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# What Happens When a Wetland Mitigation Bank Goes Bankrupt?

*The primary debate over wetland mitigation banking focuses on the extent to which banks fully replace acreage, functions, and values. While this concern is critical, the authors highlight another banking issue that receives far less attention. What happens to wetland acreage, functions, and values if the bank goes belly-up?*

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Mitigation banking, like any other entrepreneurial venture, is a risky business. A mitigation banker devotes significant resources to a project with an uncertain financial return. The banker must first navigate regulatory hurdles to establish a framework for the construction and operation of the bank; this process can take months or even years. Then, to sell credits, the banker must satisfy performance standards designed to ensure the ecological success of the mitigation project.

The mitigation banker also shoulders risk related to demand for credits. The banker competes for the business of mitigation seekers against other mitigation options such as in-lieu-fee programs and traditional, permittee-responsible projects, both of which may be less expensive. Although a mitigation bank may offer a greater likelihood of ecological success than other options, potential clients are probably more concerned with the bottom line.

Another set of risks relates to ecological factors. What if, in the course of restoration, conditions at the mitigation site deteriorate? A properly structured mitigation banking arrangement should have financial assurances to address such a contingency. Financial assurances are necessary at two stages: during the bank's construction and credit sale phase, and in the post-sale phase, during long-term site stewardship. In fact, the presence of these assurances is one of the benefits of mitigation banking over other mitigation options.

Considering these risks and the nature of entrepreneurial ventures generally, it is not surprising that some mitigation bankers have filed for bankruptcy. This article examines how bankruptcy law can affect the rights and obligations of the mitigation banker and government agencies, and the consequences of bank bankruptcy for wetlands.

**Bankruptcy Basics**

Bankruptcy can allow an individual or business to purge certain debts and obligations, reorganize, and return to its affairs with a fresh start. Bankruptcy can also lead to the liquidation of a business. When an entity has continuing mitigation responsibilities, however, these changes can lead to a "clash of absolutes": the U.S. Bankruptcy Code versus an environmental agency's regulatory powers.[1]

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When entering into a bankruptcy, a debtor selects the chapter of the bankruptcy code by which he will be governed. A business entering bankruptcy usually chooses either chapter 7 or chapter 11.

Chapter 7 involves liquidation. The bankruptcy trustee, a government-appointed individual who represents the debtor's estate and the interests of the creditors, runs the business for the purpose of liquidation. The trustee collects assets of the debtor, sells or otherwise disposes of them, and distributes the proceeds to creditors. At the conclusion of the bankruptcy proceeding, the business terminates, as does all remaining unpaid debt.[2]

Chapter 11 envisions a reorganization of the debtor company. In most cases, a chapter 11 debtor's business is run by the "debtor-in-possession," which is essentially the same entity as the debtor.[3] Rather than having an outside party run the company, the company decides for itself how to run. Debts are not paid through the sale of the company's assets, but rather through everyday operations.

The debtor-in-possession must consider how to prevent future insolvency, and often will restructure the company to increase profits. The court requires that a plan of reorganization specify how the company will be restructured and how debts will be paid. The debtor-in-possession or another entity may prepare plan proposals, but the court ultimately will approve only one.

Though most chapter 11 proceedings envision reorganization, chapter 11 also can result in liquidation. Sometimes the debtor-in-possession essentially sells its entire business, leaving only a shell company or litigation trust to handle remaining matters and then dissolve.

Regardless of the chapter, bankruptcy offers a debtor protections that can affect the rights of creditors. As soon as a debtor files a bankruptcy petition, an automatic stay is placed on actions against the debtor, albeit with some exceptions discussed below. The automatic stay applies even if the creditor is not yet aware of the bankruptcy filing.[4]

To share in the distribution to creditors, a creditor usually must file a "proof of claim" form.[5] Claims generally fall into one of three categories: secured, priority unsecured, or general unsecured. Secured claims have value ensured by collateral; all other claims are unsecured. In a chapter 7 bankruptcy, secured claims are generally paid from the value of the collateral. First payment from the unencumbered collateral goes to priority claims, and to the extent that any funds remain after payment to the priority claimants, general unsecured claims are paid. Though a chapter 11 proceeding gives more flexibility in determining the order of payment, a bankruptcy proceeding typically gives priority creditors more than general unsecured creditors.[6]

Sometimes a creditor's claim is not paid in full in the bankruptcy proceeding. In a chapter 7 proceeding, the remaining claim will not survive post-bankruptcy unless the successor entity has liability. With a successful chapter 11, however, there will often be a surviving debtor and thus the possibility of collecting claims after the bankruptcy is over. However, the plan of reorganization discharges the vast majority of claims under chapter 11.[7]

In sum, status matters in bankruptcy. Claims must be dealt with in the bankruptcy process. Creditors with general unsecured claims often receive little or nothing from bankruptcy proceedings—and courts have sometimes found government agencies enforcing environmental laws to be general unsecured creditors in bankruptcy proceedings.

**When an entity has continuing mitigation responsibilities, bankruptcy can lead to a "clash of absolutes": the U.S. Bankruptcy Code versus an environmental agency's regulatory powers.**

### Environmental "Claims" in Bankruptcy

Whether and how much of an environmental cost will be paid in bankruptcy depends on the classification of the cost. If the cost is not a claim, it will be paid outside of the bankruptcy proceeding.

In 1985, the U.S. Supreme Court in *Ohio v. Kovacs*[8] considered whether environmental cleanup costs constituted a claim in a bankruptcy proceeding. Kovacs, the CEO of a chemical company, had been charged with violating numerous state environmental laws. Kovacs and his company agreed to, but failed to complete, a site cleanup. A receiver was then appointed to take control of Kovacs's assets and perform the cleanup. Following the appointment, Kovacs filed for individual chapter 11 bankruptcy protection but later converted the bankruptcy to chapter 7. The state asked the bankruptcy court to declare that the money due to the state as a result of Kovacs's failure to clean the sites could not be discharged.[9]

The Supreme Court first considered whether the money due constituted a claim in the bankruptcy proceeding, focusing on the state's right to money for a violation of its environmental laws. At first glance, the legislative history of the bankruptcy code implies that the mere right to payment creates a claim:

> Section 101(4)(B) . . . is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title 11.[10]

However, the Court's interpretation of the provision considered not the state's *ability* to seek a monetary judgment but its *choice* to do so. The Court noted that by seeking a receivership over Kovacs, Ohio took away Kovacs's ability to clean up the site. The state was no longer enforcing its environmental laws, but rather was seeking repayment of costs already incurred. The state, therefore, had a monetary claim against Kovacs that was subject to the chapter 7 proceedings.

Lower court interpretations of *Kovacs* have not been consistent. There seems to be a consensus at the extremes: A dischargeable claim exists when the government seeks monetary reimbursement of funds already spent on remediation or restoration,[11] whereas no claim (and thus no possible discharge) exists when there is an injunction ordering the debtor to cease actions that harm the environment.[12] However, court decisions have been mixed in cases in which the government did not seek reimbursement but rather sought to require the debtor to remediate past environmental problems and prevent further environmental harm.

For example, the Bankruptcy Court for the Middle District of Florida held in *In re Robinson*[13] that a claim includes the federal government's right to enforce a wetland restoration order if the restoration entails "substantial direct expenditure" by the debtor. In this case, the debtor destroyed a salt marsh in violation of the Clean Water Act and was ordered to restore the area. Rather than complying with the order, the debtor filed for chapter 7 bankruptcy protection. The federal government did not seek a money judgment and did not file a proof of claim in the bankruptcy proceeding. Instead, the government argued that because it did not have a claim in the proceeding, the obligations of the debtor could not be discharged.[14] However, the bankruptcy court rejected the government's position, indicating that a bankruptcy court may conclude that an obligation to restore or maintain a wetland site is a dischargeable claim.

In contrast, in 1993, the U.S. Court of Appeals for the Third Circuit concluded in *Torwico Electronics Inc. v. New Jersey*[15] that no claim existed when New Jersey demanded that a debtor remediate a hazardous waste site, despite the fact that the cleanup would require a substantial expenditure by the debtor. Torwico Electronics filed a chapter 11 bankruptcy petition and listed New Jersey as a potential creditor. Between receiving that bankruptcy notice and the bar date set by the bankruptcy court for filing proofs of claim, the state discovered numerous environmental law violations on Torwico's property. In determining whether New Jersey held a claim, the court distinguished *Torwico* from *Kovacs* because New Jersey did not have the ability to clean up the site and ask for payment from the debtor; rather, the state's only feasible option was to require the debtor to clean up the site.[16] The real focus, said the court, is on whether the claim seeks to remedy "an ongoing and continuing threat" or seeks compensation.[17] *Torwico* makes a distinction between the government's desire to obtain money (a claim) and its desire to enforce its environmental policies (not a claim).[18]

**Woodbury Creek Wetland Mitigation Bank**

The Woodbury Creek Wetland Mitigation Bank situation raises issues related to early release of credits, the vitality of financial assurances, and the ability of regulators to take enforcement actions against a mitigation banker.

In 1995, the New Jersey Freshwater Wetlands Mitigation Council granted conditional approval to U.S. Wetland Services Inc. to establish and operate a wetland mitigation bank in Gloucester County. Eventually, LandBank took over as the party legally responsible for the resulting Woodbury Creek Wetland Mitigation Bank.

The resolution and subsequent permit allowed LandBank to sell up to one-third of its credits in advance, after meeting requirements such as recording a conservation restriction and posting bonds to cover construction and maintenance costs. Additional credits were supposed to be sold when the site met planting and grading performance standards.

However, in the course of its creation efforts, LandBank inadvertently drained almost 19 acres of wetlands.[19] The New Jersey Department of Environmental Protection turned to the performance bonds to fund remediation work. LandBank, however, had failed to pay the premiums on the bonds.[20] The bonds had lapsed and there was no ready pool of money from which to draw.

NJDEP brought an administrative enforcement action against LandBank, ordering the company to restore the approximately 19 acres at a 3:1 ratio. In addition, the NJDEP levied a $9,000 penalty.[21] Well aware that LandBank's controlling corporation, the IT Group Inc., had filed for chapter 11 bankruptcy,[22] NJDEP took care to state that the order was binding on bankruptcy trustees and the obligations it imposed were not dischargeable in bankruptcy.[23] As the NJDEP soon learned, however, a state administrative order does not necessarily trump a federal bankruptcy judge's decision.

In its reorganization, the IT Group sold the vast majority of its assets to another entity, the Shaw Group Inc.[24] With its remaining assets, the IT Group formed litigation trusts to pay off the excluded liabilities. Significantly, one of the assets (and liabilities) retained was the Woodbury Creek property.[25]

The court required that all creditors seeking reimbursement of claims in the IT Group bankruptcy submit a proof of claim establishing entitlement to be paid by July 15, 2002. Although listed as a potential claimant holding a contingent, unsecured, non-priority claim, NJDEP did not file a claim. The IT Group then filed an adversary proceeding seeking a determination that, by not filing a proof of claim, the state of New Jersey waived its right to payment in the bankruptcy proceedings.[26]

The bankruptcy court found that New Jersey did have a right to payment, albeit an undetermined one.[27] However, the motion to enforce the bar date did recognize one potential problem with defining New Jersey's action as a claim. Despite its broad definition, a claim focuses on a "right to payment." But the New Jersey administrative proceeding, while clearly having a monetary component, was about more than just money. It sought injunctive relief to require the creation and maintenance of new wetlands. The trustee argued that such relief could be classified as a claim because "the Trust can perform the obligation only by payment of money."[28] Thus, noted the trustee, because LandBank no longer existed, any injunctive relief that New Jersey could otherwise seek would be reduced to a monetary judgment.[29] In December of 2004, the bankruptcy court agreed with the trustee, entering an order directing New Jersey to dismiss its administrative proceeding against LandBank.[30] The court's order, which New Jersey is appealing, supports the broad reading frequently given to the definition of a claim under the bankruptcy code.

**When Bankruptcy Occurs in Early Stages**

When a mitigation bank is bankrupt, it will likely not have funds available to fulfill its continuing obligations to the mitigation site. This lack of funds is especially problematic if the mitigation bank has sold credits in advance. In LandBank's case, the Woodbury Creek bank sold 32.75 credits while creating 36.64 credits. Although Woodbury Creek had not oversold its mitigation credits, NJDEP determined that LandBank had failed to fulfill its continuing monitoring obligations. Furthermore, LandBank needed to account for the 19 acres of drained wetlands.

There are several approaches that regulatory agencies can take to reduce the likelihood of such a situation. First, as NJDEP later did, an agency could limit the amount of permissable early-release credits. NJDEP now allows the early release of no more than 10 percent of the total credits from a mitigation bank.[31] NJDEP also modified its regulations to remove an express reference to performance bonds as a financial assurance; regulations now suggest that letters of credit be used.[32] Another option used in Florida mandates that the bonding company provide 120-day notice to regulators prior to canceling a surety or performance bond.[33] The notice requirement allows the regulators to call the bond if necessary, minimizing the possibility of an unpleasant surprise.

However, what if an agency still finds itself confronting a mitigation provider that has filed for bankruptcy and has no valid financial assurances? If the agency has instituted an enforcement action, the agency must first determine whether the automatic stay applies to the action, and second, whether the agency holds a claim in the bankruptcy proceeding.

Fortunately, when considering claim assignation, most (though not all) courts look beyond the simple question of whether money is involved to the more complicated question of how the regulation is structured. To the extent that the government or even the debtor has the choice of money or remediation, a claim is more likely. The best chance that a governmental creditor has at avoiding such a claim is to establish that the enforcement action's underlying purpose is the prevention of future harm.

In the wetland context, the "continuing violation" theory may assist an agency in establishing such a purpose. Under this theory, each day that unpermitted fill remains in a wetland constitutes a violation of the Clean Water Act. A wetland restoration order thus may be viewed as both an effort to remedy a past violation and an effort to prevent a continuing violation (i.e., a future harm).

**Creditors with general unsecured claims often receive little or nothing from bankruptcy proceedings—and courts have sometimes found government agencies enforcing environmental laws to be general unsecured creditors in bankruptcy proceedings.**

**Ecobank: Florida and North Carolina Mitigation Banks**

Another mitigation banker's experience shows that while bankruptcy might not result in a loss of ecological function, firm financial assurances are vital. The Ecosystems Land Mitigation Bank Corporation was legally responsible for at least three mitigation banks: the Lake Louisa/Green Swamp Regional Mitigation Bank and the East Central Florida Regional Mitigation Bank (also called the Hunter bank), both in central Florida, and the Barra Farms Cape Fear Regional Mitigation Bank in North Carolina. In contrast to the Woodbury Creek scenario, the mitigation work at these sites is nearly complete and has largely been successful.[34]

Ecosystems, through its subsidiary Ecobank, entered into a joint venture with Da Capo al Fine Ltd. to create the banks. In this venture, Ecobank provided the wetland mitigation expertise while Da Capo provided the financing.

The financial assurances for long-term maintenance of the banks differ in amount and type. The instrument for the Lake Louisa bank calls for a trust account of approximately $600,000[35] to fund restricted site access, removal of exotic and invasive species, and prescribed burning. Da Capo supplied a letter of credit to cover the amount. The Hunter bank also is required to have a trust account to fund prescribed burns and maintain protective fencing, but in the much smaller amount of $44,700.[36] This funding apparently was also guaranteed by a letter of credit supplied by Da Capo.[37]

The long-term maintenance requirements for the Barra Farms bank in North Carolina are much looser. The mitigation banking instrument leaves the details of the long-term trust fund to be resolved in the future:

> A separate, long-term trust fund will be provided by Ecosystems Land Mitigation Bank Corporation for long-term maintenance, management, and remedial actions. The trust fund will be established upon completion of debiting of the bank or at the end of the monitoring period, whichever is longer.[38]

The trust fund for the Barra Farms bank has yet to be established.

Although the mitigation bank sites were satisfying their performance standards, thus freeing credits for sale, Ecosystems encountered financial challenges. The joint venture between Ecobank and Da Capo eventually failed due to a "difficult relationship" between the parties,[39] and Ecosystems sought chapter 11 bankruptcy protection.

Ecosystems and Da Capo filed competing plans of reorganization.[40] In November of 2005, the two parties settled their dispute[41] and the bankruptcy court dismissed the case, a rare development in such proceedings. As a result of the settlement, Da Capo gained control of the Florida banks; a new mitigation firm has since assumed their management. The long-term stewardship of the Lake Louisa and Hunter banks appears secure. Significantly, it was Ecosystem's joint venture partner, Da Capo, the entity *not* in bankruptcy, that supplied the letters of credit.

The financial arrangements for the Barra Farms bank in North Carolina are an entirely different story. The settlement agreement assigns the assets and obligations in North Carolina to the president of Ecobank, apparently in his individual capacity.[42] Yet he has filed personally for chapter 11 bankruptcy protection,[43] and the court may treat Barra Farms as part of the bankruptcy estate. In that case, without a performance bond, letter of credit, or some other financial assurance backing the long-term maintenance trust account, government agencies may have difficulty holding the president to his obligation to fund the account. The bankruptcy court could find that this obligation is a claim—if not a contingent claim (because the obligation would arise from the occurrence of future events), then certainly an unliquidated claim (because the amount of the claim is unknown and depends on the amount the mitigation bank review team finds acceptable). Moreover, this would be a general unsecured claim that would likely only be partially paid or would be discharged in its entirety.

In a Barra Farms-type situation, it seems difficult for government agencies to argue that they are exercising their police powers and should not be viewed as claimants. Maintaining a functioning wetland site does not have the urgency of the imperative to prevent future environmental harm. A court could conclude that an agency's attempt to procure monies for a long-term maintenance fund is less an exercise of police power and more a demand for payment. Such an obligation on the part of the banker would be subject to discharge in bankruptcy.

**Ensuring the Presence of Long-Term Maintenance Funds**

We recommend avoiding the Barra Farms model. There may be some benefits associated with delaying the decision about how the long-term maintenance account will be funded and at what level; waiting until after the restoration is complete can allow the MBRT to identify with more specificity what maintenance is necessary, thereby providing a better estimate of the funds needed. The downside to delaying the decision until the credits are sold is that the mitigation banker may be unable to come up with the funding that the MBRT decides is appropriate.

A benefit of identifying the amount of the long-term maintenance fund up front is that a mitigation banker can build this cost into the price of credits. Still, identifying the long-term costs up front but putting off the actual funding does not reduce the risk of the mitigation banker running into financial difficulties. Requiring an irrevocable letter of credit or a performance bond that cannot be canceled without notifying the agency reduces such concerns. To further eliminate risk, we recommend that the Corps and other agencies consider the approach used by other mitigation banks in Florida: fund the long-term maintenance account with cash as mitigation credits are released or sold.

For example, the mitigation banking instrument for the Bluefield Ranch Mitigation Bank in Florida notes that the banker has established a trust for the long-term maintenance of the site but has provided no other financial assurances.[44] Prior to selling mitigation credits from the initial two phases of the bank, the banker will fund the trust at $565 per acre. Later phases will require the banker to fund the trust at $1,121 per credit. Once all credits are sold, the banker will have contributed over $1.5 million, "which represents the MBRT's current estimated fund balance necessary to generate sufficient returns to manage the bank in perpetuity."[45] The cash in such a trust would not be subject to the mitigation banker's control and thus would not be included in any subsequent bankruptcy proceeding involving the banker.

**As the Corps and other agencies develop new mitigation regulations, it is imperative that they ensure that financial assurances are available at every stage of a mitigation site's life. If appropriate financial assurances are not in place, the risk of failure will be shifted to government agencies and the public.**

## Concluding Observations

As the Corps and other agencies develop new mitigation regulations, it is imperative that they ensure that financial assurances are available at every stage of a mitigation site's life. During the construction and restoration phase, regulators must be given notice before performance bonds or other financial guarantees are canceled. Funds for long-term stewardship must be provided when credits are sold to ensure that a pool of money will be available after the bank is closed. But the closing of the bank—the sale of the final credit—merely opens the next chapter, that of long-term maintenance and stewardship. It is critical that the funds set aside for long-term care of the site reflect the true costs of the endeavor. If appropriate financial assurances are not in place, the risk of failure will be shifted to government agencies and the public. ■

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### Notes

1. Ingrid Michelsen Hillinger and Michael G. Hillinger, Environmental Affairs in Bankruptcy: 2004, 12 Am. Bankr. Inst. L. Rev. 331 (2004).
2. David G. Epstein et al., Bankruptcy §7–1 (1993).
3. 11 U.S.C. §1101(1).
4. *See, e.g.*, *id*. §1141(3).
5. The standard form can be found at U.S. Courts, *Form B10*, http://www.uscourts.gov/bkforms/official/b10.pdf (last visited June 29, 2005).
6. 11 U.S.C. §1129(a)(9). *See, e.g.*, In re Pillowtex, 304 F.3d 246, 249 (3d Cir. 2002); In re Virginia-Carolina Financial Corp., 954 F.2d 193, 199 (4th Cir. 1992); *and* In re Tejano, 135 B.R. 686, 688 (Bankr. D. Kan. 1991).
7. Exceptions to chapter 11 discharge apply primarily to individuals who either would not be entitled to discharge under §523 of the Bankruptcy Code or to liquidating businesses that would not be entitled to discharge in a chapter 7 proceeding. 11 U.S.C. §1141(d)(2) & (3).
8. 469 U.S. 274, 15 ELR 20121 (1985).
9. *Kovacs*, 469 U.S. at 277.
10. 469 U.S. at 280, *citing* 124 Cong. Rec. 32393 (Sept. 28, 1978) (remarks of Rep. Don Edwards (D-Cal.)).
11. *See* Durham Inland Wetlands & Watercourses Agency v. Jimmo (In re Jimmo), 204 B.R. 655, 659–60 (Bankr. D. Conn. 1997).
12. *See* In re Robinson, 46 B.R. 136, 139 (Bankr. M.D. Fla. 1985), *rev'd on procedural grounds*, United States v. Robinson, 55 B.R. 355 (M.D. Fla. 1985).
13. In re Robinson, 46 B.R. at 139.
14. *Id.* at 138.
15. Torwico Elecs. v. New Jersey (In re Torwico), 8 F.3d 146, 24 ELR 20016 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994).
16. *Id.* at 149–50.
17. *Id.* at 150.
18. The same distinction between a state enforcing its police powers and simply receiving money arises frequently in the context of bankruptcy's automatic stay provisions.
19. In the Matter of LandBank, New Jersey Department of Environmental Protection Administrative Order and Notice of Civil Administrative Penalty Assessment, at 2, para. 6 (July 17, 2002).
20. *Id.* at 1–2, para. 3.
21. *Id*. at 4, para. 15.
22. Voluntary Petition, In re The IT Group Inc., No. 02–10118 (Bankr. D. Del. filed Jan. 13, 2002). The debtor listed the NJDEP as a potential claimant, holding a contingent, unsecured, non-priority claim in an unlisted amount. *Id*. at 6.
23. *Id.* at 4, para. 19 & 5, para. 22.
24. Asset Purchase Agreement By and Among The IT Group Inc. and The Shaw Group Inc., No. 02-10118 (Bankr. D. Del. filed Jan. 23, 2002).
25. *See* Motion of the IT Litigation Trustee for an Order (I) Enforcing (A) the Bar Date Order, (B) the Administrative Bar Date Order, (C) the Confirmation Order, and (D) the Plan Injunction; (II) Directing the New Jersey Department of Environmental Protection to Dismiss Certain Administrative Actions Against the Debtors Pursuant to the Court's Orders, the Plan Injunction and 11 U.S.C. §§105(a) and 1142 (b); and (III) Granting Related Relief, at 7, No. 02–10118 (Bankr. D. Del. Nov. 16, 2004) (stating that LandBank "created the [m]itigation [b]ank" and "formed a subsidiary, U.S. Wetland Services Inc . . . to manage the site") (hereinafter the IT Litigation Trust Motion).
26. Motion of the IT Litigation Trust Trustee for an Order Enforcing the Bar Date, No. 02–10118 (Bankr. D. Del. Nov. 16, 2004) (Hereinafter the IT Bar Date Order).
27. IT Litigation Trust Motion, *supra* note 25.
28. IT Bar Date Order, *supra* note 26, at 12.
29. *Id.* at 13.
30. IT Litigation Trust Motion, *supra* note 25, at 2. New Jersey has appealed the decision of the Bankruptcy Court to the U.S. District Court for the District of Delaware. Notice of Appeal, No. 02-10118 (Bankr. D. Del. filed Dec. 17, 2004).
31. N.J. Admin Code tit. 7, §7A–15.23(e)1.
32. Environmental Law Institute, Banks and Fees: The Status of Off-Site Mitigation in the United States 88 (2002).
33. Fla. Admin. Code Ann. r. 62–342.700(5)(e).
34. *See* Letter from Osvaldo Collazo, Jacksonville District Corps of Engineers, to William Gerber, Ecobank (Mar. 17, 2005) (releasing an additional 45.2 federal credits from the Hunter Bank based on four years of monitoring reports). As of March 2005, the Corps had authorized 144.64 credits released from the Hunter Bank, and 69.44 credits were still available to be sold. *See* East Central Florida Regional Mitigation Bank Ledger, Mitigation Credit Accounting Schedule (enclosure with Letter from Osvaldo Collazo, *supra*). The final release consists of 36.16 credits and "will depend on the future vegetative conditions" at two areas on the site. Letter from Osvaldo Collazo, *supra*. A letter from Ecobank also indicates that the Lake Louisa Bank has an existing inventory of released credits. *See* Letter from William G. Gerber et al., Ecobank, to Gerry Seitz, Da Capo al Fine Ltd., at 2 (June 23, 2004) (hereinafter the Gerber Letter). With respect the Barra Farms Bank, the Corps' website indicates that credits are currently available. *See* U.S. Army Corps of Engineers, *NC Mitigation Banks*, http://www.saw.usace.army.mil/WETLANDS/Mitigation/Banks/imap1/index.html (last visited June 29, 2005) (listing EcoBank as the bank sponsor).
35. *See* Gerber Letter, *supra* note 34, at 2.
36. *See* Mitigation Banking Instrument, East Central Florida Regional Mitigation Bank (South), Orange County, Florida, at tbl. 10.0 (1997) (Department of the Army Permit No. 199506135 (IP-ME)).
37. *See* Debtor's Second Amended Disclosure Statement, In re Ecosystems Land Mitigation Bank Corp., No. 6:04-bk-07391-KSJ, at 4 (Bankr. M.D. Fla. filed Mar. 4, 2005).
38. Mitigation Banking Instrument, Agreement to Establish the Barra Farms Cape Fear Regional Mitigation Bank in Cumberland County, North Carolina, at 12 (1999).
39. *See* Gerber Letter, *supra* note 34, at 2.
40. Debtor's Second Amended Plan of Reorganization, In re Ecosystems Land Mitigation Bank Corp., No. 6:04-bk-07391-KSJ (Bankr. M.D. Fla. filed Mar. 4, 2005); Da Capo Al Fine Ltd.'s Plan of Reorganization, In re Ecosystems Land Mitigation Bank Corp., No. 6:04-bk-07391-KSJ (Bankr. M.D. Fla. filed Mar. 4, 2005). Although Ecosystems' plan of reorganization initially overlooked the obligation to fund the long-term accounts, both competing plans eventually acknowledged that duty.
41. Term Sheet, Ecobank/Da Capo Settlement (Bankr. M.D. Fla. filed Nov. 30, 2005).
42. *Id*. at 1, para 5 ("Ecobank/Da Capo/ the Ventures will assign all North Carolina rights to Mccarthy.").
43. Voluntary Petition, In re Mccarthy, No. 6:04-bk-11540-KSJ (Bankr. M.D. Fla. filed Oct. 22, 2004).
44. Bluefield Ranch Mitigation Banking Instrument at iv (executive summary) (2001).
45. *Id.*