Innovations in Compensatory Mitigation

BUSINESS AND THE ENVIRONMENT CONFERENCE
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Innovations in Compensatory Mitigation

Introduction

Wetland Mitigation Banking

Water Banking

Natural Resource Damages Banking

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Resource Protection/Legal Framework

Resources

- Wetlands
- Endangered Species
- Critical Habitat
- Critical Areas
- Water Resources

Environmental Laws (Federal, State, Local)

- Clean Water Act
- Endangered Species Act
- Oil Pollution Act
- CERCLA
- Washington Growth Management Act
- Washington State Shoreline Management Act
- Washington Water Code

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Impact Mitigation

- Mitigation: avoiding, minimizing, rectifying, reducing over time, and compensating for impacts on natural resources
- Compensatory mitigation options:
  - Mitigation banking
  - In-lieu fee
  - Permittee-responsible mitigation (on- or off-site)

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"Ecological Banking"

Banking → restoration action

- Third-party private investment
- Advance restoration
- With goal of satisfying other parties' future liability for adverse environmental impacts
- For profit, market-driven

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Banking Basics

- Bank: Site where wetlands or other habitats/resource areas are restored, created, enhanced, or preserved to provide advance mitigation
- Operated by sponsor (often third-party private investor) and protected by conservation easement or similar instrument
- Interagency review team (IRT) provides regulatory review, approval, and oversight of bank

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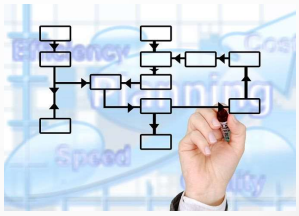
Establishing a Bank - Steps

* Prospectus
* Mitigation Banking Instrument
* IRT Review
* Public Review
* Signing and approval
* Permitting



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Banking Basics: Agreement

* Bank instrument: formal agreement between bank sponsor and regulators establishing terms of use
* Service area: geographic area in which impacts can be compensated for at a bank
* Certified to provide compensation for impacts to specified resources under specified environmental laws

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Banking Basics: Crediting

- Generates increases in resources/functions (uplift), valued in credits
- Agencies approve use of credits to compensate for project impacts or resolve liability for injury to natural resources
- Project proponents or responsible parties/trustees purchase credits to offset environmental impacts/resolve liability

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Why Banking?

- Typically involve larger, more ecologically valuable sites
- Promotes greater diversity and wetland functions
- Reduced time lag between wetland impacts and mitigation
- Greater likelihood of success over alternative mitigation approaches
- Can save money for project applicants and improve permitting efficiencies
- "Third-party" compensatory mitigation – responsibility for implementation and success is assumed by a party other than the permittee

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Multi-Resource Banking

* *Coweeman River Mitigation Bank*: Washington's first joint wetland and fish habitat bank, MBI approved May 2016
* *Wapato Valley Mitigation and Conservation Bank*: Prospectus published October 2015, banking instrument under development
  * Goal is to create credits for impacts to (1) aquatic resources authorized under the Clean Water Act, (2) special-status species including federal ESA-listed or otherwise protected species and habitats and state ESA-listed and protected priority habitat and species, (3) Critical Area Ordinance protected resources, and (4) floodplain impacts.
  * Bank credits would be used to offset future, unavoidable impacts that could result from development projects in the Columbia River floodplain and basin.

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Background and History: Water Banking in Washington

- **Scope of Ecology's Authority**: Washington's Trust Water Program (Chapter 90.42 RCW). Ecology can authorize banks to:
  - Mitigate for new uses
  - Meet future water supply needs
  - Maintain instream flows for certain beneficial uses
  - Provide a secure source of water rights that Ecology can make available to third parties for beneficial use

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Background and History: Water Banking
(Continued)

- **Intent**: Facilitate the transfer of water rights to the uses for which it is needed most, primarily to offset (mitigate) the impacts of a proposed new use

- **Mechanism**:
  - Water rights holder works with Ecology to place water right into Trust Water Rights Program (TWRP)
  - Portions of water right made available for purchase to mitigate new uses, primarily new groundwater for domestic use

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Water Banking 101

Creating a Water Bank with Existing Water Right

- Water rights holder and Ecology execute Trust Water Rights Agreement to place water rights into State Trust Water Rights Program

- Ecology holds water right in trust, protecting water right against relinquishment

- Ecology and water bank determine where the water right would suitably mitigate new development projects within the basin where the water right is located

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Water Banking 101
(Continued)

Transacting Mitigation Credits

- Water bank and Ecology determine who may purchase mitigation credits based on nature of activity, location of project requiring mitigation
- Water rights "sold" to new user as mitigation against new use

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Progress: Water Banking

- Banking is very well developed in certain watersheds: Yakima Basin and Dungeness River
- Basins with adjudicated senior irrigation rights and new demand for domestic wells may be best suited for robust markets
- Value and utility of mitigation credit varies depending on Ecology's determination of suitability within the watershed
- Drought declaration in 2015 may highlight need for broader use of water banking, but also raises questions over water certainty for existing users

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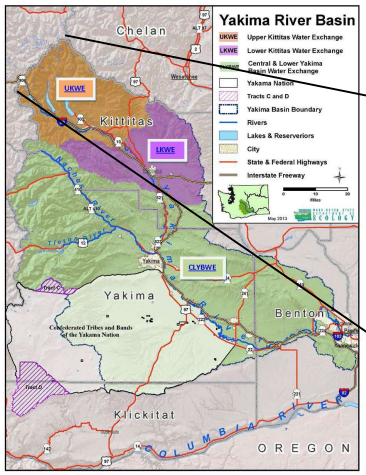
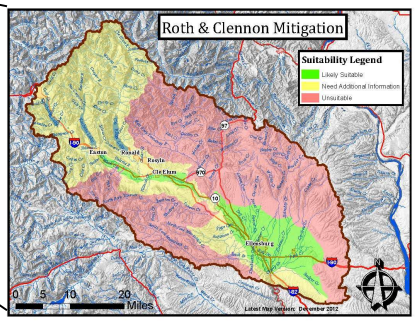
Examples: Yakima Basin Water Exchanges





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Natural Resource Damages Restoration Banking - Background and History

- Natural Resource Damage provisions found in both the Oil Pollution Act and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Trustee Councils led by either USDOI or NOAA and including designated State and Tribal entities determine total liability and assigned proportionately to the responsible parties
- 'Restoration Up Front' proposed as a mechanism analogous to Mitigation Banking to enable early action in restoring injured resources as early as 2002

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Generating, Selling, Buying: Natural Resource Damages Banking

- Habitat Equivalency Analysis measures both impacts and required offsets using Discounted Service Acre Years (DSAYS)
- Discounting typically at 3% per year is used to value temporal loss dating back to the injury and penalizing delay
- As with mitigation banking, responsible parties have three options:
  - DIY
  - Cash settlements to Trustee Council
  - Purchase DSAYs from approved NRDA banks

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NRD Restoration Credits

- Used as a release from liability – very high bar
- Attributes include - Banking Agreements, Trustee reimbursement, Consent Decrees, Financial Assurances, Habitat Easements, and Long-term Care Endowments
- Narrowly defined restoration objectives and service areas
  - Positive- in area where harm occurred
  - Challenges – Expensive real estate, contamination, highest and best use not often habitat, diverse stakeholders, difficult to entitle

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NRD Restoration Banking Limits

* NRD is a niche industry requiring very special regulatory issues and small service areas
* End-users require very specifically accredited projects in order to resolve liability
* Restoration has to compete with other land uses
* Entitlements and bank accreditation is not straightforward

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NRD Restoration Banking Opportunities

* Opportunities nationwide in billions of dollars of NRD liability
* Corporations are willing to pay for NRD habitat (this is important)
* Underutilized or surplus lands are diamonds in the rough in the right location
* Regulatory framework is being adopted nationwide
* NRD restoration banking is a NW creation – lots of expertise and access to capital here

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Questions?

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