



WADING INTO THE WATERS OF

# *Wetland & Stream Mitigation*

BY Rebecca Kihslinger and Jessica B. Wilkinson

Jepson Prairie Preserve, managed by the Solano Land Trust, is one of the best remaining examples of northern claypan vernal pools in California.



**WHEN IT COMES TO ENGAGING IN WETLAND AND STREAM COMPENSATION PROJECTS**, the Solano Land Trust in California is prepared. These projects, often called mitigation projects, are wetlands and streams that have been established, restored or preserved under the federal wetland regulatory program and are required to be protected over the long term. Because of this relatively new requirement for long-term protection, land trusts are increasingly being approached by mitigation providers to hold easements on these properties and, in some cases, to carry out their long-term management.

When approached by mitigation providers looking for a land trust partner, Solano is already equipped with an objective mitigation policy that guides the organization through the evaluation of a potential project and whether it's a good match for the organization. Under this policy, the land trust holds easements on mitigation sites and also carries out restoration projects on its fee lands to offset a developer's mitigation requirement. As Executive Director Nicole Byrd explains, "We develop management plans for all of our fee properties and identify priority restoration projects, which allows us to be prepared when permittees approach us with mitigation needs."

The Georgia Land Trust has been taking easements on mitigation properties since 1999. The group currently holds easements on 10 mitigation properties, receiving stewardship funding for each site to cover the expenses related to easement monitoring and defense. But, unlike the Solano Land Trust, the Georgia Land Trust does not own any of these mitigation properties in fee and has not taken on any long-term management responsibilities for these sites. As Justin Park, staff attorney for the land trust says, "The landowner is the one in the best position to carry out

affirmative management requirements because he or she usually owns and manages the surrounding land and may be living there."

These two examples illustrate just a few of the roles that land trusts can play in compensatory mitigation projects. More land trust examples and practical pointers on engaging in mitigation projects are included in a new publication, *Wetland and Stream Mitigation: A Handbook for Land Trusts* (2012) by the Environmental Law Institute (ELI) and the Land Trust Alliance.

#### Why Get Involved?

Despite the complexity and risks, land trusts across the country are engaging in mitigation projects. Why might your land trust consider taking mitigation easements?

First, there is a significant amount of money spent on wetland and stream compensatory mitigation each year—approximately \$2.9 billion.<sup>1</sup> The U.S. Army Corps of Engineers—the agency responsible for issuing permits for development projects under the federal wetland regulatory program—requires around 45,000 acres of compensatory mitigation a year for the impacts associated with these permits.<sup>2</sup> Over time, this acreage adds up.

<sup>1</sup> Environmental Law Institute, "Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities," (2007), [www.elistore.org/reports\\_detail.asp?ID=11248](http://www.elistore.org/reports_detail.asp?ID=11248).

<sup>2</sup> U.S. Army Corps of Engineers, Annual Reports of the Secretary, Fiscal Years 2001 - 2010, <http://cdm15141.contentdm.oclc.org/cdm/compoundobject/collection/p16021coll6/id/22>.

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With habitats ranging from steep grasslands to the riparian corridor of Lynch Creek, Lynch Canyon is home to a wide variety of flora and fauna. The property almost became a landfill in the 1980s, but voters rejected the project and Solano Land Trust purchased it in two parcels in the 1990s.

SOLANO LAND TRUST

And, federal regulations require that this acreage be permanently protected and managed and that a permanent source of funding be provided to support necessary management activities.

Second, with thorough due diligence and a solid understanding of how the regulatory program works, compensatory mitigation can help your organization build its network of conservation lands, expand its staff and expertise, and provide new streams of income for land restoration and protection, as well as easement monitoring and defense.

Your engagement in mitigation, however, should only take place after a thorough assessment of how doing so relates to your land trust's mission, the comfort level of your board of directors and staff (if any), your technical expertise and capacity, and the risks and liabilities associated with the mitigation project itself. Sensitivity to public perception may also be an important part of your evaluation.

Keep in mind that compensatory mitigation will happen with or without your land

trust's participation. The questions then are: who will carry out that compensation, where will it be located and who will care for the compensation site in perpetuity? As the nation's stewardship experts, land trusts may be best positioned to take on some or all of these responsibilities.

#### **Practical Pointers**

The new handbook, developed with the support of the U.S. Environmental Protection Agency, provides land trusts with a comprehensive starting point for understanding the opportunities and liabilities associated with taking on a compensatory mitigation project. The handbook identifies many of the questions that your land trust will need to ask before getting involved. The more

information you have up front, the less likely you are to encounter surprises down the road.

Gaining a thorough understanding of the mitigation process can feel overwhelming. So, as you consider your involvement, keep in mind these practical tips that are gleaned from interviews with more than 20 land trusts from around the country that have engaged in mitigation projects:

**1. Get up to speed:** The federal wetland and stream regulatory program—and its state counterparts—are complicated and will greet you with unfamiliar terms and arcane rules. If you are considering engaging in mitigation, you will need to understand the details. The handbook is a great place to start. You should also check your local Corps district office website for more information, program guidance and/or model documents (e.g., easements, long-term stewardship agreements) that may be specific to your state or region. Your state's wetland program will also be a critical source of information. You can find more information on the federal regulations that govern wetland mitigation on the EPA's website at [http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation\\_index.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm).

**2. Be thorough in your due diligence:** This is standard practice for land trusts, but there will be additional risk considerations associated with mitigation projects. For example, evaluate whether the project is consistent with your organization's mission and advances its conservation goals. Consider how the project will affect your organization's reputation. Thoroughly evaluate the degree to which the project will require new skills and a greater commitment of time, and how you will meet these demands. And consider whether your land trust should adopt new policies to guide your decision-making, and whether participation in a mitigation project can strengthen your organization.

**Land trusts are the nation's stewardship professionals and have a tremendous amount of experience to bring to the table.**

People tour the Campbell Creek Estuary in Alaska, purchased by Great Land Trust then donated to the Municipality of Anchorage after protecting it with a conservation easement. The property will provide permanent protection for valuable salmon and wildlife habitat, and access to the Anchorage Coastal Wildlife Refuge.



It is also critically important to thoroughly review all documentation associated with the project. Make sure that relevant documentation clearly and consistently lays out your roles and responsibilities, how funding decisions will be made, and that your organization will be notified of all potential project and program modifications and amendments.

### **3. Ask questions and seek expert advice:**

If you have questions, ask them, no matter how minor. The regulatory agencies can support you through the entire process—they are your *partners* in the project. Corps district staff can also help to connect land trusts to mitigation project opportunities and play a critical third-party enforcement role, doubling the strength of easements and covenants. The closer the partnership between the land trust and the regulatory agency, the better the chance that the land trust's interests will be well-represented when long-term management plans, stewardship agreements and other documents are designed.

If your staff or board do not have the appropriate regulatory, legal, financial, ecological or management expertise, enlist the professional services of these experts for the due diligence review and for project implementation.

**4. Get involved early:** Most of the land trusts we talked to suggested getting involved during the project planning and approval stage. This is when key decisions are made about the project, such as its location and design, the long-term management obligations, how those obligations are funded and what kinds of site monitoring and reporting will be required.

**5. Stay in the loop:** If you agree to play a role in a mitigation project, you should stay engaged during the active phase of the project—the period within which the mitigation provider is carrying out restoration and enhancement activities, monitoring the site and striving to meet performance standards. The earlier you realize that something is not on track, the better. You can request a meeting with the agencies and the mitigation provider and ensure that appropriate remedial actions are being taken. In order to stay in the loop, you should ask for notification if there is any change in the long-term site manager, and you can request that the parties provide you with monitoring and site visit reports, notifications of credit releases, annual program and financial reports and any proposed project modifications or amendments.

**6. Remember, mitigation projects are not like traditional conservation projects:** Mitigation easements are exacted as a term of a permit. They are not donated because of the landowner's conservation ethic. There are regulatory requirements associated with these easements, and the sites may be heavily manipulated. And, most important, if you agree to play any role in long-term stewardship of a mitigation project, you are entitled to receive full funding to cover the costs associated with your responsibilities.

**7. Just holding a mitigation easement does not mean long-term management responsibilities:** Your land trust may want to hold a mitigation easement but may lack the expertise or interest in carrying out long-term site management. Or you may simply not want the liability. Your organization is under no obligation to accept the long-term management responsibilities for a site on which you hold the easement.

**8. Use amendments when necessary:** If you were not at the table when the mitigation plan, instrument or long-term management plan were crafted, be particularly vigilant to ensure that your interests are represented. If your roles and responsibilities are ill-defined or inconsistently expressed in the different documents, or if your interests are poorly represented, you should seek an amendment to the authorizing documentation. More likely, the parties will simply document the modifications through a letter that is signed by all participating parties and attached to the original documentation.

**9. Just say no:** If the burden is too great on your staff, if your board isn't comfortable with the associated liability, if the mitigation provider is insisting that you serve as the long-term manager as well as the easement holder, if the long-term financing is insufficient to cover your needs, or if for any reason you have significant reservations about engaging in a mitigation project or program—say no. Do list your reasons—they may help the regulatory agencies and mitigation provider shape future projects to be more appealing.

Land trusts are the nation's stewardship professionals and have a tremendous amount of experience to bring to the table. You have an opportunity to professionalize the long-term stewardship of these sites. But you should only dive in with full knowledge of the tradeoffs. 🌿

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For information on the new handbook, see [www.eli.org/Program\\_Areas/land\\_trust\\_handbook.cfm](http://www.eli.org/Program_Areas/land_trust_handbook.cfm).