



The State of New Hampshire
Department of Environmental Services

Thomas S. Burack, Commissioner



*Celebrating 25 Years of Protecting
New Hampshire's Environment
April 12, 2012*

The Honorable Bob Odell, Chairman
Energy and Natural Resources Committee
Legislative Office Building, Room 102
Concord, NH 03301

Re: HB 1380, relative to the development of wetland mitigation banks.

Dear Chairman Odell:

Thank you for the opportunity to comment on HB 1380, which would permit the establishment of wetland mitigation banks. The Department of Environmental Services (DES) supports HB 1380.

HB 1380 provides clear state authority for the establishment of wetlands mitigation banks in New Hampshire. Mitigation banks provide an opportunity to restore, create and preserve wetlands, and their development should be encouraged in New Hampshire to the extent feasible. Some information on mitigation banks is provided below for your further consideration.

Mitigation banks are one of the mitigation options identified in the federal mitigation rule, Federal Register 33CFR, Part 332, along with restoration, preservation, creation, and in-lieu fee payment. According to the Environmental Protection Agency¹:

"A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 or a similar state or local wetland regulation. A mitigation bank may be created when a government agency, corporation, nonprofit organization, or other entity undertakes these activities under a formal agreement with a regulatory agency. Mitigation banks have four distinct components:

- *The bank site: the physical acreage restored, established, enhanced, or preserved;*
- *The bank instrument: the formal agreement between the bank owners and regulators establishing liability, performance standards, management and monitoring requirements, and the terms of bank credit approval;*
- *The Interagency Review Team (IRT): the interagency team that provides regulatory review, approval, and oversight of the bank; and*
- *The service area: the geographic area in which permitted impacts can be compensated for at a given bank.*

...The value of a bank is defined in "compensatory mitigation credits." A bank's instrument identifies the number of credits available for sale and requires the use of ecological assessment techniques to certify that those credits provide the required ecological functions."

Mitigation banks are a form of "third-party" compensatory mitigation, in which the responsibility for compensatory mitigation implementation and success is assumed by a party other than the permittee. In other parts of the country, mitigation banks exist that are owned and operated by both

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public, non-governmental, non-profit and private sector entities. For example, wetlands banks might typically be established on large properties where wetlands were destroyed by activities such as largescale rice farms that occurred decades ago. With termination of the farming activity, wetlands may be re-created and restored and a wetlands bank created. In these situations, wetlands re-creation must occur prior to the selling of wetlands bank credits to permit applicants. None of these types of mitigation banks exist in New England today, probably because the opportunities for large scale mitigation banks are limited due to New England's geography. In addition, mitigation banks must be approved by the United States Army Corps of Engineers and the Environmental Protection Agency to be eligible to sell credits to wetlands permit applicants. The federal approval requirements are quite rigorous.

In New Hampshire, the Aquatic Resource Mitigation (ARM) Fund Program, which is an in-lieu fee program, currently performs an equivalent function to mitigation banks to satisfy federal wetlands mitigation requirements. The ARM Fund has enjoyed early success, and we expect that success will continue. This program provides applicants with the option to pay an "in lieu fee" for wetlands mitigation based on a payment schedule and methodology that is established in state statute. This is different than a "traditional" mitigation bank in that applicants purchase credits at the time of permitting for projects that have not yet been implemented. DES then awards these funds, based on annual competitions by watershed, to applicants that have proposed projects for wetlands restoration, preservation or creation. To date, \$2,648,011.00 has been awarded for 18 wetlands mitigation projects on a statewide basis. Wetlands permit applicants, recipients of funds for mitigation projects and the Corps of Engineers have all been very satisfied with this program.

HB 1380 also includes, at the request of DES, a minor amendment to HB 1380 to strengthen and improve ARM Fund implementation. This proposed amendment would improve consistency with the federal mitigation rule under which the fund operates and would provide more program flexibility. At a practical level, this would allow us to consolidate some smaller Hydrologic Unit Code 8 (HUC 8) watersheds into larger areas for purposes of ARM Fund collection and distribution. We have learned from our early experience with this program that some HUC 8 watersheds are too small in area for the ARM Fund to function well, so consolidation of smaller contiguous HUC 8 watersheds into single service areas would make the program more effective and efficient. This change has also been encouraged by the United States Army Corps of Engineers.

Thank you for this opportunity to comment. Please contact Rene Pelletier at 271-2951, or me at 271-2958, if you have any questions or need additional information.

Very truly yours,



Thomas S. Burack
Commissioner

cc: Representatives Merrow, Mirski, and Babson.
Senator Bradley

ⁱ "Mitigation Banking Factsheet", United States Environmental Protection Agency, www.epa.gov/owos/wetlands/facts/fact16.html