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TO: United States Senate Committee on Banking, Housing and Urban Affairs

RE: Proposal to Foster Economic Growth

Valencia Wetlands Trust respectfully submits the following proposal to foster economic growth in the United States.

Description of Proposal:

Valencia recommends and requests legislation to remove the ongoing job-killing and unfair competition to an otherwise proven successful privately funded mitigation banking industry. Hundreds of millions of dollars of additional private funds are currently sitting on the sidelines, waiting for more certainty to be introduced into the environmental permitting process. These important reforms will open the floodgates of this investment capital into wetland banks, stream banks, conservation banks, and NRD restoration work. Additionally, because Mitigation banks are currently taxed at a higher rate than other types of development, greater investment is being deterred. If mitigation banks were taxed at the capital gains rate, investment would only increase.

While the regulatory framework has been in place since the 2008 Final Rule for wetland mitigation, the primary features of this rule are inconsistently applied. The 2008 Rule not only places mitigation banks first in the hierarchy of offset solutions for environmental impacts, it also lists twelve requirements that must be met before any project can be permitted to offset impacts to environmental resources. These twelve items have been determined to be necessary to insure successful replacement of destroyed environmental functions. Every privately funded mitigation bank is required to meet all twelve of these requirements to receive regulatory approval to operate.

a. Unfortunately, permits are sometimes issued for mitigation alternatives that neither meet the prescribed hierarchy or these twelve high standard requirements. This inconsistent application of regulations can dampen the flow of private investment into this promising industry. Private investors can be concerned that after many years of work and expense to create a bank that meets all the necessary requirements, a rival project that was not subject to the same regulations, can undercut the private bank credit price substantially. In many cases, after the Public Notice comment period has expired, government agencies are collecting cash, easements, etc., to issue permits, rather than using existing approved mitigation banks. This is occurring without the benefit of public transparency. Additionally, some government agencies are utilizing these non-transparently acquired funds to do their own, tax-payer subsidized offset restoration work instead of simply requiring the use of private sector mitigation credits as the 2008 Rule dictates. This practice is transferring vast resources away from private industry into regulatory agencies. In some cases, credits are actually being sold in competition with successful mitigation banks and/or are preventing the entry into the market of privately funded solutions. Because investors in this industry are aware this is happening, some are holding back on future investment until these unfair practices end.

b. In some cases, instead of utilizing existing mitigation banks, offset permits are being issued in exchange for tracts of preservation land donated to non-profit land trusts,. This not only does not meet the requirements of the law, it also dis-incentivizes private investors from entering the market. Because credit sales cannot compete in this unfair scenario, actual work to restore wetlands sometimes does not happen, contributing to the continued loss of wetlands in the U.S.
c. Permittee Responsible Mitigation (PRM) permits are also being issued. PRMs do not meet the same strict standards required of mitigation banks. The stated reason for this is most often, “Well, they can’t afford to do those things.” In other words, permits are being issued for people to destroy environmental values that they cannot afford to replace. Furthermore, because of the high failure rate of PRMs, they require vast regulatory staff resources to monitor and enforce their performance. This contributes to the hesitation of private investment to enter this market. It also contributes to the continued loss of at least 60,000 acres of wetlands annually, despite legislation requiring replacement of destroyed wetlands.
d. Because some regulators across the country are simply opposed to private industry providing environmental restoration/mitigation, they may not support any private bank project. Clear legislation is needed to end this unfair bias.

Impact on Economic Growth:

- Wetland and Conservation Banks reduce permitting time by at least 50%, and often much more, for those seeking permits to impact resources.
- Banks drastically reduce the regulatory staff required to enforce environmental legislation, since oversight of a bank which will offset many projects reduces the staff time needed to oversee those smaller projects.
- Mitigation banks are both a less expensive and less risky option for government, when all costs are taken into consideration.
- Use of mitigation banks creates predictability of costs and confidence in the ultimate success of development projects so those projects can attract more financing.
- When mitigation banks are used, long term legal liability is transferred from the developer to the banker, freeing developers to do their projects.
- Removing unfair competition for mitigation banks will create a boom in the growing restoration industry that creates private sector jobs instead of more government jobs. As of 2014, the restoration industry was larger than coal, larger than steel, and larger than logging sectors.

Impact on market participants and financial companies to participate in the economy:

When private investors have the confidence that their investments will be rewarded with credit sales, there will be a huge commitment of funding for restoration projects, including wetlands, streams, species conservation, and NRDA restoration. Removing obstructions for private industry in these markets would ultimately resolve the historical conflicts between economic development and responsible environmental stewardship. Privately funded restoration creates jobs near project sites, boosting local economies. In 2014 for example, this sector accounted for approximately 126,000 jobs in the U.S.

Legislative language recommended:

- Legislative language should prohibit regulatory agencies from benefiting in any way from the permits they issue.
- Regulatory agencies should be barred from entering markets where private industry would otherwise fill the needs.
- Simple donations of preservation land should not be allowed as mitigation.
- In Lieu Fee organizations, which are non-profit and do not have the same costs as private banks, should not be allowed to compete with private mitigation banks where banks are established. (The 2008 Rule was not intended to allow ILF's to compete with private banks, but unfortunately the practice is becoming widespread. Some ILF documents prohibit competition with banks, but most do not.)
- Permittee Responsible Mitigation should be required to meet all the same requirements as mitigation banks, including a provision that mitigation must be provided IN ADVANCE of impact, before being issued permits.
- Tax treatment of mitigation bank credit income should be clarified as capital gains, as other development project income is. This change would greatly incentivize private investment.

Background Information:

With the help of Congress and many regulatory agencies, the mitigation banking industry has been working successfully since 1995 to bring integrity, transparency and fairness to the environmental permitting process. The Federal Highway Administration has mandated the use of mitigation banks where they are available. Industry representatives have participated in meetings with many stakeholders across the country to educate and inform about the phenomenal success of private industry in the restoration markets. We will come to participate in discussions as needed to assist in clarifying any of the above issues.

For an example of the unqualified success of private investment in this industry, please see:

https://www.youtube.com/watch?v=ztEXVSNKuqs

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