

MITIGATION BANKS ON VOF OPEN SPACE LAND
10/18/12

The purpose of this document is to 1) give an overview of mitigation banks, 2) explain VOF's current approach to the banks, and 3) describe recent events and challenges to the status quo.

1. Mitigation Banks

The creation of mitigation banks is part of a federal and state regulatory process required by the Clean Water Act to compensate for the loss of wetlands (including streams) during construction projects. A mitigation bank is typically a for-profit entity that commits private land to 'permanently' preserve wetlands and streams or rare species habitat (a mitigation site) to compensate for impacts to those resources elsewhere. The bank is awarded a certain number of wetland, stream, or habitat credits based on the size and scope of the mitigation project. Credits can be sold for cash to others who need to mitigate development impacts.

Approval of a mitigation bank is a lengthy, expensive, and complicated process that involves numerous state and federal agencies, which are collectively called the Interagency Review Team (IRT). The IRT is responsible for approving the design and layout of the mitigation bank and site, ensuring that water quality and wetland goals are met during the process.

The actual ground work required for a mitigation site varies from nothing to extensive grading and landscape work, but the three principle mitigation techniques include:

- Preservation – preserving an existing resource (e.g. *permanent forested riparian buffers*)
- Enhancement – enhancing a degraded system (e.g. *regrading eroded stream*)
- Creation/Restoration – more extensive work (e.g. *filling ditches & creating stream channels*)

Most mitigation projects will include some measure of creation/restoration or enhancement. To ensure that impacts are compensated locally, mitigation credits may only be used in the same watershed/vicinity as the impacts. Wetland creation is less common than in the early years of wetland mitigation.

The wetland regulatory agencies (IRT members) prefer mitigation banks over smaller, isolated mitigation projects. The banks offer a greater chance of success and less oversight than many small projects at the property on which the impact occurs

2. VOF approach and experience with mitigation banks

The current VOF deed template includes language to allow “ecological services” including stream and wetlands mitigation. This is based on the assumption that mitigation banks can be compatible with an open-space easement as they may enhance conservation values of a property by creating natural habitat and improving water quality. Staff follows a review and approval procedure for any mitigation banks proposed on open-space land checking for compatibility with easement provisions: this review and approval process is subject to the recent VOF cost recovery fees on newer easements that include such specific language.

In recent years VOF approved approximately eight mitigation banks that were proposed after the open-space easement was recorded, and VOF has only accepted a few easement donations on land where mitigation banks were in place or ready to break ground before the donation.

To date, VOF has not accepted responsibility for any obligations (such as enforcing restrictions) of a mitigation bank. VOF has been asked to consider taking on the role of a holder of mitigation bank conservation easements which could involve steps like: 1) including IRT restriction language in VOF easement to satisfy the requirements of the ACE, DEQ and the objectives of the mitigation program, and 2) accepting stewardship responsibility for the long term stewardship of mitigation sites (This could include, for example, upkeep such as invasive species removal). This would be an entirely new role for VOF and although the required tasks are funded by the mitigation banks, the majority of VOF staff believes the proposed roles go beyond staff capacity and would require new skill sets, equipment, and legal obligations.

3. Recent events and challenges to the status quo

The VOF Board, at its October 2012 meeting is being asked to consider open-space easements that are being planned and executed nearly simultaneously and in conjunction with mitigation banks. This is a new occurrence, and presents some challenges to staff.

Some questions are:

- Should VOF place a traditional VOF easement on an area that is already required to be protected in perpetuity by an instrument that will most likely be more restrictive than a VOF easement?
- If the mitigation bank is excluded from the VOF easement, will landowners be willing to pay for a survey, will it produce oddly configured easement parcels, and will it affect appraisals?
- If the bank is not approved or the mitigation banker decides not to proceed, has VOF lost an opportunity to protect the entire parcel?
- If a mitigation bank and a VOF open-space easement are done in conjunction, often the mitigation bank wishes to retain the riparian buffer rights for the

mitigation easement to maximize mitigation credits, even though VOF may request a buffer in negotiations. (VOF Guidelines “strongly recommend” stream buffers).

- Even though the current VOF template makes it clear that VOF has no obligation to enforce any of the terms or conditions of the mitigation projects, should we be concerned that if the bank fails or there is no designated long term mitigation holder/steward, that VOF will be pressured to become involved?

General Conclusion:

Mitigation projects are not like traditional conservation projects. Mitigation easements are the product of a regulatory system that exacts these easements as a permit condition. This permitting program comes with regulatory requirements. Mitigation projects must be provided with long-term protection. Long-term funding must be provided to cover all long-term stewardship needs, including easement monitoring and defense as well as maintenance requirements. VOF should be cautious and informed before engaging itself fully in this process.