

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 estab-

lished 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-

ing to change. In cases where future outcomes are subject to performance measures or future studies, then that banker wants the processes and methodologies clearly defined at the prospectus stage.

Prospectus Issues: Unfortunately, given the somewhat vague language in the Mitigation Rule as to what constitutes a “sufficient level of detail” and the differing perspectives between regulators and bankers, conflicts have arisen. Mitigation bankers have complained that the some Corps districts are requiring complete wetland delineations at the prospectus stage. It is widely accepted that a full wetland delineation is a necessary step to be able to determine the amount of wetland credits a site will yield. However, the costs for wetland delineation can range from tens of thousands of dollars for a small site to hundreds of thousands of dollars for a large wetland site. Most bankers will accept the risk and responsibility of providing a fully delineated and verified site prior to the finalization and release of credits, but the costs at the prospectus stage can be prohibitive for a project still under review. However, as Mike McCollum, Secretary of the National Mitigation Banking Association (NMBA) and an experienced mitigation banking consultant stated: “Only big bankers and corporate land owners can play under these rules; smaller, individual land owners may be locked out of being able to do a bank. This was not the intent of the rule.”

Another major complaint from bankers is that, once the prospectus has been reviewed and approval has been given to move to the draft mitigation bank instrument phase, key issues, such as the proposed service area or the methodology for determining wetland credits, can get adjusted. Bankers will base the investment of millions of dollars of cash and resources, e.g., land, staffing, etc., on the information at the prospectus stage. An adjustment or reduction in the service area can result in bankers losing substantial portions of their estimated mitigation markets, and is often the difference between profitability and loss. However, regulators on the IRT will often counter that the materials provided within the prospectus are often not enough to meet the “sufficient level of detail” threshold. The individual project site conditions and site-specific ecological factors related to the type of reestablishment or restoration being proposed can also dictate the level of infor-

mation necessary within the prospectus. For example, one project may require substantially more information than another project, if the proposed project calls for creation of wetlands versus the restoration or enhancement of a historically wetland habitat. Given the very important issues raised in the prospectus process and the very real challenges that both the mitigation bankers and the regulators face, it is obvious that some of the key issues need to be addressed. The NMBA has had preliminary discussions with IRT member agencies about this issue and is working on developing a white paper on the issue.

Recommendations: As with most of these controversial issues surrounding rule implementation, it seems that some level

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of direction from Corps headquarters on what information should be included in a prospectus should be outlined, along with examples of when additional information would be justified. Overall, most mitigation bankers would like general agreement at the prospectus stage on:

1. Service area: That includes not only the areas in which mitigation can occur, but also the types of credits that are appropriate to use the mitigation bank, e.g., seasonal, riparian, stream, etc. IRT member agencies also need to clearly state if certain types of credits or areas will be omitted from the service area.
2. Credit methodology: Agreement about how credits will be determined is generally enough information for the bankers to be able to invest the monies and take the next step.
3. Credit releases: The timing of when credits can be released also needs to be clearly spelled out, even if it is dependent upon performance of the project. This will allow mitigation bankers to

model if the project is financially viable.

4. IRT Member Agreement: It is important that all members of the IRT agree on the direction provided to the banker at the prospectus stage. Having one member agency alter its original position or not take a position at the time of the prospectus, and then later in the process propose a different set of standards, is harmful to the project and goes against the intent of the review process.

The most important item that mitigation bankers need from the regulators, especially at the draft prospectus stage, is clear and direct feedback (otherwise referred to as “being brutally honest”). Sugarcoating the responses or

asking for more information only delays the inevitable “No.” The delays in rejecting a project upfront only increase the costs and time sunk on the banker’s part, and results in more time demands to the regulator responding to additional materials from the banker.

On the mitigation banker’s side, it is important to understand what the respective IRT members need to address their statutory and program requirements and to provide adequate information related to those issues. Also, each mitigation bank site has its own unique issues and features, so it is important to provide enough information on the key issues related to your project. For example, if a banker is proposing to create wetlands rather than just restore former wetlands, then a full analysis of the soils, elevations, and available hydrology is necessary. Finally, bankers who do not provide adequate information in the draft and formal prospectus process are taking on greater risks and opportunities for failure by not using the processes provided under the Mitigation Rule to get timely and direct feedback on the viability of their project. ■

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