

BENEFITS OF LONG TERM PLANNING FOR INTEGRATION OF CLEAN WATER ACT SECTION 404 PERMIT MITIGATION AND THE GEORGIA GREENSPACE PROGRAM

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Abstract. The Georgia Community Greenspace Program, administered by the Georgia Department of Natural Resources, establishes a framework within which developed and rapidly developing counties and their municipalities can preserve and protect community Greenspace. Wetland and stream mitigation banking, administered by the U.S. Army Corps of Engineers in coordination with other federal and state agencies, in application of the Clean Water Act, Section 404, permit program, provides opportunity to generate credits in advance of actual impacts. Integrating these two programs by long-term planning at the local level may provide fiscal savings and environmental protection opportunity synergistically. Application of in lieu fee mitigation funds from the Wetland and Stream Trust Accounts administered by the Georgia Land Trust Service Center may help offset costs associated with land acquisition and provide permanent land protection through deed restrictions or conservation easements, thereby qualifying as Greenspace. Adoption and implementation of local ordinances may help establish the need and purpose of these local natural amenities.

INTRODUCTION

County and city managers and administrators can take advantage of Clean Water Act Section 404 mitigation opportunities in furthering their Community Greenspace and Greenway programs in a cost effective manner. When county/municipal offices and departments are compartmentalized, staff within the county may be pursuing land acquisition for separate purposes when multiple purposes could be achieved using the same tract. Environmental consultants familiar with CWA Section 404 permitting, can be useful in assisting counties and municipalities in locating properties within their jurisdiction that are appropriate for meeting both mitigation and Greenspace

Program purposes. County owned mitigation banks increase opportunity to mitigate within the same watershed as the impacts to wetlands and streams occur. Options to meet this goal can be explored with the Corps of Engineers and the Georgia Community Greenspace Program prior to expenditure of funds on land acquisition.

THE CLEAN WATER ACT

Under the Clean Water Act, Section 404 (33 U.S.C. 1344) permit determinations are made authorizing the placement of fill or dredge material in jurisdictional waters of the United States. The permit requires that mitigation be sufficient to offset the impacts to wetlands and streams. Mitigation is generally the replacement of wetlands and streams impacted by permitted construction projects, with additional wetlands and streams, in ratios and with functions, sufficient to balance the environment.

TYPES OF MITIGATION

Mitigation involves preservation, restoration, enhancement and creation of wetlands, streams and their buffers. *Preservation* means the permanent protection of an area containing wetlands and/or streams and their buffers. *Restoration* means actions taken to correct previous alterations that have either destroyed or seriously impaired the values and functions of an aquatic site. *Enhancement* means increasing or improving one or more of the functions or values of an *existing* aquatic area. *Creation* means the conversion of non-aquatic habitat to aquatic habitat. Creation is generally very difficult to achieve. No more than 50% of a proposed mitigation plan may be *preservation*. Therefore, there must be some *restoration, enhancement and/or creation* with every

mitigation plan proposed. In addition, the permit regularly requires that all the mitigation property be perpetually protected by the recordation of a perpetual restrictive covenant providing that the property will be forever held in its undeveloped scenic, open and natural state.

MITIGATION BANKING

Wetland or stream mitigation banking provides for the creation, enhancement, restoration and preservation of an aquatic resource to generate credits usable as advanced compensation for unavoidable wetland/stream losses due to impacts of other permitted sites. The owner of a tract of land proposes a mitigation plan for beginning a mitigation bank. If approved by the Mitigation Banking Review Team, the mitigation work is begun. At various stages of ecological success, credits are granted to the owner of the mitigation bank. A compensation credit is an ecological unit of a restored, enhanced or preserved wetland/stream. The Corps uses credits as the basis for comparing the impacted wetlands/streams to the restored and preserved wetlands/streams offered in compensation. The owner may sell those ecological wetland/stream credits to applicants for Section 404 permits if approved by the Corps. If the owner of the bank is a county, the county may use the credits as mitigation for various construction projects where permits are required. The County may also sell the credits, thereby generating funds.

The advantage of a bank is that the aquatic restoration, enhancement and creation work, once completed, offers credits for use or sale immediately. The construction project may go forward immediately upon purchase or withdrawal of the credits once approved by the Corps. On the other hand, if a county applicant for the permit must acquire or condemn property for use as mitigation, submit a plan for restoration, enhancement and creation to the Corps, and substantially begin the mitigation work prior to commencement of the construction project, then there will be a delay in moving forward in a timely manner.

INTEGRATION OF GREENSPACE AND SECTION 404 MITIGATION

When planning for construction projects that involve impact to jurisdictional waters of the United States, counties and their municipalities must consider the cost and time required for mitigation associated with

Section 404 permits. They must seek property to acquire, restore and perpetually protect, or they must pay funds to mitigation banks for the amount of credits required by the CWA Section 404 permit. Existing mitigation banks may or may not be within the jurisdictional geographic boundaries of the county and its municipalities. Thus, the county may be paying funds to approved mitigation banks in other counties. If counties desire to keep mitigation property within their jurisdictional geographic boundaries, so as to benefit from the open, natural and scenic sites, long term planning requires consideration of the establishment of county owned mitigation banks. Once the property is perpetually protected, the property used as mitigation may qualify under the Community Greenspace Program and/or could be used as Greenways or for passive recreational use. In addition, it may be advantageous to support privately owned commercial banks within the county jurisdictional boundaries if the owner of the property is willing to consider long-term use of the property as Community Greenspace and is willing to grant a conservation easement to a qualified holder.

If counties and their municipalities are seeking property to acquire and protect as Greenspace and Greenways, then consideration of property containing wetlands and/or streams may also serve the dual purpose of providing mitigation credit opportunities for CWA Section 404 permits or may present opportunities to establish a mitigation bank. In addition, stream restoration and enhancement projects, approved as mitigation for CWA Section 404 permits by the Corps, may also serve to reduce total maximum daily loads (TMDL) on streams and may improve water quality through reduced erosion.

In order to maximize the benefits, the sequencing of events for use of the property should be explored with the Corps. For example, if a tract of land with wetlands and/or stream and buffer is acquired and protected as Greenspace with a conservation easement or a contractual arrangement prior to its proposed use as a mitigation project for a CWA Section 404 permit, then *preservation* credits would not likely be granted by the Corps due to the fact that the property has already been perpetually protected. However, the tract may present opportunities for *restoration* and *enhancement* credits. The goal of the CWA as to preservation mitigation is to perpetually protect wetlands and streams that are not already protected.

On the other hand, if a tract of land with aquatic resources is presented to, and accepted by the Corps as mitigation for a permit, or as a mitigation bank, and has no protected status, then the credits for the

preservation, as well as the *restoration* and *enhancement* of wetlands and/or streams on the tract could be obtained. The Corps would then require the property to be perpetually protected by use of a Declaration of Covenants and Restrictions. Use of preservation credits, along with the restoration and enhancement credits would increase the total amount of credits in the bank pool. If owned or acquired by the governmental entity, the tract most likely would also qualify as meeting the Greenspace qualifications since it would be an aquatic resource that would be perpetually protected by a restrictive covenant as required by the CWA permit, running in favor of a federal governmental entity. Therefore, understanding the benefits of sequencing the acquisition and use of the property to meet multiple goals would require long range planning and consultation with the agencies.

CONCLUSION

A county may determine that it can maximize the use of property containing aquatic resources to serve dual purposes as mitigation for Clean Water Act Section 404 mitigation for required permits and as Community Greenspace, greenways or natural resource areas. Sequencing is important to obtain maximum benefit. If the county plans to sell the credits, it may generate funds to assist in the acquisition of land costs. The Georgia Land Trust Service Center may have funds available to assist in acquisition of aquatic resource property. The Corps Regulatory Branch is available to consult with counties, municipalities, their staff and consultants about possible opportunities for land use and mitigation.