

**Advisor's Group Meeting Minutes**  
**September 20, 2007**  
Seattle Corps of Engineers, Edsel Room  
10am-2pm

**Attendees:**

Doug Peters  
Mary Heinrich  
Theresa Dusek  
Joan Cabreza  
Peggy Bill

Bill Leonard  
Sarah Cooke  
Gretchen Lux  
Gary Cooper  
Yolanda Holder  
Steve Erickson

**Facilitator:** Gary Cooper

**Note Taker:** Yolanda Holder

## **Warm-up and Introductions**

### **Conservation Easements**

Peggy Bill with Cascade Land Conservancy (CLC) provided background on the Conservation Easement (CE) Q & A sheet provided prior to today's discussion. The Q & A sheet provides answers to numerous questions CLC received from the Department of Ecology, the Corps and EPA.

CEs are not one-size fits all, each CE should be tailored for the specific bank. The CE holder and the person providing the long-term management can be different entities or they can be the same entity, depending on the situation. In one example, CLC is both the conservation easement holder and they provide the monitoring for the easement.

**Mary:** In enforcing the CE and being the easement holder isn't this a conflict of interest? How can you truly monitor yourself?

**Peggy:** There has been no conflict thus far. If we (CLC) didn't do our part appropriately the MBRT wouldn't release credits to the bank sponsor.

Peggy provided the details of the three different pieces of the Conservation Easement which ensure there would be no conflict of interest.

1. Monitoring of the Conservation Easement for compliance
2. Monitoring by the agency for compliance of the bank
3. After the bank has been certified, the Long-term management of the bank begins

The bank sponsor is responsible for designing the bank and achieving their performance standards. CLC is responsible for ensuring the CE specifications are upheld.

**Mary:** There still appears to be a level of conflict with being both the long-term manager and the Conservation Easement (CE) holder.

**Gretchen:** Ecology, the Corps and EPA are the entities that approve the release of credits. Any credit release requires that the sponsor document successful establishment of the bank by meeting their performance standards. If the banker doesn't achieve their performance standards, the credits will not be released until those standards are met.

Conversation continued regarding the *potential* conflict of interest when one entity is identified as both holding the conservation easement and being the long-term steward responsible for the site management.

Peggy provided examples of text that may be included in the Conservation Easement:

- State the purpose of the document.
- Show the Grantor of the easement (landowner) and the Grantee (who is responsible for enforcement obligations).
- State if the Grantor has rights to access the property, enjoy the property, recreational activities, any agricultural use, etc.
- Show any rights that could be transferred on the property i.e. you would usually extinguish the right for a feedlot, mineral extraction, roads, etc.
- Clear intentions should be written into the CE; however, the language should not be too restrictive that future non-problematic items might be denied.
- Rights for maintenance i.e. maintain the right to go onto the property and take care of invasive species or noxious weeds, etc.

*The parties involved must all agree (or by judicial proceedings) to make changes or to extinguish in whole or in part the CE for future land use.*

**Mary:** We need to look at these CEs as Banking Conservation Easements used as the regulatory easement not just an everyday CE. There shouldn't be clauses for extinguishment within the CE for future non-wetland mitigation bank purposes. The bank site was created as mitigation for destroying a wetland and it should take a court mandate to remove this standing.

**Steve:** Would it only be Ecology that would need to sign off on changes to the CE?

**Gretchen:** No, it would be Ecology, the Corps and EPA (the standing MBRT) that would need to sign off on any changes.

**Steve:** Who has standing to uphold and regulate the easements?

**Peggy:** If the grantee is not upholding their part of the easement, the agencies can work together to have the rights transferred to another party.

**Bill:** The local agency has the choice to state they agree with the recommendation of the MBRT and they don't need to sign the CE; or the local agency can state they do need to sign off on the CE before it can move forward.

**Theresa:** Where in the banking process does the CE get reviewed, including the clause of extinguishment of all or a portion of the CE...at the end of the process, close to certification or ? Also, how does that line up with the coordination with local jurisdictions?

**Gretchen:** Ecology tries to ensure the local government is involved in the development of the Conservation Easement (CE) as part of the MBRT. The MBRT makes every effort to include the local jurisdiction as it goes along in reviewing the proposed Conservation Easements. The MBI requires an MBRT approved CE. Typically the details of the CE are not known until close to the end of the process.

**Bill:** The credits won't be released until the conservation easement is approved.

**Steve:** Section 173-700-422 contains language that the department shall require the CE, but doesn't specify it must be approved by the MBRT.

**Gretchen:** The MBI template states the CE must be approved by the MBRT.

**Theresa:** The local government must sign off on the MBI.

**Advisor Group Decision:** The Advisors Group agrees that language should be included in the rule which states the MBRT must approve the Conservation Easement.

**Theresa** made a strong recommendation for language in the rule requiring 1) the CE be signed and recorded for approval - prior to the release of credits, and 2) specific language requiring the CE to be reviewed and approved by members of the MBRT prior to signing the MBI. If the locals are involved in the MBI, they should also be involved in the CE.

**Gretchen:** Does this also need to be articulated in the rule?

**Mary:** Yes, it does need to be in the rule.

**Peggy:** An agency may not be aware of a deed years in the future, even if it's been recorded.

**Joan:** Having the city as part of the agreement will be good, because the zoning may be changed in certain areas and the city may be the one who wants to change an easement to enable development [10, 15 or more] years down the road.

**Bill:** We are trying to implement the local jurisdictions involvement right now.

**Mary:** How do we ensure the recognition of the CE in the future by the city?

**Theresa:** In perpetuity type easements are difficult to track if not specifically identified.

**Gary:** The local government needs to be involved, but is this information outside of banking easements?

**Theresa:** Yes, it is the bigger picture, but it needs to be made transparent for the local government. The locals may not be aware of the extinguishment rights within the CE.

**Peggy:** Where does this information need to be addressed? She doesn't feel that this information should be in the CE, but in the MBI.

**Theresa:** It's just as important for the local government to sign off on the CE as the MBI.

**Sarah:** She also feels the local government should sign off on the CE and it should be written in the rule.

**Mary:** Can development rights be transferred? The mitigation bank is already a transfer of development rights from the destroyed wetland. She stated there is a transfer of

density in Skagit County with the portion of the 300 acres that will be going into mitigation banking.

**Theresa:** We do not have jurisdiction over the zoning for those properties which are adjacent to a bank.

**Peggy:** The Conservation Easement (CE) doesn't address current or future zoning - only the extinguishment of terms of the CE.

**Mary:** Maybe there should be a size limit or percentage of land for a mitigation bank. One example is 800 acres of land were purchased under the term "mitigation banking", but only 300+ acres are proposed as the bank. They shouldn't be allowed to do whatever they want on the remainder of the 450+ acres.

**Gary:** Should there be added rule language that states a bank cannot be used as a method for establishing transfer of development credit rights? Or Bank area cannot be used to calculate TDRs?

**Steve:** All development rights within the bank site must be extinguished by the CE. ('Extinguish development potential of and from the bank site.')

**Theresa:** [Guidance documents on the CAOs \(CTED\) would be a better place to discuss this issue. Local Governments need to look at the transfer of density and related issues in comp plans and development regulations.](#)

**Sarah:** The CE for the banking instrument should only contain those lands that are within the bank.

**Steve:** In section 173-700-423 of the rule, [we should add language](#) to prohibit transfer of development rights. Also, the development potential should be extinguishable somehow. Proposed change "[...extinguish development potential of and from the bank site.](#)"

**Peggy:** We need to focus the language specific to the bank.

**Sarah:** 173-700-423 (1) Prohibit '[future changes](#)'

[Steve, Sarah and Mary agreed that the above changes should be incorporated into 173-700-423 and that the text should be moved to a more appropriate section as noted by Peggy below. Bill suggested the use of 'Future unauthorized changes' to allow flexibility to use adaptive management as needed with approval of the MBRT.](#)

**Peggy:** The CE language in 173-700-423 (2 and 3) should be moved to another area, this text seems to be out of place. This section relates to requirements of the long term manager.

**Mary:** When you place the condition on the easement and restrictions, the zoning baseline information should be in the CE.

**Peggy:** This information should be part of the MBI.

**Audience:** Part of Preston, Gates and Ellis' template starts with "You need to know what the current zoning is to then put what can be done on the land later". You can't strip development rights, so how can you transfer the development rights?

Bill Leonard and Peggy Bill left the meeting on completion of the CE discussion.

## Lunch

### July Advisor's Meeting

Checklist and draft schedule: The draft schedule wasn't completed by the bank sponsor. At the beginning of the meeting, Ecology provided separate checklists for the following:

- Mitigation Banking Instrument
- Mitigation Banking Application
- Mitigation Banking Public Notice
- Mitigation Banking Prospectus for discussion

*The Advisor's Group attendees made no recommendations for changes to these documents.*

#### Reviewed July's Recommendations:

The attendees took time to further review the handout titled *Summary of Discussion and Recommendations* from the July 13, 2007 Advisor's Meeting.

**Mary:** Where do we anticipate getting the locals involved in this process?

**Gretchen:** We'll discuss this topic during the SEPA conversation.

*The Advisor's Group attendees made no recommendations for changes to the document.*

## SEPA

**Gretchen:** Ecology has been looking at how to accomplish SEPAs for wetland mitigation banks. Signing the MBI is an action and when Ecology anticipates a bank review would be the SEPA trigger. Ecology could be the lead on SEPA through the conceptual banking proposal or could be co-lead with the local jurisdiction. The conceptual SEPA would be initiated with the public notice when the prospectus was received. The local jurisdiction would then follow with the project specific SEPA and could "adopt" the documents from the conceptual SEPA phase.

Gretchen directed the attendees to the revised timeline handout. This document shows how the public processes line up and where we might incorporate these two parts of SEPA.

**Steve:** Where would signing of the MBI come in to play?

**Gretchen:** The technical review would be largely complete prior to the joint 404/401 public notice. The MBI signing is last, after the local SEPA process has been completed.

**Steve:** What's the appeal process?

**Doug:** I understand the intent of SEPA is not to piecemeal projects, but what about co-leads on the project and doing it in phases? Ecology would be the lead through the

first part of the process and the local government would be the lead for the permitting process.

**Steve:** SEPA includes language pertaining to the *need of the action*.

**Gary:** The only Ecology determination of the need of the bank would be if Ecology needs to spend resources on another bank.

**Theresa:** The public could ask for the necessity of a project to be reviewed.

**Mary:** Why waste the State's time if we know there are too many banks in one specific area? There wouldn't be a need for two banks within a minimal amount of land area.

We should potentially add language which states you must have the mitigation capacity to show the amount of bank land applied for is necessary.

**Doug:** You make a SEPA determination with all the information that you know at that specific time.

**Theresa:** After the threshold determination, the MBI technical review is done.

**Steve:** Is this a project or a non-project action?

**Advisor Group Recommendation:** There should be a separate specialized SEPA checklist for mitigation bank projects.

**Gary:** The prospectus is like the banking checklist. Why is the threshold determination in this location on the timeline? SEPA should be more at the conceptual level - at the hydrologic end, etc. for Ecology. The local government would then do a more detailed SEPA site review, but where in the process would we transfer to the local government for the specific review? From point A to the threshold determination could be done at a different point on the timeline.

**Steve:** SEPA does go over conceptual. How should it be staged on the timeline?

**Joan:** That's where the MBI would come in.

**Steve:** It doesn't make sense to have unaddressed issues carried over for the locals.

**Theresa:** If the threshold determination is done on the conceptual phase, we are not seeing some potentially necessary documentation. She feels the public should be able to see the technical information.

**Doug:** He read text from the SEPA WAC.

**Advisor Group Recommendation:** We should ask - Is this [project] needed and is it located at the appropriate site? Should it go on to Phase 2 with the local government?

**Gretchen:** Ecology would make the threshold determination when they had enough information to make the decision of project need and site selection.

**Theresa:** The technical information and site impact would go into the Phase 2.

**Gretchen:** Ecology would be the lead for Phase 1 and would continue to be the lead until the threshold determination is made of the need for the project.

**Steve:** By doing the SEPA in this way it would allow the local government to get a clean packet.

**Mary:** Having the SEPA early with Ecology allows the locals to be involved early.

**Theresa:** You need the scope of the SEPA clearly defined so that the threshold determination would be done prior to the technical review and the detailed discussion could go later on.

**Gretchen:** The bankers see the prospectus as the early conceptual document.

**Gary:** The SEPA may change from one project to another, depending on the project.

**Steve:** He likes the concept of a phased SEPA process and this approach may aid with the permits. The first phase would have to be completed prior to the permit SEPA.

### **Returned to Conservation Easement (CE) Discussion:**

**Mary:** Can the CE be amended to include vegetation through the years. Having the CE contain baseline vegetation information would be good information for tracking purposes down the road. The banking easements are different than a standard conservation easement. Regulatory stewardship is more complicated than standard open easements.

### **Wrap-up**

**ACTION:** Gretchen will e-mail the group with items left to be covered in the next two meetings. – Complete.

**Theresa:** Suggested future meeting agendas include extra topics, in case we complete the agenda faster than anticipated.