Chris Tanner
Assumption of the CWA Section 404 Mitigation Banking Program – Legal Considerations
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Legal Considerations
Overview

1. On-going commitment – “The Knowns”
2. Section 7 vs. Section 10 ESA Consultations
3. Application Review Timelines
4. Mitigation Banking Instrument
5. Challenges to State Issued Federal Banking Authorizations
On-Going Commitment

• “Known Knowns”
  o FA, CE, access, encumbrances, engineering, lift determinations, success criteria, credit releases, enforcement, bank failure, etc.

• “Known Unknows”
  o New federal rule and future RGLs coming.

• “Unknown Unknowns”
  o Litigation/caselaw, changes in the industry, changes in rule interpretation and policies.
Example – FL Mit Bank
Regulatory Agencies

- Corps – 33 CFR Part 332
- State – Section 373, F.S. and Section 62-342, F.A.C.
ESA Consultations

- Section 7 Consultation
  - Applies to federal agency actions that may affect a listed species.
- Section 10 Consultation
  - Applies to non-federal actions (e.g. state agency or private landowner action with no federal nexus).
- EPA Memorandum – August 27, 2020
  - EPA should consult with FWS and NMFS under Section 7 of the ESA regarding approval of a state or tribal CWA Section 404 program.
Application Review Timelines

• Waiving of permit review and issuance deadlines required under state rules and statutes.
• Need buy-in from banking community.
Mitigation Banking Instrument

• What is an MBI:
  o Permit?
  o Contract?
  o “Formal agreement”?
  o “A regulatory instrument”?

• Does it matter for the purposes of states or tribes assuming the federal banking program?
Authorization Challenges

• New venue to challenge authorizations granted pursuant to federal regulations at the state level.
• Issue one or two authorizations?
• E.g. Florida Division of Administrative Hearings
Questions