No Endowment, No Protection: Long-Term Funding Considerations for Mitigation and Conservation Banks

Long-term funding for mitigation and conservation banks is required by the 2008 Compensatory Mitigation Rule and the 2003 U.S. Fish and Wildlife Service (FWS) Guidance on Conservation Banking respectively, but neither document is long on the details. Often, long-term funding for banks is achieved through establishing an endowment fund. Marjorie Blain (33 NAT'L WETLANDS NEWSL. (May-June 2011)) and Sherry Teresa (38 STETSON L. REV. (Winter 2009)) both gave thorough analyses of the types of expenses that should be included when developing endowment analyses for long-term funding of banks, and this article will cover some additional considerations related to how endowments are treated.

Whether using Property Analysis Record (PAR) or another type of spreadsheet to determine the endowment amount (or target amount), the costs need to be explained clearly. Chances are, in 20 years, all that will be left of the bank documents for any given bank will be the conservation easement and the long-term management plan. This is by design, but, at that time, the people who developed the endowment analysis and management plan will likely not be available to answer questions.

A bank can have more than one endowment, depending on how many entities are involved in holding easements and managing the land. A common scenario in California is for the bank sponsor to own the bank property and also to be the long-term manager of the property. Neither the property owner nor the bank sponsor can hold the easement or endowment, so those functions are met by one or two other parties. If the easement and endowment holders are separate entities, there may be multiple endowments: one for long-term site management and one for holding the easement. This second endowment would include the costs for the easement holder to monitor the bank site to ensure compliance with the conservation easement and report to the agencies. It would also be used to mount a legal defense of the easement, should that become necessary. This second endowment would be held by the entity that holds the easement. If the endowments are separate, then both should still go through a rigorous screening process and should include appropriate contingency amounts.

There will also be an agreement, or contract of some kind, between the funder of the endowment, i.e., the bank sponsor, and the holder of the money. This endowment funding agreement will spell out the terms under which the endowment is funded, what the money can be used for, and how the land manager can access it. It should also explain how the money will be managed, e.g., if it will be held in trust, and any state or federal laws that apply to the investment of such funds. Interagency review team (IRT) agencies may not wish to be parties to such agreements, but the agreements should be subject to the same level of review as the other bank documents, so that the agencies are aware of the terms under which the endowments are held, managed, and distributed.

Endowments can be funded 100% immediately upon establishing a bank, but that is not possible for many bank sponsors. In California, once an endowment is fully funded, it remains untouched for one to three years to allow it to grow before any money is withdrawn to use for management costs.

If an endowment is not fully funded right away, then the target amount undergoes an annual adjustment to keep up with inflation. This adjustment is based on the Consumer Price Index (CPI), published by the California Department of Industrial Relations, Division of Labor, Statistics

Credit Release	Criteria	Credits Released	Endowment Funded
1	Bank Establishment*	15%	0%
2	(a) As-built drawings accepted, and (b) endowment funded 15%	25%	15%
3	(a) All of the above, and (b) year 2 performance standards met, as shown in monitoring report, and (c) endowment funded 40%	15%	40%
4	(a) All of the above, and (b) year 3 performance standards met, as shown in monitoring report, and (c) endowment funded 70%	15%	70%
5	(a) All of the above, and (b) year 4 performance standards met, as shown in monitoring report, and (c) endowment funded 100%	15%	100%
6	(a) All of the above, and (b) year 5 performance standards met, as shown in monitoring report	15%	100%

*Bank Establishment means: (1) all parties have executed the BEI; (2) short-term financial assurances have been funded; and (3) the conservation easement has been recorded.

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and Research. If there is an increase in the CPI, then the target amount is adjusted upward by the same percentage. If there is a decrease in the CPI, then no adjustment is made. Once these endowments are fully funded, they will remain untouched for one to three years as described above.

Endowments that are not fully funded in the beginning are funded through credit sales. Every time a credit sale is made, a portion (agreed upon in advance and specified in the bank enabling instrument (BEI)) is deposited into the endowment. It can be important, if not necessary, to provide milestones or performance criteria for funding a percentage of the endowment as a condition of each credit release. The table shows a very general "template default" credit release schedule used in California, for both wetland and species banks that have a construction component.

Performance criteria will vary depending on the credit type, and the credit release table can be modified to include more steps at the IRT's discretion. If the bank does not include construction or habitat performance standards, then the only criteria for credit release will be the endowment funding. If the bank does not include any construction or habitat performance standards, and the endowment has been fully funded, then all of the credits are released upon bank establishment.

If credits are not selling in a down economy, then that may be taken into consideration when adjusting the endowment-funding schedule. However, the most important thing to remember is: if the endowment does not get funded, then the resource, wetlands or species, is not really protected. ■

-Valerie Layne

MITIGATION

The Bankers' Perspective on the Prospectus

In the development and permitting of a wetland mitigation bank, the mitigation bank prospectus is often the most important, and yet undervalued, part of the process. Even though the development and evaluation of the prospectus comes at the very early part of the bank review process, the decisions made or directions provided at the prospectus stage often determine whether or not millions of dollars and assets will be invested in the project, and whether the restoration of a valuable wetland resource will be implemented. Given the importance of this document, bankers and regulators often do not give it the time and consideration it demands.

Mitigation Bank Prospectus Requirements: The mitigation bank prospectus is the first written submission related to a mitigation bank review process, which also involves review and approval of a draft and final mitigation instrument. The Mitigation Rule (33 C.F.R. pts 325 and 332) states that the mitigation prospectus "must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee [ILF] program, at a sufficient level of detail to support informed public and IRT [interagency review team] comment" (Section 332.8(d)(2)).

The Mitigation Rule further states that a complete mitigation bank prospectus include the following information:

- Objectives of the proposed bank;
- How the bank or ILF will be established and operated;
- Proposed service area;
- General need for and technical feasibility of the mitigation bank;
- Proposed ownership arrangement and long-term management strategy;
- Necessary qualifications of the sponsor to successfully complete.

There are two time lines related to the mitigation bank prospectus: one time line for the draft prospectus and one for the more formal prospectus, which includes the public comment period. The timeline for the draft prospectus calls for the IRT to provide comments within 30 days. The complete process for the draft and formal prospectus, with public and agency comments, is 90 to 120 days (with the draft prospectus) until the banker will find out if they can proceed with the preparation of the draft mitigation banking instrument. The overall mitigation bank review process, which includes the prospectus and both the draft and final mitigation bank instruments, is designed to take approximately one year from start to finish.

Current Status of Mitigation Bank Prospectus Implementation: The amount and type of information within the prospectus varies substantially between U.S. Army Corps of Engineers (the Corps) districts. This inconsistency at the prospectus stage, and the often front-loaded amount of project detail, has caused a great deal of concern and criticism from the mitigation banking community. However, criticism of this program can often be explained by the perspectives of regulators and bankers.

Regulators: Most IRT regulators want enough information to be able to reasonably determine if the bank will be ecologically and economically viable. They do not necessarily want to see bankers expend undue resources on a project upfront, especially for a project that may not be viable. However, regulators may argue that in order to have sufficient information for constructive IRT and public comment, you need more information, not less. Additionally, the relatively hard and fast time lines now required under the Mitigation Rule means that IRTs want as much information as possible upfront to be able to meet those deadlines.

Mitigation Bankers: The mitigation banker views the prospectus stage as an opportunity to determine whether his or her project has the potential to be approved and whether it will be able to provide mitigation to enough types and locations of impacts to be economically viable. However, the mitigation banker wants to do this in the most cost-effective manner possible. Thus, any additional studies or information requirements above and beyond what it takes to determine the basic feasibility of the project result in more costs and, hence, reduced profitability. In addition, the banker needs relative certainty from the prospectus stage, so that the factors on which the banker decided to invest large sums of resources are not go-