



# The Growing Demands for **WETLANDS**

## Should a new class of land use be considered when determining highest and best use?

BY WAYNE RASMUSSEN

Historically, wetlands have been valued solely for their marginal use potential. More recently, there has been a rapidly growing demand by developers to acquire wetlands and other sensitive habitats, particularly around developing urban areas. Since this land is needed to serve as off-site mitigation for many construction projects, the growing market demand of wetlands now appears to be ripe for consideration as a specific class of land use in determining the highest and best use.

### DEMAND FOR FLAT TERRAIN

To help keep construction costs from escalating, infrastructure projects involving highways, transit and other facilities typically require the flattest terrain possible. However, this low-lying land is in high demand and often occupied by waterways and other wetlands as part of the natural drainage system. These lands are not only important from a construction standpoint, but also from

an environmental regulatory preservation perspective. This translates into market value.

Although low-lying land is in high demand, its highest potential market value can sometimes be overlooked in the eminent domain process. Instead of determining its highest and best use as wetlands, these areas are generally grouped with undevelopable open space and appraised with a correspondingly low land value. From a land use planning point of view, this can present a land valuation inequity.

### COMPOSITION OF WETLANDS

The term wetlands refers to land that is covered or saturated with water at a frequency and duration that is sufficient to support vegetation requiring saturated soils. Due to their significance as a natural resource, one of the nation's long-term conservation goals is to achieve a net gain in wetlands acreage and values over time.

Wetlands generally consist of waterways, ponds, and fresh and salt water marshes. They provide many important biological functions, such as habitat for plant and animal species, including those with the special status of endangered, threatened or candidate species. They are also crucial to groundwater recharge, filtration of surface water runoff and contaminants, sediment control and biodiversity.

Wetlands are closely regulated, so any developer who proposes significant grading or construction work within identified wetland areas must first obtain permits from the applicable federal, state and local agencies. This process requires the developer to demonstrate the extent to which grading or other degradation to project area wetlands will be avoided, or at least minimized. In cases where avoidance and impact minimization do not completely eliminate all significant environmental impacts, the developer must provide mitigation for the remaining impacts. Commonly referred to as “wetland mitigation,” this may take place somewhere else within the project site or in nearby off-site areas, if necessary.

### **SUPPLY AND DEMAND**

As communities expand, wetlands are routinely replaced with urban development. As the scarcity of these lands has increased, concern over the loss of them has grown, leading to more pressure on federal, state and local agencies to enact stricter environmental protection laws.

Agencies have been delegated increased responsibility to limit the extent to which wetland habitat may be disturbed or developed. In cases where some disturbance is determined to be acceptable, off-site mitigation may be required to compensate for project impacts to wetland habitats and special status plant and animal species.

Pressure on environmental agencies to strengthen their regulations has in turn increased the demand for off-site wetlands by developers to fulfill their mitigation requirements. The corresponding market value of this diminishing commodity has therefore increased. In other words, a decreasing supply of wetlands, along with an increasing demand for off-site wetland mitigation, has led to a higher land value.

### **OFF-SITE WETLAND MITIGATION**

Recognizing that the need for off-site mitigation continues to grow, new ways to meet this demand have recently evolved. Among these are conservation banking and off-site conservation easements, both of which are now widely recognized as acceptable programs by the environmental agencies.

**“...the scarcity of this land is increasing due to ongoing urbanization.”**

### **CONSERVATION BANKING**

In effect, conservation banks provide a mechanism for developers to pay for wetland credits and then transfer their mitigation obligations to the conservation bankholder. Wetland credits are sold to developers when they are required to provide off-site mitigation for their project impacts that cannot otherwise be handled on-site. Revenues received from the sale of credits are then used to acquire the land, fund habitat creation and restoration, and create an endowment for operation of the bank in perpetuity as a preserve.

These banks, which are comprised of wetlands and other protected habitat, usually involve all or a portion of a watershed. There are no actual minimum or maximum acreage requirements that the conservation bank land area must meet. However, the area must be large enough to either be self-sustaining or else be part of a more extensive conservation strategy that has a reasonable expectation of being accomplished.

Conservation banks are created through binding agreements between the bank operator and the appropriate regulatory agency(s). The price of credits however is negotiated and established between the bank operator and the buyer. The price of land acquired for conservation banks varies depending on the local real estate market, the demand for off-site mitigation for land by local developers, the availability of such land, and the proximity of the bank to project sites. Land acquisition is only one of several components that comprise the overall cost of establishing and operating a bank. It's important that the appraiser take this into account when determining a per-acre comparable land value.

## OFF-SITE CONSERVATION EASEMENT

A conservation easement (or covenant) is a legally binding and recorded agreement. Its primary purpose is to restrict land use and developmental potential in ways that support long-term conservation and habitat values. The land area encumbered by an easement remains under the possession of the landowner, and restrictions apply in perpetuity.

The responsibility for enforcing conservation easement restrictions is typically delegated to a governmental agency or non-profit conservation organization. Enforcement usually includes the right to enter the property for the purpose of monitoring the habitat condition and potentially undertaking corrective maintenance work, if necessary. Such activities are generally funded through a perpetual endowment that is paid to the enforcing organization by the developer who received the mitigation benefit for the easement.

Conservation easements only restrict landownership rights that are deemed necessary to protect site-specific conservation values. Easements are further tailored to the meet the landowner's needs for economically viable use of the land. Landowners generally continue to live on the property and use it as they historically have done.

There are no actual minimum or maximum acreage requirements that a conservation easement area must meet. Similar to conservation banking, the cost of acquiring conservation easements as off-site mitigation varies depending on the availability of appropriate land and other local market factors. The cost of the easement is negotiated and determined by the landowner and buyer.

## DETERMINING FACTORS

Highest and best use is best defined as the reasonable and probable use of vacant land or an improved property that is physically feasible, legally permissible, financially feasible, and that results in the highest value. Determining whether or not wetlands may be the highest and best use in eminent domain cases begins with examining the physical feasibility and legal permissibility.

One factor that establishes the physical feasibility of land for conservation banking and easements is determining whether the land assumed to be wetlands actually meets the state definition for this classification. Another factor is that the wetland area must be large enough to either be self-sustaining or can become part of a more extensive conservation strategy that has a reasonable expectation of being accomplished. The question concerning whether

conservation banking or easements are legally permissible requires verification that enabling legislation is in effect and that it permits the use of these mechanisms within reasonable proximity to the site.

In determining highest and best use feasibility, the appraiser may first want to review the environmental documentation prepared for the project for which the condemnation is required. This usually consists of the project's initial environmental study, an environmental impact statement or an environmental impact report. The chapters that deal with biology should contain information and mapping about the existence and location of wetlands within the project site.

## HABITAT ASSESSMENT

If the appraiser finds that wetlands exist within the project site, a relatively simple habitat assessment can be conducted to determine and document the significance of this relative to land valuation. Depending on the extent and type of wetlands, the appraiser can determine the potential for this to be the actual highest and best use as compared to the range of other potential land uses under consideration.

Wetland habitat assessments should include at least three components:

- 1) A map identifying all wetlands contained within the portion of the project that is the subject of the condemnation. The wetlands area map found in the project environmental evaluation document may serve this purpose.
- 2) Calculation of the wetland area's acreage.
- 3) Identification of the types of wetland being taken, such as riparian, ponds, marsh, etc.

If the appraiser feels that wetlands may potentially be the highest and best use for all or a portion of the project take, then the next step is to investigate the price of comparable land that was recently sold to non-government entities by local area conservation banks. The same can be done for determining the current market rate for conservation easements. Since the increasing demand by developers to acquire off-site mitigation credits is a recent dynamic, the search for comparable sales may be difficult in the short-term. It is expected however, that this condition will lessen as more conservation banks come online and wetland credit sales take place.

The use of governmental purchase prices paid for conservation banking credits and easements should be

excluded from the appraiser's analysis. The reason for this is because actual sale prices may be obscured by supplemental sources of compensation not reflected in the sale price. The distinction should be made that the value developed for the wetlands is indeed market value, unless the appraiser's assignment calls for something else.

If the resulting per-acre price as wetlands turns out to be higher than the appraiser's alternative highest and best uses, then wetlands can be considered as the actual highest and best use for the area of the take. This can then be identified as a specific class of land use separate from the undevelopable open space classification.

### SEVERANCE DAMAGES

In addition to issues pertaining to the actual wetland condemnation areas, the potential for severance damages to other outlying wetlands and protected habitat areas may exist. Adjacent habitat areas lying beyond the condemnation area may also be adversely impacted by a project. The condemnation project environmental documentation should address this matter. Due to their habitat value, these lands may also possess higher market value in the before condition than in the after condition.

In transportation projects like highway construction, the outlying habitat land value can be impacted by increased disruption to the movement and loss of life of special status species that might otherwise have been able to safely cross the area. These kinds of transportation projects can create a significant barrier to wildlife corridors and degrade the habitat value of property on both sides of the highway, thus diminishing the corresponding market value of this land for potential conservation bank or easement purposes.

As indicated, the condemnation project environmental documents can be used as the primary source of information for evaluating wetlands and other protected habitat areas as highest and best use candidates, as well as for determining severance damages in the eminent domain process. In addition, the conservation and open space elements contained within local general plans can be helpful in providing information pertaining to wetlands and other protected habitat. The administrators of local habitat conservation banks and other conservation banking experts can assist in better understanding habitat values and their corresponding land values. Local biologists and land use planning specialists may also be helpful with regard to related feasibility study coordination and technical matters.



Many states even maintain computerized inventories of biological information that provide the public with information about the general location and condition of the state's sensitive species and natural communities.

### CONCLUSION

Wetland areas are becoming increasingly more important to developers. While they provide off-site mitigation opportunities for construction projects, the scarcity of this land is increasing due to ongoing urbanization. This translates into a higher market value potential than the traditional undevelopable open space land-use category, typically used in past years as the comparable in the eminent domain process.

From a land use planning perspective, it would be more equitable if consideration were given to valuing wetlands at the comparable price paid for conservation banking or conservation easement use. Since wetlands are increasingly in demand by the developers of projects around urban areas, the determination of highest and best use and the corresponding market value for wetlands appears to be ripe for recognition as a specific class of land use.



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