

# Hopping Green & Sams

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January 20, 2010

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**Re: Reconciling State and Federal Differences Regarding Mitigation Bank  
Financial Responsibility and Real Estate Related Documentation**

Dear John, Bill, Kathryn, Tom and Sheryl:

We represent the Florida Association of Mitigation Bankers (FAMB) which is an industry trade group that promotes the interests of the wetland mitigation banking industry in Florida. FAMB membership consists of permitted and authorized mitigation banks located all over Florida. The FAMB has identified a common statewide problem involving conflicts between the State and Federal agency reviews of proposed mitigation bank related financial responsibility and real estate preservation documentation that we ask your assistance in resolving.

To explain this problem, the State mitigation bank permitting programs require a mitigation bank permit applicant to submit documentation demonstrating adequate financial responsibility to ensure that a proposed wetland mitigation bank, if permitted, will be constructed, implemented, and managed in perpetuity according to the terms of its permit. (See e.g. rule 62-342.700, F.A.C.; SJRWMD Applicant's Handbook: Management and Storage of Surface Waters §12.4.8; SWFWMD Environmental Resource Permit Basis of Review Appendix 4 §9; SFWMD Environmental Resource Permit Basis of Review § 4.4.10.) These requirements allow a mitigation bank permit applicant to propose a letter of credit or a bond with a standby trust fund, or simply place funds within a trust fund, to ensure there is sufficient funding to complete the proposed

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mitigation bank activities. The State mitigation bank rules specify forms that must be used for this financial responsibility documentation.

The State mitigation bank permitting programs also require a mitigation bank permit applicant to demonstrate that the land within the proposed mitigation bank will be protected by either encumbering the land with a conservation easement or conveying the land in fee simple to the permitting agency. (See e.g. rule 62-342.650, F.A.C.; SJRWMD Applicant's Handbook: Management and Storage of Surface Waters §12.4.7; SWFWMD Environmental Resource Permit Basis of Review Appendix 4, §8; SFWMD Environmental Resource Permit Basis of Review §4.4.9.) While no specific forms are set forth in the agencies' rules, the DEP and each water management district has a conservation form they prefer the applicant to use.

Similarly, the Federal mitigation bank authorization process requires a mitigation bank sponsor to submit to the Corps financial assurances ensuring that the mitigation bank will be successfully constructed, implemented and perpetually managed. (33 C.F.R. 332.4(c)(13).) These financial assurances can take the form of letters of credit or bonds with standby trust funds or simply a trust fund, as is required by the State. (33 C.F.R. 332.3(n).) The Corps' rules do not specify financial assurance forms that must be used.

The Federal mitigation bank authorization process also requires a mitigation bank sponsor to submit to the Corps a site protection instrument that will be used to ensure long-term protection of the land comprising the mitigation bank. (33 C.F.R. 332.4(c)(4), and 33 C.F.R. 332.7(a).) The Corps rules do not specify site protection instrument forms that must be used.

The Corps' rules requiring these financial assurances and site protection instruments became effective in June 2008. These Corps' rules replaced a federal guidance document that governed the establishment and operation of mitigation banks.

During the review of mitigation bank permit applications and prospectuses, it is the experience of FAMB members that the Corps, pursuant to the new federal rules, has been requesting the permit applicant/bank sponsor to change the State's standard financial responsibility or conservation easement documentation in a manner that is objectionable to counsel for the Florida Department of Environmental Protection (DEP) or the applicable water management district. This leaves the mitigation banker in a Catch-22 situation in which the requests of the Corps and DEP or water management district attorneys are contradictory and cannot be satisfied.

Some examples of conflicts that have arisen between the federal and state agencies regarding this required documentation include the following:

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- Specifying in trust fund agreement language the amount of control over the monies in the trust fund, and how that control is shared/split between the federal agency and the state agency.
- Listing prohibited uses in a conservation easement.
- Stating enforcement and liability provisions in a conservation easement.

Because of this federal-state conflict, the FAMB believes that the current process for reviewing and approving mitigation bank financial responsibility and real estate related documentation between the federal and state agencies is unduly complicated, costly, and an unnecessary use of agency staff resources. This current situation is untenable, and does not reflect the cooperative and smart working relationship that the federal and state agencies seek in Florida. The FAMB believes this situation is the result of Federal and State agency staff not having the opportunity to revisit the mitigation bank financial responsibility and real estate related documentation after the adoption of the new federal mitigation rules. The FAMB also believes the State standard documentation can be revised in a manner that complies with both the state and federal rule requirements.

Therefore, to reconcile this situation, the FAMB respectfully requests a meeting among relevant Corps, DEP and applicable water management district counsel to review this issue in a global context and develop revised documentation acceptable to the DEP, water management districts and the Corps. To avoid additional travel expense or agency staff time, the FAMB suggests that this meeting could be overlapped with a DEP/water management "anti-drift" meeting, general counsels' meeting, or other similar arrangement. This meeting could also be conducted by telephone or electronic means. FAMB representatives would offer to coordinate and participate in this meeting if the agencies so desired.

After the documentation requirements are reconciled, the FAMB respectfully requests that the DEP and water management districts adopt this revised documentation by rule so that mitigation bank permit applicants and agency staff will have clear guidelines to use documentation acceptable to all agencies. This should reduce the time and costs both to the agencies and permit applicants in preparing and reviewing this documentation.

We are aware that some progress towards reconciling these conflicts has been made on a case-by-case basis involving some recently approved mitigation bank documentation. The FAMB would like to build upon that progress. The FAMB

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recognizes that some documentation, such as conservation easement forms, is not identical among the water management districts and DEP. The FAMB is willing to continue using this non-identical documentation so long as the Corps accepts the differing forms used by each state agency.

The FAMB and its members thank you for your time and efforts in reviewing and considering this request, and ask that you move forward expeditiously to remove this unnecessary impediment to efficient governmental operation in Florida. Please do not hesitate to contact Amelia Savage of my office or myself if you have any questions or responses to the FAMB's request.

Sincerely,



Eric T. Olsen

cc: FAMB Membership  
Dave Moore  
Mike Sole  
Kirby Green  
Carol Wehle  
David Hobbie