

A PILOT WETLANDS MITIGATION BANK IN THE TAUNTON RIVER WATERSHED

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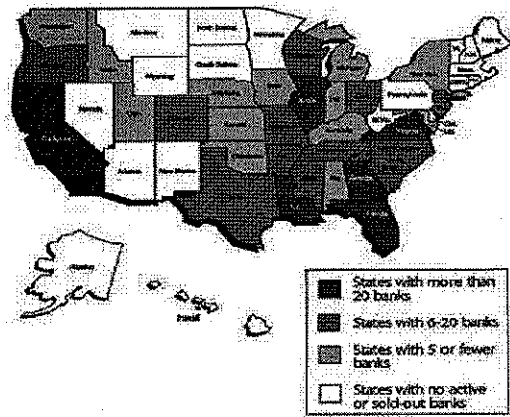


Figure 1: Geographic Trends in Mitigation Banking: The Number of Approved (active or sold-out) Mitigation Banks in Each State of the U.S. in 2005. (From Wilkinson, J. and J. Thompson. 2006. 2005 Status Report on Compensatory Mitigation in the United States. Environmental Law Institute, Washington, D.C.)

On August 10, 2004, Governor Romney signed the 2004 Massachusetts Acts Chapter 291 authorizing the creation of a pilot wetlands mitigation bank in the Taunton River Watershed. The purpose of the bank is to mitigate for the wetlands impacts of transportation, other public works projects, and projects requiring wetlands variances, permits, and Orders of Conditions within the Taunton River Watershed. This pilot project represents the first bank in Massachusetts and only the second in New England.¹

A wetlands mitigation bank is a wetland creation, restoration, enhancement, and/or preservation project undertaken to compensate for unavoidable losses to wetlands and other aquatic resources by providing compensatory mitigation in advance of authorized development impacts. The bank sells "credits," which quantify the estimated tangible and intangible values created through the bank's restoration efforts. Purchasers use these credits to comply with permit requirements and offset impacts to wetlands. Similar to cash deposits in a checking account, credits are withdrawn or debited from the bank prior to development to compensate for the losses incurred. As development continues over time, the credits of the bank are progressively exhausted.

The sale of the wetlands credits legally transfers the liability for wetland mitigation from the developer to the wetlands banker. Entities ranging from The Nature Conservancy to the North Carolina Department of Transportation to private entrepreneurs have created and managed wetlands mitigation banks across the United States.

In 2006, the Environmental Law Institute ("ELI") reported on the status of wetlands mitigation banking in the United States. The findings of the

report, using data available through September 2005, include:

- Four-hundred and five (405) wetlands mitigation banks have been approved in the United States, of which 72.2% are entrepreneurial banks.² An additional 169 banks are pending approval.³
- Of the 405 approved banks, 330 are active and 75 have been sold-out.
- The approved banks are located in 31 states. Eighteen states have more than five banks within their borders.
- Of the 197 active banks that existed in 1991, 164 (83.2%) remained active in 2005, while 33 (16.8%) had been sold-out, reclassified, or were inactive for another reason.

In response to the enacted legislation, the Massachusetts Executive Office of Environmental Affairs ("EOEA") issued a Request for Proposals ("RFP") in the fall of 2004 to identify a wetlands mitigation banking team to assist in the implementation of the enabling legislation. Specifically, the team would:

- Identify a wetlands banking site;
- Develop a restoration plan;
- Develop a bank enabling instrument and other legal instruments governing the management of the bank;
- Develop a long-term monitoring plan;
- Manage the permitting process;
- Conduct market research;
- Undertake the construction and monitoring of the restoration site; and
- Manage the bank.

As mandated by the legislation, a Mitigation Banking Review Team ("MBRT") was established to advise the consultant team on regulatory and environmental issues. The team meets monthly and the members include representatives from the following government agencies and interest groups:

- Executive Office of Environmental Affairs;
- Department of Environmental Protection;
- Division of Fisheries and Wildlife;
- Executive Office of Transportation and Construction;
- Massachusetts Bay Transportation Authority;
- Coastal Zone Management Wetlands Restoration Program;
- U.S. Fish and Wildlife Service;
- U.S. Environmental Protection Agency;
- U.S. Army Corps of Engineers;
- National Association of Industrial and Office Properties;
- Taunton River Watershed Residents; and
- Environmental Advocacy Groups.

The wetlands mitigation bank in the Taunton River Watershed is expected to have numerous ecological benefits:

- Creation of high quality wetlands and wildlife habitat;
- Enhanced wetland functions in the Taunton River Watershed;
- Increased leverage for local Conservation Commissions, the Department of Environmental Protection, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers for achieving mitigation success;
- Reduced uncertainty over whether the com-

¹ The other wetlands mitigation bank in New England is located in Maine, was created unilaterally by the Maine Department of Environmental Protection, and is not recognized by federal agencies.

² An **entrepreneurial bank** is a bank sponsored by a private entrepreneur with credits available for sale on the open market.

³ A **pending bank** is one with a completed draft banking instrument or prospectus, but for which the U.S. Army Corps of Engineers has not yet approved the banking instrument. An **inactive bank** is one that has been approved to sell credits, but is either suspended or inactive for another reason.

⁴ For the purposes of the pilot wetlands banking program, the following definitions have been adopted: **Restoration** involves constructing wetlands in an area that historically contained wetlands, but currently functions as upland; **Creation** entails constructing wetlands in an upland area that was never wetland; and **Enhancement** consists of improving the functions of an existing, most likely degraded, wetland.

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pensatory mitigation will be successful in offsetting project impacts; and

- Efficient use of limited agency resources in the review and compliance monitoring of compensatory mitigation projects.

Additionally, the wetlands mitigation bank will result in the following numerous environmental permitting, transportation infrastructure, and economic benefits, including:

- Streamlined permitting of bridge replacement, road repair, and other essential transportation improvement projects in southeastern Massachusetts;
- Flexibility in the resolution of enforcement actions and more meaningful Supplemental Environmental Project ("SEP") contributions;
- Increased certainty that projects will meet wetlands permitting requirements resulting in more certain, cost-effective, and timely wetlands permitting; and
- Assembly and application of extensive financial resources, planning, and scientific expertise not always available to many permittee-responsible compensatory mitigation proposals.

Wetlands mitigation banking is not a substitute for the current wetlands permitting and enforcement system; rather, it represents an enhancement of the current system. Consistent with Section 404 of the Clean Water Act and other federal, state, and local regulations, all parties seeking wetlands approval must first avoid and minimize wetlands impacts, and to the extent possible, mitigate any impacts on-site.

TAUNTON RIVER WATERSHED PILOT WETLANDS BANK

The site solicitation process was formulated with input from the MBRT. A candidate site nomination sheet that summarized the purpose of the

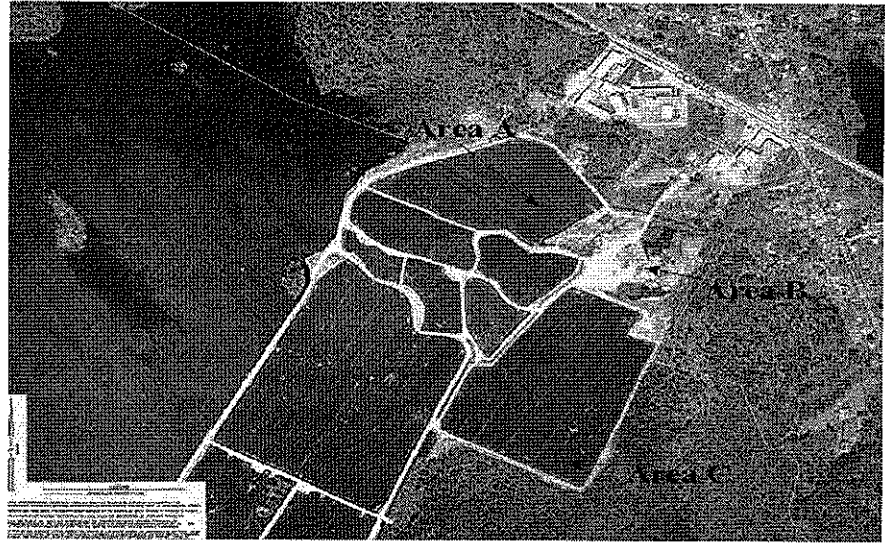


Figure 3: Aerial Photograph of the Burrage Pond Site, 2001

pilot wetlands mitigation bank and site eligibility requirements, and requested nominations for potential properties suitable for locating the bank was mailed to: (1) the Conservation Commission, Planning Board, and Boards of Selectmen in each town located within the Taunton River Watershed; (2) regulatory agency personnel; and (3) representatives from numerous statewide and watershed-based environmental organizations. A public notice regarding the search for a pilot wetlands mitigation banking site and supplemental information explaining how to nominate a site were published in the July 9, 2005 issue of the Environmental Monitor. Additionally, a web page was created to provide general access to information about the pilot wetlands bank and the site nomination process.

Several nominated sites underwent a preliminary review. Each site was evaluated for size; site context; known/suspected contamination; timeline/availability for restoration; Article 97 status; restoration, creation, or enhancement potential;⁴ and other criteria. The Burrage Pond Wildlife Management Area was the area chosen as most consistent with the intent of the wetlands mitigation banking legislation and the preliminary review criteria. The 1,600-acre property, located in Halifax and Hanson, is comprised of woodlands, wetlands, open water areas, and former cranberry bogs.

Although not fully designed, the pilot bank will likely be sited within three areas at the northern extent of the Burrage Pond Wildlife Management Area: (1) an abandoned cranberry bog (Area A); (2) an un-

improved sand access road and potentially portions of the adjacent abandoned bog (Area C); and (3) a highly disturbed upland area with pockets of degraded wetlands adjacent to the bogs (Area B).

These areas have been historically managed as part of the cranberry operations. Conceptually, the wetlands mitigation bank will entail the creation of wetlands within the upland areas, as well as enhancement of portions of the historic bog and other degraded wetlands. In order to provide appropriate mitigation for various future development projects, several different wetland types, including forested, scrub-shrub, and shallow and deep emergent marshes, are proposed.

FOR MORE INFORMATION

The success of this pilot program depends upon more than sound science and economics. The legislative authority for the creation of the pilot bank also seeks to ensure that the project will serve as an opportunity to bring all of the affected stakeholders "to the table." This is being accomplished both through representation on the aforementioned Mitigation Banking Review Team and through a transparent and inclusive public process. For additional information please visit <http://www.bluewavestrategies.com/wetlands.shtml>.

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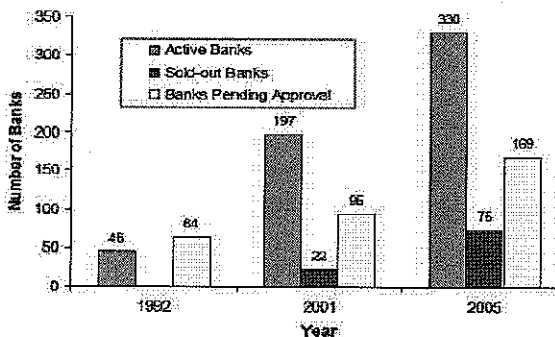


Figure 2: The number of mitigation banks in the United States that were active, sold-out, or pending approval in 1992, 2001 and 2005 (From Wilkinson and Thompson, 2006).