

Overview of Conservation Banking and Restoration Banking

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Session Contents

Authorities

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Conservation Banking Overview

Restoration Banking Overview

Authorities – Laws and Regulations*

- Endangered Species Act (ESA)
- Fish and Wildlife Coordination Act (FWCA)
- National Environmental Policy Act (NEPA)
- Clean Water Act (CWA)
- Oil Pollution Act & CERCLA (NRDA)
- MBTA & E.O. 13186 Conserve Migratory Birds
- National Defense Authorization Act / Sikes Act
- Rivers and Harbors Act
- Magnuson-Stevens Act
- Other Federal and State Laws and Regulations

**not comprehensive*

Definitions

Mitigation Bank – bank established primarily for CWA 404 compensation purposes

Conservation bank – bank established primarily for ESA conservation purposes

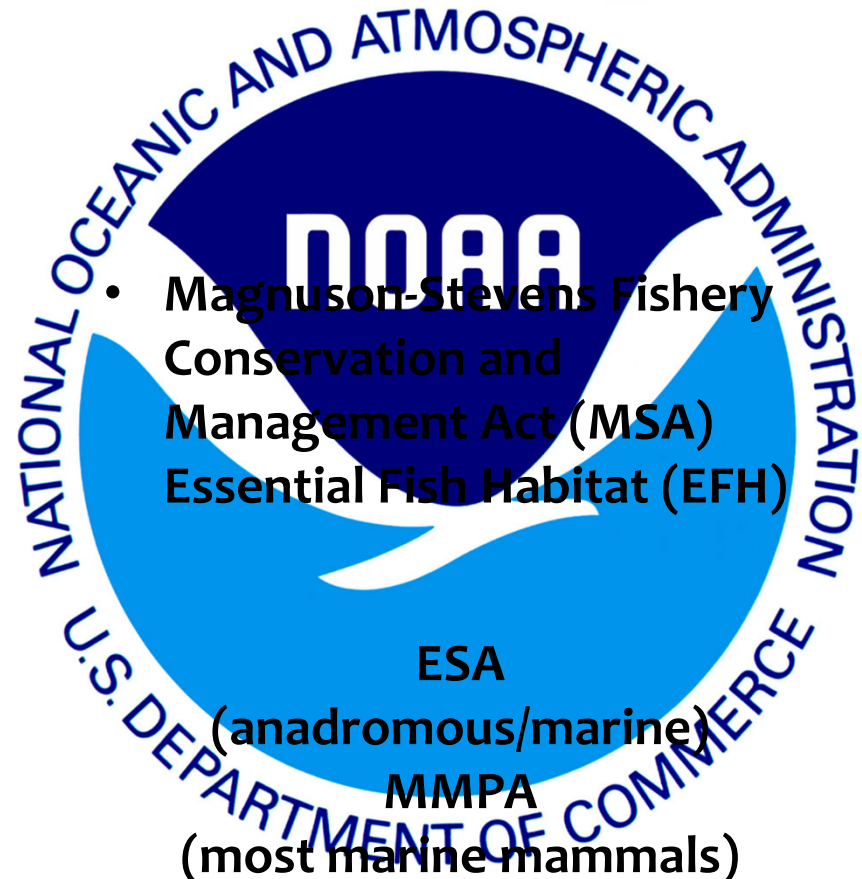
Restoration bank – bank established primarily for OPA or CERCLA restoration purposes

**not comprehensive*

“The Services” Distinct Authorities or Roles



(5 marine mammals:
walrus, polar bear, dugong,
manatees, some sea otters)



Conservation Banking

(and species compensatory mitigation)

Conservation banking roots are in wetland mitigation banking

First “conservation bank site” is
Coles Levee Ecosystem Preserve,
CA, 1992

**Some sources recognize Carlsbad Highland
Conservation Bank, San Diego County, CA,
1995, as first conservation bank*



Coles Levee Ecosystem Preserve

History of Conservation Banking

Important Events

- 1973 Endangered Species Act (ESA)
- 1982 ESA Section 10 amended to include HCP
- 1992 *first* conservation bank established – Coles Levee
- 1995 USFWS issues first programmatic biological opinion promoting use of conservation banks

History of Conservation Banking

Important Events

- 2003 USFWS Guidance for the Establishment, Use, and Operation of Conservation Banks
- 2008 Army Corps/EPA Mitigation Rule
- 2015 NMFS West Coast Region Conservation Banking Guidance
- 2016 Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment

History of Conservation Banking

Important Events

2016 USFWS Mitigation Policy

2016 USFWS ESA Compensatory Mitigation Policy

2016 NMFS begins scoping NOAA Mitigation Policy

2018 ~~2016 USFWS Mitigation Policy~~

2018 ~~2016 USFWS ESA Compensatory Mitigation Policy~~

2018 NMFS (quietly) continues developing NOAA Mitigation Policy

What do we use right now?



1981 USFWS Mitigation Policy

2003 USFWS Conservation Banking Guidance

2008 USFWS Recovery Crediting Policy

2018 Voluntary Prelisting... Policy



2015 NMFS West Coast Region Conservation Banking Guidance



2008 USACE & EPA Compensatory Mitigation for Losses of Aquatic Resources: Final Rule



2018 BLM IM on Mitigation



State or local regulations where applicable

Conservation Banking: Purpose and Goals

- Aid in recovery of ESA listed species
- Promote sustainable, larger landscape-scale approach to mitigation planning & implementation
- Provide an economically effective process that provides project proponents with options to offset unavoidable adverse impacts to listed and other at-risk species
- Aid in preventing future listings of candidate and other at-risk species
- Reduce the Services' ESA workload
- Improve regulatory processes for project proponents

Why do Conservation Banking?

Biological Benefits

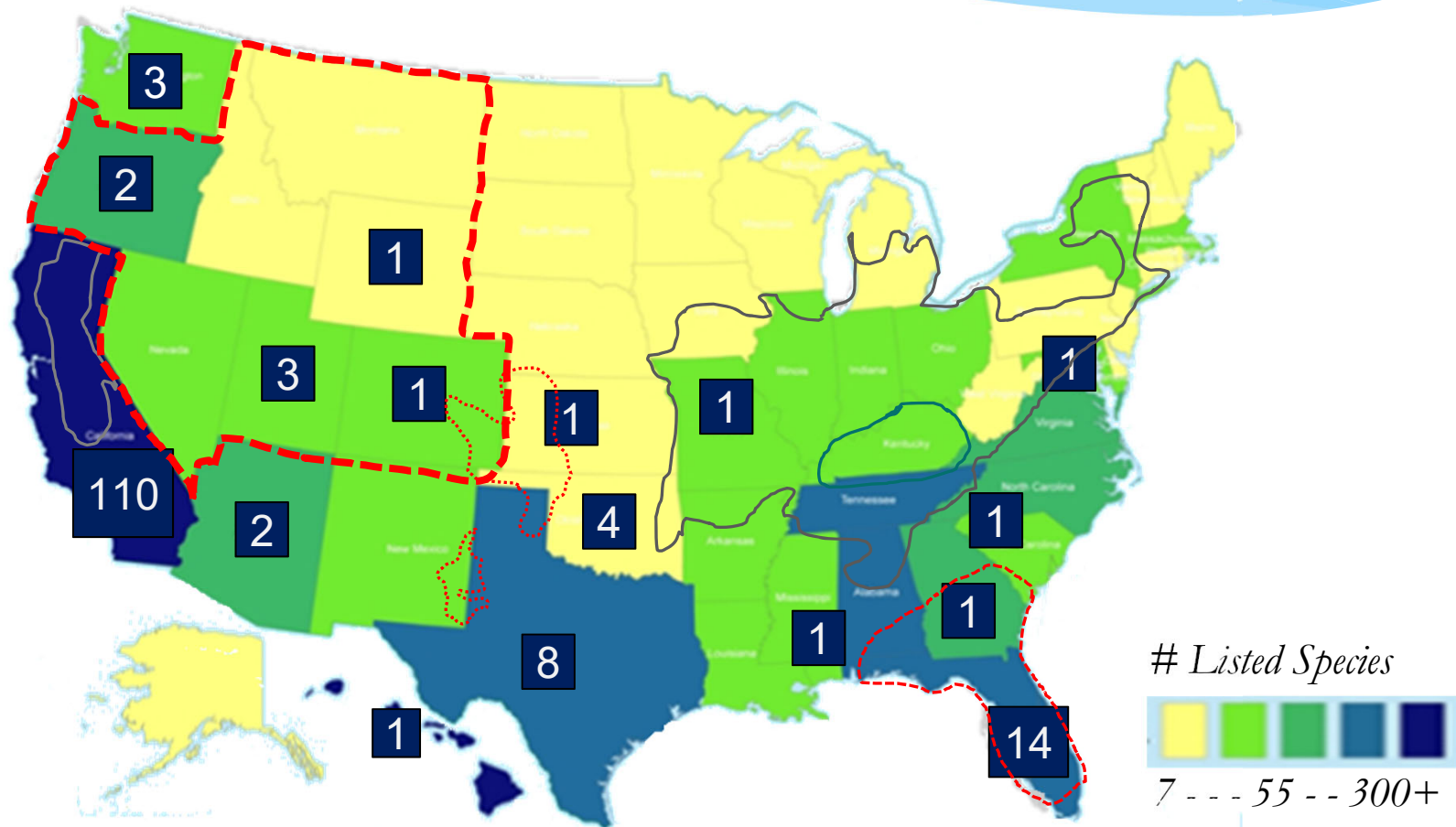
- Aid in recovery (outcome-based & traceable)
- Preserve ecosystems
- Avoid piecemeal mitigation
- Avoid time lag issues
- Contributes to science
- Contributes to community conservation strategies
- Long term durability

Business Benefits

- Streamlined permit process
- Transfer of liability
- Reduced mitigation costs
- Reduced agency compliance/monitoring time
- Reduced need for enforcement
- Multi-land use compatibility
- Revenue
- Brings together development and environmental communities

Economies of Scale

ESA “market”



FWS/NMFS Conservation Banks (152) & ILF Programs (3)
Data source (for banks): RIBITS, Sep 2018

ESA-listed Species (1,662)
Data source: ECOS, April 2018

ESA Conservation Banking

- Services can *recommend* the use of mitigation to offset the adverse impacts of incidental take actions under the ESA; actions should not not appreciably reduce the survival and recovery of the species.

Section 7
Consultation - Federal Agencies

Section 10
Permits - Private Entities

- Services can *require* mitigation under section 10(a)(1)(B) and under a section 7 jeopardy/adverse modification
- Section 7(a)(1)– develop conservation plans that include compensatory mitigation programs

Section 7(a)(2) Compensatory Mitigation

1. Incorporated into Proposed Action (Conservation Measures)
to compensate unavoidable negative effects of the proposed action
(recommend - - non-discretionary measures)
2. As Reasonable and Prudent Measures (RPM)
if such a measure minimized the effect of incidental take
(recommend - - non-discretionary measures; minor change rule)
3. As Conservation Recommendations
to avoid, minimize, or compensate for adverse effects
(recommend - - discretionary measures)
4. As a Reasonable and Prudent Alternative (RPA)
to avoid likelihood of jeopardizing continued existence of a listed
species or destruction or adverse modification of critical habitat
(require - - non-discretionary measures)

Section 10 Habitat Conservation Plans

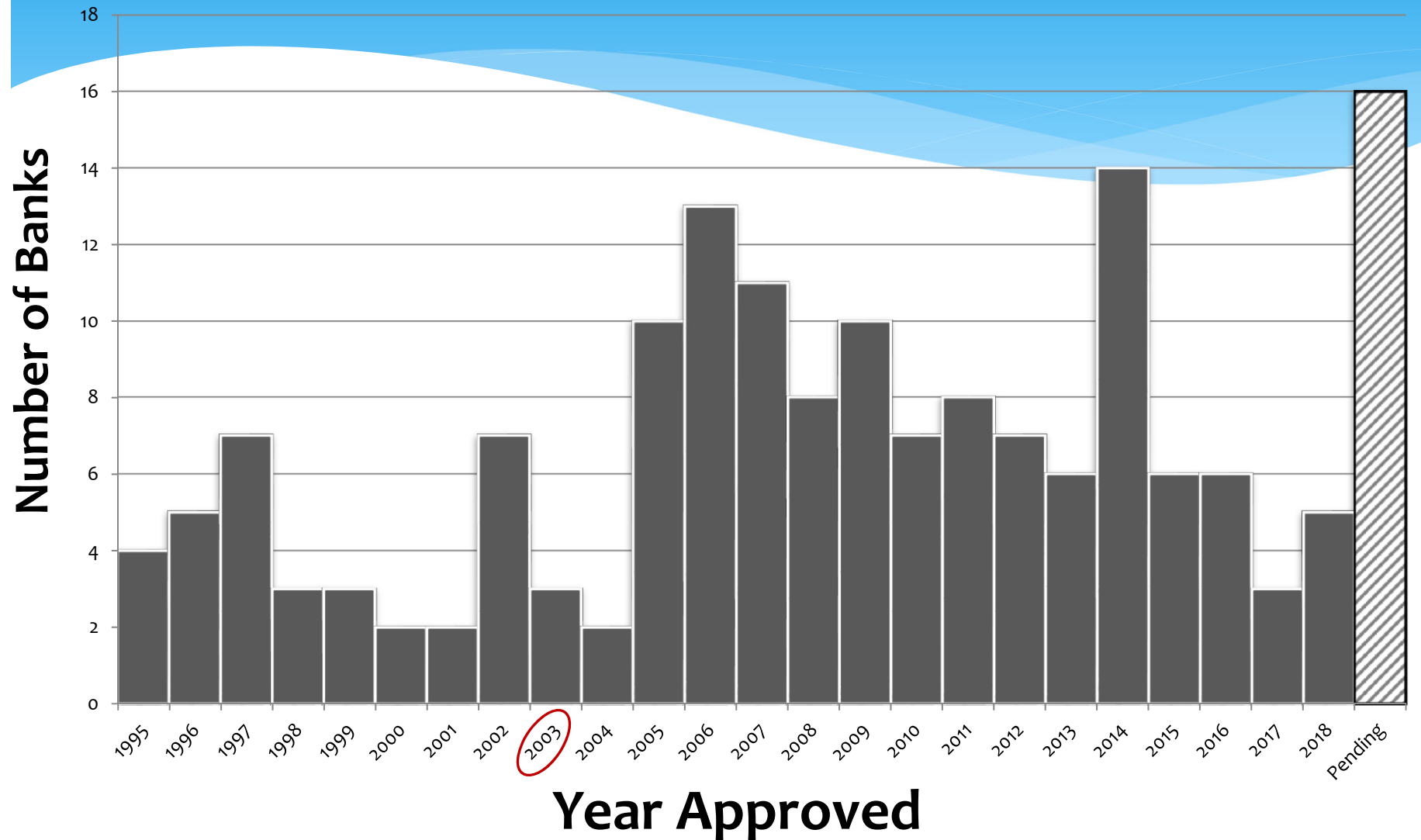
- Tool for landowners who want to undertake activities that may incidentally take listed species.
- Provides ITP with regulatory certainty “No Surprises”
- Describes minimization and mitigation measures to offset effects
- Regional HCPs facilitate comprehensive planning and can incorporate banks or in-lieu programs

Mitigation Banking and Conservation Banking

- From the banker's perspective, much is the same
- Standards and processes for CWA 404 banks work well for ESA banks
- Recovery plans often facilitate bank siting and planning
- Assessment methodologies may be different
- Compensation must be in-kind for species
- For the applicant and action agency, earlier incorporation of credit purchases into project design

Approved Conservation Banks

1995-2018



155 Approved Conservation Banks and 3 ILF Programs

9 NMFS Banks; 32 Joint Banks with USACE

>249,000 acres; >70 ESA-listed species



Data source:
RIBITS, Sept 2018
ILFs not in RIBITS



How long does it take to establish a conservation bank?

- About 3 months to 7 years
- The level of trust among and between the various parties involved with the bank approval process determines how quickly and successfully the process is completed.

Trust is key!

- Good coordination among MRT/IRT members
- Stepdown guidance/templates facilitates approval processes
- Use of a knowledgeable biological consultant

Future of Conservation Banking

- Umbrella banking agreements
- More aquatic banks
- On-line “tool boxes” developed by Services’ Regional and Field offices with templates
- Possible incorporation of other credit types (e.g., carbon, water quality) – more joint banking
- “Next generation” of conservation banking – holistic approach to ecosystem restoration and management / biodiversity banking

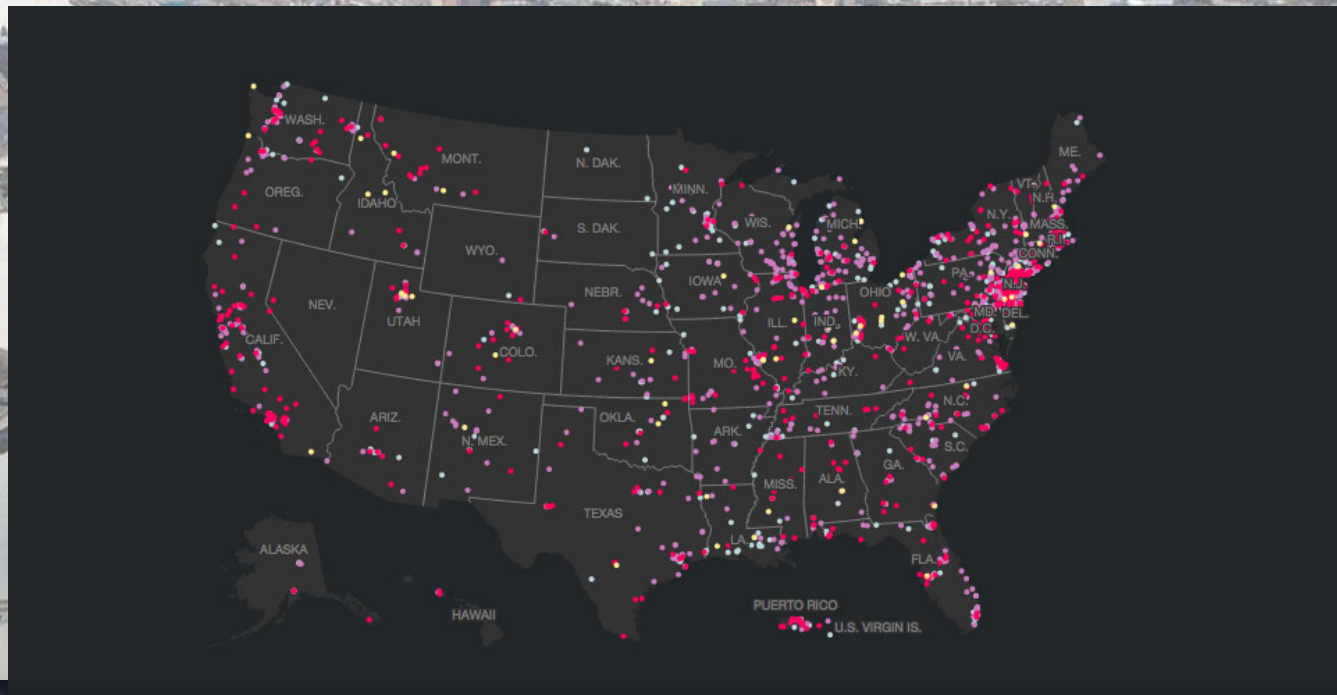
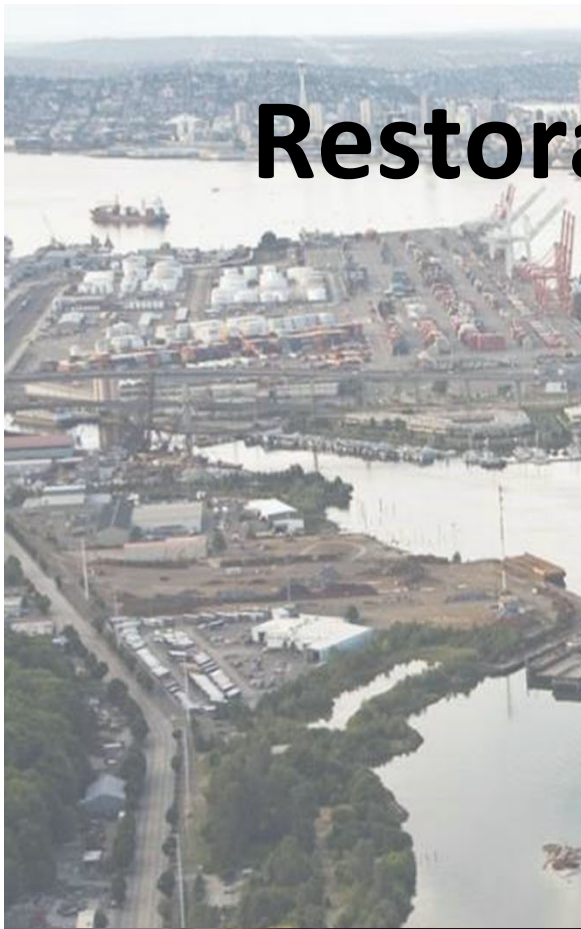


An aerial photograph of a city skyline, likely Seattle, with a large body of water in the foreground. A semi-transparent white rectangular box is overlaid on the image, containing text. The title 'Restoration Banking' is at the top of the box in a large, bold, black font. Below it is a bulleted list of information regarding environmental restoration and legal requirements.

Restoration Banking

- Under OPA and CERCLA, Responsible Parties (RPs) are required to pay the cost of:
 - restoring injured natural resources to baseline conditions
 - compensation for “interim loss”, a.k.a. temporal loss,
 - reasonable cost of a damage assessment
- NMFS and USFWS are among “trustees” for public trust resources.
- The Natural Resources Damage (and Assessment) process can be very long and litigious.

Restoration Banking Markets



Proposed

Sites have been studied, and cleanup plans proposed.



Active

Cleanup facilities have not yet been completed.



Construction Completed

All the facilities necessary for cleanup have been built. They may need to be operated and maintained indefinitely.



Deleted

All cleanup efforts have been completed and the site removed from the National Priorities List.



Bluefield/Duwamish River



- The Duwamish River Superfund Site is one of the largest in Washington.
- Bluefield Holdings, Inc. established a NRDA restoration bank in the Duwamish River by leasing from the City of Seattle 19 potential restoration project sites.

Bluefield Holdings NRDA Restoration Bank Project Sites



An aerial photograph of Seattle, Washington, showing the city skyline in the background and the Duwamish River in the foreground. The river is filled with industrial activity, including ships, barges, and cranes. The city skyline is visible in the distance, with the Space Needle and other tall buildings. The foreground shows a large industrial area with various structures and equipment.

Bluefield/Duwamish River

The Seattle Times

Seattle buys restoration credits for Duwamish cleanup

Sept. 23, 2016

- In 2016 Seattle agreed to resolve its liability by purchasing about \$3.5 million worth of restoration credits
- Additional credits will be available to other RPs



Bluefield/Duwamish River – Lessons Learned

- Consent Decree required development of new CD model with DOJ
- Bluefield required to provide financial assurances for construction, monitoring, and stewardship prior to trustee approval of project for credit sales
- Bluefield paying Trustee costs for technical assistance

Portland Harbor

- Site placed on National Priorities List in 2000
- Trustee Council formed in 2002
- Began restoration planning in 2009
- Began cooperative damage assessment in 2011
- Issued draft Restoration Plan/Programmatic EIS in 2012
- Began negotiating settlements in 2015
- First restoration project completed in 2015
- Final RP/PEIS completed 2017

Memorandum of Agreement for Restoration Up-Front

- WHEREAS, the Parties desire to facilitate the creation of habitat in the Restoration Focus Area in advance of the Trustees' completion of a damage assessment or the filing of actions against liable parties; and
- WHEREAS, the Parties recognize that the terms of any natural resource damages ("NRD") settlement . . . must be subject to public review and comment and court approval, and therefore the Trustees can make no final determination to accept a restoration project prior to entering into a settlement agreement; and
- WHEREAS, the Parties agree that, if a habitat restoration project developed pursuant to this MOA is included in an NRD settlement agreement, it is appropriate to credit the ecological value produced by the project prior to entering into the settlement agreement against the liability of the settling party or parties
- WHEREAS, Developer is willing to develop one or more habitat restoration projects in the Restoration Focus Area with the intention of marketing the ecological value credits produced by such project(s) to one or more parties liable for natural resource damage claims . . . to offset some or all of their liability in settlements with the Trustees

Memorandum of Agreement for Restoration Up-Front

- The Trustees will collaborate with Developer in evaluating options for potential habitat restoration projects located in the Restoration Focus Area.
- Technical Assistance will be provided in an effort to maximize the ecological services of habitat restoration projects and the consistency of such projects with Trustee goals and responsibilities.
- Developer will reimburse the Trustees for the cost of Technical Assistance provided by the Trustees at Developer's request.

Portland Harbor



	Project Name	Proponent	Implementation Date	Status	Credit Sold
○	Alder Creek	Wildlands	2014 and 2015	Constructed	33
●	Linnton Plywood	RestorCap	2016 and 2017	Permitting	0
●	Miller Creek	Wildlands	2017?	Planning	0
●	Harborton Wetlands	Portland General Electric	2016 and 2017	Permitting	0
●	Rinearson Creek	Falling Springs	2016	Permitted	0
●	West Hayden Island	The Freshwater Trust	2017?	Planning	0

Elements of Trustee Technical Assistance

- Feedback on site selection, feasibility questions, project design
- Input on development of monitoring plan and performance standards
- Review of financial assurances, long-term stewardship estimates, land protection mechanisms, credit sales agreement
- Guidance and support in public involvement/outreach efforts
- Facilitate contact with PRPs in the market for credits

Portland Harbor Lessons Learned

- **Need a termination clause in MOA**
- **Need to more clearly articulate (in final PEIS) how Trustees will select among available credits to purchase with cash-out funds**
- **Will continue to encourage bankers to pursue multi-purpose banks, and continue to work with agency partners to develop common language and practice around banking**

NRDA/Restoration Banking Lessons Learned

- Bankers are willing /able to take risks: Prospective third-party projects can be implemented sooner, no waiting for damage assessment to be completed and settlements to take place
- Private developers can access property that is unavailable to government entities (pay more, maneuver easier, and utilize more tools and mechanisms for acquisition)
- Projects designed to address liability of multiple PRPs are larger, more cost effective and restore multiple ecosystem processes and services
- Third-party banks can incentivize settlement by producing cost-effective credits

Questions and Challenges

- There is not enough NRDA liability in the Northwest to continue to incentivize third-party restoration bank development; thus, working with our agency partners to facilitate the approval of multi-purpose banks is a priority
- In-lieu Fee is part of banking (the “cash-out option”) and should be included under the banking umbrella when developing policy
- There is a need for more clarity about the appropriate level of NEPA analysis for credit transactions; Portland Harbor has developed a draft approach
- There is a need for policy guidance to help encourage consistency of implementation among DARRP cases and across authorities (NRDA, ESA, CWA); “Color” of credits in banks needs to be normalized in some way.

Mitigation Banking and Restoration Banking

- From the banker's perspective, much is different
- NRD Process is long and unpredictable, thus higher risk
- Credit determination is through HEA and DSAYs
- Environmental baseline can be an issue
- Terminology is different
- Lots of lawyers are involved
- For the users, not much is different.

So Let's Put it All
Together.....