. In addition to the Buffalo and Alaska Districts, discussed *infra*, the Los Angeles District has entered into multiple fee mitigation agreements. *See, e.g.*, Memorandum of Agreement Regarding Establishment of the Santa Margarita Arundo Control Fund In-Lieu Fee Mitigation Program (Feb. 15, 1999). The agreement specifies that “the Corps retains full authority to approve or deny the use of Fund monies.” *Id.* at 2. The monies “will be solely used to restore and enhance aquatic resources by removal of . . . non-native species,” such as Arundo, Casto Bean, and Tamarisk. *Id.* at 1. The Los Angeles District uses the agreement as a “template” for other fee mitigation arrangements. *See* Telephone Interview with Fari Tabatabai, Environmental Scientist, Los Angeles District, U.S. Army Corps of Engineers (Feb. 4, 2000).

<sup>155</sup> *See* Buffalo Contribution Sheet, *supra* note 154 (listing fee mitigation recipients).

<sup>156</sup> *See* Kachemak Heritage Agreement, *supra* note 154; SEAL Agreement, *supra* note 154; Great Land Trust Agreement, *supra* note 154; Conservation Fund Agreement, *supra* note 154.

<sup>157</sup> *See* Buffalo Program Summary, *supra* note 100, at 2 (describing Phase I of the development of the fee mitigation program).

<sup>158</sup> *See id.* For example, the ODNR received funds to restore an 80-acre marsh, while The Nature Conservancy used contributions to purchase the Kitty Todd Preserve in Ohio and a site in Rome Sand Plain, New York. *See id.*

<sup>159</sup> *See id.*

of eighty-nine private organizations and governmental agencies within its jurisdiction that had a conservation and environmental protection mission.<sup>160</sup> The district sent each organization and agency a letter inquiring as to whether it was interested in participating in a fee mitigation program; twenty-six organizations returned the questionnaire and expressed interest.<sup>161</sup> The district developed a standard In Lieu Fee Arrangement Operational Agreement, which the organization and the district would sign.<sup>162</sup> The agreement and other documents provide that acquisition and preservation are the primary goals of the program.<sup>163</sup> Unlike other districts, the Buffalo District specifically limits the use of the funds to direct costs associated with title or a conservation easement.<sup>164</sup> The standard agreement emphasizes that fee mitigation funds may not be used to pay for salaries, advertising or public relations activities, or an organization's overhead costs.<sup>165</sup>

When an applicant seeks a permit (typically authorization under nationwide permit twenty-six), the Buffalo District may direct the applicant to conservation organizations that work near the proposed development project.<sup>166</sup> The applicant and the organization then negotiate an agreement, which the district reviews.<sup>167</sup> If the agreement is acceptable to the district, the project may proceed upon payment to the conservation organization. Since 1997, the Buffalo District has authorized the use of fee mitigation in forty-eight actions; in exchange for contributions of \$1.24 million, the district approved the filling of 56.1 acres.<sup>168</sup> The conservation organizations and governmental agencies that participate in this program have acquired approximately 150 acres of wetlands.<sup>169</sup>

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<sup>160</sup> See *id.* (describing Phase II of the development of the fee mitigation program).

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 3. Appendix B to the Buffalo Program Summary contains a sample agreement.

<sup>163</sup> See *id.* at 3 (providing that a "recipient organization is required to direct funds to aquatic resource acquisition and long term protection").

<sup>164</sup> See In Lieu Fee Arrangement Operational Agreement, Appendix B, ¶ 9 (identifying direct costs as "payment to the property owner, filing fees, title insurance, and a land survey").

<sup>165</sup> See *id.* ¶ ( 10; see also Buffalo Program Summary, *supra* note 100, at 6-7.

<sup>166</sup> See Buffalo Program Summary, *supra* note 100, at 2.

<sup>167</sup> See *id.*

<sup>168</sup> See Buffalo Contribution Sheet, *supra* note 154. Some permittees, however, apparently decided not to go forward with their projects because they did not pay the contribution amount.

<sup>169</sup> In response to the FOIA request, the district identified three sites that were acquired with the use of fee mitigation, the largest of which is The Nature Conservancy's 112-acre Tryon Tract, which is 65-70% wetlands. See The Nature Conservancy Fact Sheet on the

Because of the size of its jurisdiction, it is not surprising that the Alaska District has entered into a number of fee mitigation agreements with private organizations. The agreements state that permit applicants and violators may contribute to the funds, the former to satisfy compensatory mitigation obligations and the latter to resolve illegal fill or discharge activities.<sup>170</sup> Although the district signed its first agreement in 1998, at least one fund is beginning to accumulate money. The Great Land Trust, which works in south-central Alaska, has received over \$418,000 from two permittees that were allowed to fill about 12 acres of wetlands.<sup>171</sup> The Great Land Trust is reimbursed for direct costs and also charges a 2% fee for administering the program.<sup>172</sup> As of July 1999, The Great Land Trust had not yet purchased any wetlands but had begun the negotiation process.<sup>173</sup>

#### 4. Regional and Programmatic General Permits

Several districts have authorized, explicitly or implicitly, the use of fee mitigation through general permits. In addition to general permits issued at the national level, individual districts issue regional and programmatic general permits. Regional general permits authorize specific types of projects that have minimal environmental impacts. In contrast, programmatic general permits

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Tryon Tract at Deer Creek Marsh 1 (1998) (stating that The Nature Conservancy incurred \$24,700 in expenses in purchasing site); Letter from Jim Howe, Director of Conservation Programs, The Nature Conservancy to Kathy Ryan, U.S. Army Corps of Engineers 1 (Oct. 5, 1998) (thanking Corps for support of "in-lieu fee arrangement"). Additionally, the Chagrin River Land Conservancy acquired a ten-acre parcel (the Gottlieb parcel) along the Chagrin River and a sixty-five acre site in Newbury, Ohio (the Hess Project). *See* Summary of Chagrin River Land Conservancy's In Lieu Fee Operations Through March 1999 (Mar. 19, 1999) (noting use of \$21,150 in fee mitigation to help purchase conservation easement on the Gottlieb parcel; noting use of \$50,400 to help purchase conservation easement on the Hess Project).

<sup>170</sup> *See, e.g.*, Kachemak Heritage Agreement, *supra* note 154, at 1 (stating that the purpose is "to provide greater flexibility to applicants and violators").

<sup>171</sup> *See* Letter from Kevin Morgan, Project Manager to Tom Adams, P.E., Lounsbury and Associates, Inc. 1 (Mar. 23, 1999) (stating that the permittee elects to pay \$14,000 in exchange for authorization authorized to fill 2.35 acres of wetlands); Letter from Evie Whitton, Executive Director, The Great Land Trust, to Steve Van Horn, P.E., Alaska Department of Transportation and Public Facilities 1 (Mar. 16, 1999) (confirming receipt of "\$404,163 as compensatory mitigation for two Corps of Engineers wetland permits at Anchorage International Airport").

<sup>172</sup> *See* Great Land Trust Agreement, *supra* note 154, at 4. Each of the other agreements have the same provision. *See* Kachemak Heritage Agreement, *supra* note 154, at 3; SEAL Agreement, *supra* note 154, at 4; Conservation Fund Agreement, *supra* note 154, at 3.

<sup>173</sup> E-mail from Jean Downing to Royal C. Gardner (July 19, 1999) (transcribing voice mail message from Evie Whitten, Executive Director, The Great Land Trust).

allow a state or local governmental agency to assume primary responsibility for the federal permit decision.<sup>174</sup> After issuing a programmatic general permit, the Corps oversees the local permitting agency.<sup>175</sup> But, as a practical matter, an authorization at the local level suffices for the purpose of federal authorization as well.<sup>176</sup>

The Jacksonville District, which has used fee mitigation on an *ad hoc* basis,<sup>177</sup> has also expressly encouraged such contributions through regional general permits. Under General Permit 59, the district granted permission for construction of residential housepads and driveways in certain wetlands along the Tamiami Trail.<sup>178</sup> A special condition of the permit required applicants to enhance 1.5 acres of off-site wetlands for every acre of wetlands filled.<sup>179</sup> The permit suggested that the applicant could satisfy this enhancement requirement by making a contribution to the Dade County/Everglades National Park East Everglades Exotic Vegetation Control Program.<sup>180</sup> The program focuses on removing exotic species such as *Melaleuca*.<sup>181</sup> In 1995, based on the per-acre costs associated with *Melaleuca* control, applicants wishing to avail themselves of General Permit 59 had to contribute \$11,773 for

<sup>174</sup> See Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1281-84 (1995) (discussing different state programmatic general permit models).

<sup>175</sup> See *id.* at 1283-84.

<sup>176</sup> See *id.* The Corps' authority to issue programmatic general permits was recently upheld. See *Alaska Center for the Env't v. West*, 157 F.3d 680, 685-86 (9th Cir. 1998) (holding that the Corps did not improperly delegate authority to Municipality of Anchorage).

<sup>177</sup> The Jacksonville District recently authorized one of the largest projects (in terms of wetland acreage destroyed) ever to use fee mitigation to satisfy compensatory mitigation requirements. In exchange for a payment of more than \$1.2 million to Palm Beach County Environmental Resources Management, Lennar Homes was granted permission to fill 53.14 acres and excavate 22.6 acres of isolated freshwater wetlands. See U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT, DEP'T OF THE ARMY, PERMIT 199803381 (IP-RM), at 1-3 (Nov. 6, 1998); see also U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT, DEP'T OF THE ARMY, PERMIT 199801778 (IP-MD), at 1, 3 (February 23, 1999) (permitting 16.9 acres of waters to be filled on the condition that approximately \$220,000 be paid to the South Florida Water Management District's wetland mitigation fund).

<sup>178</sup> See U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT, DEPARTMENT OF THE ARMY, GENERAL PERMIT 59 (REVISION), at 1.

<sup>179</sup> See *id.* at 1.

<sup>180</sup> See *id.* at 2.

<sup>181</sup> See EAST EVERGLADES EXOTIC PLANT MANAGEMENT PROJECT, OPERATIONAL PLAN (June 1995). *Melaleuca* is native to Australia and has replaced native vegetation in hundreds of thousands of acres in the Everglades. See University of Florida, Institute of Food and Agricultural Sciences, Center for Aquatic and Invasive Plants, *Melaleuca* (visited Mar. 6, 2000) < <http://aquat1.ifas.ufl.edu/melainv.html> >.

each acre they filled.<sup>182</sup>

The oil and gas industry in the Vicksburg District has been spared similar expense. When reissuing a general permit for hydrocarbon exploration in 1987, the district required permittees to donate \$200 to a conservation organization or agency.<sup>183</sup> Depending on the depth of the gas well, an eligible project could affect up to one-half or one acre of wetlands.<sup>184</sup> The \$200 was a “flat fee” assessed regardless of the magnitude of the impacts.<sup>185</sup> Reauthorizing this general permit in 1993, the Vicksburg District listed fee mitigation as an option that the permittee could consider.<sup>186</sup> The 1993 general permit established \$300 per acre as the appropriate level of compensatory mitigation.<sup>187</sup> The 1998 general permit reauthorization retained fee mitigation as an option but omitted any reference to a fixed dollar amount per acre.<sup>188</sup>

Occasionally, a district will implicitly authorize fee mitigation when it issues a state programmatic general permit (“SPGP”). The Baltimore District’s SPGPs with Maryland and Pennsylvania acknowledge that the states may utilize fee mitigation programs.<sup>189</sup>

<sup>182</sup> See EAST EVERGLADES EXOTIC PLANT MANAGEMENT PROJECT, OPERATIONAL PLAN, *supra* note 181, at 3 n.2. The cost per acre in 1989 was \$2,003. See FEE-BASED MITIGATION CASE STUDIES, *supra* note 98, at 13.

Another example from the Jacksonville District is Regional General Permit SAJ-74, which applies to residential and commercial construction in portions of Dade County. See U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT, DEP’T OF THE ARMY, REGIONAL GENERAL PERMIT SAJ-74, at 1. Applicants again were expected to mitigate wetland impacts at a 1.5 ratio. See *id.* For every acre developed, an applicant would satisfy its compensatory mitigation obligation by writing a check for \$28,480 to Dade County’s Freshwater Wetland Mitigation Trust Fund. See *id.*

<sup>183</sup> See FEE-BASED MITIGATION CASE STUDIES, *supra* note 98, at 54.

<sup>184</sup> See *id.* at 55 (stating that for wells less than 4,000 feet deep, the general permit authorized one-half acre of impacts; for wells greater than 4,000 feet, one acre of impacts was permitted).

<sup>185</sup> See *id.* at 56.

<sup>186</sup> See U.S. ARMY CORPS OF ENGINEERS, VICKSBURG DISTRICT, DEP’T OF THE ARMY, GENERAL PERMIT CELMK-OD-FE 14-GPD (VICKSBURG DISTRICT)-19, at 4 (July 15, 1993).

<sup>187</sup> See *id.* The Delta Environmental Land Trust Association and the Delta Wildlife Foundation were identified as organizations approved to receive funds. See *id.*

<sup>188</sup> See U.S. ARMY CORPS OF ENGINEERS, VICKSBURG DISTRICT, DEP’T OF THE ARMY, GENERAL PERMIT-19, at 3 (Dec. 28, 1998) (stating that acceptable mitigation included a “letter from an approved organization” that agreed to implement restoration or enhancement projects).

<sup>189</sup> See U.S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT, DEP’T OF THE ARMY, MARYLAND STATE PROGRAMMATIC GENERAL PERMIT, at 2 (May 6, 1996) (effective July 1, 1996) (citing Maryland’s Nontidal Wetlands Protection Act, MD. CODE ANN., ENVIR. § 5-901 et seq.) (containing MD. CODE ANN., ENVIR. § 5-909, specifically authorizing fee mitigation when other mitigation alternatives are not feasible); U.S. ARMY

One of the major differences between a federal and a state fee mitigation program is that the Corps directs funds to government agencies and private conservation organizations, while the states typically channel the money into their own coffers. The next section explores state fee mitigation programs in greater depth.

### B. State Fee Mitigation

At least seven states have expressly authorized fee mitigation by statute or regulation.<sup>190</sup> Some have done so recently (Louisiana,<sup>191</sup> Maine,<sup>192</sup> and North Carolina<sup>193</sup>) and consequently have little ac-

CORPS OF ENGINEERS, BALTIMORE DISTRICT, DEP'T OF THE ARMY, PENNSYLVANIA STATE PROGRAMMATIC GENERAL PERMIT 1 (December 1995) (citing 25 PA. Code § 105 (WESTLAW 2000) (acknowledging in Appendix O the availability of fee mitigation in the limited circumstance of private residential construction on parcels purchased prior to November 22, 1991)); Letter from Alfonsa Gilley, Freedom of Information Act Attorney, the U.S. Army Corps of Engineers, Baltimore District, to Royal C. Gardner 1 (July 27, 1999) (noting that Maryland and Pennsylvania each have "an in lieu fee process that is honored by the Corps").

<sup>190</sup> See FLA. STAT. ANN. § 373.414(1)(b) (WESTLAW 1999); LA. ADMIN. CODE tit. 43, § 724.J.5.a.iii (WESTLAW 2000); 38 ME. REV. STAT. ANN. tit. 38, § 480-Z (WESTLAW 1999); MD. CODE ANN., ENVIR. § 5-909 (1999 Supp.); N.J. STAT. ANN. § 13:9B-13(c) (West 1991); N.C. GEN. STAT. § 143-214.11(d) & .12(b) (WESTLAW 1999); and 25 PA. CODE 5 105, Appendix O (WESTLAW 2000).

<sup>191</sup> See LA. ADMIN. CODE tit. 43, § 724.J.5.a.iii. If a permit applicant's project qualifies for a general permit or affects 5 acres or less, the applicant may propose a "monetary contribution" as compensatory mitigation. *See id.* The contribution may be paid to an affected landowner or parish or the Louisiana Wetlands Conservation and Restoration Fund. *See id.* at § 724.E.1.d.

<sup>192</sup> See 38 ME. REV. STAT. ANN. tit. 38, § 480-2 (authorizing establishment of compensation fund to pay for wetland mitigation projects).

<sup>193</sup> See N.C. GEN. STAT. § 143-214.11(d) & .12(b). The North Carolina General Assembly enacted the North Carolina Wetlands Restoration Program ("NCWRP") in 1996; the NCWRP administers the Wetlands Restoration Fund. *See id.* § 143-214.8. The Fund may receive appropriated funds, monetary contributions, donations of land, and grants. *See id.* § 143-214.12(a). The Fund may be used for restoration, enhancement, creation, and preservation of wetland and riparian areas. *See id.*

In November 1998, the Corps' Wilmington District entered into an agreement with the NCWRP concerning the use of fee mitigation. *See* Memorandum of Understanding Between the North Carolina Department of Environment and Natural Resources and the United States Army Corps of Engineers, Wilmington District (1998) [hereinafter North Carolina MOU]. If the Corps deems fee mitigation to be appropriate compensatory mitigation, it will specify what the mitigation must provide in terms of: amount of acreage, the type of wetland, its functions, its location, and whether the project is restoration, enhancement, creation, or preservation. *See id.* at 3-4.

If the NCWRP agrees to provide the mitigation, the Corps will provide it a copy of the issued permit. *See id.* at 4. The NCWRP will then send an invoice to the permittee. *See id.* For wetlands (other than "SWL wetlands"), a permittee will pay \$12,000 per acre for non-riparian wetlands and \$24,000 per acre for riparian wetlands. *See* N.C. ADMIN. CODE tit. 15A, r.2R.0402 (schedule of fees) (WESTLAW 1999). For Class SWL wetlands, which include coastal wetlands and wetlands contiguous to estuarine waters, a permittee will pay

tivity to report. Because Pennsylvania authorizes the filling of so few acres and focuses on restoration projects, its fee mitigation program is relatively small.<sup>194</sup> The following programs in other states, which have longer histories and greater numbers of fill permits, have generated millions of dollars.

### 1. New Jersey

Although New Jersey has one of the oldest state fee mitigation programs, it is among the least active with respect to applying the funds to environmental projects. In 1987, the New Jersey legislature passed a law allowing the New Jersey Department of Environmental Protection to accept cash contributions as a form of compensatory mitigation for impacts to freshwater wetlands.<sup>195</sup> The contributions go to the Wetlands Mitigation Bank, which is not a “mitigation bank” as that term is now defined,<sup>196</sup> but rather a governmental entity that is managed by the Wetlands Mitigation Council.<sup>197</sup> The Council, which has seven appointed members,

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\$120,000 per acre. *See id.* The Corps-NCWRP agreement states that the Corps will consider fee mitigation “on a case-by-base basis.” North Carolina MOU, *supra*, at 4.

<sup>194</sup> Pennsylvania accepts fee mitigation pursuant to a general permit for private residential construction, which is codified at 25 PA. CODE § 105, Appendix O (WESTLAW 2000). Projects that only affect a half-acre of nontidal wetlands or less may qualify for participation if the project parcel was purchased prior to November 22, 1991. The money is deposited into a fund, the Pennsylvania Wetland Replacement Project (“PWRP”), which is managed by the Pennsylvania Department of Environmental Protection (“DEP”) and the National Fish and Wildlife Foundation. *See id.* The contribution rate is \$7,500 for projects affecting .40 to .50 acres, \$5,000 for projects affecting .30 to .40 acres, \$2,500 for projects affecting .20 to .30 acres, \$1,000 for projects affecting .10 to .20 acres, and \$500 for projects affecting .05 to .10 acres. *See id.* at (D)(9)(b). There is no contribution required for impacts of less than .05 acres. *See id.*

In 1997, the DEP approved 70 permits, each involving less than .05 acre impacts, that resulted in a total of 2.2 acres of impacts. *See* Bureau of Water Quality Protection, Division of Waterways, Wetlands and Erosion Control, 1997 Program Summary, Attachment 3 (table summarizing chapter 105 wetland permitting). Another 43 permits (for projects affecting between .05 and .5 acres) were also approved, resulting in an 8.8-acre loss. *See id.* Since the PWRP’s inception in 1996, Pennsylvania DEP has spent approximately \$250,000 on fourteen projects that restored 41.4 acres of wetlands. *See* PWRP STATUS REPORT, *supra* note 98, at 1.

<sup>195</sup> *See* Freshwater Wetlands Protection Act, N.J. STAT. ANN. § 13:9B-13(c) (West 1991) (effective July 1, 1988). NJDEP’s regulations state that cash donation should only be considered if “other forms of mitigation are not feasible onsite or offsite in the same watershed.” N.J. ADMIN. CODE, tit. 7, § 7A-14.2(a)(4) (WESTLAW 1999). In this context, feasibility includes “a determination of whether other types of mitigation would be as beneficial as the donation.” *Id.*

<sup>196</sup> *See supra* note 3. New Jersey’s “Bank” does not provide mitigation in advance of developmental impacts. As discussed below, it is not yet providing mitigation after impacts.

<sup>197</sup> *See* N.J. STAT. ANN. § 13:9B-14(b).

must approve the use of the collected contributions.<sup>198</sup> The Council may authorize disbursement for a number of projects: to acquire privately owned freshwater wetlands for purposes of restoration, enhancement, and preservation; to restore or enhance publicly owned freshwater wetlands; to contract with private conservation organizations or other governmental agencies to conduct mitigation projects; or to transfer funds to a state or federal conservation agency for mitigation or research activities.<sup>199</sup>

Since 1993, the fund has accumulated just over \$3 million from thirty-eight applicants and violators.<sup>200</sup> An additional \$1.655 million is pending.<sup>201</sup> The money; however, is not being spent on mitigation projects; indeed, included in the \$3 million figure is \$383,000 in dividends and interest.<sup>202</sup> While this sort of return might please a risk-adverse individual investor, it does nothing to alleviate the impacts of the permitted development projects.

Part of the difficulty flows from the cumbersome decision-making process. For example, in October 1997, the Council issued a request for proposals and announced that it was contemplating eight \$300,000 grants.<sup>203</sup> Each prospective grant recipient was required to commit matching funds to its proposed programs.<sup>204</sup> The Council received twelve grant proposals by the December deadline; one applicant later withdrew.<sup>205</sup> After formal presentations in March and April, the Council voted in May 1998 to award two

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<sup>198</sup> *See id.* at § 13:9B-15. The Council members, who serve without compensation, are appointed by the Governor. *See id.* at § 13:9B-14(b). In addition to the Commissioner of Environmental Protection, six members of the general public must serve on the Council. *See id.* Two members must be recommended by "recognized building and development organizations," two must be recommended by "recognized environmental and conservation organizations," and two must be from New Jersey "institutions of higher learning." *Id.*

<sup>199</sup> *See id.* at § 13:9B-15(a)-(c). The New Jersey legislature added the authority for enhancement projects and projects on public lands in a 1993 amendment. *See* 1993 N.J. Laws, c.298, § 6.

<sup>200</sup> *See* The Wetlands Mitigation Fund c/o Natural Lands Management as of 4/29/99 (data sheet) (listing 32 payments from violators and 35 payments from permittees) [hereinafter N.J. Data Sheet].

<sup>201</sup> *See id.* at 5. The bulk of the money is due from Woodhaven Village (\$1.425 million) to settle an enforcement action and from AT & T (\$230,230) to satisfy permit mitigation obligations. *See id.*

<sup>202</sup> *See id.* at 5.

<sup>203</sup> *See* Resolution of the New Jersey Wetlands Mitigation Council Conditionally Approving Two of the Mitigation Grant Proposals to Use Wetland Mitigation Fund Money to Perform Mitigation 1 (May 21, 1998) [hereinafter N.J. Council Resolution].

<sup>204</sup> *See id.* (noting October announcement that listed necessary items for grant proposals).

<sup>205</sup> *See id.* at 2.

conditional grants.<sup>206</sup> One project involves five acres of restoration and creation with forty-three acres of preservation,<sup>207</sup> and the other intends to enhance 3.5 acres, create 3.5 acres, and preserve fifty-four acres of wetlands.<sup>208</sup> Since the Council's approval, however, one grant recipient has withdrawn its proposal.<sup>209</sup>

## 2. Maryland

The Maryland legislature established a Nontidal Wetland Compensation Fund in 1989.<sup>210</sup> Court-imposed penalties from violators and fee mitigation from permit applicants are deposited into the Compensation Fund.<sup>211</sup> Permit applicants may use fee mitigation for impacts to nontidal wetlands when on-site mitigation is not feasible.<sup>212</sup> The Maryland Department of the Environment may use the funds "only for the creation, restoration, or enhancement projects of a nontidal wetland."<sup>213</sup>

In stark contrast to New Jersey, Maryland actually spends the money it collects. By February 1999, the Maryland Department of the Environment had completed twenty-three projects, spending approximately \$831,000 to create or restore 79.72 acres of nontidal wetland.<sup>214</sup> An additional eight projects (involving over fifty-three acres) were planned for summer 1999.<sup>215</sup>

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<sup>206</sup> See *id.* at 2-6. The Freshwater Wetlands Protection Act provides that Council action requires "the affirmative vote of a majority of the full membership." N.J. STAT. ANN. § 13:9B-14c (1991). Since the Council has seven members, at least four members must have been present and have voted in the affirmative for the Council to have taken action. See N.J. STAT. ANN. § 13:9B-14c (1991).

<sup>207</sup> See N.J. Council Resolution, at 4 (Friends of the Rockaway River proposal).

<sup>208</sup> See *id.* at 4-5 (New Jersey Conservation Foundation Proposal).

<sup>209</sup> See Telephone Interview with Virginia Kop'kash, NJDEP Staff to the Freshwater Wetlands Mitigation Council, Trenton, N.J. (July 1999).

<sup>210</sup> See MD. CODE ANN., ENVIR. § 5-909 (Supp. 1999).

<sup>211</sup> See *id.* at § 5-909(c)(2).

<sup>212</sup> See *id.* at § 5-909(b)(2). The Maryland Department of the Environment's regulations provide additional details concerning the appropriate use of fee mitigation. The Fund may be used only when: (1) "the size of the nontidal wetland loss is less than 1 acre;" (2) mitigation is "technically infeasible" because of the type of wetland (*e.g.*, bogs, spring seeps, vernal pools); (3) "[a]n acceptable mitigation site" cannot be located within the county; or (4) "[t]he Department recommends the use of the compensation fund." MD. REGS. CODE tit. 26, § 23.04.07(C) (WESTLAW 2000).

<sup>213</sup> MD. CODE ANN., ENVIR. § 5-909 (c)(3) (1996 & 1999 Supp.).

<sup>214</sup> See Maryland Department of the Environment, Programmatic Mitigation, Project Status, February 1999, at 5.

<sup>215</sup> See *id.* at 6-7.

### 3. Florida

Florida law identifies a number of options for mitigation of projects affecting wetlands: on-site mitigation, off-site mitigation, and mitigation banks.<sup>216</sup> Florida law also expressly authorizes wetland permitting agencies, such as water management districts, to accept cash donations as mitigation.<sup>217</sup> The water management districts may accept fee mitigation, provided that the money is collected for a specified creation, preservation, enhancement, or restoration project.<sup>218</sup> The amount of the fee mitigation may include all direct and indirect costs incurred by the district, including “general overhead consisting of costs such as staff time, building, and vehicles.”<sup>219</sup> Two of Florida’s five water management districts have elected to receive fee mitigation.<sup>220</sup> In a two-year period beginning in July 1997, the two districts have collected over \$16.1 million.<sup>221</sup>

The South Florida Water Management District uses its fee mitigation (approximately \$8.696 million) to assist in the implementation of the Save Our Rivers (“SOR”) program.<sup>222</sup> The SOR pro-

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<sup>216</sup> See FLA. STAT. ANN. § 373.414(1)(b) (WESTLAW 1999).

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

<sup>219</sup> *Id.*

<sup>220</sup> See Note from Carliane Johnson, Office of the Governor, to Royal C. Gardner (Aug. 8, 1999).

<sup>221</sup> For money collected by the South Florida Water Management District (“SFWMD”), see Memorandum from Terrie Bates, Director, Regulation Department, to Samuel E. Poole III, Executive Director 6-7 (Jan. 26, 1998 (amended Mar. 31, 1999)) (reporting that SFWMD received over \$1.93 million in the last half of 1997); Memorandum from Terrie Bates, Director, Regulation Department, to Samuel E. Poole III, Executive Director 5-6 (July 31, 1998) (reporting that SFWMD received over \$1.84 million in the first half of 1998); Memorandum from Terrie Bates, Director, Regulation Department, to Samuel E. Poole III, Executive Director 6-7 (Jan. 29, 1999) (reporting that SFWMD received over \$2.69 million in the last half of 1998); Memorandum from Terrie Bates, Director, Regulation Department, to Frank R. Finch, P.E., Executive Director 6-7 (July 30, 1999) (reporting that SFWMD received over \$2.23 million in the first half of 1999).

For money collected by the St. Johns River Water Management District (“SJRWMD”), see Memorandum from Jeff Elledge, Department Director, to Henry Dean, Executive Director 4 (Jan. 30, 1998) (reporting that SJRWMD received over \$464,000 in the last half of 1997); Memorandum from Jeff Elledge, Department Director, to Henry Dean, Executive Director 4 (July 29, 1998) (reporting that SJRWMD received over \$468,000 in the first half of 1998); Memorandum from Jeff Elledge, Department Director, to Henry Dean, Executive Director 5 (Jan. 20, 1999) (reporting that SJRWMD received over \$6.05 million in the last half of 1998); Memorandum from Jeff Elledge, Department Director, to Henry Dean, Executive Director 4 (July 20, 1999) (reporting that SJRWMD received over \$482,000 in the first half of 1999).

<sup>222</sup> See, e.g., January 1998 Bates Memorandum, *supra* note 221, at 1 (explaining that fee mitigation is used to implement two mitigation projects that are part of SFWMD’s SOR

gram authorizes water management districts to purchase and manage environmentally sensitive lands.<sup>223</sup> The district has directed that fee mitigation funds be used to acquire lands in the Pennsuco Wetland Area on the east coast and lands in the Corkscrew Regional Ecosystem Watershed on the west.<sup>224</sup> In its semi-annual report to the Governor, the district noted that applicants that use the fee mitigation option “usually do so because of the expediency and simplicity of this form of mitigation.”<sup>225</sup> The report also observes that district-sponsored fee mitigation is less expensive than other mitigation alternatives, including mitigation banks.<sup>226</sup>

The St. Johns Water Management District has applied its mitigation fees to at least fourteen ongoing mitigation projects.<sup>227</sup> The district’s focus, like that of the South Florida Water Management District, is the acquisition and preservation of environmentally valuable sites. For example, at an April 1998 conference, a St. Johns representative reported that fee mitigation was used to purchase over 1100 acres of wetlands and uplands and to secure conservation easements over another 590 acres.<sup>228</sup> The fee mitigation would be used to enhance or restore only about thirty acres.<sup>229</sup>

#### IV. THE DANGERS OF FEE MITIGATION

As the previous Part demonstrated, the popularity of fee mitigation is growing. The many federal and state wetland-protection agencies that promote fee mitigation view it as an environmentally sound option for compensatory mitigation. Developers often favor fee mitigation because of its relatively low cost and administrative ease. Even many environmental groups, especially those that are managing the fee mitigation accounts, support fee mitigation. Despite this support from disparate quarters, if fee mitigation programs are not properly structured, the environmental costs of fee

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1998 Plan).

<sup>223</sup> See FLA. STAT. ANN. § 373.59 (WESTLAW 1999) (establishing Water Management Lands Trust Fund). The trust fund for the SOR program is replenished by monies collected from a documentary stamp tax and Preservation 2000 funds. See SOUTH FLORIDA WATER MANAGEMENT DISTRICT, SAVE OUR RIVERS: 1999 LAND ACQUISITION AND MANAGEMENT PLAN 1.

<sup>224</sup> See Jan. 1998 Bates Memorandum, *supra* note 221, at 2-4.

<sup>225</sup> July 1999 Bates Memorandum, *supra* note 221, at 1.

<sup>226</sup> See *id.* at 1-2.

<sup>227</sup> See Jan. 1998 Bates Memorandum, *supra* note 221, at 1-2.

<sup>228</sup> See Jennifer S. Cope, Environmental Specialist, SJRWMD, *Donating Money for Mitigation* (presented at the Terrence institute’s First Mitigation Banking Conference, Washington, D.C., April 1998).

<sup>229</sup> See *id.*

mitigation (especially its impact on mitigation banking) may outweigh its benefits. Furthermore, a regulatory agency's reliance on fee mitigation raises ethical and legal questions. This Part examines the environmental drawbacks, conflict of interests issues, and legal concerns associated with fee mitigation. It concludes with a review of pending legislative and administrative proposals regarding fee mitigation and with recommendations to limit the use of fee mitigation.

#### *A. The Environmental Case Against Fee Mitigation*

Fee mitigation is not an intrinsic evil. Indeed, in many cases fee mitigation is an improvement over traditional, developer-provided mitigation. Because developer-provided mitigation often fails, the regulatory agencies and the public receive little or nothing in terms of compensatory mitigation.<sup>230</sup> At least with fee mitigation there is a greater likelihood of success, especially if the money is simply used for preservation activities. Fee mitigation also makes it easier for agencies to require mitigation for small impacts, such as those resulting from projects authorized by general permits. This too is environmentally preferable; at least the agencies are taking some steps to offset the cumulative impact of these minor projects.<sup>231</sup> Yet, despite these advantages over traditional mitigation, one must not overlook the negative consequences of fee mitigation.

First, by definition, fee mitigation is not advance mitigation but rather mitigation provided after project impacts. One of the dangers of after-the-fact mitigation is that it may never come to fruition. The funds may never be spent, or years may pass until the funds are devoted to environmental projects. New Jersey's experience offers an instructive warning. Although New Jersey has been collecting funds for over six years, it has had great difficulty in identifying and approving projects. Only one mitigation project is presently slated for funding, and the grant amount, \$300,000, does not even touch the principal in New Jersey's account.<sup>232</sup>

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<sup>230</sup> See *supra* note 2.

<sup>231</sup> Additionally, consolidated mitigation sites are easier for regulatory agencies to monitor. See 1999 NWP Proposal, *supra* note 85, at 39,271 (recognizing that fee mitigation and mitigation banking "may make monitoring efforts more manageable because those efforts can be focused on a smaller number of large sites instead of a large number of small individual mitigation projects").

<sup>232</sup> See generally *supra* notes 195-209. New Jersey's approach lends itself to delay and a lag time between project impacts and functioning mitigation. New Jersey first accumulates the funds and then seeks spending opportunities by calling for requests for proposal. A better process involves the regulatory agency identifying specific mitigation projects

Of course, spending money in a timely manner does not guarantee that the funds will be used to offset project impacts - wetland losses - in a meaningful, direct way. Some regulatory agencies, such as the Chicago District, may use the money for monitoring and research projects rather than for immediate restoration, enhancement, creation, or preservation activities.<sup>233</sup> Moreover, as we have seen, fee mitigation funds are sometimes used for educational purposes, such as contributing to the construction of viewing stations on publicly-owned land<sup>234</sup> and to the Louisville Zoo Wetlands Exhibit.<sup>235</sup> Although education of the general public about the value of wetlands is an important goal, it is ironic that the authorized destruction of wetlands is subsidizing some of these efforts.

Another criticism of fee mitigation is that, when the funds are actually spent on mitigation efforts, those projects are frequently devoted to acquiring and preserving wetland sites. Preservation alone does not contribute to the policy of no net loss.<sup>236</sup> If a developer fills five acres of wetland in exchange for agreeing to preserve ten acres, the immediate net result is still a loss of five acres. If a developer fills five acres on the condition that it restore ten acres, the net result (over time, if the mitigation is successful) is a gain of five acres. Accordingly, in other regulatory contexts such as mitigation banking, the agencies emphasize restoration and discourage preservation.<sup>237</sup>

This criticism, however, misses the mark. A fee mitigation program that relies on preservation does provide a critically important environmental benefit. Almost all privately-owned wetlands are or will be under the threat of development.<sup>238</sup> Regulatory programs, such as the Clean Water Act section 404 program, erect

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before issuing a permit. While this approach is more work-intensive (at least at the front-end of the process), it ensures that the funds contributed are used in a timely manner.

<sup>233</sup> Of course, the Corps may assert that environmental benefits will accrue in the long term from increased wetland knowledge, but the Corps' control of the funds raises appropriation law issues. See generally *infra* notes 257-288 and accompanying text.

<sup>234</sup> See *supra* notes 106-108 and accompanying text.

<sup>235</sup> See *supra* notes 109-111 and accompanying text.

<sup>236</sup> See Robin Mann, *A Lieu-Lieu Policy with Serious Shortcomings*, 21 NAT'L WETLANDS NEWSL. (Env'tl. L. Inst.) 5, 11 (July/Aug. 1999) ("Many conservationists and resource agency staff argue that reliance on preservation results in a net loss of wetland acreage, function, and value.").

<sup>237</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,608 (identifying restoration as "the first option" and accepting preservation-only banks "only in exceptional circumstances").

<sup>238</sup> It is estimated that 75% of wetlands in the contiguous United States are privately owned. See Gardner, *supra* note 1, at 542; H.R. 1290, 106th Cong., § 2 (1999).

significant hurdles to development, but it is chimerical to conclude that a wetland, by virtue of Clean Water Act jurisdiction, is “federally protected.” The wetland is protected by a permit requirement. Before destroying the wetland, a developer must seek and obtain permission from the government, and that permission is usually forthcoming. To be sure, the government does not always allow a developer to proceed with the project as originally envisioned, and the agencies may extract more compensatory mitigation than the developer believes is justified. Nevertheless, permit statistics establish that most projects go forward.<sup>239</sup> Thus, the Corps reports that we lose over 36,000 acres of “federally protected” waters each year.<sup>240</sup>

The most effective means of protecting these aquatic resources is the elimination of the threat of development. The threat of development is only extinguished when a governmental conservation agency or private conservation entity purchases the wetland, acquiring either a fee title or a conservation easement. Thus, when a developer fills five acres of a degraded or low-functioning wetland in exchange for paying for the costs to preserve ten acres of high-quality wetlands, there is indeed a long-term benefit for the environment: those ten acres will never be filled for development.<sup>241</sup> Accordingly, preservation by any means, whether on an ad hoc basis or as part of a fee mitigation or mitigation bank program, ought to be supported and encouraged by the regulatory agencies. Unfortunately, the agencies presently encourage preservation only in the context of fee mitigation. Preservation in the mitigation banking context is emphatically discouraged.

Regulatory agencies control both the demand for and the supply of mitigation.<sup>242</sup> Demand is created when an agency requires compensatory mitigation in exchange for granting a permit or settling an enforcement action. The supply side involves agency approval

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<sup>239</sup> See Davis, A More Effective and Flexible Section 404, *supra* note 43, at 9 (noting that fewer than 1% of individual Clean Water Act section 404 permit applicants receive permit denials).

<sup>240</sup> See 1998 NWP Proposal, *supra* note 11, at 36,042 (stating that in 1997 the Corps granted permission for filling of 15,989 acres through individual permits and 21,409 acres through general permits).

<sup>241</sup> Some states, however, may limit the duration of conservation easements. See Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Programs*, 43 CASE W. RES. L. REV. 401, 404-05 (1993). In these states title to the area should be transferred to an agency or organization dedicated to ensuring that the area will be off limits to development in perpetuity.

<sup>242</sup> See Shabman, *supra* note 61, at 16-18.

of mitigation options, whether developer-provided mitigation, fee mitigation, or mitigation banks. When administering a regulatory program, an agency must be careful not to discourage environmentally preferable behavior by creating conditions that inadvertently affect mitigation demand or supply. The disparate treatment of fee mitigation and mitigation banks may lead to this regrettable result.

On the demand side, agencies make accommodations for fee mitigation entities that they do not make for mitigation bankers. The mitigation banking federal guidance explains that mitigation banking is only appropriate “for the purpose of providing compensatory mitigation in advance of authorized impacts,” meaning impacts from a project that has expressly received agency approval.<sup>243</sup> Credits from a mitigation bank are therefore not available to a violator who illegally fills a wetland and who must restore, enhance, create, or preserve wetlands as part of an enforcement action. Federal and state agencies, however, do permit violators to settle enforcement actions by writing a check to a fee mitigation entity. For example, the Norfolk District relied on fee mitigation to dispose of sixteen enforcement actions, generating over \$504,000 for the Virginia Wetland Restoration Trust Fund.<sup>244</sup> New Jersey has accepted \$428,525 from violators for its fund.<sup>245</sup> In this way, the demand side of the mitigation equation is tipped in favor of fee mitigation.

Similarly, fee mitigation receives special treatment on the supply side. A mitigation banker must negotiate the labyrinth of the multi-agency MBRT process.<sup>246</sup> A mitigation banker must prepare a detailed banking instrument;<sup>247</sup> however, conservation organizations wishing to oversee a fee mitigation fund are not required to go through the MBRT process. Rather than dealing with a myriad of agencies, they simply work out an arrangement with the local Corps district.<sup>248</sup> Similarly, mitigation programs operated by state

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<sup>243</sup> Federal Mitigation Banking Guidance, *supra* note 3, at 58,607.

<sup>244</sup> See Norfolk information Sheet, *supra* note 132, at 1-2, The Alaska District’s agreements also contemplate collecting money from violators. See Kachemak Heritage Agreement, *supra* note 170 and accompanying text.

<sup>245</sup> See N.J. Data Sheet, *supra* note 200, at 1-5.

<sup>246</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,610. See also *supra* notes 19-37 and accompanying text.

<sup>247</sup> See *id.*

<sup>248</sup> See, e.g., Norfolk MOU, *supra* note 130; Savannah Agreement, *supra* note 139; Chicago Agreement, *supra* note 143; Kachemak Heritage Agreement, *supra* note 154; SEAL Agreement, *supra* note 154; Great Land Trust Agreement, *supra* note 154; Conservation

agencies are not burdened by the MBRT process.

Mitigation banks (whether entrepreneurial or not) compete with fee mitigation programs. A mitigation bank sponsor and an entity administering a fee mitigation fund seek the same dollars to recover costs (for the former) or to pay for future projects (for the latter). A permit applicant will naturally gravitate toward the least-cost alternative. Regulatory agencies authorizing the use of fee mitigation have created a situation in which fee mitigation organizations have several advantages over mitigation bankers. For fee mitigation, preservation (or, even worse, educational endeavors) is acceptable and usually less expensive than restoration, enhancement, or creation projects; preservation banks are viewed skeptically. Fee mitigation administrators may accept money from violators; bankers may not. Fee mitigation administrators typically do not face a lengthy approval process for the establishment of funds, as mitigation bankers do. These advantages allow fee mitigation to be offered at a lower cost than credits from a mitigation bank.<sup>249</sup>

Why should one care if mitigation bankers are undercut by a fee mitigation program? First, as the regulatory agencies recognize, mitigation banking is a significant improvement over traditional compensatory mitigation efforts.<sup>250</sup> Second, and more important in this context, mitigation banking is environmentally preferable to fee mitigation because banking involves advance mitigation. One of the principal benefits of mitigation banking is that the mitigation is generally-in place (or at least targets have been met) before project impacts occur. Yet, by favoring fee mitigation to the detriment of mitigation banks, the regulatory agencies may discourage the private sector from investing more in wetland restoration, enhancement, creation, and preservation. The rise of fee mitigation programs may severely limit the environmental benefits associated with mitigation banks.

### *B. The Ethical Case Against Fee Mitigation*

Fee mitigation raises two types of conflict-of-interests issues.

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Fund Agreement, *supra* note 154.

<sup>249</sup> See David T. Urban and John H. Ryan, *A Lieu-Lieu Policy with Serious Shortcomings*, 21 NAT'L WETLANDS NEWSL. (Env'tl. L. Inst.) 5, 10 (July/Aug. 1999) (stating that "[t]he Chicago district's in-lieu-fee program set prices below the price of the seven existing mitigation banks, thereby undercutting the market for mitigation bank credits").

<sup>250</sup> See Federal Mitigation Banking Guidance, *supra* note 3, at 58,607 (listing advantages of mitigation banking). See also *supra* notes 39-50 and accompanying text.

First, a conflict may exist when regulatory agencies solicit contributions for a government-controlled fund. The permit applicant is well aware that the agency has the power to kill the proposed project outright by denying a permit or by allowing it to wither on the vine by withholding a decision.<sup>251</sup> While the agency may note that fee mitigation is only one of several mitigation options available to the applicant,<sup>252</sup> most applicants simply wish to proceed as quickly and as cheaply as possible. Thus, a great incentive exists for an applicant to please the regulators by making a donation to the agency's favorite charity: itself. But what is best for the agency is not necessarily best for the environment.

This conflict of interests is most clear in state fee programs where the checks are made out to the government. The state government grants the permit on the condition that it receives payment. Even in the federal fee mitigation programs, where the Corps districts never have physical possession of the funds, this possible conflict of interests survives. Most fee agreements provide that the Corps district must approve the expenditure of the funds. For example, the Norfolk District's agreement with The Nature Conservancy emphasizes that the private organization is acting "as a passive recipient" of the money, which may be spent only after the district approves specific projects.<sup>253</sup> The Nature Conservancy's role is in effect that of a government contractor. Similarly, the Chicago District "retains full authority to approve the use of Fund monies."<sup>254</sup> The name of the Chicago District's partner further exacerbates the conflict of interest by conflating the permit decision-maker (the Corps) with the recipient of the permittees' funds (CorLands).

A second type of conflict of interests involves the regulatory agency's relationship with mitigation bankers. By operating or overseeing a fee mitigation fund, the agency competes with mitigation bankers, whom they also regulate, for the same dollars. Of course, the agency stands in a dominant position, by virtue of its status as decision-maker and its control over the demand for and supply of mitigation. This conflict is intensified when one considers how some agencies use the fee mitigation funds. The money

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<sup>251</sup> See Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* at ix (Beveridge & Diamond, P.C. 1994).

<sup>252</sup> See Chicago District Mitigation Options, *supra* note 144, at 1 (listing mitigation banks, in-lieu fee mitigation, and other site-specific projects or actions as options).

<sup>253</sup> Norfolk MOU, *supra* note 130, at 1.

<sup>254</sup> See Chicago District Policies, *supra* note 100, at 1.

may be available for research and education projects.<sup>255</sup> Thus, a mitigation banker is not simply competing against other restoration, enhancement, creation, or preservation projects, but against an agency's pet projects that have not received full funding through the ordinary appropriations process. While this conflict should at least raise the eyebrow of an ethics advisor, it also raises legal concerns that will be examined in the next section.

### *C. The Legal Case Against Fee Mitigation*

The Corps of Engineers, unlike some state wetland-protection agencies, lacks the express legal authority to oversee fee mitigation funds. Of course, the absence of specific legislative authorization does not necessarily mean that the Corps is acting unlawfully. Often the administrative details of a program are left to an agency's judgment, and the Clean Water Act section 404 program provides wonderful case studies of the boundaries of administrative discretion.<sup>256</sup> Nevertheless, the Corps' reliance on fee mitigation is legally questionable on two points. First, there is a clear statutory prohibition, a proscription against the augmentation of appropriated funds, that restricts the Corps' ability to accept funds to compensate for wetland impacts. Second, the Corps' agreements with conservation organizations are equivalent to cooperative agreements. Under fiscal law principles, an agency must have explicit authority to enter into such agreements, and the Corps lacks this authority.

#### *1. Augmentation of Appropriations*

A prohibition on an agency's augmentation of its appropriated funds has both a constitutional and a statutory basis. In legislative and executive branch relations, the Congress has the critical power of the purse. The Constitution assigns to the Congress the power to raise revenue,<sup>257</sup> and "[n]o Money shall be drawn from the

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<sup>255</sup> See *supra* notes 150-153 and accompanying text.

<sup>256</sup> For example, the Clean Water Act section 404 program has prompted great debate on what types of waters and activities are subject to federal jurisdiction. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding assertion of regulatory jurisdiction over wetlands adjacent to traditionally navigable waters); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (invalidating 33 C.F.R. § 328.3(a)(3) and holding that the Corps' regulation of isolated waters, the use, degradation or destruction of which could affect interstate commerce, exceeded congressional authorization); *National Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (invalidating regulation of incidental fallback associated with dredging activities).

<sup>257</sup> U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising revenue shall originate in the

Treasury, but in consequence of Appropriations made by Law.”<sup>258</sup> Congress therefore exerts control over agencies by controlling their funding levels. If, in addition to those funds already appropriated, an executive branch agency could raise funds without congressional approval, such an action would diminish congressional oversight of the executive branch.<sup>259</sup>

Several statutory provisions codify this constitutional principle. The most significant provision with respect to fee mitigation is the Miscellaneous Receipts Act (“MRA”)<sup>260</sup> which states the general rule: “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”<sup>261</sup> As the General Accounting Office has explained, the MRA clearly means that “any money an agency receives from a source outside of the agency must be deposited in the Treasury.”<sup>262</sup> The agency may not add these outside funds to its own appropriations.

The Corps has attempted to comply with the MRA by structuring fee mitigation arrangements so that the Corps districts do not handle any money directly. The permittee writes a check to a conservation organization, and the Corps may then claim that it has not received money for purposes of the MRA. Unfortunately for the Corps, the Department of Justice’s Office of Legal Counsel (“OLC”) has concluded otherwise.

In 1980, the OLC examined the legality of requiring a defendant to donate money to a waterfowl preservation organization to settle an oil spill claim.<sup>263</sup> The United States and Virginia sued the Steuart Transportation Company for an oil spill in the Chesapeake Bay, and the proposed settlement agreement contemplated that the company would contribute money to an organization “desig-

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House of Representatives . . . .”); *id.* § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imports and Excises. . . .”).

<sup>258</sup> *Id.* § 9, cl. 7.

<sup>259</sup> OFFICE OF THE GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-103 (2d ed. 1992) [hereinafter PRINCIPLES OF FEDERAL APPROPRIATIONS LAW] (stating that “[t]o permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative”).

<sup>260</sup> See 31 U.S.C. § 3302(b) (1994 & 1997 Supp.).

<sup>261</sup> *Id.*

<sup>262</sup> 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 259, at 6-106.

<sup>263</sup> See Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. Off. Legal Counsel 684 (1980).

nated jointly” by the federal and state governments.<sup>264</sup> Although the OLC noted that two theories might support federal involvement in such an arrangement, it rejected both. First, the OLC observed that the MRA may not apply to bona fide trusts.<sup>265</sup> Here, however, the OLC emphasized that Congress had not authorized a trust and “that trusts created by nonstatutory executive action could indeed be used to circumvent legislative prerogatives in the appropriations area.”<sup>266</sup> Second, the OLC dismissed the argument that the MRA was not applicable because no federal agency “received” any money. The OLC opined that “the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of [the MRA], if a federal agency could have accepted possession and retains discretion to direct the use of the money.”<sup>267</sup> The form of the settlement did not legitimize it: “The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance.”<sup>268</sup>

In its fee mitigation transactions, the Corps has constructively received the funds for purposes of the MRA. In many cases, Corps districts expressly retain the control of the funds and must approve expenditures.<sup>269</sup> If fund recipients such as The Nature Conservancy are only “passive recipients,” then the Corps must be the active recipient.<sup>270</sup> In any event, in light of the OLC opinion, the Corps may not contend that it is somehow beyond the reach of the MRA because the money does not touch its palms.

The MRA applies to money received “for the Government.” In the case of wetland violators, Congress intends that any penalties assessed go to the Treasury. Although arranging for a violator to send a payment to a conservation organization will produce more environmental gains than arranging for a violator to write a check to the Treasury, the Corps is nonetheless improperly diverting money intended “for the Government.” The Comptroller General has reached a similar conclusion in other enforcement actions. For example, the EPA developed a Clean Air Act settlement policy in which the EPA would agree to reduce a violator’s penalty if the violator “agreed to pay for certain public information or other

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<sup>264</sup> *Id.* at 685.

<sup>265</sup> *See id.* at 686.

<sup>266</sup> *Id.* at 687.

<sup>267</sup> *Id.* at 688.

<sup>268</sup> *Id.*

<sup>269</sup> *See, e.g., supra* notes 135 & 148 and accompanying text.

<sup>270</sup> Norfolk MOU, *supra* note 130, at 1.

projects approved by the EPA relating to mobile source air pollution issues.”<sup>271</sup> These projects included sponsoring “marathons, bicycle races, fairs, [and an] airplane towing messages.”<sup>272</sup> The Comptroller General determined that, because Congress had not expressly authorized the EPA’s alternative payment policy, the money should have gone to the Treasury.<sup>273</sup> The EPA’s control of the funds therefore amounted to an improper augmentation of appropriations.<sup>274</sup>

The Comptroller General also held that a comparable program operated by the Nuclear Regulatory Commission (“NRC”) was unauthorized.<sup>275</sup> Under that program, the NRC settled civil claims by allowing violators to contribute the penalty (or a portion thereof) to universities or other nonprofit institutions to conduct nuclear safety research projects.<sup>276</sup> While such a program advanced the NRC’s statutory objectives, it was an improper augmentation because it permitted the NRC “to control, in circumvention of the congressional appropriations process, the amount of funds available for nuclear safety research projects.”<sup>277</sup>

Several Corps districts operate fee mitigation programs that have direct parallels to the questionable EPA and NRC programs. Like those agencies, the Corps districts settle some enforcement actions by having a violator make a donation to a conservation organization.<sup>278</sup> The organization’s activities may further the statutory objectives of the Clean Water Act section 404 program, but the objectives are accomplished in an unauthorized manner. The Corps, like the EPA and the NRC, has no authority to direct funds to a private organization (under the Corps’ control), instead of to the United States Treasury. By doing so, the Corps has encroached on congressional prerogatives. Essentially, the Corps is

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<sup>271</sup> 1992 WL 726317, at \*1 (C.G. 1992).

<sup>272</sup> *Id.* at 4 n.1.

<sup>273</sup> *See id.* at 4. *See also* 1993 WL 798227 (C.G. 1992).

<sup>274</sup> *Cf.* PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 259, at 6-134 to 135 (citing other enforcement cases in which money collected as a fee or penalty was held to be due to the Treasury). For an economic argument against the use of this enforcement technique, see David A. Dana, *The Uncertain Merits of Environmental Reform: The Case of Supplemental Environmental Projects*, 1998 WISC. L. REV. 1181, 1184 (contending that such “programs may operate to lower the cost to regulated entities of violating environmental regulations”).

<sup>275</sup> *See* Nuclear Regulatory Commission’s Authority to Mitigate Civil Penalties, 70 Comp. Gen. 17 (1990).

<sup>276</sup> *See id.* at 18.

<sup>277</sup> *Id.* at 19.

<sup>278</sup> *See, e.g., supra* notes 133 & 170 and accompanying text.

raising revenue and directing disbursement of funds without legislative authority.

## 2. *Cooperative Agreements*

A different analysis, however, applies when the Corps allows a permittee to contribute money to a conservation organization to satisfy compensatory mitigation requirements. In the case of a violator, Congress intends the penalties to be paid to the Treasury, and payment is “money for the Government.” In the case of a permittee, Congress does not intend for the mitigation money to be paid to the Treasury. Rather, in the absence of a mitigation fund, the permittee would pay its own employees or contractors to perform the required mitigation. The permittee’s money is not “for the Government.” Accordingly, the Corps may argue that, although it retains control over a fee mitigation fund generated solely by permittee contributions, it is not receiving money for the Government, and the MRA is not applicable. Nevertheless, such arrangements run afoul of another appropriations principle. The Corps is entering into cooperative agreements with conservation organizations without the required congressional approval.

An agency may disburse funds in one of three ways: by procurement contract, by grant agreement, or by cooperative agreement.<sup>279</sup> While an agency has the inherent authority to contract for goods and services, it does not have inherent authority to make a grant or to enter into a cooperative agreement.<sup>280</sup> Congress must explicitly provide this authority<sup>281</sup> and has done so, for example, in the Clean Water Act for the EPA.<sup>282</sup> In the case of the Corps, Congress has not conveyed similar authority.

The difference between a grant agreement and a cooperative agreement is the level of federal involvement after the recipient obtains the money. The purpose of each agreement is “to transfer a thing of value to the . . . recipient” to achieve a public purpose.<sup>283</sup> A grant agreement contemplates no “substantial involvement” be-

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<sup>279</sup> See 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 259, at 10-11.

<sup>280</sup> See *id.* (citing 51 Comp. Gen. 162, 165 (1971)).

<sup>281</sup> See *id.*

<sup>282</sup> See, e.g., 33 U.S.C. § 1255 (1994) (providing research and development grants); 33 U.S.C. § 1256 (1994) (providing pollution control program grants); 33 U.S.C. § 1263a (1994) (providing Alaskan grants); 33 U.S.C. § 1381 (1994) (providing state revolving fund grants).

<sup>283</sup> See Fed, Grant and Cooperative Agreement Act, 31 U.S.C. § 6304 (1) (1994).

tween the agency and recipient.<sup>284</sup> A cooperative agreement, on the other hand, expects an agency to be substantially involved in overseeing the recipient's use of the funds.<sup>285</sup>

Many of the Corps districts' arrangements with conservation organizations amount to cooperative agreements. First, because the Corps controls the use of the agreed upon funds, the agency has constructively received the money. The Corps directs this money - a "thing of value" - to an organization or entity to carry out the public goal of wetland protection. Second, the Corps remains substantially involved in the organization's execution of its responsibilities, such as approving particular mitigation sites and disbursing funds.<sup>286</sup> However the Corps chooses to characterize its relationships with mitigation fee recipients, the relationship has the attributes of a cooperative agreement. Yet, fiscal law principles state that an agency may only disburse funds through a cooperative agreement after receiving specific congressional authorization,<sup>287</sup> and the Corps has not received such authorization.

A mitigation banking instrument differs in important respects from a fee mitigation agreement and accordingly does not raise the fiscal law concerns considered above. In many cases, a banking instrument constitutes a Clean Water Act section 404 permit, because restoration and enhancement projects often involve the discharge of dredged or fill material. A banking instrument establishes a baseline of bank conditions and explains how mitigation credits are generated and when they may be debited. Significantly, the instrument does not give the Corps any direct control over funds. In the case of entrepreneurial banks, money is transferred from permittees to the bank operator. The Corps does not specify how much money the bank operator is to receive, nor does it assert authority over how the bank operator spends the money.

In contrast, a fee mitigation agreement is not a permit. The agreement establishes a relationship between the Corps and the organization and provides a framework under which the Corps will direct funds to the organization. The purpose of the document is to establish a mechanism to pass funds to the organization, and, in many cases, the Corps retains control over the use of these funds.

The Corps could attempt to remedy the fiscal law problems as-

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<sup>284</sup> *Id.* at § 6304 (2).

<sup>285</sup> *Id.* at § 6305 (2).

<sup>286</sup> *See, e.g., supra* notes 135 & 148 and accompanying text.

<sup>287</sup> *See* 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 259, at 10-11.

sociated with fee mitigation by relinquishing control of the funds.<sup>288</sup> Of course, the Corps would be reluctant to structure a fee mitigation program based solely on trust. Naturally, the Corps would be concerned that, without proper federal oversight, the conservation organization might not follow through on its mitigation commitments. But its concern once again highlights the problem of after-the-fact mitigation: will the mitigation be performed as promised?

To avoid these fiscal issues and the concern about after-the-fact mitigation, the Corps (and state agencies) should express a preference for mitigation banks to provide compensatory mitigation. Mitigation banks offer advance mitigation, and because the Corps does not “retain control” over the permittees’ payments, the Corps has not constructively received those funds. In sum, mitigation banks are the better environmental, ethical, and legal choice.

#### *D. Legislative Proposals, Administrative Developments, and Recommendations*

Congress and federal agencies are considering legislative and administrative revisions to Clean Water Act mitigation requirements. The Corps and the EPA have developed draft guidance, in the form of a memorandum to the field, that would limit the use of fee mitigation. While the guidance may offer a quick fix, legislation is the appropriate mechanism for a permanent solution.

##### *1. H.R. 1290*

Congressman Walter Jones (R-N.C.) introduced a bill, H.R. 1290, that would codify much of the federal mitigation banking guidance.<sup>289</sup> Because the current federal guidance may be revoked immediately without any public input,<sup>290</sup> codification of these rules provides greater certainty to mitigation bankers and should encourage more private investment. Tucked into H.R. 1290 is a provision regarding fee mitigation that may have radical but environmentally beneficial implications for this issue.

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<sup>288</sup> In the OLC opinion that called into question the EPA’s authority to direct the use of settlement money, the OLC pointed out an obvious way to avoid the applicability of the Miscellaneous Receipts Act: just let Virginia control the settlement fund. *See* Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, *supra* note 263, at 684. If the federal agency has no control over the fund, it has received no money for purposes of the Miscellaneous Receipts Act.

<sup>289</sup> H.R. 1290, 106th Cong. § 3 (1999).

<sup>290</sup> *See* Gardner, *supra* note 1, at 577.

H.R. 1290 seeks to level the playing field between mitigation banking and fee mitigation. For example, credits from mitigation banks would be authorized to be used to settle enforcement actions.<sup>291</sup> More importantly, however, the bill urges the Corps and the EPA to establish, within one year, “standards and criteria applicable to the use of on-site mitigation, in lieu fees, and other off-site mitigation as compensatory mitigation that are similar to those applicable to a mitigation bank.”<sup>292</sup> It is this provision that could transform mitigation requirements under the Clean Water Act; the provision could conceivably impose a requirement of advance mitigation in almost every permit action.

The fundamental distinction between mitigation banking and other forms of compensatory mitigation is that mitigation banking offers mitigation in advance of project impacts. If fee mitigation and other off-site mitigation are held to “similar” standards and criteria, the mitigation must be in place before a development project begins. After-the-fact mitigation would no longer be acceptable. In essence, such a requirement would convert fee mitigation programs into mitigation banks.

The prospects for enactment, however, are unclear. Congress has not made any significant amendments to the Clean Water Act since 1987,<sup>293</sup> and this trend of inaction may very well continue.

## 2. Agency Guidance

A quick way to remedy the problems associated with fee mitigation is for the Corps and the EPA to issue guidance. The agencies typically do not submit guidance documents for public notice and comment prior to promulgation, so they can act more swiftly than when they develop regulations.<sup>294</sup> The Corps and the EPA are considering draft guidance that, in its present form,<sup>295</sup> would place significant restrictions on the use of fee mitigation.

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<sup>291</sup> See H.R. 1290, 106th Cong. § 3 (proposing to create a new subsection in Clean Water Act section 404 (section 404(u)(6)(A)) that would permit mitigation banks to sell credits to permittees and for “required injunctive relief in an enforcement action”).

<sup>292</sup> *Id.* (proposed section 404(u)(6)(c)).

<sup>293</sup> See Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

<sup>294</sup> See Royal C. Gardner, *Public Participation and Wetlands Regulation*, 10 UCLA J. ENV'T'L L. & POL'Y 1, 23-24 (1991).

<sup>295</sup> See Draft Memorandum to the Field, Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Federal Regulatory Programs [hereinafter Draft Fee Mitigation Guidance]. An abbreviated version of the draft guidance appeared in the National Wetlands Newsletter. See Draft Interagency Guidance on In-Lieu-Fee Mitigation, 21 NAT'L WETLANDS NEWSL. (Env'tl. L. Inst.) 3 (July/Aug. 1999).

The guidance provides that fee mitigation should be the last mitigation option considered. For example, fee mitigation would not be appropriate in an area where an approved mitigation bank has available credits.<sup>296</sup> The guidance states the general rule that fee mitigation is not to be used to offset impacts from individual permits.<sup>297</sup> Moreover, fee mitigation funds would only be available “for replacing wetlands functions and values and not to finance non-mitigation programs and priorities (e.g., education projects, indirect administrative costs).”<sup>298</sup> Thus, under the guidance, a Corps district could not authorize wetland impacts in exchange for donation for a zoo exhibit.

The Corps’ refusal to accept fee mitigation would render some state fee mitigation programs moot. A permit applicant seeks to provide mitigation that satisfies all regulatory agencies (federal, state, and local), but a mitigation plan that garners approval from only one agency is useless. For example, a mitigation bank that sells credits approved only by the Corps offers an illusory product if the credits are not recognized by state agencies. Similarly, a permit applicant will not contribute to a mitigation fee account if only one sovereign recognizes fee mitigation as a permissible option. Accordingly, if the Corps’ Jacksonville District no longer accepted fee mitigation, Florida’s water management districts would find contributions drying up.<sup>299</sup> Nevertheless, the draft guidance does appear to permit fee mitigation in the context of nationwide permits, programmatic permits, and other general permits.<sup>300</sup> States such as Maryland and Pennsylvania that operate under state program general permits would remain largely unaffected by the guidance.<sup>301</sup>

### 3. Recommendations

Despite the Corps’ pronouncements, fee mitigation is becoming a common feature in many districts throughout the country. For

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<sup>296</sup> See Draft Fee Mitigation Guidance, *supra* note 295, at 5.

<sup>297</sup> See *id.*

<sup>298</sup> *Id.* at 6.

<sup>299</sup> See *supra* notes 216-229 and accompanying text for a discussion of Florida’s fee mitigation program.

<sup>300</sup> See Draft Fee Mitigation Guidance, *supra* note 295, at 5. Although the draft guidance states that fee mitigation should not be used to offset impacts from individual permits, it is silent with respect to the use of fee mitigation to offset impacts from general permits. The implication is that fee mitigation will continue to be permitted in those cases.

<sup>301</sup> See *supra* notes 189 & 210-215 and accompanying text for discussion of these state programs.

the reasons noted above, however, it makes good sense from an environmental perspective if the use of fee mitigation is limited. Legislation is needed either to level the playing field between fee mitigation and mitigation banking or to establish a preference for mitigation banking for all permit actions.

*a. The Process Question: Legislation versus Guidance*

While agency-issued policy guidance offers speed, the legislative approach is advantageous for several reasons. First, agency guidance is typically, by its own terms, non-binding and can be modified or revoked with no advance notice. A statutory limitation on fee mitigation obviously rests on firmer ground. Second, a related advantage is the relative transparency of the legislative process. While the Corps and the EPA might submit proposed guidance for public notice and comment, nothing in the Administrative Procedure Act compels them to do so.<sup>302</sup> Third, the legislative process puts the fiscal law questions in the proper forum.<sup>303</sup> Congress may, if it chooses, expressly authorize the use of fee mitigation and mitigation banks to settle enforcement actions. Fourth, because the prohibition or limitation of fee mitigation may affect existing state programs, Congress, rather than the agencies, should carefully weigh the federalism issues raised.

Finally, Congress should take the lead pursuant to its proper constitutional role. Congress should set the nation's environmental agenda, and the agencies should implement its policies. In the area of wetland regulation, Congress seems to have abdicated its traditional responsibilities. Rather than guiding or directing agencies, Congress has been content to ratify agency actions.<sup>304</sup>

*b. Level the Playing Field: Require Advance Mitigation*

Fee mitigation programs should be held to the same standards as mitigation banking operations. As a matter of fairness, fee mitigation programs should be subject to the same approval process and oversight as mitigation banks. A conservation organiza-

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<sup>302</sup> See Gardner, *supra* note 294, at 22-39 (explaining why section 404 guidance documents need not be submitted for public notice and comment).

<sup>303</sup> See *supra* notes 259-62 and accompanying text for a discussion of Congress's role in raising revenue and appropriating funds.

<sup>304</sup> See TEA-21, U.S. P. L. No. 105-178, 112 Stat. 107 (1998) (ratifying Federal Mitigation Banking Guidance in context of federally funded highway projects); H.R. 1290, 106th Cong., § 3 (1999) (proposing to ratify much of the Federal Mitigation Banking Guidance in context of all other projects).

tion should not receive a pass and be subject to less scrutiny simply because agencies view its motive as pure. Like mitigation banks, fee mitigation should only be available to directly offset wetland impacts. Fee mitigation should not be used for “educational mitigation.” Most important, fee mitigation should be advance mitigation, provided ahead of project impacts.

An advance mitigation requirement would require entities administering fee mitigation programs to modify their operations. Some organizations may very well not be able to continue with wetland mitigation projects. This short-term cost should not detract from the long-term environmental benefits of standardization. If advance mitigation is a general requirement, the likelihood of mitigation success will increase, whether the mitigation is provided by entrepreneurial bankers or not-for-profit organizations.

*c. In the Alternative: Establish a Preference for Mitigation Banks*

If fee mitigation programs and mitigation banking operations are held to the same standards, there is no need to establish a preference for mitigation provided from mitigation banks. Mitigation bankers should compete with not-for-profit organizations, as long as the playing field is level. If, however, different standards persist, Congress should establish a preference for mitigation banks. Specifically, a permit applicant should be prohibited from using fee mitigation if the project will take place in the service area of a mitigation bank that has available credits that are appropriate to offset project impacts. Until fee mitigation becomes advance mitigation, an established preference for mitigation banks is the best approach for furthering the goal of no net loss of wetland functions and values. Such an action would also be a logical extension of Congress’s expression of support for mitigation banks in TEA-21.<sup>305</sup>

## V. CONCLUSION

Traditionally, wetland mitigation has been based on promises: a developer receives permission to destroy a wetland based on the promise of future mitigation. Unfortunately, developers have often failed to follow through on these promises and have not provided adequate compensatory mitigation to offset their projects’ wetland impacts. In 1995, federal wetland agencies endorsed miti-

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<sup>305</sup> See *supra* notes 17-18 and accompanying text for a discussion of TEA-21.

gation banking, which emphasizes mitigation provided in advance of project impacts, as an important alternative to assist in meeting the national goal of no net loss of wetlands. Many states followed the federal government's lead and authorized the use of mitigation banking.

Just as mitigation banking is beginning to blossom, however, federal and state agencies have embraced "in lieu fees" or fee mitigation as another mitigation alternative. Although fee mitigation may be an improvement over developer-provided mitigation, fee mitigation raises a number of policy, ethical, and legal issues. Most significant, fee mitigation does not necessarily provide the same level of environmental benefits offered by mitigation banking. Fee mitigation is provided after-the-fact, it is subject to less agency oversight, and it is not always used for direct restoration, enhancement, creation, or preservation efforts.

When operating a fee mitigation program, an agency controls the funds collected. Conflicts of interests are bound to arise when one agency grants wetland permits, establishes mitigation requirements, approves mitigation plans, regulates mitigation bankers, and collects or directs fee mitigation. In these circumstances, the regulatory agency has entered into competition with the very entities that it regulates. Frequently, the agency, as a competitor, can undercut the price of mitigation offered by mitigation bankers. From an environmental perspective, the situation is troubling because the rise of fee mitigation may limit the growth and benefits of mitigation banking.

Accordingly, Congress should enter the fray and level the playing field by requiring, where practicable, advance mitigation for all permit actions. While the short-term beneficiaries may be mitigation bankers, the long-term beneficiaries will be the aquatic environment and the public that enjoys this critical natural resource.