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Banking on a Loss

Wetland mitigation banks may be much more interested in profit than environmental protection.

By Craig Pittman

About 15 minutes outside the Central Florida town of Clermont is a rolling hillside covered with wildflowers. The sandy hill, full of stunted oaks, rises to about 140 feet above sea level, which means it's about as dry as land in Florida can get. But as far as the government is concerned it's a muddy swamp.

Welcome to the Lake Louisa Wetland Mitigation Bank, part of a billion-dollar industry that for more than a decade has been making it easier to replace the nation's dwindling supply of wetlands with new homes, stores, and highways. Instead of making up for the damage to wetlands themselves, builders can write a check to a mitigation banker, buying "wetland credits" that are supposed to equal what's been lost.

The wetland mitigation banking industry is unknown to the general public. Even some professional planners are in the dark about it. At the Northeast Florida Regional Planning Council in Jacksonville, for instance, no one has any information about the dozen or so mitigation banks in the region, says Kathy Dennis, AICP.

But the business is booming. Fifteen years ago, only 46 banks existed nationwide. Now there are more than 400. In Florida, where the U.S. Army Corps of Engineers issues more wetland destruction permits than in any other state, more than 40 banks are scattered across the state.

"It's a great way to make a living. We're doing the Lord's work and getting paid for it," says Florida Republican Party vice chairman Allison DeFoor, who works for EarthBalance, a company that has launched four Florida banks and has a dozen more in the works.

Credit prices in Florida range from as low as $17,000 per credit in sleepy North Florida to as high as $150,000 each in fast-growing Central Florida. Yet the banks' prices are cheap enough to appeal to developers because they are an easy way to satisfy the requirements of their permits.

"In 95 percent of the cases we're more economical to the developter than any other form of mitigation," says Raymond Pavelka, a Southwest Florida developer who also runs a pair of mitigation banks there.

They love it

The promise of the wetland mitigation banking industry — a free-market solution that's good for the environment — pleases politicians of every stripe. Thanks to a strong lobbying effort by the National Mitigation Banking Association, headquartered in Orlando, Congress has steered millions in federal funds into the bankers' pockets to make up for highway projects that destroyed wetlands.

Now the federal government wants to boost the industry even more, proposing a new set of wetland-destruction rules that will all but require private developers to use the banks. "We're going to have a tremendous number of mitigation banks after we finalize this rule," U.S. Environmental Protection Agency assistant administrator Benjamin Grumbles predicted last year at a forum on wetlands mitigation.

But as the bone-dry Lake Louisa bank shows, not all is as it seems in the world of wetland mitigation banks.

Making the trade

"A lot of banks are square pegs pounded into round holes," says Chuck Olson, a veteran environmental consultant whose company, Mitbank USA, owns the 2,675-acre Bluefield Ranch Mitigation Bank on Florida's east coast. "A lot of them are people looking to cash out on bad pieces of property by turning them into mitigation banks."

Wetlands are protected under the Clean Water Act because they absorb floods, filter out pollution, recharge the underground water supply, and provide habitat for a wide range of wildlife. When builders destroy a swamp, they are supposed to make up for the damage because federal policy says there should be no net loss of wetlands.

For years the most common way developers mitigated their wetland destruction was by promising to create a new wetland elsewhere. But a 2001 National Research Council report found that mitigation projects rarely work and that the Corps does a poor job of tracking success and failure.

Advocates of mitigation banking contend it's the ideal alternative.

The would-be banker buys a wetland that has been drained, usually by farmers. The banker draws up a plan for turning it back into a swamp, usually by blocking ditches or filling in canals, then replanting wetland vegetation. Regulators review the plan and decide how to translate the restoration into wetland credits.

Invariably the permits require the owner to sign over all development rights and set up a fund to maintain the site in perpetuity. Each bank usually gets a certain number of credits just for putting a conservation easement on the property, with more credits released at each stage of restoration progress.

From the public's perspective, the trick is not to let mitigation banks make silk purses out of sows' ears, says Wayne Daltry, AICP, Lee County's smart growth coordinator. In other words, the banker's work should offer some wetland-related benefit to the community instead of simply allowing an entrepreneur to rake in big bucks for doing little beyond fencing off some land. For instance, one 1,650-acre central Florida mitigation bank filters the pollution from the stormwater runoff coming from Walt Disney's theme parks, helping keep a creek clean as well as earning profit for the bank owner.

Some history

Banking started in Louisiana in the 1980s. The Fina Oil Company took a 7,000-acre parcel of degraded wetlands, built levees and weirs to fix the flow of water across the property, then banked the mitigation value to use later, as Fina destroyed wetlands elsewhere during its routine operations.

The idea caught on quickly, especially after Congress passed the Intermodal Surface Transportation Efficiency Act of 1991, which authorized state highway departments to use federal funds to establish mitigation banks.

Then along came a Florida company that refined the idea. George Platt, a former Broward County commissioner and state treasurer of the Democratic Party, joined forces with partner David Johns to launch a company called Florida Wetlandsbank. Platt and Johns cut a deal with the city of Pembroke Pines for use of a weed-choked garbage pit that a developer had donated to the city. They turned the property back into a 450-acre marsh on the eastern edge of the Everglades. But instead of keeping the credits for its own use, Florida Wetlandsbank sold them to developers destroying wetlands, splitting the profit with the city.

Because of the devastation wrought by Hurricane Andrew in 1992, more than 100,000 Miami–

Dade residents moved out of their damaged homes. Many moved one county north to Broward. The demand for new housing there led to wholesale destruction of wetlands.

"Of course the whole south end of Broward is a floodplain, practically, so everything needed to be mitigated," Platt says.

But now the easy way to make up for the wetland destruction was to buy credits from Florida Wetlandsbank. In six years Platt's company managed to sell every credit. Total take: $20 million.

However, the wave of development that generated those profits also left their bank an island of green surrounded by sprawl. "We're adjacent on three sides to areas that were either developed or were going to be developed," says Platt. "One is called The Preserve, and the developer charges an extra $10,000 a lot to look out on our swamp."

Dry wetlands

The point of wetland mitigation banks is "to provide for the replacement of the chemical, physical and biological functions of wetlands," according to the current federal rules governing mitigation banks. That means saving dry land, known as uplands, is not the goal.

The nonpartisan Environmental Law Institute, based in Washington, D.C., surveyed the mitigation banking industry in 2002 and recommended that dry land "should not be directly counted as mitigation credits."

"It's a net loss if you're permitting five acres of wetland losses and you're only doing two acres of wetland restoration and three acres of uplands," explains Jessica Wilkinson, who led the survey. "That's a net loss of acres."

But under the current federal rules, "credit may be given for the inclusion of upland areas occurring within a bank" — although "only to the degree that such features increase the overall ecological functioning of the bank." Florida's law goes even further, treating wetlands and dry land as if both were equally important.

State officials have allowed 10 mitigation banks to claim a third or more of their credits for merely saving dry land, rather than for doing anything wetland-related. Added up, those 10 banks got more than 5,386 credits for their dry land — credits which, under state law, can be sold as if they were the equivalent of 5,386 acres of pristine wetlands.

At the Lake Louisa bank, 279.8 credits were approved by the state in 1996. Of those, 257.4 credits — more than 90 percent — are for converting its sandy hills from citrus groves back to forest, not for helping wetlands. "It's a beautiful piece of property,'' says Dennis Benbow, whose company, Mitigation Marketing, sells Lake Louisa's credits. "You wouldn't necessarily say this is a beautiful wetland."

Yet when construction of the Central Florida Expressway wiped out more than 60 acres of wetlands between 1997 and 2000, the state itself bought credits from the Lake Louisa bank to make up for the damage. That means state officials spent $2 million on dry land at Lake Louisa while wiping out Central Florida swamps that replenish the water supply. The state Department of Transportation has been Lake Louisa's biggest customer.

For 11 years Todd Gipe was the state official in charge of drawing up the permits for Lake Louisa and 14 more banks in Central and North Florida for the St. Johns River Water Management District. He says Lake Louisa got so many wetland credits for dry land because there wouldn't have been much of a mitigation bank otherwise.

"More credits were given for uplands because the wetlands themselves were not greatly improved directly," says Gipe, who in 2005 quit his state job to become a mitigation banking consultant.

While Lake Louisa is the driest of the Florida banks, others come close. At the Barberville Mitigation Bank near Daytona Beach, state officials granted it 84.3 mitigation credits — 73.8 of them for the uplands. At nearby Lake Monroe Mitigation Bank, the state said 146 of its 199.9 mitigation credits are for preserving the uplands, not the wetlands.

Ironically, both are owned by government agencies — Barberville by Volusia County and Lake

Monroe by the Florida DOT. The design and permitting for both banks were overseen by consultant Stuart Bradow. He says dry land is as essential to protecting the ecosystem as the wetlands. When asked why the uplands deserves more wetland credit than the wetlands, Bradow said, "It's a little bit of a convoluted logic."

As for how giving wetland credits for dry land fits in with no net loss of wetlands, Bradow laughed and said, "Yeah, well, good luck with that!"

Last year Florida officials issued a permit for the Peace River Mitigation Bank in rural Central Florida. Not only did the owners, EarthBalance, get more credits for saving dry land than for the wetlands, they got all 138.82 credits for doing little beyond merely preserving the land.

Because nothing is being restored, each credit sold will equal a lost acre of wetland in the Peace River area — at a time when the river, which supplies drinking water to Sarasota and Charlotte counties, is drying up.

Toothless tigers

Who polices the banking industry? After permits are issued, the answer often is: nobody.

In 2005, investigators from the Government Accountability Office searched through 15 mitigation bank files in the Corps's main Florida office in Jacksonville. Ten contained no evidence the Corps had ever inspected them.

The regulators miss out on a lot. Lake Louisa's original owner, a company called Ecobank, was founded by developers who had once gone to jail on charges of illegally filling wetlands (a flawed search warrant led to the charges being dropped). They owned two other banks, one in Florida and one in North Carolina. To help their struggling finances, they quietly paid local officials, including the chairman of one county commission, to hawk their wetland credits to developers and government agencies.

But they ran into major financial trouble, eventually filing for bankruptcy in 2004. Ecobank's owners did not notify state and federal regulators, as required by their permits. It took state officials two months to figure it out. It took the Corps more than a year.

"We're all busy people,'' says Ron Silver of the Corps's Jacksonville office. "We've got a lot to do. Do I wish they had told us? Yes, absolutely."

It took the Corps even longer to notice anything amiss at the Sundew Mitigation Bank in rural Clay County. Silver calls Sundew "the poster child" for his agency's failure to play its watchdog role.

The Sundew bank received its state and federal permits in 2001, and got 60 credits for recording its conservation easement. The 2,104-acre property was mostly pine plantation, which owner Ernest Hale promised to convert back to wetlands. Five years passed, during which Hale sold the 60 credits to people destroying wetlands. But Hale didn't do the restoration work he had promised.

Hale said he stalled because he didn't have demand for more than the 60 credits he received up front — and those initial credits didn't actually require him to restore anything. In 2005, just as his permits were about to expire, he asked for an extension so he could get started.

On paper, the credits from the Sundew bank made up for the destruction of wetlands. But because Hale hadn't done the work, in reality those wetlands were a net loss. No state or federal government agency checked on Sundew, even though their nearest offices are 16 miles away.

How far is too far?

Finding a site for a mitigation bank is tricky. Bankers need an area where there are wetlands to be restored, but with enough surrounding development to generate a demand. Put the bank too far away and not only will there be no demand, but also any environmental benefits that the bank generates will not replace the ones wiped out.

"Mitigation should have some degree of proximity to where the impacts are," says Platt of Florida

Wetlandsbank.

Yet the Little Pine Island Mitigation Bank shows how elastic the concept of proximity can be. Owner Raymond Pavelka has restored about 1,600 acres of wetlands on the island, but his customers are wiping out wetlands on the mainland on the outskirts of booming Fort Myers and Naples.

One customer who bought credits from the island bank was making up for wiping out wetlands more than 30 miles inland, near the Hendry County line, on the edge of the Everglades. "Admittedly it is somewhat removed from the majority of impacts," Silver says.

Pavelka said the improvements he's made on the island are "impacting the entire coastal area that projects using our credits flow into."

However, an EPA-funded study found that the Little Pine Island bank, because of its isolated location, was doing a poor job of replacing wetlands destroyed on the mainland. The bank couldn't provide the same flood protection, pollution filtration, or water recharge as the natural wetlands, according to the 2003 study by the nonpartisan think tank Resources for the Future.

"If people understood what it is we're losing when we lose these wetlands, we'd have a lot less wetlands destruction in this country," says James Boyd, one of the study's authors.

Politics as usual

Despite its flaws, the mitigation banking industry has convinced Congress that it's the wave of the future. It helps that bankers have been generous with campaign contributions. For instance David McIntosh, the chairman of Mitbank USA, which owns Bluefield Ranch Mitigation Bank, donated thousands of dollars to the campaigns of Florida's Republican U.S. Sen. Mel Martinez and former U.S. Rep. E. Clay Shaw. Meanwhile George Platt, of Florida Wetlandsbank, has donated heavily to the Florida Democratic Party and Democratic candidates.

Without Congress, there wouldn't be much of a mitigation banking industry, according to Wilkinson of the Environmental Law Institute. Congress has required the Corps itself to use mitigation banks to make up for the wetlands destroyed by its dams, canals, and other projects. And in 1998 Congress decreed that for any federally funded highway projects that wipe out wetlands, "preference shall be given, to the maximum extent practicable, to the use of the mitigation bank."

That was due to lobbying by the bankers, according to Sheri Lewin of the National Mitigation Banking Association. They're now working to require all airports that wipe out wetlands during federally funded construction to use mitigation banks, she says.

The biggest congressional champion of mitigation banking is U.S. Rep. Walter Jones, (R-N.C.). Jones declined an interview, but he has spoken at the mitigation bankers' annual conference and they have attended his fundraisers. In 2004, Jones included language in a defense-spending bill that required the Corps to establish new rules for wetland mitigation that would boost the mitigation banking industry. Jones, in a news release, predicted the new rules would result in "greatly enhancing the quantity and quality of wetlands in the future."

Last year, the Corps and the EPA jointly proposed regulations that would encourage developers to use mitigation banks instead of trying to mitigate wetland loss on their own. The new rules drew more than 12,000 comments, says Palmer Hough of the EPA. A revised version was due to go to the Office of Management and Budget this fall, with final issuance slated for two to three months later.

One controversial element of the proposed new rules would allow Corps officials greater freedom to grant credits for dry land, as Florida does. Another involves defining service areas. Until now the primary concern in drawing the boundaries has been environmental: Is it in the same watershed as the development? But the new rules say, "The service area should be large enough to support an economically viable mitigation bank." An economic viability test will likely to lead to larger service areas, allowing credits to be sold much farther away from the impact it's supposed to make up for, critics of the measure say.

The basic problem, though, is that federal and state officials are treating mitigation banking as if it has been proven to be the best option for dealing with wetland losses, says Wilkinson. "If the agencies are building in preferences for one type of mitigation over the other, I believe it should be based on some empirical, field-based research," he adds.

Last year the first such research was published, and it didn't bode well for the banking industry. A study of 12 Ohio mitigation banks by that state's environmental department found that four were total flops, five were partial failures, and only three could be called successful.

But that didn't affect their ability to sell credits to builders. The report noted that "half of all credits were released before a demonstration of any ability ... to meet even the limited performance standards in the agreements." The authors concluded: "Too often, mitigation banks have simply meant more acres of poor quality wetland restoration than a comparable, small individual mitigation site. This is clearly not acceptable nor what was intended."

That's beside the point for investors, who just want in on the bonanza. Platt says he has been contacted repeatedly by investors wanting to jump on the bandwagon. He says the reason is simple: "The idea is to make money."

Craig Pittman is a reporter at the St. Petersburg Times. *His series of articles on mitigation banks — written with fellow reporter Matthew Waite — this year won the top award for investigative reporting from the Society of Environmental Journalists. Their book on wetlands will be published by the University Press of Florida next year.*

Resources

Images: Top — Before, during, and after construction of the Panther Island Mitigation Bank in Southwest Florida. Bottom — The city of Pembroke Pines got both a 450-acre marsh and cash infusion when the credits for the marsh were sold to developers elsewhere. Photos Wetlands Bank Group.

The Environmental Law Institute's Wetland Mitigation Banking Study Searchable Database: www2.eli.org/wmb/search.htm.

The National Mitigation Banking Association: www.mitigationbanking.org.

The Ohio Mitigation Banks Report is available at: www.epa.state.oh.us.

Federal Register notice of proposed new mitigation rules from the Corps and EPA: www.epa.gov/owow. Click on "Wetlands."