

# Modification of a Wetland Mitigation Bank Boundaries: U.S. District Court Addresses Challenge to U.S. Corps of Engineers Approval



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

08/27/2018

Co-Author: Jon Mader

A United States District Judge for the Middle District of Florida addressed in an August 13th opinion whether the St. Johns River Water Management District (“SJRWMD”) and the Army Corps of Engineers (the “ACOE”) violated:

- Clean Water Act (“CWA”) Compensatory Mitigation Rule
- Administrative Procedure Act (“APA”)
- National Environmental Policy Act (“NEPA”).

See *Sierra Club, Inc. v. St. Johns River Water Management District*, No. 6:14-CV-1877-Orl-40GJK, 2018 WL 3853997 (M.D. Fla. August 13, 2018).

The Sierra Club challenged the SJRWMD and ACOE’s decision to allow certain portions of the Farnton Mitigation Bank (“FMB”) to be converted to mixed use development.

The Miami Corporation owns the FMB. It sought to withdraw 820.22 acres from the boundaries of the mitigation bank. The request was approved by the ACOE after public comment and interagency coordination.

Mitigation banking is the restoration, creation, enhancement, or preservation of a stream, wetland, habitat, or other natural resources to establish credits used to offset or mitigate for the adverse impacts caused by a nearby project. The goal of mitigation banking is to replace or increase the amount or value the specific resource or habitat impacted.

Plaintiff Sierra Club, Inc. (“Plaintiff”) initially challenged the approval in a Complaint filed on November 18, 2014. The organization raised constitutional arguments implicating both the Supremacy Clause and Contracts Clause. It argued Florida statutory and administrative law were in conflict with the CWA.

The ACOE moved to remand to allow for a more thorough NEPA environmental assessment (“EA”). The ACOE subsequently conducted a coordinated assessment that took into consideration the opinions and recommendations of the Florida State Historic Preservation Officer, an Interagency Review Team, and the U.S. Fish and Wildlife Service.

The ACOE concluded that the results of the NEPA EA validated its initial approval for modification of the FMB. It stated:

“the proposed modification to the North Bank Site of FMB will not impact the ability of the site to continue to provide appropriate compensatory mitigation for future impacts to waters of the United States within the approved service area.”

The U.S. District Court reopened the case after release of the EA. Plaintiff then filed its Third Amended Complaint alleging:

1. ACOE violated the CWA, CWA regulations, and APA by approving the modification to the FMB;
2. SJRWMD violated the CWA and implementing regulations by issuing permits contrary to the purpose of the FMB; and
3. ACOE improperly applied NEPA to the modification.

The Plaintiff contended:

1. The ACOE did not follow its regulations and procedures under the CWA when it approved the modification.
2. Modification is contrary to the site-protection requirements of the Mitigation Rule
3. The Farmton Local Plan was incorporated in the MBI Modification, thereby “unleash[ing] decades of development into the FMB, with all the resulting environmental degradation . . . and other manifestations of intense human presence on the landscape.”
4. SJRWMD violated the Mitigation Rule by granting permits that “are inconsistent with the bank’s permanent site protection and sustainability” requirements.
5. SJRWMD’s issuance of a Consumptive Use Permit is incompatible with the Mitigation Rule’s requirement for “assurance of sufficient water rights to support the long-term sustainability of the mitigation bank.”
6. The ACOE’s NEPA analysis was improper because NEPA applies only to discretionary federal actions.

The parties filed cross-motions for summary judgment. The U.S. District Court ruled for the ACOE and SJRWMD.

The court concluded the ACOE followed all applicable procedural guidelines for receiving, evaluating, and approving the written request for modification submitted by Miami Corporation. It then evaluated Plaintiff’s claim that modification was inconsistent with certain requirements of 33 C.F.R. § 332 (the “Mitigation Rule”).

The court found that the Mitigation Rule does not prohibit alteration of the boundaries of a mitigation bank if such action is necessary to make the bank environmentally and economically viable. Further, in its recognition of the flexibility of the rule, the court found that the ACOE operated within its scope to approve modifications in adherence to the ecological performance standards. Also noted was the Plaintiff’s general inability to identify violation of any ACOE regulations in opposing the modification.

As to SJRWMD’s issuance of permits, the court found that the Mitigation Rule does not prohibit a state water management district from issuing such permits under state wetland regulations. The CWA’s express protection of states’ right to regulate waters within their jurisdiction was noted. The court also found that, prior to issuing a Consumptive Use Permit to the Farmton Water Resources LLC, the SJRWMD properly considered, by way of a detailed study, the drawdown impacts projected to occur on surface waters within the FMB.

Finally, the court found that the NEPA EA, while not technically required under the CWA, did not violate the Mitigation Rule as the removal of land within the FMB was discretionary within the framework of supporting the environmental and economic viability of the FMB.

A [copy of the opinion](#) can be downloaded here.