STUDENT WORKS

SEAGRASS MITIGATION BANKS AND THE GOVERNOR'S VETO

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I. INTRODUCTION

On June 30, 2008, Governor Charlie Crist vetoed a bill enacted by the 110th Florida Legislature that called for the establishment of seagrass mitigation banks on sovereign submerged lands.[1] Mitigation banks are a method by which third-parties can become involved in curtailing the negative environmental effects of development.[2] Coastal development often impacts important environmental resources, such as seagrasses, and developers are typically left to shoulder the burden of compensating for those impacts.[3] Mitigation done by a developer, known as permittee-responsible mitigation, has a history of being unsuccessful and leading to a net loss of resources.[4] On the other hand, new federal regulations recognize mitigation banking as the preferred method of compensatory mitigation because it is a safer, more beneficial

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1. Ltr. from Charlie Crist, Gov. of Fla., to Kurt S. Browning, Sec. of St., *Veto of Council Substitute for House Bill 7059* ¶ 8 (June 30, 2008) (available at http://www.flgov.com/leg_actions/2008/2008_hb7059.pdf) [hereinafter Veto Ltr.]; 2008 Fla. Laws ch. 7059 (vetoed by the Governor on June 30, 2008).

2. *See* 73 Fed. Reg. 19594, 19594 (Apr. 10, 2008) (stating that mitigation banks involve activities by third parties to compensate for resource losses).

3. *See infra* pt. II(B) (discussing how developers must compensate for impacts to seagrass beds).

4. Royal C. Gardner, Rapanos *and Wetland Mitigation Banking*, in *The Supreme Court and the Clean Water Act: Five Essays* 63, 66–67 (L. Kinvin Roth ed., Vt. J. Envtl. L. 2007).

means of making up for lost resources.[5] Governor Crist's veto letter gives the impression that he is genuinely trying to protect seagrasses. Instead, by vetoing the bill, he has removed this beneficial method of third-party involvement—leaving the fate of impacted seagrass beds in the hands of developers.

Governor Crist stated that the establishment of mitigation banks for seagrass beds, all of which are on sovereign submerged lands,[6] raises serious constitutional issues.[7] The Florida Constitution provides that activities on sovereign submerged lands may be authorized by law only when those activities are not contrary to the public interest.[8] The decision of whether an activity is contrary to the public interest rests with the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees), which holds title to all sovereign submerged lands in trust for the citizens of Florida.[9] The public interest test is a balancing test that involves ensuring the maximum benefit and use of such lands for the citizens while providing for the maximum protection of all resources on such lands.[10] Sovereign submerged lands are held in

5. 73 Fed. Reg. at 19605; *see infra* pt. III. & pt. IV (discussing reasons why mitigation banking is preferred over permittee-responsible mitigation).

6. *See* Fla. Stat. Ann. § 253.03(1)(e) (2007) (stating that submerged lands include all lands covered by shallow waters of the ocean, gulf, bays, or lagoons); *O. H. Lobean v. Trustees of the Internal Improvement Fund*, 118 So. 2d 226, 227 (Fla. 1st Dist. App. 1960) (stating that submerged lands are sovereign lands).

7. Veto Ltr., *supra* n. 1, at ¶ 2.

8. Fla. Const. art. X, § 11.

9. Fla. Stat. Ann. § 253.001. The Board of Trustees includes the Governor, Secretary of State, Attorney General, Comptroller, State Treasurer, Commissioner of Agriculture, Commissioner of Education, and their successors in office. *Id.* at § 253.02(1). The Board of Trustees manages sovereign submerged lands pursuant to Fla. Admin. Code Ann. r. 18-21 (2008).

10. Fla. Admin. Code Ann. r. 18-21.001. The following seven factors are available to assist the Board of Trustees in evaluating the public's interest:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

trust so citizens can enjoy traditional uses such as fishing, swimming, and boating.[11] Fishing and swimming require a healthy supply of commercial and recreational fish as well as good water quality—both of which are dependent on healthy seagrass beds.[12] The use of sovereign submerged lands for boating creates a need for docks, marinas, and navigation channels—all of which negatively affect seagrass beds.[13] As a member of the Board of Trustees, Governor Crist failed to balance the public's right to fish, swim, and boat in waters with seagrass beds against the public's need to protect these resources to the maximum extent possible and in a way that assures the maximum public good.

Specifically, Governor Crist raised the following three concerns in his veto letter: (1) it is not in the public's interest to authorize the conveyance of sovereign submerged lands for the purpose of creating credits to be sold to facilitate the destruction of seagrass elsewhere; (2) artificially created seagrass beds, the long-term success of which has not been conclusively established, will result in a net destruction of seagrass beds on sovereign submerged lands; and (3) the necessary exclusion of the public from sovereign submerged lands used as mitigation banks will contravene the public's common law navigation rights and the "sovereign submerged lands doctrine" embedded in the Florida Constitution.[14]

This Article examines each of Governor Crist's concerns and shows why seagrass mitigation banks should not only be permitted on sovereign submerged lands, but encouraged because mitigation banks provide a better balance between allowing for socially beneficial uses of sovereign submerged lands and protecting valuable seagrass beds than permittee-responsible mitigation.

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7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

Fla. Stat. Ann. § 373.414(1)(a) (2008).

11. Fla. Admin. Code Ann. r. 18-21.004(2)(a).

12. Clinton J. Dawes, Ronald C. Phillips & Gerold Morrison, *Seagrass Communities of the Gulf Coast of Florida: Status and Ecology* 5 (Fla. Fish & Wildlife Conserv. Commn., FWC Fish and Wildlife Research Inst. & Tampa Bay Estuary Prog. Aug. 2004) (available at http://gulfsci.usgs.gov/gom_ims/sgpubs.html).

13. Michael R. Johnson et al., *Impacts to Marine Fisheries Habitat from Nonfishing Activities in the Northeastern United States* 123–124 (NOAA Tech. Memo. NMFS–NE–209 Feb. 2008).

14. Veto Ltr., *supra* n. 1, at ¶¶ 3–5.

Part II provides background information about seagrass and the laws governing compensatory mitigation. Part III reveals how permittee-responsible mitigation can leave habitat provided by seagrass beds badly fragmented and unable to provide discernable ecosystem services; whereas, a mitigation bank can provide healthy, intact seagrass beds that can provide optimal ecosystem services. Part IV, through contrasting a case study of a recent permittee-responsible mitigation project with the process and procedures for creating a mitigation bank, reveals how permittee-responsible mitigation is more dangerous to seagrass beds than mitigation banking and more time consuming and costly for developers. Part V analyzes and discusses the public's common law navigation right and the constitutional "sovereign submerged lands doctrine." Part V will also show that as long as seagrass mitigation banks are not contrary to the public's interest neither will be contravened.

II. BACKGROUND

A. What Are Seagrasses?

Seagrasses are a unique type of underwater angiosperm specially adapted to live and reproduce in the warm, marine environment.[15] They form meadows commonly referred to as seagrass beds and inhabit Florida's coastal waters.[16] Florida has seven species of seagrass,[17] covering approximately 2.7 million acres

15. Dawes et al., *supra* n. 12, at 7. "Seagrasses have developed unique ecological, physiological, and morphological adaptations to a completely submersed existence, including internal gas transport, epidermal chloroplasts, submarine pollination, and marine dispersal." Robert J. Orth et al., *A Global Crisis for Seagrass Ecosystems*, 56 BioScience 987, 988 (Dec. 2006).

16. F.J. Sargent et al., *Scarring of Florida's Seagrasses: Assessment and Management Options* Exec. Summ. (Fla. Marine Research Inst. FMRI Tech. Rep. TR–1 1995).

17. Florida's seven species are turtle grass (*Thalassia testudinum*), manatee grass (*Syringodium filiforme*), shoal grass (*Halodule wrightii*), star grass (*Halophila engelmannii*), paddle grass (*Halophila decipiens*), Johnson's seagrass (*Halophila johnsonii*), and widgeon grass (*Ruppia maritima*). *Conserving Florida's Seagrass Resources: Developing a Coordinated Statewide Management Program* 9 (Fla. Fish & Wildlife Conserv. Commn. Sept. 2003) [hereinafter *Conserving Florida's Seagrass Resources*]. Approximately sixty species exist worldwide. UNEP Press Release, *Underwater Life Support System Dying through Ignorance* (London/Nairobi Oct. 15, 2003) (available at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=352&ArticleID=4274&l=en).

and providing many important ecological and economic benefits.[18] The ecological services provided by seagrass beds include water filtration, sediment stabilization, photosynthesis, and the support of food webs.[19] These services are estimated at $19,000 per hectare per year.[20] Seagrasses also provide habitat and nursing grounds for as many as 70% of Florida's recreational and commercial fish, shellfish, and crustaceans,[21] which are "directly responsible for bringing in millions of dollars annually from out-of-state and resident recreational boaters and fishermen."[22]

During the past few decades, Florida has seen a substantial decline in seagrass acreage.[23] Florida has lost approximately thirty-five percent of its original cover, with some regions experiencing sharper declines than others, for example, Tampa Bay alone has seen an 80% decline.[24] There are several contributing causes to seagrass losses in Florida, many of which involve direct human impacts, such as water pollution,[25] blow holes from boat groundings,[26] boat propeller scarring,[27] and dredge and fill activi-

18. Sargent et al., *supra* n. 16, at Exec. Summ.; *Conserving Florida's Seagrass Resources*, *supra* n. 17, at 10.

19. Dawes et al., *supra* n. 12, at 5. For example, live seagrasses provide food for species that feed directly on it—manatees, sea turtles, pinfish, parrotfish, and sea urchins—and when the seagrasses die, shrimp and mullet feed on the nutrient rich detritus, which game fish and wading birds feed on. Fla. Fish & Wildlife Conserv. Commn., *Seagrass*, in *Fishing Lines: An Angler's Guide to Florida's Marine Resources* 13 (Dan Ellinor & Michelle Owen eds., 6th ed., Fla. Fish & Wildlife Conserv. Commn. Div. Marine Fisheries Mgt. 2007); Mark S. Fonseca, *A Guide to Planting Seagrasses in the Gulf of Mexico* 2 (Texas A&M Univ. Sea Grant Program, TAM–SG–94–601 1994).

20. Paul L.A. Erftemeijer & Roy R. Robin Lewis III, *Environmental Impacts of Dredging on Seagrass: A Review*, 52 Marine Pollution Bull. 1553, 1553 (2006).

21. *Conserving Florida's Seagrass Resources*, *supra* n. 17, at 10.

22. Dawes et al., *supra* n. 12, at 5.

23. *See* David Conway, *A Seagrass Success in Tampa Bay*, in *Florida Sportsman* 86 (June 2007) (stating that "Florida has lost about 300,000 acres of valuable seagrass beds since 1995—or slightly more than 10 percent in 10 years").

24. Margaret O. Hall et al., *Developing Techniques to Enhance the Recovery Rates of Propeller Scars in Turtlegrass* (Thalassia testudinum) *Meadows: Final Report to USFWS* 2 (Fla. Fish & Wildlife Conserv. Commn., Fla. Fish & Wildlife Research Inst., Center for Coastal Fisheries and Habitat Research, NCCOS, NOS & NOAA, File Code: F2319–02–F Mar. 2006).

25. *See* Roy R. Lewis III, *The Restoration and Creation of Seagrass Meadows in the Southeast United States*, 42 Marine Research Publications 153, 153 (1987) (explaining that declines in seagrass coverage are due partly to reduced light penetration from silt resuspension and eutrophication).

26. National Park Service, U.S. Department of the Interior, *Marine Plants/Algae*, "Seagrass Restoration Projects," http://www.nps.gov/bisc/naturescience/marineplants.htm (last updated Aug. 15, 2007). Blowholes often occur accidentally when a grounded boat

ties.[28] Dredging is the excavation and transportation of soft-bottom material, which damages seagrass vegetation directly by physically removing it.[29] Indirectly, dredging smothers and buries neighboring beds because of increased turbidity and sedimentation from suspended material.[30] Dredge and fill activities that impact seagrasses are associated with the deepening or widening of canals and navigation channels, and the building of bridges, private docks, commercial marinas, and ports.[31] The dredge and fill activities associated with such development are a primary cause of destruction of seagrass habitat in South Florida.[32] Dredge and fill activities are federally regulated because of the damage they cause to aquatic resources.[33]

B. Section 404 of the Clean Water Act

The primary regulatory mechanism for dredge and fill activities at the federal level is the Section 404 permitting program of the Clean Water Act (CWA).[34] The Army Corps of Engineers (Corps) and the Florida Department of Environmental Protection (FL DEP)—the state agency charged with certifying compliance under the CWA—jointly issue dredge and fill permits.[35] Before

needs to free itself from the sediment. *Id.* For a rare case in which a company intentionally created more than six hundred blowholes in the Florida Keys National Marine Sanctuary, see *U.S. v. Fisher*, 977 F. Supp. 1193, 1197–1201 (S.D. Fla. 1997) (ordering defendants to pay $589,311 for destroying 1.63 acres of seagrass with "mailbox" that excavated the ocean floor during treasure hunting).

27. *See* Sargent et al., *supra* n. 16, at v (stating that more than 173,000 acres of Florida's seagrasses in all areas of the state have light-to-severe scarring from propellers).

28. Erftemeijer & Lewis, *supra* n. 20, at 1554–1555.

29. *Id.*

30. *Id.*

31. Johnson et al., *supra* n. 13, at 123–124.

32. Walter C. Jaap & Pamela Hallock, *Coral Reefs*, in *Ecosystems of Florida* 580 (Ronald L. Myers & John J. Ewel eds., Univ. of Central Fla. Press 1990). In 1968 it was estimated that dredge and fill activities accounted for the loss of 1,400 hectares of bottom in Boca Ciega Bay, amounting to 1,131 metric tons of turtle grass. Robert J. Livingston, *Inshore Marine Habitats*, in *Ecosystems of Florida* 571 (Ronald L. Myers & John J. Ewel eds., Univ. of Central Fla. Press 1990).

33. 40 C.F.R. at § 230.1 (2008).

34. 33 U.S.C. § 1344(a) (2000); Douglas R. Williams & Kim Diana Connolly, *Federal Wetlands Regulation: An Overview*, in *Wetlands Law and Policy: Understanding Section 404* 8 (Kim Diana Connolly, Stephen M. Johnson & Douglas R. Williams eds., ABA 2005).

35. Virginia B. Wetherell et al., *Operating Agreement between the U.S. Army Corp of Engineers, the Florida Department of Environmental Protection, the South Florida Water Management District, the St. Johns River Water Management District, the Southwest Flor-*

the agencies will approve a Section 404 permit, a permittee must show that (1) impacts to special aquatic sites are unavoidable, (2) unavoidable impacts have been minimized, and (3) a mitigation plan is in place to compensate for the remainder of the unavoidable and minimized impacts.[36] Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes.[37] Seagrasses fall squarely within the definition of vegetated shallows—"permanently inundated areas that under normal circumstances support communities of rooted aquatic vegetation, such as turtle grass and eelgrass in estuarine or marine systems."[38]

Mitigation plans (for any unavoidable and minimized impacts) are regulated jointly by the Corps and the United States Environmental Protection Agency (EPA).[39] Compensatory mitigation is defined as

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ida Water Management District, and the Suwannee River Water Management District Concerning Regulatory Programs for Activities in Wetlands and Other Surface Waters § II (Nov. 30, 1998). A joint application for an environmental resource dredge and fill permit can be obtained from the FL DEP and will satisfy the requirements of the FL DEP, local water management districts, and the Corps. *Id.* at § IV(A).

36. Royal C. Gardner, *Mitigation*, in *Wetlands Law and Policy: Understanding Section 404* 254–255 (Kim Diana Connolly, Stephen M. Johnson & Douglas R. Williams eds., ABA 2005) [hereinafter Gardner, *Mitigation*].

37. 40 C.F.R. at §§ 230.40–45.

38. *Id.* at § 230.43(a).

39. The Corps and corresponding EPA regulations are set forth in 33 C.F.R. at § 332.8 and 40 C.F.R. at § 230.98 respectively. Prior to the codification of the compensatory mitigation program into law, it was regulated by various guidance letters and memoranda of agreement by and between the Corps and EPA. *See e.g.* Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58605, 58605 (Nov. 28, 1995) (recommending procedures for the use and establishment of mitigation banks); U.S. Army Corps of Engineers, *Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899* (Reg. Guidance Ltr. No. 02–2 Dec. 24, 2002) (setting forth guidelines for conducting compensatory mitigation) [hereinafter *Corps Guidance*]; Robert W. Page & LaJuana S. Wilcher, *Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines* (February 6, 1990) (setting forth policies and procedures for determining the appropriate level of mitigation to comply with the 404(b)(1) guidelines) [hereinafter Policy MOA]; Robert W. Page & Rebecca W. Hanmer, *Memorandum of Agreement between Department of the Army and Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (1989) (establishing the allocation of enforcement responsibilities under the Section 404 program). These memoranda did not have the force of law and due to the recommendations of the National Research Council, which found that the compensatory mitigation program was not achieving a "no net loss" of wetlands, Congress called for the establishment of regulatory standards and criteria for

> [T]he restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purpose of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.[40]

For seagrass impacts in Florida, a permittee has but one option—to handle the mitigation itself.[41] Take, for example, a permittee that applies to expand a commercial marina—an activity that impacts an acre of seagrass. The permittee must compensate for that loss by conducting permittee-responsible mitigation.[42] In this scenario, the permittee will conduct restoration activities either on-site (on adjacent or contiguous seagrass beds) or off-site (if on-site mitigation is impracticable).[43] The mitigation will be implemented concurrent with or after the authorized impacts.[44] Then the permittee will remain legally responsible for the continued maintenance of the mitigation site until the district engineer has deemed the mitigation a success.[45]

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the use of compensatory mitigation in the Section 404 program. 73 Fed. Reg. 19595 (April 10, 2008). In April 2008, the final rules were published in the Federal Register after a notice and comment period that produced 12,000 comments. *Id.* The FL DEP procedures are set forth in Fla. Stat. Ann. § 373.4136 (2003).

40. 73 Fed. Reg. 19594, 19671 (April 10, 2008). Preservation should generally generate credits only when augmenting other types of mitigation, except for exceptional circumstances where the resources either provide important ecological functions or are under a demonstrable threat of loss. *Corps Guidance*, *supra* n. 39, at 2(f).

41. The veto letter prevented the legislature from mandating seagrass mitigation banking. Veto Ltr., *supra* n. 1, at ¶ 3. Permittees are only limited to permittee-responsible mitigation for impacts to aquatic sites on sovereign submerged lands, as mitigation banks are established in Florida for other wetland resources. *See generally* Kelly Chinners Reiss et al., *An Evaluation of the Effectiveness of Mitigation Banking in Florida: Ecological Success and Compliance with Permit Criteria* 38–41 (May 2007) (available at http://www.dep.state.fl.us/water/wetlands/docs/mitigation/Final_Report.pdf) (evaluating the success of mitigation banking for wetland habitats such as cypress domes, prairies, marshes, mangrove swamps, woodlands, and others).

42. Fla. Admin. Code Ann. r. 18-21.004(2)(b); 73 Fed. Reg. at 19594.

43. Gardner, *Mitigation*, *supra* n. 36, at 259. On-site mitigation is preferred except where impracticable or where off-site is more beneficial. *Id.*

44. *Corps Guidance*, *supra* n. 39, at 2(m).

45. *Basis of Review for Environmental Resource Permit Applications within the Southwest Florida Water Management District, Adopted by Reference in Chapter 62–330, F.A.C. for Use by DEP* § 3.3.6 (SWFWMD 2005) [hereinafter *Basis of Review*]. For a persuasive article opposing use of the term "success" when evaluating ecological restoration, see Joy B. Zedler, *Success: An Unclear, Subjective Descriptor of Restoration Outcomes*, 25 Ecological Restoration 162, 164–165 (2007) (arguing that the term "compliance" is more

The vetoed bill mandated the establishment of a second option for the permittee—to purchase credits from a mitigation bank.[46] In this scenario, the permittee purchases credits held by a third party who has conducted the required mitigation in advance in an off-site mitigation bank.[47] Here the permittee's responsibility ends when it pays the mitigation bank sponsor, who in turn remains legally responsible for the long-term stability of the bank.[48] For the mitigation bank sponsor, the mitigation bank is a business and the sponsor can sell credits at a profit.[49] Accordingly, this option provides financial incentive for third-party bank sponsors to take on the business of mitigating the effects of environmentally destructive coastal development.

Permittee-responsible mitigation has often failed at achieving the required mitigation goals[50] and mitigation banks are now the preferred method of compensatory mitigation.[51] This is especially so because credits are not available to offset authorized impacts until there has been at least some demonstrated success with the compensatory mitigation,[52] but also for reasons that will be illuminated throughout the following examination of Governor Crist's veto letter. Permittee-responsible mitigation is still an option, however, where mitigation bank credits are not available.[53] In Florida, seagrass mitigation bank credits are unavailable because

suitable for mitigation projects since they are judged on whether they comply with mandated criteria).

46. Fla. H. 7059, 110th Leg., Reg. Sess., at lines 2–5.

47. 73 Fed. Reg. at 19594.

48. *Id.*; Royal C. Gardner & Theresa J. Pulley Radwan, *What Happens When a Wetland Mitigation Bank Goes Bankrupt?* 35 Envtl. L. Rptr, 10590, 10592 (Sept. 2005); Gardner, *Mitigation*, *supra* n. 36, at 271.

49. *See* 73 Fed. Reg. at 19595 (stating that mitigation banks are usually operated for a profit).

50. *See* Gardner & Radwan, *supra* n. 48, at 10591 (stating that "[m]any studies have found that mitigation projects were unsuccessful in the short and long term, at least with respect to mitigation projects for which permittees were responsible."); Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 Iowa L. R. 527, 540 (1996) (discussing an assessment of mitigation projects within Florida that revealed a 6.3% rate of permit compliance and 34% failure to commence mitigation, even though impacts had occurred) [hereinafter Gardner, *Banking*].

51. 73 Fed. Reg. at 19605; Fla. Stat. Ann. § 373.4135(1).

52. *See* Fed. Reg. at 19628 (explaining the reasons why the new rule establishes a preference for the use of mitigation bank credits). Mitigation bank credits are not released until the mitigation bank achieves specific milestones associated with the site's protection and development. 33 C.F.R. at § 332.3(b)(2); 40 C.F.R. at § 230.93(b)(2).

53. 33 C.F.R. at § 332.3(b)(4); 40 C.F.R. at § 230.93(b)(4).

Governor Crist incorrectly believes seagrass mitigation banks are contrary to the public's interest.[54]

III. THE MISPERCEPTION OF MITIGATION BANKING

Governor Crist expressed his belief that "[a]uthorizing the conveyance of sovereign[ ] submerged lands for the purpose of creating a seagrass mitigation bank that would create 'credits' to be sold to facilitate destruction of seagrasses on sovereign[ ] submerged lands elsewhere could fail the public interest test."[55] He stated that mitigation banks undermine the protection of seagrass beds.[56] His statement mirrors that of David Guest, a respected Earthjustice advocate who wrote to Governor Crist during his consideration of the bill: "[T]his bill allows the destruction of healthy, fully-functioning [seagrass] beds in the hope that a mitigation bank will make up for the loss of habitat."[57] David Guest also described Governor Crist as a hero to the environmental community for his ability to do the right thing under pressure.[58]

But is Governor Crist really doing what is best for the environment and for seagrass? Is this the end of all seagrass destruction? Seagrass impacts from dredge and fill activities are the result of coastal development.[59] Governor Crist has not promised to halt the development of Florida's coast. His emphasis on mitigation banks generating credits that facilitate the destruction of seagrass resounds in the general misperception of the role that mitigation banks play in compensatory mitigation. First, mitigation banks do not facilitate seagrass destruction, but instead give third parties an incentive to help curtail the effects of development.[60] Second, the fact that mitigation banks will compensate for impacts that happen *elsewhere*, as Governor Crist states, is a fea-

54. Veto Ltr., *supra* n. 1, at ¶¶ 3–4.

55. *Id.* at ¶ 3.

56. *Id.* at ¶ 2.

57. Craig Pittman, *End Run on Sea Grass Rules?* St. Pete. Times 1B, ¶ 9 (May 20, 2008).

58. Craig Pittman, *Veto to Kill Bill on Sea Grass*, St. Pete. Times 1B, ¶ 5 (June 11, 2008).

59. Johnson et al., *supra* n. 13, at 123; Fonseca, *supra* n. 19, at 1.

60. *See supra* Part II. B. Section 404 of the Clean Water Act (discussing the financial incentive mitigation bank sponsors have in helping compensate for losses dues to development).

ture of mitigation banking that provides a better balance between allowing for socially beneficial uses of sovereign submerged lands and protecting valuable seagrass beds than does permittee-responsible mitigation.

A. The Generation of Credits to Facilitate Seagrass Destruction

Governor Crist's emphasis on mitigation banks generating *credits* to be sold to *facilitate* the *destruction* of seagrasses, and David Guest's statement that mitigation banks allow the destruction of healthy, fully functioning seagrass beds, evidence a broad prejudice against development generally, not mitigation banks. All compensatory mitigation requires the *assessment of impacts*—the qualification of impacted resource functions or quantification of the impacted area of a proposed activity,[61] and the generation of *credits*—units of measure which represent the increase in ecological value after conducting a mitigation activity.[62] This means that regardless of whether the mitigation is being done by a permittee or by a mitigation bank sponsor, credits need to be generated to offset the impacts.[63]

Also, to say that mitigation banks would *facilitate* the destruction of healthy, fully-functioning seagrasses is misleading. All seagrass mitigation, whether done beforehand in a mitigation bank or for a specific project, is done in anticipation of the destruction of other seagrass, sometimes fully functioning and healthy seagrass.[64] All permittees must still avoid and minimize impacts prior to purchasing mitigation bank credits; hence, mitigation banks do not lead to additional impacts.[65] Mitigation banks allow third-party bank sponsors to compensate for the inevitable loss.

The particular problem some environmental activists have with mitigation banks is that they arguably make it easier for a

61. Fla. Admin. Code. Ann. r. 62-345.300(3)(a–e).

62. *Id.* at 62–345.200(8).

63. *See* 73 Fed. Reg. at 19671 (stating that credits represent "the accrual or attainment of aquatic functions at a compensatory mitigation site" without differentiating between a mitigation bank and permittee-responsible mitigation location).

64. 60 Fed. Reg. at 58608.

65. Gardner, *Mitigation*, *supra* n. 36, at 270.

developer to get the required permit. The developer merely has to write a check to the mitigation bank sponsor immediately before starting its impacts.[66] However, lengthy delays common to permittee-responsible mitigation are not in the public's interest when they encumber socially beneficial uses of land.[67] And, preventing the establishment of mitigation banks does nothing to end coastal development. Sovereign submerged lands are held in trust for the maximum benefit and use of all Florida citizens.[68] The Florida Constitution authorizes leases of sovereign submerged lands as long as the activity is not contrary to the public's interest and sale of these lands when in the public's interest.[69] Structures that have been deemed in the public interest in the past include: the construction of navigation channels, private and public docks, ports, and marinas;[70] ensuring the health of Florida's fishing and boating industries;[71] and the development of Florida's coast.[72] Congress has facilitated this development by mandating that the Corps provide the necessary permits so long as losses to aquatic resources are avoided, minimized, and compensated for.[73] These aquatic resources, including seagrasses, are protected, in part, because of the benefits they provide to our economy. Therefore, it

66. Craig Pittman & Matthew Waite, *How Billions are made 'Restoring' Florida's Wetlands*, St. Pete. Times, 1A (Dec. 17, 2006); *see also Wetland Mitigation Banking: Status and Prospects III*, at Criticisms of Mitigation Banking (CRS Rpt. for Cong. 97–849 ENR 1997), http://www.cnie.org/NLE/CRSreports/wetlands/wet-8.cfm (accessed Apr. 16, 2009) (discussing how critics worry that the efficiency of mitigation banking will allow greater destruction of wetlands by reducing the quality of regulatory decisionmaking).

67. *See Preliminary Report of the U.S. Commission on Ocean Policy: Governor's Draft* 139–140 (2004) (discussing how lengthy time frames for projects, such as commercial ports, can be ecologically and economically detrimental to a region).

68. Fla. Const. art. X, § 11.

69. *Id.*

70. *Sarasota Co. Anglers Club, Inc. v. Burns*, 193 So. 2d 691, 693 (Fla. 1st Dist. App. 1967).

71. *See* Fla. Admin. Code. Ann. r. 18-21.004(2)(a) (providing that sovereign lands shall be managed for the "propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming").

72. *See State v. City of Tampa*, 102 So. 336, 338 (Fla. 1924) (discussing the legislative history of granting filled-in submerged land to the public for the purpose of improving and developing waterfront property because it provides a benefit to the state of Florida).

73. *See* Gardner, *Mitigation*, *supra* n. 36, at 254 (explaining that although the CWA does not mention compensatory mitigation, Congress implicitly required that permits be issued after avoidance and minimization by referencing the Section 403(e) ocean dumping criteria, which mandates that marine discharge permits be issued only after avoidance and minimization).

is also in the public's interest to protect them.[74] Governor Crist cannot and undoubtedly will not try to curtail development, but what he fails to understand is that mitigation banks provide greater protection to the resource than permittee-responsible mitigation.[75]

B. Location, Location, Location

The difference between mitigation banks and permittee-responsible mitigation is not the creation of credits to facilitate the destruction of seagrass, but rather where the mitigation takes place. When a permittee conducts permittee-responsible mitigation, the majority of the restoration or other mitigation activity is done on-site, in an area adjacent or contiguous to the impact site[76] and sometimes in a patchwork fashion.[77] A mitigation bank sponsor, on the other hand, will conduct large scale restoration efforts on one large parcel of badly damaged seagrass meadows[78] in anticipation of future coastal development in the mitigation bank service area.[79]

Conducting mitigation *elsewhere* in a mitigation bank is preferable to permittee-responsible mitigation for two main reasons—habitat fragmentation and heavy human traffic. A single large bay area in Florida will typically have several navigation channels, possibly a commercial port,[80] several commercial marinas,[81]

74. *See* Fla. Stat. Ann. § 253.12(4)(e) (providing that the Board of Trustees must consider whether a conveyance of sovereign submerged lands will negatively affect seagrass flats that are suitable nursery or feeding grounds); Fla. Stat. Ann. § 373.414(1)(a) (stating that activities which adversely affect marine productivity shall be considered and balanced against the other public interest factors); *Conserving Florida's Seagrass Resources*, *supra*, n. 17, at 10 (recognizing that seagrasses provide refuge, nursery, and food to more than 70% of Florida's recreational and commercial fish, shellfish, and crustacean species).

75. Fla. Stat. Ann. § 373.4135(1).

76. *Corps Guidance*, *supra*, n. 39, at 2(g).

77. *See* R.R. Lewis III et al., *Evaluation of the Success of Seagrass Mitigation at Port Manatee, Tampa Bay, Florida*, in *Seagrass Restoration: Success, Failure, and the Costs of Both* 24 (Lewis Envtl. June 2006) (describing a mitigation plan for a port expansion project that included salvaging 2.16 hectares of seagrass from two impact sites and transplanting it into fifteen discrete areas).

78. 33 C.F.R. at § 332.3(b)(2); 40 C.F.R. at § 230.93(b)(2).

79. 60 Fed. Reg. at 58608. The mitigation bank service area is defined as "the area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources." *Id.* at 58611.

80. Florida has eight commercial ports: Jacksonville Port Authority, Panama City Port Authority, Port Canaveral, Port of Palm Beach, Port Everglades, Port of Miami, Port

or hundreds of single-family residential docks. The traffic in and out of the bay area is heavy and concurrent with fishing and other recreational activities. In permittee-responsible mitigation, seagrass beds that are impacted during development are mitigated by repairing beds that neighbor the construction sites instead of repairing beds that are within the channels where the heavy activity occurs.[82] Accordingly, a well-developed bay will have several patches of seagrass meadows, all adjacent to open spaces with heavy traffic and heavily scarred seagrass beds, if it has any at all.

The result of these fragmented habitats surrounded by high human activity is a significant deterioration of the services that seagrass beds provide. A badly fragmented seagrass bed cannot provide optimal sediment stabilization or safe refuge to the protected species that feed on and rest within them.[83] Manatee and sea turtles, both federally protected species,[84] cannot move from one patch to the next without the danger of propeller impacts.[85] Furthermore, polluted water can severely restrict the growth of seagrasses, which in turn cannot provide favorable nursery grounds or food for recreational and commercial fish and shellfish.[86] The storm runoff associated with a well-developed coast

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Manatee, and Tampa Port Authority. Am. Assn. of Port. Auths., *Map of U.S. Member Ports*, http://www.aapa-ports.org/files/PDFs/US_ports.pdf?navItemNumber=987 (accessed Apr. 16, 2009).

81. *See* Marinas.com, http://marinas.com/browse/marina/US/FL/ (accessed Apr. 16, 2009) (listing 958 different marinas in Florida). Some marinas are nestled within port areas. *See e.g.* Cape Marina, *Welcome to Cape Marina*, http://www.capemarina.com/ (accessed Apr. 16, 2009) (emphasizing that Cape Marina is "[s]trategically located in Port Canaveral").

82. *Corps Guidance*, *supra* n. 39, at 2(g).

83. Susan S. Bell et. al., *Faunal Response to Fragmentation in Seagrass Habitats: Implications for Seagrass Conservation*, 100 Biological Conserv. 115, 121 (2001).

84. 16 U.S.C. §§ 1531–1599 (2006).

85. *See Metro. Dade Co. v. Coscan Fla., Inc.*, 609 So. 2d 644, 650 (Fla. 3d Dist. App. 1992) (holding that a lower court applied the wrong legal standard in not considering evidence of a potential increase in the number of boat collisions with manatees as a possible result of a proposed marina expansion project and remanding the case to consider that impact); Ga. Dept. Nat. Resources, *Vessel-Related Impacts on Loggerhead Sea Turtle Mortality and Evaluation of Mitigation Alternatives*, http://www.gtsav.gatech.edu/go/research-highlight/vessel-related-impacts-on-loggerhead-sea-turtle-mortality-and-evaluation-of-mitigation-alternatives (accessed Apr. 13, 2009) (stating that many sea turtles in the southeastern United States are injured by boat strikes).

86. *Conserving Florida's Seagrass Resources*, *supra* n. 17, at 10.

pollutes the water and damages the seagrasses.[87] Also, navigation areas with heavy boat traffic are susceptible to accidental oil spills.[88] And, water inundated with pollution causes algal blooms, which cut off the ability of seagrass to photosynthesize light into oxygen.[89]

Although it is not preferable that these areas have no seagrass cover, spending hundreds of thousands of dollars ensuring the health of severely fragmented beds is not cost effective in the face of continued seagrass damage.[90] It makes more sense to spend the money on creating a healthy, intact, and pollution-free habitat with limited human activity by creating a mitigation bank.[91] Mitigating for aquatic resource losses should not only be about planting an acre of seagrass to compensate for the destruction of a neighboring acre of seagrass; it should also be about ensuring that the seagrasses can provide their ecological and economic services at the best possible level. A mitigation bank, by its design, protects a large, intact area of seagrass beds that can be depended on for optimal sediment stabilization, water filtration, and nesting and feeding grounds.[92] If it is in the public's interest to provide maximum protection for sovereign submerged lands important to shellfish harvesting and fish and wildlife propagation,[93] mitigation banks are superior to permittee-responsible mitigation.

Governor Crist's statement that seagrass mitigation banks facilitate the destruction of healthy, fully functioning seagrass is misleading. Mitigation banks are a channel for third parties to become involved in compensating for inevitable losses resulting

87. *See* Jaap & Hollock, *supra* n. 32, at 578 (noting that factors limiting the growth of seagrass include increased turbidity and decreased salinity, both of which can result from storm runoff).

88. *See* Livingston, *supra* n. 32, at 569–570 (discussing some of the negative impacts of economic activities that occur around wetlands).

89. *See* Jaap & Hollock, *supra* n. 32, at 579 (discussing the productivity of seagrass).

90. *See* Lewis, *supra* n. 77, at 24, 28 (documenting a seagrass mitigation project that cost over six-million dollars and included transplanting more than five acres of seagrass into fifteen discrete areas).

91. *See* 60 Fed. Reg. at 58607 (recognizing that "[i]t may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels when ecologically appropriate").

92. *See* 33 C.F.R. at § 332.3(b)(2); 40 C.F.R. at § 230.93(b)(2) (discussing characteristics of mitigation banks and the procedure for creating mitigation bank credits).

93. Fla. Admin. Code Ann. r. 18-21.001(4).

from coastal development, which impacts healthy seagrass beds regardless of the mitigation plan the permittee chooses.[94] Furthermore, Governor Crist's recognition that the seagrass mitigation bank will compensate for losses to seagrass elsewhere is not a negative, but positive, characteristic. Because it is off-site, a mitigation bank can protect a large intact seagrass bed that can better provide services such as fish habitat, water filtration, and sediment stabilization,[95] whereas permittee-responsible mitigation is often done in a patchwork-fashion, leaving seagrass beds badly fragmented and unable to render discernable ecosystem services.[96] Mitigation banks should be preferred over permittee-responsible mitigation, given that Governor Crist's intent[97] is to protect healthy, fully functioning seagrass beds while ensuring the ability to continue socially beneficial development of the coast. Analysis of Governor Crist's concern over the state of seagrass restoration will likewise show that mitigation banks are preferable to permittee-responsible mitigation.

IV. BANKING IN THE FACE OF UNCERTAINTY

Governor Crist also expressed concern over his recognition that "the long-term success of artificially created seagrass beds has not been conclusively established."[98] "The likely result of seagrass mitigation banks," he said, "would be the net destruction of seagrass beds on sovereign submerged lands."[99] Yet, the mitigation activities conducted within a mitigation bank are the same activities that a permittee will conduct in permittee-responsible

94. *See* Johnson et al., *supra* n. 13, at 123 (discussing the effect of coastal development on aquatic environments); Fonseca, *supra* n. 19, at 1 (mentioning the loss of aquatic animals' habitats in the Gulf of Mexico as a result of coastal development). The purpose of the compensatory mitigation program is mitigating for unavoidable, minimized impacts to existing aquatic resources. Policy MOA, *supra* n. 39, at II(B).

95. *See* 33 C.F.R. at § 332.3(b)(2); 40 C.F.R. at § 230.93(b)(2) (discussing procedure behind mitigation bank credits).

96. *See* Bell et al., *supra* n. 83, at 121 (discussing the effect of fragmentation on fauna in a seagrass environment and the practical methods to measure the effects of fragmentation).

97. *See* Veto Ltr., *supra* n. 1, at ¶ 6 (recognizing the importance of seagrass beds and the importance of not risking their destruction).

98. Veto Ltr., *supra* n. 1, at ¶ 4.

99. *Id.*

mitigation.[100] If Governor Crist and the other members of the Board of Trustees are truly concerned about waiting until the science of seagrass mitigation is conclusively established, no permittee should have been granted a permit based on a mitigation plan that involves seagrass restoration. This is not the case, as conducting seagrass restoration to compensate for development-related seagrass impacts has been occurring since the early 1980s.[101]

Governor Crist is right that seagrasses are difficult to replace and the science of successful seagrass restoration is relatively new and not well established.[102] The current state of seagrass restoration can be illustrated through contrasting a recent permittee-responsible mitigation project with the process of creating a seagrass mitigation bank. This examination will demonstrate why mitigation banks, as a less risky means of compensatory mitigation, can provide better seagrass protection while simultaneously providing a more efficient and affordable means of developing socially beneficial uses of sovereign submerged lands than permittee-responsible mitigation.

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100. *See* 33 C.F.R. at § 332.2 (2008) (defining a mitigation bank as a site where resources are restored, established, enhanced, or preserved, and defining permittee-responsible mitigation as an aquatic resource restoration, establishment, enhancement, or preservation activity). Of the different kinds of mitigation, establishment (formerly called creation) is the only activity that involves developing an aquatic resource where it did not previously exist. *Id.* Seagrass restoration literature states that "[i]f there is no tangible evidence to indicate that a site once supported seagrass [. . .], or if the suspected cause of seagrass decline has not abated, then the site must be rejected." Fonseca, *supra* n. 19, at 6. For a recent documented study on establishing seagrass on bare substrate that was vacant only because of temporal dynamics see Amy V. Uhrin et al., *Survival and Expansion of Mechanically Transplanted Seagrass Sods*, 2008 Restoration Ecology, 2–3 (targeting landscapes where seagrass was continuous yet interspersed).

101. *See e.g.* Lewis, *supra* n. 25, at 159–169 (documenting the successes of four case studies where experimental seagrass restoration was conducted to offset and mitigate for dredge and fill projects).

102. Gary J. Montin & Raymond F. Dennis III, *A Shallow Water Technique for the Successful Relocation and/or Transplantation of Large Areas of Shoalgrass* (Halodule wrightii) 3 (Env. Affairs Consultants, Inc. Oct. 2003) (submitted for Hillsborough Community College 30th Annual Conf.: Ecosystems Restoration and Creation). For documented successful restoration efforts see W. Judson Kenworthy, Kamille Hammerstrom & Mark S. Fonseca, *Scientific Evaluation of a Sediment Fill Technique for the Restoration of Motor Vessel Injuries in Seagrass Beds of the Florida Keys National Marine Sanctuary* 229, 243 (NOAA/NOS/NCCOS Ctr. for Coastal Fisheries and Habitat Research Oct. 2, 2006) (documenting successful propeller scar experiments in Florida Keys National Marine Sanctuary).

A. Port Manatee

The Port Manatee project was a port expansion plan that required compensatory mitigation for 5.33 acres of seagrass impacts (3 acres of turtle grass and 2.33 acres of shoal grass).[103] The FL DEP issued a conceptual permit in December 1999 that required, among other things, that all mitigation be deemed successful prior to any dredging and construction activities.[104] The permit also required that the mitigation generate 12.7 credits prior to the opening of the new berths.[105] The mitigation plan proposed to offset the project impacts by performing a combination of resource protection, restoration, enhancement, and management activities.[106] Those activities included salvaging all seagrass from the impacted site; transplanting it to fifteen discreet, unvegetated areas adjacent to damaged seagrass beds; and supplementing it with seagrass collected from undisturbed donor beds.[107]

The methods used during the course of the seagrass restoration encompassed almost all accepted and new ways of transplanting seagrass. The established methods included using large landscaping staples to secure bundles of seagrass shoots to the substrate[108] and planting peat pot plugs of shoal grass units into the substrate, similar to planting common yard plants.[109] The

103. *Manasota-88, Inc. v. Manatee Co. Port Auth.*, 2007 Fla. Admin. Div. Hrgs. LEXIS 74, *22 (Fla. Dept. of Envtl. Protec. 2007) (recommended order).

104. *Manasota-88, Inc. v. Manatee Co. Port Auth.*, 2007 E.R. F.A.L.R. 130, 2 (Fla. Dept. of Envtl. Protec. 2007) (final order).

105. *Id.* at 4.

106. Lewis et al., *supra* n. 77, at 21–23.

107. *Id.* at 21, 24.

108. *Id.* at 28–29. The staple method is a method of hand transplanting that has been used widely since its development in the late 1970s. Fonseca, *supra* n. 19, at 10–11. It is done by attaching groups of plants to wire landscaping staples with paper-coated twist-ties and then burying the staples approximately ten centimeters into the sediment. *Id*; Lewis et al., *supra* n. 77, at 28–29. This method was used in two different ways in the Port Manatee project: first, by collecting floating, bare-root shoots of seagrass and planting them individually; and second, by collecting floating seagrass fragments from the surface water, tying them into bundles, and then planting them. *Id.* This method is widely applicable and relatively low cost, but can be very time consuming. Fonseca, *supra* n. 19, at 11.

109. Lewis et al., *supra* n. 77, at 29–30. The peat-pot method was used to transplant 6,582 shoal grass plugs in the Port Manatee project. *Id.* This method consists of bedding excavated plugs of grass into three-by-three inch peat pots and hand installing the sediment-filled pots using plastic garden shovels. *Id.* at 29. Once in the bottom, the sides of the peat pot must be removed to allow the roots to spread, and the plots must be covered with a chain link fence anchored over the substrate to prevent disturbance by rays. Fonseca,

newer methods included using a modified pontoon boat equipped with a hydraulically operated bucket to mechanically transplant large turtle grass sods[110] and a modified shovel method used to transplant shoal grass sods.[111] The benefit of the peat pot, mechanical, and modified shovel methods is that each leaves the rhizomes and surrounding substrate intact, which helps the seagrass grow successfully in the new location.[112]

Unfortunately, in January 2003, after monitoring the mitigation sites for approximately twenty-six months, the scientists observing the sites' progress deemed the restoration a failure.[113] The largest loss was from the three acres of turtle grass that were mechanically transplanted.[114] Turtle grass is a climax species in terms of succession and a larger, deeper growing species of seagrass.[115] It stores more energy and provides greater refuge and nursery for shrimp and fish.[116] The loss of these three acres had a substantial adverse effect on fish and wildlife utilization at the project area.[117] The failure was attributed to (1) poor location of

supra n. 19, at 11–12. This method was developed in the early 1990s, is low cost, but is limited to the smaller species and has not been universally recommended. *Id.* at 12.

110. Lewis et al., *supra* n. 77, at 31. This method has only been tested in a few documented projects and its use has constraints. Uhrin et al., *supra* n. 100, at 2, 7. It is restricted to water depths in the range of 0.6–1.5 meters, moves slowly, and is only efficient when moving sods from donor and receiver beds that are in proximity to each other. *Id.* at 2, 8. However, this method is very promising for filling in areas of seagrass beds that have bare substrate, because the sods contain almost one foot of sediment and can be planted in units up to eight meters apart, allowing for expansion. *See e.g. id.* at 2–5 (testing this method for planting sods of turtle grass and shoal grass on unvegetated substrate and establishing expansion resulting in a net gain of 3,512.4 square meters in shoal grass and 11.8 square meters in turtle grass). This method is also promising for salvaging from channels due for maintenance dredging. *Id.* at 8–9.

111. Lewis et al., *supra* n. 77, at 31. The modified shovel method was an experimental method used during the Port Manatee project and was used to transplant 1.92 acres of shoal grass into two mitigation sites equaling 6.86 acres. Montin & Dennis, *supra* n. 102, at 7. The shovel is modified with sharpened edges and predrilled holes to reduce friction and prevent suction. *Id.* Part of the success of this method is the unique organizational infrastructure, which included thirty labor personnel divided into harvesters, loaders, drivers, planters, and runners. *Id.* at 6. This method is promising as a versatile and cost efficient means of stabilizing propeller scars, blowholes, and berms. *Id.* at 8.

112. *See* Fonseca, *supra* n. 19, at 11–12 (discussing the peat-pot and other planting methods); Montin & Dennis, *supra* n. 102, at 8 (discussing the modified shovel method); Uhrin et al., *supra* n. 100, at 1 (explaining various planting methods and their history).

113. Lewis et al., *supra* n. 77, at 38–39.

114. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at **23–24.

115. *Id.* at *23.

116. *Id.*

117. *Id.* at **23–24.

transplanted sites—the seagrass was planted in an area with excessive currents,[118] (2) lack of quality control on an unproven technique,[119] and (3) the need for time-sensitive completion.[120]

The total cost to the Manatee County Port Authority (MCPA) was $6,319,449. In addition, the two credits that were granted in January 2003 were from the passive protection of adjacent seagrass beds by enforcing a motorized exclusion zone at $100,000 per year.[121] Even though the restoration had not been deemed successful, the FL DEP nevertheless authorized dredging in early 2003 since the mitigation activities were complete.[122] In 2004, dredged material from a disposal area was inadvertently released onto one of the mitigation sites killing 2.52 acres of mixed seagrass beds and requiring the MCPA to remove the sediment.[123] The shoal grass that was transplanted using the modified shovel method eventually started expanding, resulting in an award of 6.1 credits in September 2005, and then 11.45 credits in April 2006.[124]

In 2005, the MCPA applied for a modification to the permit, which would allow the port to open to vessel berthing prior to the 12.7 credit requirement.[125] This was met with strong opposition from a non-profit environmental organization (Manasota-88) of fisherman and wildlife enthusiasts.[126] Manasota-88 filed for and was granted an administrative hearing to fight the proposed permit modification.[127] In March 2007, the FL DEP granted the requested modification with a condition that the MCPA submit a

118. *See* Lewis et al., *supra* n. 77, at 37 (documenting that the majority of mechanically transplanted units were inadequately placed to a sufficient depth to withstand the tidal drag).

119. *See Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *24 (discussing the existence of remedial plans that would be required in the event of transplantation failure).

120. *Id.* at **25–27.

121. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *25. The mechanical device was redesigned following the failures at Port Manatee and was successful at transplanting twenty-seven seagrass sods (nine turtle grass and eighteen shoal grass) in a study conducted in Sarasota Bay prior to maintenance dredging. Uhrin et al., *supra* n. 100, at 7–8.

122. *Manasota-88*, 2007 E.R. F.A.L.R. 130, at 4.

123. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *33. At the time of the hearing, those 2.52 acres had remained un-mitigated. *Id.* at **33–34.

124. *Id.* at **30–31.

125. *Manasota-88*, 2007 E.R. F.A.L.R. 130, at 6.

126. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *8.

127. *Manasota-88*, 2007 E.R. F.A.L.R. 130, at 6.

Remedial Action Plan (RAP) for the loss of the three acres of turtle grass that never recovered.[128] The conflict ended with a win-win situation, even for the turtle grass. In August 2007, the FL DEP announced that the MCPA had been granted 15.20 total credits.[129] Even though this was more than the initial requirement, the FL DEP noted that the MCPA was not relieved of its duty to implement the RAP.[130] The RAP was carried out in September and October 2007, and the transplanted turtle grass and shoal grass showed an 83.8% survival rate after one year.[131]

What can be learned from the Port Manatee project is that the success of seagrass restoration is unpredictable and can take many years to determine. A reflection on some of the problems can reveal how risky permittee-responsible mitigation can be for seagrass beds. First, the seagrass was salvaged from the impacted site and then the site was completely dredged.[132] If the restoration efforts had failed, there would have been a net loss of seagrass. Second, the accidental fill material released onto a neighboring mitigation site is a danger associated only with conducting mitigation activities and impact activities in close proximity to each other. As of July 2006, those 2.52 acres that were buried under the fill material remained unmitigated and represented additional resource losses.[133] Third, because the port expansion project was time-sensitive, unproven and sloppy methods were used to transplant some of the most valuable seagrass species, resulting in a substantial loss of habitat.[134] And, the time and money lost to the MCPA was considerable.[135] A commercial port is in the public's interest, because it facilitates the functioning of our intrastate and international economy. Fortunately, in the case of the

128. *Id.* at 38.

129. Ltr. From Michael R. Barnett, P.E., Chief, Bureau of Beaches & Coastal Sys., to George Isiminger, P.E. Manatee Co. Port Auth., *Seagrass Mitigation Final Credit Determination* ¶ 1 (Aug. 2, 2007) (copy on file with *Stetson Law Review*).

130. *Id.* at ¶ 5.

131. First Annual Monitoring Rpt. prepared by WilsonMiller, Inc., for Manatee Co. Port Auth., *Port Manatee Seagrass Mitigation Project, Seagrass Remedial Action Plan* 17 (copy on file with *Stetson Law Review*).

132. Lewis, *supra* n. 77, at 24 (stating that the mitigation plan was based on salvaging seagrass from the impact site prior to dredging).

133. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at **33–34.

134. *Id.* at **23–27.

135. The cost of the failed mechanical transplantation of turtle grass alone was $1,266,837. Lewis, *supra* n. 77, at 38.

Port Manatee project, opening the additional berths was only in the public's interest if the MCPA continued its remedial mitigation of turtle grass, striking the proper balance of public use and resource protection.[136] This is only due to the efforts of environmentally interested parties who exhausted themselves emotionally and financially to ensure that these remedial efforts were mandated.[137] Mitigation banks can prevent many of the issues revealed in the Port Manatee case study from arising.

B. Creating a Seagrass Mitigation Bank

Consider the process and procedures of creating a seagrass mitigation bank. A mitigation bank sponsor locates an area of severely degraded and damaged seagrass beds, where it has been determined that the suspected cause of seagrass decline has abated[138] and any vacancies are only due to temporal dynamics.[139] The site possibly has seagrass beds badly damaged by propeller scarring or blow holes from boat grounding. This presents an opportunity for the two types of mitigation that are associated with a net gain of resource area and function: restoration and establishment.[140]

Before beginning mitigation, the bank sponsor must obtain what is called a mitigation banking instrument by following the procedures set forth by the Corps and EPA.[141] This mitigation banking instrument is the product of three phases—proposed plan, draft instrument, and final instrument—all subjected to

136. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *42; *Manasota-88*, 2007 E.R. F.A.L.R. 130, at 38.

137. The FL DEP had given notice of its intent to approve the permit modification in April 2006. *Manasota-88*, E.R. F.A.L.R. 130, at 5–6.

138. *See* Fonseca, *supra* n. 19, at 6 (emphasizing that if there is no evidence that the cause of seagrass decline had abated on a site that once supported seagrass, it should be rejected).

139. *See* Uhrin et al., *supra* n. 100, at 2–3 (describing site selection that "targeted landscapes where existing seagrass was continuous yet interspersed with areas of bare substrate, suggesting that the unvegetated areas were within acceptable environmental limits to support seagrass growth but were currently vacant only due to the temporal dynamics of seagrass cover").

140. 33 C.F.R. at § 332.2; 40 C.F.R. at § 230.92.

141. A mitigation banking instrument is defined as the legal document for the establishment, operation, and use of a mitigation bank. 33 C.F.R. at § 332.2; 40 C.F.R. at § 230.92. The Corps and corresponding EPA procedures are set forth in 33 C.F.R. at § 332.8 and 40 C.F.R. at § 230.98 respectively.

public notice and comment and evaluation by an established interagency review team.[142] The mitigation banking instrument will contain a credit release schedule, which includes, among other things, specific milestones that must be met prior to the release of credits and provisions for reducing and suspending credit availability where necessary to ensure a high likelihood of meeting performance standards.[143]

The mitigation bank sponsor can then begin conducting its restoration activities. It is difficult for seagrass species to recover from propeller scars because the scarred areas are normally deeper than the surrounding seagrass beds and the nutrient rich sediment has generally been displaced.[144] A relatively new technique of repairing scars is using what are known as "sediment tubes."[145] Biodegradable, nutrient-rich, fabric sediment tubes are placed within the scars, leveling them with the neighboring beds.[146] Seagrass units are placed in the tubes, and bird roosting stakes are used for fertilizer.[147] As the tubes dissolve, the sediments settle and the rhizomes expand and coalesce with the neighboring grasses.[148] To establish seagrass in vacant substrate, the same methods demonstrated at Port Manatee can be used.[149]

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142. 33 C.F.R. at §§ 332.8(d)(2), (d)(4); 40 C.F.R. at §§ 230.98(d)(2), (d)(4).

143. 33 C.F.R. at § 332.8(d)(6)(iii)(B); 40 C.F.R. at § 230.98(d)(6)(iii)(B).

144. Hall et al., *supra* n. 24, at 3; Jennifer Kay, *Boaters Are Damaging Seagrass, Advocacy Group Says*, Tallahassee Democrat B6 (Jan. 6, 2006).

145. For a discussion on the success of the sediment tube method see Kenworthy et al., *supra* n. 102, at 243 (documenting the success of an experiment in the Lignumvitae Key Submerged Land Management Area of the Florida Keys National Marine Sanctuary where sediment tubes were found to be an efficient means of repairing propeller scars); Hall et al., *supra* n. 24, at 28–35 (reporting to the United States Fish and Wildlife Service the results of the Lignumvitae Key Submerged Land Management Area experiment that documents using sediment tubes planted with seagrass and fertilized with wild bird droppings is a feasible method for restoring seagrass damage involving the excavation of sediments).

146. Hall et al., *supra* n. 24, at 29.

147. *Id.* at 29–30.

148. *Id.* at 33–34.

149. One additional method is the plug method that is used to harvest turtle grass by using a core tube. Fonseca, *supra* n. 19, at 9–10. Turtle grass roots grow horizontally across the sediment with the grass growing up in what are called short shoots. *See* David A. Tomasko, Clinton J. Dawes & Margaret O. Hall, *Effects of the Number of Short Shoots and Presence of the Rhizome Apical Meristem on the Survival and Growth of Transplanted Seagrass* Thalassia Testudinum, 32 Marine Science 41, Abstract (1991) (referring to the seagrass leaf stems as short shoots). One study indicates that the highest rates of survival occur when four shoots are captured in one plug and decrease as the number of plugs decreases. *Id.* at 43.

The seagrass could possibly come from an impact site if there is a nearby channel that is being prepared for maintenance dredging and has healthy seagrass beds.[150] Maintenance dredging is exempt from compensatory mitigation requirements,[151] thus salvaging seagrass from navigation channels would help prevent a net loss of healthy seagrass. But, the seagrass can also be taken from donor sites, and, if extracted correctly, the seagrass will recolonize itself, returning to normal within one year.[152] The mitigation bank sponsor will want to fill the area with shoal grass or widgeon grass first, as they are pioneering species and can establish cover quickly.[153] Once the pioneering grasses have stabilized the substrate, plugs of turtle grass can be patched in to begin their slow recolonization.[154]

The biggest burden is on the mitigation bank sponsor who must pay the cost of restoration upfront.[155] The costs of the restoration and time will be reflected in the price of the credits, but the dangers associated with permittee-responsible mitigation are not present. No fill material will be inadvertently released onto the restored beds because no dredging is taking place on location. If the seagrass restoration fails, the donor beds are still alive and there is no net loss of seagrass, unlike the salvaged site that will have been dredged already.

Most importantly, the chance of successful restoration is higher because it can be performed correctly. The restoration of turtle grass illustrates this. A mitigation bank sponsor can take the proper seagrass species from the donor beds only as needed, unlike a permittee who needs to expeditiously move an entire bed of turtle grass to a new location before it is dredged, resulting in a possible loss to the species. Once a mitigation bank has been established and its credits are released, a permittee can purchase

150. Fonseca, *supra* n. 19, at 8.

151. Fla. Stat. Ann. § 403.813(1)(f) (2008).

152. Fonseca, *supra* n. 19, at 7–8. There is disagreement as to which method is preferred. *Compare id*. (recommending harvesting seagrass from wild stocks in small patches from sites with conditions as similar as possible to the planting site); *with* Lewis, *supra* n. 25, at 169 (stating that salvaging seagrass plant material from sites proposed for destruction should be given higher priority because little information is available to document the recovery of donor sites).

153. Hall et al., *supra* n. 24, at 6; Fonseca, *supra* n. 19, at 7.

154. Fonseca, *supra* n. 19, at 7.

155. Gardner, *Banking*, *supra* n. 50, at 579.

its credits and begin its publically beneficial impacts. The cost of the mitigation credits will reflect the true cost of successful restoration without the additional cost of undue delays, litigation, and time.

Seagrasses are difficult to replace, and the science of seagrass restoration is still relatively new.[156] In his veto letter, Governor Crist raised his concern that seagrass mitigation banking would likely result in the net loss of seagrass beds.[157] However, contrasting what happened at Port Manatee with the process and procedures of creating a seagrass mitigation bank illustrated that, because seagrass restoration comes with no guarantees, mitigation banking is far safer for seagrass beds than permittee-responsible mitigation. Also, mitigation banking is a more efficient and affordable means of compensating for losses caused by the development of socially beneficial uses of sovereign submerged lands, such as commercial ports. Instead of being contrary to the public interest as Governor Crist stated, mitigation banking provides a better balance between protecting the seagrass beds and providing for socially beneficial uses of sovereign submerged lands than permittee-responsible mitigation, which is associated with dangerous, time consuming, and costly methods of compensatory mitigation.

Examination of parts three and four has revealed that mitigation banking favors the public's interest more than permittee-responsible mitigation. The third issue that Governor Crist raised—that mitigation banks contravened Florida's "sovereign submerged lands doctrine"—was highly dependent on the opposite premise.

V. CONSTITUTIONAL IMPLICATIONS

Governor Crist's statement that the vetoed bill raises serious constitutional issues stems from his conclusion that seagrass mitigation banks are contrary to the public's interest.[158] He is worried that seagrass mitigation banks would create implementa-

156. *See* Fonseca, *supra* n. 19, at 3 (stating that technique development started only in the late 1970s and its record of success is poor).

157. Veto Ltr., *supra* n. 1, at ¶ 4.

158. *Id.* at ¶¶ 2, 5.

tion problems because "[t]o ensure the 'perpetual protection and management of the land within the bank,' the mitigation bank owner would have to exclude the public from the area where the attempt at seagrass cultivation or management was being undertaken to avoid prop dredging."[159] Governor Crist's concern has some merit. Excluding the public from portions of sovereign submerged lands for activities contrary to the public interest would contravene the common law right of navigation and the constitutional "sovereign submerged lands doctrine."[160] But, activities that are not contrary to the public interest do not implicate the navigation right or the doctrine.[161] As discussed in the previous two sections, mitigation banks are better at satisfying the public interest test for mitigating seagrass impacts than permittee-responsible mitigation, an activity that is expressly allowed[162] because mitigation banks do a better job at balancing the ability to use sovereign submerged lands while simultaneously protecting valuable seagrass beds. Even so, complete exclusion from a mitigation bank may not be necessary or even feasible, which removes these constitutional implications.

The constitutional "sovereign submerged lands doctrine" states that the lands are held in trust for all the people, and that private uses of such lands may not be contrary to the public's interest.[163] Exclusion of the public is not prohibited, but private activities that generate revenues or exclude traditional public uses must provide just compensation.[164] Traditional public uses are

159. *Id.* at ¶ 5.

160. *Id.*; *City of Tampa*, 102 So. at 342–343 (stating that the rights of navigation are subject only to the general public welfare); Fla. Const. art. X, § 11 (providing that private use of lands under navigable waters may be allowed only when not contrary to the public interest).

161. Private uses, which exclude traditional public uses, are permitted when not contrary to the public interest. Fla. Const. art. X, § 11. Exclusion of the public from navigable waters is permitted when the excluding activity is in the public's interest and a valid exercise of the State's police power. *Carmazi v. Bd. of Co. Commrs. of Dade Co.*, 108 So. 2d 318, 323–324 (Fla. 3d Dist. App. 1959).

162. *See* Fla. Admin. Code Ann. r. 18-21.005(1)(c)(15) (provisioning for permitted mitigation activities, not including mitigation banking, on sovereign submerged lands subject to written authorization).

163. Fla. Const. art. X, § 11.

164. Fla. Admin. Code Ann. r. 18-21.001(5). Some activities for which the Board of Trustees lease sovereign submerged lands even take precedence over the traditional uses by the general public, and exclusion is permitted. *See e.g. id* at 18–21.005(1)(e) (providing that aquaculture leases and existing clam or oyster leases preempt the recreational or

boating, fishing, and swimming.[165] All other activities, including the construction or restoration of seagrass beds (if for the purpose of selling credits), must satisfy the public interest test and provide just compensation for exclusion.[166]

The common law right of navigation grew out of the "sovereign submerged lands doctrine," as it refers to the traditional use of boating.[167] This common law right states that navigable waters are held for the benefit of the public subject only to the police power of the state and the health, safety, and welfare of the public.[168] Limited privileges may be granted to individuals so long as they do not obstruct or interfere with the navigation of any of the navigable waters of the state.[169] Although the public right of navigation is protected by law, it can be restricted through the exercise of the state's police power when in the interest of the public.[170] When public rights and needs conflict, it is for the Board of Trustees to adopt a position of public policy that serves the greatest public good.[171]

Governor Crist's concern that the establishment of mitigation banks will contravene the constitutional right of use and common law right of navigation necessarily follows from his conclusion that mitigation banking on seagrass beds would not pass the public interest test.[172] Otherwise, neither the Constitution nor common law completely restricts the exclusion of the public for private purposes.[173] As the discussion of parts three and four re-

commercial use by the general public); *id*. at 18–21.004(2)(m)(5) (recognizing that aquaculture leases result in exclusion of the general public from sovereign submerged lands).

165. *Id*. at 18–21.004(2)(a).

166. Fla. Const. art. X, § 11; Fla. Admin. Code Ann. r. 18-21.005.

167. *Ellis v. Gerbing*, 47 So. 353, 355 (Fla. 1908).

168. *Id*. at 356.

169. *See id*. (stating that a state may grant reasonable and limited rights to individuals for the purpose of the development of natural or artificial resources, but such privileges should not unreasonably impair the rights of use).

170. *Wilcox v. T.O.L., Inc.*, 206 So. 2d 69, 72 (Fla. 4th Dist. App. 1968).

171. *See id.* (stating that "[w]hen public rights or public needs come in conflict, it is for the public officer or agency cloaked with discretionary authority to exercise that authority by adopting a position of public policy seeking at its end the greatest and highest public good"). For an example of a case where the public interest allowed for exclusion of the public from navigable waters see *Carmazi*, 108 So. 2d at 323–324 (finding that erection of a dam, although extinguishing the ability of bordering property owners to navigate a stream, was in the public interest and a valid exercise of the state's police power).

172. Veto Ltr., *supra* n. 1, at ¶¶ 3–4.

173. Fla. Const. Art. X, § 11 (providing that uses other than traditional uses of sover-

vealed, seagrass mitigation banks provide more protection and assurances than permittee-responsible mitigation. Therefore, exclusion of the public, if necessary, could be permitted.

Exclusion is thought to be necessary to properly offset the impacts of a project because of the danger of further blow holes or propeller scars.[174] A scarred seagrass meadow is not the functional or spatial equivalent of an intact, healthy seagrass meadow,[175] and the number of credits a permittee needs to purchase is determined by the proposed loss to function or area.[176] Accordingly, if a permittee pays for the proper number of credits and the seagrass is then damaged, the impacts it conducts could lead to a net loss of function or area.

Arguably, complete exclusion of the public from a mitigation bank is no more necessary than exclusion from a mitigation site maintained by a permittee. In permittee-responsible mitigation, temporary exclusion is sometimes necessary to protect mitigation areas from being compromised prior to achieving success.[177] Once the seagrass beds are stable, only monitoring is necessary and only for as long as the seagrass beds are under the responsibility of the permittee.[178] Management is implemented and enforced simply and effectively through "manatee protection zones," pursuant to Chapter 68C-22 of the Florida Administrative Code.[179] While a permittee is legally responsible for the mitigation site, it has a right to pursue a cause of action through the courts for damage from negligent boaters.[180] However, once the permittee

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eign submerged lands must not be contrary to the public interest); Fla. Admin. Code Ann. r. 18-21.001(5) (providing that any activities that exclude traditional public uses must provide just compensation); *Carmazi*, 108 So. 2d at 323–324 (standing for the notion that the state may, using its police power, allow activities on state lands that exclude traditional uses if they are in the public's interest).

174. Veto Ltr., *supra* n. 1, at ¶ 5.

175. *See* Livingston, *supra* n. 32, at 571 (discussing how local damage to seagrass beds has been associated with losses of benthic productivity, lowered species richness, and altered food web interactions).

176. *Basis of Review*, *supra* n. 45, at 3.3.3.1, 3.3.2.

177. *See id*. at 3.3.5 (stating that applicants are responsible for implementing methods to limit adverse impacts that compromise success).

178. *Id*. at 3.3.4 to 3.3.6.

179. Fla. Admin. Code Ann. r. 68C-22.001.

180. For an analogous case that demonstrates that leaseholders have the ability to pursue a cause of action for damage to their leasehold interest see *Avenal v. State*, 886 So. 2d 1085, 1100 n. 20 (La. 2004) (recognizing that "an oyster lessee has a valuable property right in his oyster beds, for the loss of which he can recover against one whose fault

generates the required credits, and the FL DEP grants the permit, the only incentive for the permittee to incur these costs would be if the FL DEP required remedial action.

Similarly, a mitigation bank sponsor would have the ability to limit public activity and enforce restriction zones in which boaters would have to watch their speeds.[181] Any negligent damage caused could be remedied through the courts.[182] For the mitigation bank sponsor, this costly option is only necessary for expansive damage because a mitigation bank will have a trust fund set aside for routine maintenance.[183] A trust fund is established during the approval phase, and the amount provided should reasonably be expected to generate annual revenue equal to the cost of perpetual management of the seagrass beds.[184] In the event that inadvertent propeller dredging occurs, the mitigation bank sponsor can use money from the trust fund to restore the scars with sediment tubes. Its incentive to do so lies in the ability of the FL DEP to suspend the availability of credits.[185] Because the mitigation bank sponsor has more incentive and ability to maintain the seagrass within the bank, the public does not need to be completely excluded from the bank's boundaries.

Furthermore, one obstacle unique to seagrass beds may actually preclude perpetual exclusion—potential problems with boundary delineation. Seagrass beds are not stationary—they expand, contract, and move with the sediment.[186] It has been observed that seagrass beds will appear to come and go over large areas.[187] This is possibly one reason that a permittee will have responsibility for a mitigation site only for as long as it takes to establish its success. It is impractical to maintain watch over seagrass that may move to another area. This presents a problem for

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the loss was incurred").

181. *Basis of Review*, *supra* n. 45, at 3.3.5.

182. Florida law requires that the mitigation bank sponsor have a legal or equitable interest in the land, which for seagrass mitigation banks would be obtained through a lease. Veto Ltr., *supra* n. 1, at ¶ 3. Leaseholders have a valuable property interest for which they can recover against third parties. *Avenal*, 886 So. 2d at 1100.

183. Fla. Admin. Code Ann. r. 62-342.700(9)(a) (2009).

184. *Id*. at 62–342.700(9)(b). The financial responsibility mechanism must be in place prior to the withdrawal of any credits. *Id*. at 62–342.700(9)(c).

185. *Id*. at 62–342.470(4).

186. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *21.

187. *Id*.

mitigation banks as well, because they require perpetual protection.[188] A mitigation bank sponsor may restore a bed of seagrass only to find that it has moved into a zone not regulated by its safety measures or that the sediments that have moved within the bank's boundaries are bare.

A possible way to handle this issue of boundary delineation is to require no more protection for mitigation banks than is required for permittee-responsible mitigation. According to the federal compensatory mitigation rules, a permittee is supposed to provide reasonable assurances for the long-term safety of the mitigation site.[189] This responsibility shifts to the mitigation bank sponsor when the permittee chooses mitigation bank credits.[190] In Florida, however, permittees are only responsible for maintenance and monitoring mitigation sites until they are deemed successful.[191] Perhaps seagrass beds can be an exception to the rule of perpetual management of mitigation banks in Florida. Once the mitigation is successful and all of the bank's credits are sold, the mitigation bank sponsor can end its lease with the Board of Trustees. The seagrass beds will lose no more protection than those restored under permittee-responsible mitigation. The mitigation bank sponsor will complete the restoration, offset the impacts, and protect the seagrasses for as long as needed to establish that the seagrasses are able to sustain themselves.

In his veto letter, Governor Crist expressed the reasons he believes mitigation banks could be contrary to the public interest.[192] Activities contrary to the public interest are not permitted on sovereign submerged lands, especially if they interfere with the rights of citizens to use and enjoy the lands that are held in trust for them.[193] Parts three and four revealed that mitigation banks are not contrary to the public's interest and are a safer and more protective means of compensating for resource losses that occur when developing Florida's coast. Accordingly, excluding the public

188. Fla. Admin. Code Ann. r. 62-342.400(1)(c); Fla. Stat. Ann. § 373.4136(1)(h).

189. 33 C.F.R. at § 332.3(l)(1); 40 C.F.R. at § 230.93(l)(1).

190. 33 C.F.R. at § 332.3(l)(2); 40 C.F.R. at § 230.93(l)(2).

191. *Basis of Review*, *supra* n. 45, at 3.3.6.

192. *See* Veto Ltr., *supra* n. 1, at ¶¶ 3, 4 (stating that seagrass mitigation banks could fail the public interest test because (1) their purpose is to generate credits to facilitate seagrass destruction elsewhere and (2) because the long-term success of seagrass restoration has not been conclusively established).

193. Fla. Const. art. X, § 11.

from mitigation banks could be permitted without contravening the common law navigation rights or constitutional "sovereign submerged lands doctrine." Even so, complete exclusion may not be necessary, and permanent exclusion may not be feasible. Seagrasses pose a unique problem in that they move with the substrate and can be hard to keep within a boundary.[194] This problem can be solved by allowing for flexibility in the rules with regard to seagrass mitigation banks—mitigation bank sponsors could have short-term responsibility over the mitigation bank similar to permittees in permittee-responsible mitigation.

VI. CONCLUSION

The perception in Florida is that mitigation banks are a poor method of compensatory mitigation, mainly because they have a bad reputation for being improperly implemented.[195] However, the new compensatory mitigation rule promises more oversight and better coordination between the agencies.[196] Seagrass restoration technology has had a rough past, but it is moving forward with a promising new transplanting technique that was peer-reviewed just this past year.[197] Seagrasses are a unique type of aquatic resource, and they do pose some interesting problems with regard to excluding the public.[198] However, these problems are nothing that cannot be solved with a little flexibility in the law. The federal agencies responsible for enforcing the Section 404 program have understood the value of mitigation banks for fourteen years,[199] and the new compensatory mitigation rule mandates that mitigation bank credits be the first choice a developer

194. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *21.

195. *See generally* Pittman & Waite, *supra* n. 66 (reporting on an investigation into wetland mitigation banks in Florida that found many problems with how they were being implemented); Craig Pittman & Matthew Waite, *The 'Bad Apple' of Wetlands Banking*, St. Pete. Times 1A (Dec. 18, 2006) (reporting on mitigation banks in Florida that contain dry lands and faraway lands, and noting the lack of government enforcement).

196. 73 Fed. Reg. at 19594.

197. *See generally* Uhrin et al., *supra* n. 100, at 1–10 (documenting the increasing survival and expansion of seagrass sods that were transplanted using a mechanized Giga Unit Transplant System (GUTS)).

198. *Manasota-88*, 2007 Fla. Div. Admin. Hrgs. LEXIS 74 at *21.

199. *See* 60 Fed. Reg. at 58607 (listing six advantages that mitigation banks have over permittee-responsible mitigation).

contemplates.[200] Florida should likewise recognize the benefit that mitigation banking can provide to seagrass beds and allow for seagrass mitigation banks.

200. *See* 33 C.F.R. § 332.3(b)(1) (mandating that the district engineer consider type and location options in the order presented in (b)(2) through (b)(6) in which (b)(2) is the use of mitigation bank credits).