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# The Increasing Privatization of Environmental Permitting

Jessica Owley

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## THE INCREASING PRIVATIZATION OF ENVIRONMENTAL PERMITTING

*Jessica Owley\**

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### I. INTRODUCTION

Forty years ago, Congress passed many of the nation’s federal environmental laws. Congress and state legislatures recognized the growing environmental damage occurring in the country and passed laws restricting the actions of businesses, individuals, and government entities. One of the hallmarks of these environmental laws is the growth of permitting programs. Acknowledging that a halt to all pollution and development was both impractical and undesirable, governments developed programs to minimize, monitor, and mitigate environmental harms. Over the past forty years, private organizations have been increasingly involved in these permitting programs. For example,

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\* Associate Professor, SUNY–Buffalo Law School. Thanks to Kalyani Robbins for organizing Akron’s symposium on the Next Generation of Environmental & Natural Resources Law. The lively discussions and questions improved this piece and my thinking about the future of environmental law generally. Suggestions from Eric Biber, Fred Cheever, and Robin Craig were particularly helpful for this Article and future planned work. As is often the case, Adena R. Rissman provided helpful suggestions and caught embarrassing errors. I am in her debt.

through conservation easements and mitigation banks, private businesses and nonprofit organizations have taken on the responsibilities of monitoring and enforcing environmental permits.

This article examines the increasing privatization of environmental law by taking a close look at mitigation measures in permitting programs. As mitigation has become an increasingly important element of permitting programs, permitting agencies have looked for outside organizations to help design, monitor, and enforce the mitigation projects. Thus, compensatory mitigation projects provide a good lens for examining the role of private organizations in environmental law. There are good reasons for drawing on the power of private organizations. They can provide flexibility and expertise as well as increased capacity. However, concerns regarding democracy and accountability arise when government agencies hand off duties to private actors. It is not clear that the private organizations have adequate oversight, and there are no clear mechanisms for stepping in when these organizations fail to perform (or inadequately perform) their conservation duties. This increasing privatization has largely occurred without a public debate regarding who is the appropriate entity to carry out and enforce environmental law. The privatization has gone unnoticed and under examined. Environmental conservation is a public duty, and we should be concerned with the increasing privatization of that task.

## II. THE RISE OF COMPENSATORY MITIGATION

### A. Background

Mitigation is a key element of most environmental and land-use permitting programs.<sup>1</sup> Many environmental laws appear to prohibit environmental degradation outright, but then contain provisions allowing for environmentally destructive activities after obtaining appropriate permits.<sup>2</sup> Permit programs generally require that permit applicants

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1. See, e.g., Margaret S. Race & Mark S. Fonseca, *Fixing Compensatory Mitigation: What Will It Take?*, 6 *ECOLOGICAL APPLICATIONS* 94 (1996) (describing the rise of compensatory mitigation in the wetlands context); Robert Bonnie, *Endangered Species Mitigation Banking: Promoting Recovery Through Habitat Conservation Planning Under the Endangered Species Act*, 240 *THE SCI. OF THE TOTAL ENV'T* 11 (1999) (describing mitigation for loss of endangered species habitat); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 *ENVTL. L.* 113 (1998) (discussing mitigation for loss of agricultural land).

2. See, e.g., Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000); Clean Air Act, 42 U.S.C. §§ 7401-7671 (2010); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2000) (originally enacted in

avoid, minimize, and mitigate environmental harms arising from their proposed project.<sup>3</sup>

This section offers two example mitigation programs to illustrate how mitigation programs arose and to outline their general structure. The following section demonstrates the increasing privatization of mitigation programs and the concerns associated with that privatization. Under Section 404 of the Clean Water Act, permittees receive permission to alter wetlands in exchange for promises to mitigate harm from that wetland alteration.<sup>4</sup> Similarly, Section 10 of the Endangered Species Act creates a permit program for incidental takes of endangered species.<sup>5</sup> Under Section 10, developers can avoid criminal charges for violations of the take prohibition (i.e., harming individuals of a species or altering species' critical habitat) by creating a Habitat Conservation Plan and receiving a Section 10 incidental take permit.<sup>6</sup> The Habitat Conservation Plan must outline plans to mitigate any negative impacts on species.<sup>7</sup> These two major environmental laws place mitigation projects at the center of their environmental protection schemes.

## B. Examples

### 1. The Clean Water Act's Section 404 Permitting Program

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.<sup>8</sup> In an effort to achieve that objective, the Clean Water Act limits the ability to discharge pollutants into waters of the United States.<sup>9</sup> Through Section 404, the statute seeks to prevent discharge of dredged or fill materials into wetlands within the Clean Water Act's jurisdiction.<sup>10</sup> To legally dredge or fill a wetland that comes under federal jurisdiction, one

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1973); Resource Conservation and Recovery Act Regulations, 40 C.F.R §§ 239-282 (2013).

3. See, e.g., 40 C.F.R. § 1508.20 (2013) (defining mitigation for operations under the National Environmental Policy Act); Morgan Robertson & Palmer Hough, *Wetlands Regulation: The Case of Mitigation Under Section 404 of the Clean Water Act*, in WETLANDS 171 (B.A. LePage ed. 2011); Stephen M. Johnson, *Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation After Dolan v. City of Tigard*, 6 FORDHAM ENVTL. L.J. 689 (1995).

4. 33 U.S.C. § 1344.

5. 16 U.S.C. § 1539(a).

6. 16 U.S.C. § 1539(a)(2)(B).

7. 16 U.S.C. § 1539(a)(2)(B)(ii) & (v).

8. 33 U.S.C. § 1251(a).

9. 33 U.S.C. § 1251(a)(1).

10. 33 U.S.C. § 1344(f)(2).

must first obtain a Section 404 permit.<sup>11</sup> These permits (issued by the Army Corps of Engineers with coordination and oversight from the Environmental Protection Agency) require project proponents to avoid, minimize, and mitigate the harms of any wetland destruction or modification.<sup>12</sup> The Army Corps rarely denies these permits and while the EPA has the authority under Section 404(c) to veto permits that it feels are not adequately protective of the environment, it rarely does so.<sup>13</sup>

When granting Section 404 permits, the Corps requires project proponents to mitigate any damage occurring to wetlands caused by the project. Indeed, with a national policy of no net loss of wetlands, mitigation is imperative.<sup>14</sup> Mitigation comes in three categories: avoidance, minimization, and compensation.<sup>15</sup> First, permit applicants (usually developers) must avoid any harm to wetlands.<sup>16</sup> Next, they

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11. 33 U.S.C. § 1344(a). As the Supreme Court has instructed, not all wetlands fall under the Clean Water Act's scope. The debate over jurisdictional wetlands has been prevalent in the courts and academic literature, and I will not enter the fray here. For more details and discussion, see *Rapanos v. United States*, 547 U.S. 715 (2006) (detailing the history of the Court's jurisprudence regarding the term "waters of the United States"); U.S. ARMY CORPS OF ENGINEERS, REVISED GUIDANCE ON CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT DECISION IN *RAPANOS V. U.S. AND CARABELL V. U.S.* (2008), available at [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf); Margaret "Peggy" Strand & Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the §404 Program*, 40 ENVTL. L. RPT. NEWS & ANALYSIS 10372 (2010) (providing detailed information about Section 404 cases); Mark Squillace, *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulations*, 40 U. MICH. J.L. REFORM 799 (2007); Jonathan H. Adler, *Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 Mo. ENVTL. L. & POL'Y REV. 1 (2006); Patrick Parenteau, *Bad Calls: How Corps' Districts are Making Up Their Own Rules of Jurisdiction Under the Clean Water Act*, 6 VT. J. ENVTL. L. 1 (2004-2005); Kim Diana Connolly, *Keeping Wetlands Wet: Are Existing Protections Enough?*, 6 VT. J. ENVTL. L. 169 (2004-2005).

12. 33 U.S.C. § 1344(a); Connolly, *supra* note 11 at 174-175; Palmer Hough & Morgan Robertson, *Mitigation under Section 404 of the Clean Water Act "Where it Comes From, What it Means*, 17 WETLANDS ECOLOGY & MGMT. 15, 16 (2009).

13. 33 U.S.C. § 1344(c); *Mingo Logan Coal Co. v. U.S. Env'tl. Prot. Agency*, 850 F.Supp.2d 133, 139-43 (D.D.C. 2012). *Clean Water Act Section 404(C) "Veto Authority,"* ENVTL PROT. AGENCY, [http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c_index.cfm) (last visited Oct. 19, 2012); see also Squillace, *supra* note 11, at n.11; Jessica Owley, *Privatizing Wetlands Mitigation*, in BEYOND JURISDICTION: WETLANDS POLICY FOR THE NEXT GENERATION (Kim Connolly ed. forthcoming 2014); Hough & Robertson, *supra* note 12, at 27 (explaining the rarity of permit denials).

14. *Wetlands*, U.S. DEPT. OF AGRICULTURE, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/water/wetlands/> (last visited Dec. 14, 2012) (explaining President George H.W. Bush's 1989 adoption of the "no net loss" policy).

15. Johnson, *supra* note 3, at 695.

16. *Id.*

must design their project to minimize any harm.<sup>17</sup> Finally, the developers must compensate for any harm still expected to occur after avoidance and minimization.<sup>18</sup> The third category of mitigation, compensatory mitigation, is a troubling concept because it acknowledges wetland destruction will occur.<sup>19</sup> Instead of preventing wetland conversion, developers compensate for the wetlands lost.<sup>20</sup> Most efforts of wetland protection appear focused on compensation, often neglecting the avoidance and minimization requirements.<sup>21</sup>

Corps regulations set forth four acceptable compensatory mitigation strategies: restoration, establishment, enhancement, and preservation.<sup>22</sup> These are relatively straightforward sounding approaches but can be challenging to implement.<sup>23</sup> Establishment (or creation) requires building a wetland out of whole cloth where one did not exist before.<sup>24</sup> Wetland creation has been beset by a variety of problems with many failed projects.<sup>25</sup> Restoration takes an existing but degraded wetland and increases its function by doing things like removing debris and invasive species, planting wetlands species, and ensuring adequate water supplies.<sup>26</sup> This is linked to enhancement, which also starts with an existing wetland and increases its functions.<sup>27</sup> The difference between restoration and enhancement is that they come from different starting points. Enhanced wetlands tend to be healthy functioning ecosystems

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17. *Id.*

18. *Wetland Regulatory Authority*, THE WETLAND FACT SHEET SERIES (EPA, Washington, DC), available at [http://water.epa.gov/type/wetlands/outreach/upload/reg\\_authority.pdf](http://water.epa.gov/type/wetlands/outreach/upload/reg_authority.pdf) (last visited Dec. 14, 2012); Clean Water Act Section 404(b)(1) Guidelines, 40 C.F.R. § 230.91(c)(2) (West 2013).

19. WILLIAM J. MITSCH & JAMES GOSSELINK, WETLANDS 379-80 (4th ed. 2007).

20. Todd BenDor, Nicholas Brozovic, & Varkki George Pallathucerhri, *The Social Impacts of Wetland Mitigation Policies in the United States*, 22 J. PLANNING LITERATURE 341, 342 (2008).

21. See Hough & Robertson, *supra* note 12, at 29.

22. 40 C.F.R. § 230.92.

23. See MITSCH & GOSSELINK, *supra* note 19, at 381-424.

24. *Wetlands Compensatory Mitigation*, E.P.A., <http://www.epa.gov/owow/wetlands/pdf/CMitigation.pdf> (last visited Dec. 14, 2012).

25. See William J. Mitsch & Renee F. Wilson, *Improving the Success of Wetland Creation and Restoration with the Know-How, Time, and Self-Design*, 6 ECOLOGICAL APPLICATIONS 77 (1996); Dennis F. Whigham, *Ecological Issues Related to Wetland Preservation, Restoration, Creation and Assessment*, 240 SCI. TOTAL ENV'T. 31 (1999); Hough & Robertson, *supra* note 12, at 24.

26. *Wetlands Compensatory Mitigation*, *supra* note 24; WILLIAM J. MITSCH & JAMES G. GOSSELINK, *supra* note 19, at 377-424 (explaining different restoration techniques and strategies).

27. R.R. Lewis, *Wetlands Restoration/Creation/Enhancement Terminology: Suggestions for Standardization*, in WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE 417-22 (Jon A. Kusler & Mary E. Kentula eds., 1990) (describing the different wetlands terms and offering a glossary).

with capacity for even higher quality environmental protection than they are currently providing while restoration projects usually start with rather degraded parcels. Restoration and enhancement projects have largely fared better than creation projects, and understandings of restoration ecology are improving the outcomes for all of these projects.<sup>28</sup> Yet, restoration projects provide fewer acres and fewer functions than ecologists had predicted.<sup>29</sup> After creating, restoring, or enhancing wetlands, the wetlands themselves are usually protected with conservation easements with the hopes of keeping the wetlands from being degraded or converted again in the future.<sup>30</sup>

The final option for compensatory mitigation is preservation.<sup>31</sup> Preservation involves protecting existing wetlands in exchange for destroying wetlands.<sup>32</sup> Preservation of wetlands can occur either by securing fee simple ownership of wetlands and then ensuring that the wetlands will be protected from development and conversion or by securing conservation easements over wetlands.<sup>33</sup> The Corps works with the applicant to determine the correct ratio of destroyed versus protected wetlands.<sup>34</sup> The option to use preservation as a mitigation option is particularly unsatisfying because, as even the EPA acknowledges, it results in a net loss of wetlands.<sup>35</sup> Preservation on its own does not increase wetland function or acreage. It accepts a decrease in both as worth the benefit that will be supplied by the development project.

The Clean Water Act did not originally involve mitigation in its permitting program.<sup>36</sup> Initially, it was thought that if proposed projects were likely to lead to ecosystem disruption, the permits associated with

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28. See Anya Hopple & Christopher Craft, *Managed Disturbance Enhances Biodiversity of Restored Wetlands in the Agricultural Midwest*, ECOLOGICAL ENG'G (In press 29 March 2012); Joy B. Zedler & Suzanne Kercher, *Wetland Resources: Status, Trends, Ecosystem Services, Degradation, and Restorability*, 30 ANN. REV. ENVT. & RESOURCES 39, 60 (2005).

29. See David Malakoff, *Restored Wetlands Flunk Real-World Test*, 280 SCI. 371 (1999) (noting struggles but suggesting that given enough time the projects might end up more successful than currently being demonstrated).

30. Jessica Fox & Anamaria Nino-Murcia, *Status of Species Conservation Banking in the United States*, 19 CONSERVATION BIOLOGY 996, 997 (2005).

31. 40 C.F.R. § 230.92 (West 2013).

32. See Robert E. Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RES. J. 781, 798 (1994).

33. *Wetlands Compensatory Mitigation*, *supra* note 24.

34. James T. Robb, *Assessing Wetland Compensatory Mitigation Sites to Aid in Establishing Mitigation Ratios*, 22 WETLANDS 435, 439 (2002).

35. *Wetlands Compensatory Mitigation*, *supra* note 24.

36. The EPA and the Corps added mitigation requirements to their Section 404(b)(1), Guidelines in 1990, codified at 40 C.F.R. pt. 230.

those projects would be denied.<sup>37</sup> However, Congress quickly acknowledged that it would be politically undesirable to deny many permits (particularly for popular projects).<sup>38</sup> Thus, there was a perceived need to issue permits to facilitate such projects alongside a desire to lessen potential harm from those projects.<sup>39</sup> Without a flexible permit program, the extensive network of wetlands in this country might prevent desired development. Congress acknowledged that it was not in the public interest to stop all development for the sake of improving water quality.<sup>40</sup> Some water pollution can be an acceptable exchange for the benefits gained from development projects like homes, roads, and hospitals. Thus, instead of prohibiting development, the Clean Water Act seeks to minimize development's impacts on wetlands. Issuing a permit with conditions embodies an assessment that the remaining unavoidable impacts are acceptable. That is, the Corps (and the EPA) believes that the benefits of the development project outweigh the harm to the wetlands.

Programs for compensatory mitigation wetlands take three forms: (1) permittee-driven, (2) mitigation banks, or (3) in lieu programs.<sup>41</sup> Permittee-driven mitigation, which is the largest category of projects, involves the permit applicant establishing her own mitigation program.<sup>42</sup> She arranges the mitigation projects, usually with the help of outside consultants and government agencies. The permittee arranges for the conservation easements involved, often through negotiation with a land trust.<sup>43</sup> Such conservation easements may burden land owned by the

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37. Richard F. Ambrose, *Wetlands Mitigation in the United States: Assessing the Success of Mitigation Policies*, 19 WETLANDS (AUSTRALIA) 1, 2-5 (2000) (detailing the development of wetlands mitigation policies); Hough & Robertson, *supra* note 12, at 17.

38. See Hough & Robertson, *supra* note 12, at 17 (arguing that the allowing general permits "was an acknowledgement that Congress intended the 404 program to allow large numbers of permitted impacts which damaged wetlands").

39. Robertson & Hough, *supra* note 3, at 174.

40. The mere existence of numerous permit programs demonstrates this.

41. *Wetlands Compensatory Mitigation*, *supra* note 24.

42. *Id.*; Adrienne M. Sakyi, *Mitigation Banking: Is State Assumption of Permitting Authority More Effective?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 1027, 1032 (2010); Hough & Robertson, *supra* note 12, at 24. The ease of structuring one's own mitigation program, lack of availability of mitigation credits, and preferences for on-site and in-kind mitigation may explain why most mitigation projects are permittee-driven.

43. Under state law, conservation easements can usually be held by governmental entities and land trusts, with some varying constraints on the type of agency that can hold the conservation easement and requirements of land trust holders. Under permitting schemes, public agencies may hold conservation easements as well. This article examines the concerns arising when the conservation easements are held by land trusts, but when a public agency uses conservation easements we also have a unique host of concerns. While public agency actions are more easily reviewed or challenged than the actions of private organizations, traditional agency analysis shifts



permittee or permittees may purchase conservation easements on others' property. The role of land trusts and conservation easements is discussed in more detail below.<sup>44</sup>

When compensatory mitigation occurs through mitigation banks, the permittee purchases the appropriate number of credits (as determined by the Corps) from a bank (deemed acceptable by the Corps).<sup>45</sup> State and federal laws govern mitigation banks, which are also subject to mitigation bank agreements.<sup>46</sup> Such banks may be owned and operated by for-profit companies, nonprofit organizations, or state agencies.<sup>47</sup> Where privately owned, the land in the banks is encumbered with conservation easements to ensure long-term protection.<sup>48</sup>

In-lieu programs involve government agencies (or sometimes nonprofit organizations) conducting mitigation projects.<sup>49</sup> In such cases, permittees pay fees directly to a natural resource agency (or nonprofit) that then uses the money to implement wetlands protection projects.<sup>50</sup> The strength of in-lieu programs is that the program manager can pool money from multiple permittees to work on larger, more comprehensive projects.<sup>51</sup> As with the mitigation banking, in-lieu compensatory mitigation also occurs off site.

Many wetland mitigation projects rely on private actors to create, maintain, and steward the projects. This is particularly true for preservation projects and wherever conservation easements are used. Preservation as mitigation relies heavily on private actors for enforcement because government agencies tend to be reluctant to hold the conservation easements and monitor the land in perpetuity. Increasingly, nonprofit organizations, known as land trusts, oversee the preserved wetlands and aquatic resources.<sup>52</sup>

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when the agency operates by contract (as with a conservation easement or mitigation banking agreement) instead of using its regulatory authority. The shift to contract law raises questions about reviewability and public participation. See Mark Aronson, *A Public Lawyer's Response to Privatization and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 40 (Michael Taggart ed., 1997).

44. See *infra* section III.B.2.

45. *Wetlands Compensatory Mitigation*, *supra* note 24.

46. See *Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks*, 60 FED. REG. 58,605 at 58,613 (Nov. 28, 1995), available at <http://water.epa.gov/lawsregs/guidance/wetlands/mitbankn.cfm>.

47. *Id.*

48. *Id.*

49. *Wetlands Compensatory Mitigation*, *supra* note 24.

50. *Federal Guidance*, *supra* note 46, at 58,613.

51. Jessica Wilkinson, *In-lieu Fee Mitigation: Coming Into Compliance with the New Compensatory Mitigation Rule*, 17 *WETLANDS ECOLOGY & MGMT* 53 (2009).

52. See, e.g., *Wetlands Protection: Partnering with Land Trusts*, E.P.A.,

## 2. The Endangered Species Act

The Endangered Species Act has a similar permitting scheme. In 1973, Congress passed the Endangered Species Act.<sup>53</sup> The Act establishes a program to protect threatened and endangered species and the ecosystems upon which they depend.<sup>54</sup> Federal protection for a species commences once the Department of the Interior lists the species in the Federal Register as either threatened or endangered.<sup>55</sup> Section 9 of the Act prohibits any person from “taking” any listed wildlife or fish species.<sup>56</sup> Under the Act, “take” includes “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”<sup>57</sup> Harm is further defined in agency regulations as including “significant habitat modification where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>58</sup> With these definitions, the prohibition on taking species prevents many actions that involve land conversion or development.

In 1982, Congress responded to growing protests from developers by amending the Endangered Species Act to provide partial relief from the Section 9 ban on habitat modification.<sup>59</sup> Acknowledging a need to balance economic pressures and species preservation, Congress designed a framework to foster “creative partnerships” between the public and private sectors and state, municipal, and federal agencies.<sup>60</sup> The amendments added Section 10 to the Act, authorizing the Secretaries of Commerce and the Interior to issue incidental take permits.<sup>61</sup> These permits allow landowners to develop their land even when the land provides habitat to listed species, as long as the taking of individual members of the species is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>62</sup>

To obtain an incidental take permit, applicants must submit a

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<http://water.epa.gov/type/wetlands/outreach/upload/landtrust-pr.pdf> (last visited Mar. 15, 2013).

53. 16 U.S.C. §§ 1531-1544 (2000) (originally enacted in 1973). The Senate approved the ESA 92-0. The House then approved a slightly altered version 355-4. President Nixon signed the bill into law on December 28, 1973. Pub. L. No. 93-205, 87 Stat. 844 (1973).

54. 16 U.S.C. § 1531(b); Lara M. Bernstein, *Ecosystem Communities: Zoning Principles to Promote Conservation and the Economy*, 35 SANTA CLARA L. REV. 1309, 1312 (1995).

55. Bernstein, *supra* note 54, at 1312.

56. 16 U.S.C. § 1538(a)(1)(B).

57. *Id.* § 1532(19).

58. 50 C.F.R. § 17.3 (West 2013).

59. Pub. L. No. 97-304, 86 Stat. 1411 (1982).

60. H.R. Rep. No. 97-835, 97th Congress, 2d Sess. (1982).

61. 16 U.S.C. § 1539(a)(1)(B).

62. *Id.*

“comprehensive plan,”<sup>63</sup> also known as a Habitat Conservation Plan or HCP. Section 10 explains that an HCP must (1) assess the impact on listed species of the proposed activity, (2) analyze alternatives to the proposed activity, (3) set out the steps to be taken to minimize and mitigate the impact, and (4) describe the funding available to implement such steps.<sup>64</sup> The regulations define mitigation to include:

- a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- e) Compensating for the impact by replacing or providing substitute resources or environments.<sup>65</sup>

This definition follows the contours of Clean Water Act mitigation discussed above but with a slightly different approach. First, unlike the Section 404 scheme, there is no stated preference for mitigation types. Arguably, avoidance and minimization of harm are pre-mitigation strategies. That is, a project proponent should begin by avoiding all possible harm. Where avoidance is impossible, the applicant should minimize the likely harm. The remaining impacts are the ones the applicant should then mitigate (or compensate) for. The Endangered Species Act does not detail the mitigation as clearly as the Clean Water Act does. Thus, (c), (d), and (e) contain elements of compensatory mitigation for remaining harms.

Because these regulations still do not provide detail about what HCP mitigation projects should look like and how the HCP process should work, the Services provided detail in the jointly issued HCP Handbook in 1996.<sup>66</sup> This Handbook describes the process of mitigating for habitat loss:

Potential types of habitat mitigation include, but are not limited to: (1) acquisition of existing habitat; (2) protection of existing habitat

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63. *Id.* § 1539(a)(2)(A).

64. *Id.* Additionally, the Secretary may require any other measures he deems necessary or appropriate for purposes of the plan.

65. 40 C.F.R. § 1508.20 (2013).

66. UNITED STATES FISH & WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE, HABITAT CONSERVATION PLAN HANDBOOK (1996) [hereinafter HCP HANDBOOK].

through conservation easements or other legal instruments; (3) enhancement or restoration of disturbed or former habitat; (4) prescriptive management of habitat to achieve specific biological characteristics; and (5) creation of new habitats.<sup>67</sup>

Note that some of these mitigation options do not lead to increased habitat; both (1) and (2) are just protecting already-existing habitat. Yet, a cursory investigation into HCP mitigation plans shows that preservation of habitat (through fee simple ownership, conservation easement, or deed restriction) is the most common mitigation technique.<sup>68</sup>

As with wetlands mitigation, private organizations are often heavily involved in the creation, maintenance, and enforcement of mitigation projects. Privately owned habitat mitigation banks are increasingly popular ways to preserve or enhance existing habitat. Conservation easements, often held by land trusts, have also played a fundamental role in Endangered Species Act mitigation from the very first HCP in San Bruno Mountain in 1986.<sup>69</sup>

### III. PRIVATIZATION OF MITIGATION

The preceding section introduced the basics of environmental mitigation programs, setting forth the examples of wetland mitigation under Section 404 of the Clean Water Act and habitat mitigation under Section 10 of the Endangered Species Act. The involvement of private actors in those schemes is pervasive and follows a general trend of privatization with other governmental programs. This section provides some of the broad contours of privatization of governmental services with a discussion of programs associated with environmental permitting before delving specifically into mitigation programs. Private actors are involved in many areas of governmental decision making and service provision. The role of privatization in mitigation may be less obvious than elsewhere. I explain the extent to which private actors may become involved in environmental policy making by overseeing mitigation projects—a pattern that appears to be continually on the rise. After this illustration of the phenomenon, the next section discusses some of the benefits and drawbacks of turning to private actors to run mitigation

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67. *Id.* at 3-21 to 3-22.

68. *Id.*

69. Jessica Owley, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293 (2004) [hereinafter Owley, *Exacted Conservation Easements*].

programs and presents questions to ask before allowing the trend to continue.

### A. *Background*

Privatization of governmental services (also termed “contracting out”) has been on the rise.<sup>70</sup> This has occurred for a variety of reasons. In some cases, cash-strapped governments simply do not have the funds or capacity to provide all the services they wish. Private companies and organizations may offer a less expensive alternative. In other cases, privatization appears more efficient because governments do not have the relevant expertise or infrastructure. Many privatization projects arise however because of efforts to shrink government and reduce bureaucracy.<sup>71</sup>

While privatization exists in most public sectors to some degree, the most discussed examples occur with prisons, schools, hospitals and the military. Private companies have been running prisons<sup>72</sup> and public hospitals for many years now.<sup>73</sup> Charter schools serve as a privately run public option in many school districts.<sup>74</sup> Even the U.S. military has been hiring private contractors to take on some of its duties.<sup>75</sup>

Privatization is popping up in some unexpected areas. For example, Kansas and Nebraska are among the states that have privatized their child welfare programs.<sup>76</sup> Several states, including California, have

70. In this article, I use privatization to mean the increased governmental reliance on the private sector, rather than on government agencies, to satisfy the needs of society. See E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889 (1987). Jody Freeman argues for a narrower use of the term to refer only to turning over government property to private companies, organizations, or individuals. Jody Freeman, *Private Parties, Public Functions and the New Administrative State*, 52 ADMIN. L. REV. 813, 821-22 (2000). In Freeman’s parlance, what I am focusing on here is the contracting out of government services. Contracting out is but one form of privatization but is the main subject of this work.

71. Paul Starr, *The Limits of Privatization*, 36 PROCEEDINGS ACAD. POLITICAL SCI. 124, 126 (1987).

72. Savas, *supra* note 70; Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149 (2010).

73. David U. Himmelstein & Steffie Woolhandler, *Privatization in a Publicly Funded Health Care System: The U.S. Experience*, 38 INT’L J. HEALTH SVCS. 407 (2008).

74. GERALD BRACEY, *THE WAR AGAINST AMERICA’S PUBLIC SCHOOLS: PRIVATIZING SCHOOLS, COMMERCIALIZING EDUCATION* 101-102 (2002).

75. Mateo Taussig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 2 YALE J. L. & HUMANITIES 101 (2009) (arguing, among other things, that the hiring of private military contractors enables the government to mask the true losses of life involved in armed conflicts because the military contractors are not included in the body counts).

76. Luke Andrew Steven Demaree, “*Tiny Little Shoes*”: *The Privatization of Child Welfare Services in Kansas* 69 UMKC L. REV. 643 (2000); Kevin O’Hanlon, *Privatization Fails: Nebraska Tries Again to Reform Child Welfare*, CTR. FOR PUBLIC INTEGRITY (Aug. 21, 2012, 6:00 AM),

privatized fraud prosecution, with private companies pursuing debt collection with the imprimatur of attorneys general offices.<sup>77</sup> There are also increasing pushes to privatize roads,<sup>78</sup> sewage systems,<sup>79</sup> postal delivery,<sup>80</sup> and Amtrak.<sup>81</sup> Indeed, debates over privatizing Medicare and Social Security took center stage in the 2012 presidential contest.<sup>82</sup>

There has also been a privatization push in the environmental realm. For example, the National Park Service and other public spaces are privatizing operations.<sup>83</sup> The land does not become private, but private companies take over tasks like collecting fees, cleaning bathrooms, and running campsites. In fact, this is not new for the National Park Service, which has had contracts with private companies to conduct tours, run lodges, and other operations since Yellowstone first opened its gates.<sup>84</sup> The U.S. Forest Service has also worked with private

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<http://www.publicintegrity.org/2012/08/21/10706/privatization-fails-nebraska-tries-again-reform-child-welfare>.

77. Jessica Silver-Greenberg, *In Prosecutors, Debt Collectors Find a Partner*, N.Y. TIMES, Sept. 15, 2012, available at <http://www.nytimes.com/2012/09/16/business/in-prosecutors-debt-collectors-find-a-partner.html> (often threatening jail time for defaulters who refuse to pay).

78. James E. Miller, *A Glimpse of What Privatized Roads Could Look Like*, AM. THINKER (May 20, 2012), [http://www.americanthinker.com/2012/05/a\\_glimpse\\_of\\_what\\_privatized\\_roads\\_could\\_look\\_like.html](http://www.americanthinker.com/2012/05/a_glimpse_of_what_privatized_roads_could_look_like.html); Michael Cooper, *States Consider Privatizing Roads*, N.Y. TIMES (Apr. 1, 2009). The discussion is lively in right-leaning blogs. See, e.g., Bart Frazier, *Private Roads Work*, LENROCKWELL.COM (Jan. 2, 2009), <http://www.lewrockwell.com/orig6/frazier3.html>; Tad DeHaven, *Privatizing Roads*, CATO INST. (Dec. 14, 2010, 10:20 AM), <http://www.cato-at-liberty.org/privatizing-roads/>.

79. Joan Gralla, *Update 2-NY Nassau County Budget Delays Sewer Deal, Not Refunds*, REUTERS, (Sept. 18, 2012, 6:51 pm EDT), <http://www.reuters.com/article/2012/09/18/usa-nassau-budget-idUSL1E8KIFFC20120918>.

80. George F. Will, *Privatize the Nation's Mail Delivery*, Opinion, WASH. POST (Nov. 25, 2011), available at [http://www.washingtonpost.com/opinions/privatize-the-nations-mail-delivery/2011/11/23/gIQAe2J7wN\\_story.html](http://www.washingtonpost.com/opinions/privatize-the-nations-mail-delivery/2011/11/23/gIQAe2J7wN_story.html).

81. Keith Laing, *GOP Unveils Plan to Privatize Amtrak*, THE HILL (June 15, 2011, 12:48 PM ET), available at <http://thehill.com/blogs/transportation-report/railroads/166601-gop-unveils-plan-to-privatize-rail-service-provided-by-amtrak>.

82. See Laura Meckler, *Obama Vows to Fight 'Privatizations'*, WALL ST. J. (Sept. 8, 2012, 10:27 PM ET), <http://online.wsj.com/article/SB10000872396390443819404577639742331612420.html>.

83. George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729 (1997).

84. Richard A. Bartlett, *The Concessionaires of Yellowstone National Park: Genesis of a Policy, 1882-1892*, 74 PAC. NW. Q. 2 (1983); MARK DANIEL BARRINGER, *SELLING YELLOWSTONE: CAPITALISM AND THE CONSTRUCTION OF NATURE* (2002); Devin Boyle, *Should National Parks be Privatized?*, BLUE RIDGE OUTDOOR MAGAZINE (Nov. 2012), available at <http://www.blueridgeoutdoors.com/eco/news-issues/should-national-parks-be-privatized/>. See also Dru Stevenson, *My Response to the Question: Should National Parks be Privatized*, PRIVATIZATION BLOG (Sep. 12, 2012), <http://www.privatizationblog.com/2012/09/my-response-to-question-should-national.html>; *NPS Commercial Services*, NAT'L PARK SERV., [www.concessions.nps.gov](http://www.concessions.nps.gov) (last

concessionaires for decades and allowed private timber and mining companies as well as recreation outfitters and ski facilities to operate on its lands.<sup>85</sup>

Privatization is also occurring in the framework of environmental laws and regulations. We see it both in traditional and neoliberal approaches to environmental protection. For example, the private role is evident in market-based schemes like cap and trade programs or land conservation through conservation easements.<sup>86</sup> Such programs establish rules and incentives and hope that market mechanisms will result in environmental protection. Negotiated Rulemaking (or reg-neg) also enables private parties (particularly regulated industries) to play a significant role in establishing, implementing, and enforcing environmental programs.<sup>87</sup>

Traditional command-and-control environmental regulations are the quintessential example of government-driven policies overseen by a complex public bureaucracy, but even these programs involve private actors in significant ways.<sup>88</sup> We see it in the levels and standards that regulated entities must comply with.<sup>89</sup> Private organizations are often involved in this process, sometimes explicitly by responding to a request

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visited Mar. 16, 2013).

85. See Coggins & Glicksman, *supra* note 83, at 738. In fact, the U.S. Forest Service is now facing litigation from a nonprofit organization known as BARK that argues that the Forest Service's grants to concessionaires violates federal law (the Federal Lands Recreation Enhancement Act) by resulting in the Forest Service charging excessive fees for recreational use of lands. Specifically, BARK argues that federal law prevents charging any fees for use of undeveloped land and can only charge fees that are justified by the expenses of the facilities provided (e.g., bathrooms, visitor centers, parking lots). Complaint, *Bark v. U.S. Forest Service*, Civ. No. 12-1506 (D.C. Dist. Ct.), available at <http://www.cnsenvironmentallaw.com/2012/09/14/Privatize.pdf>.

86. See, e.g., Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002); Amy Wilson Morris, *Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism*, 39 GEOFORUM 1215 (2008).

87. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

88. Daniel H. Cole & Peter Z. Grossman, *When is Command-And-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887 (1999) (describing common depictions of command-and-control instruments); David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289 (1998) (describing intersections between command-and-control pollution regulations and economic incentive programs); Edward Balleisen & David Moss, *Introduction, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION* 4 (Balleisen & Moss eds. 2009).

89. Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, 4 GLOBAL GOVERNANCE 295 (1998).

to establish standards.<sup>90</sup> This occurs throughout environmental regulatory processes because agencies are somewhat dependent on the regulated industries for information about the pollution their discharge and the possible technological ways to address the problem.<sup>91</sup> In some cases, public agencies adopt already-established voluntary standards.<sup>92</sup> Doing so may be expedient, but it also enables the private firms to set their own ground rules.<sup>93</sup>

Command and control regulations also rely significantly on private participation in implementation.<sup>94</sup> There are self-reporting procedures for permits and self-identification for coverage.<sup>95</sup> Agencies lack the resources necessary to do independent research about regulated interests and may not have the resources to pursue rule violations. But privatization necessarily entails going beyond mere instances of private organizations cooperating with public entities or with each other.<sup>96</sup> The private actors actually have significant implementation and policy-making roles.

Multiple aspects of environmental regulation have been outsourced to citizens and private organizations.<sup>97</sup> Of particular interest here is the use of private organizations for carrying out essential parts of environmental permitting programs. Private actors are involved in permits at different levels. They may determine permit terms, enforce permit terms, interpret permit terms, or even alter permits. For example, citizen suit provisions within the Clean Water Act and the Endangered Species Act work toward privatizing enforcement of permitting

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90. Robert Falkner, *Private Environmental Governance and International Relations: Exploring the Links*, 3 GLOBAL ENVTL. POLITICS 72, 79 (2003).

91. Freeman, *supra* note 70, at 828 (voicing concerns with private standard-setting).

92. See, e.g., Spencer Henson & John Humphrey, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, CODEX ALIMENTARIUS COMMISSION 32ND SESSION 24-25 (2009), available at [http://origin-www.fsis.usda.gov/PDF/Codex\\_al32\\_09Dbe.pdf](http://origin-www.fsis.usda.gov/PDF/Codex_al32_09Dbe.pdf) (describing government adoption of food safety policies); Falkner, *supra* note 90, at 76.

93. Freeman, *supra* note 70, at 829.

94. See *id.* at 835-36 (referring to the command-and-control as a “co-regulatory” regime because of the extensive involvement of private actors).

95. See, e.g., John K. Stranlund & Carlos A. Chavez, *Efficient Enforcement of a Transferable Emissions Permit System with a Self-Reporting Requirement*, 18 J. REGULATORY ECON. 113 (2000); Sarah L. Stafford, *Should You Turn Yourself In? The Consequences of Environmental Self-Policing*, 26 J. POL'Y ANALYSIS & MGMT. 305 (2007)

96. Falkner, *supra* note 90, at 73.

97. See, e.g., Miriam Seifter, *Rent-A-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 ECOLOGY L.Q. 1091 (2006) (describing the hiring of private environmental compliance officers).



programs under those laws.<sup>98</sup> This can also be a form of privatization for monitoring and compliance efforts. While citizen-suit provisions seek to work in tandem with (as opposed to at odds with) public enforcement, they bring private actors into the framework of the law.<sup>99</sup> Where public agencies are lacking capacity for enforcement, these private attorneys general provisions may play pivotal roles in forwarding the goals of environmental protection.<sup>100</sup> The Endangered Species Act goes even further to privatize endangered species protection. Not only does the statute have a citizen suit provision for enforcing its permit program, but it also involves citizens in the decision of which species to protect.<sup>101</sup>

As explained above, many environmental laws involve the use of permitting programs to limit environmentally destructive activities. In carrying out these programs, government agencies have turned to private organizations for assistance. The mitigation procedures for both wetlands and endangered species protection outlined above rely heavily on private actors for their success.

### B. Examples

Private actors pop up in mitigation programs in a few places. Permit applicants hire firms to help with environmental review of mitigation programs or to help design mitigation projects.<sup>102</sup> They hire ecological restorationists and conservation biologists to enhance and create wetlands and other desired ecological features.<sup>103</sup> This is not surprising or worrisome. We anticipate that permit applicants will not have the expertise needed to perform these activities and yet we place responsibility for their completion on the applicants. Such actions and plans are still subject to public review and government agencies confirm that the proposals will make ecological sense and yield desired

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98. 33 U.S.C. 1365 (West 2013); 16 USC § 1540(g) (West 2013).

99. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 6 (2003).

100. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985).

101. See Berry J. Brosi & Eric G.N. Biber, *Citizen Involvement in the U.S. Endangered Species Act*, 337 SCI. 802 (2012) (explaining that citizen petitions are more likely to cover biologically threatened species than those species selected by the government agency).

102. See, e.g., ECOSYSTEM RENEWAL, <http://www.ecosystemrenewal.com/company/index.shtml> (providing services designing compensatory mitigation projects).

103. See, e.g., CARDNO JFNEW, <http://www.cardnojfnew.com/> (wetlands restoration consultants).

mitigation outcomes.

There are a few places where the role of the private actors goes beyond carrying out government-approved actions and starts to look like environmental policy making. In some cases, actions that look like category one (carrying out government-approved tasks) morph into category two (policy making). This section offers two examples where private actors working in the mitigation realm may have greater power and reach than government agencies or the public realize. First, I examine private mitigation banks working to protect both wetlands and endangered species habitat. While governed by mitigation banking agreements and numerous laws, mitigation bank operators and subsequent landowners shape the projects more than many realize. Second, I look at the role played by land trusts. Land trusts are nonprofit land conservation organizations and may take part in mitigation projects in multiple ways.<sup>104</sup> Of particular note is the role they play in overseeing conservation easements preserving compensatory mitigation lands. These perpetual land-use restrictions are governed by agreements between the landowners and land trusts with minimal or absent government involvement and oversight. I explain both mitigation banks and land trust mitigation below to set the stage for discussing concerns with private actors and mitigation tasks that appears in the following section.

### 1. Mitigation Banks

Mitigation programs under both the Clean Water Act and the Endangered Species Act often enable permit applicants to meet their mitigation obligations by purchasing credits from an approved mitigation bank.<sup>105</sup> Mitigation banks are areas that have been set aside to protect a particular natural resource, such as wetlands, streams, or endangered species habitat.<sup>106</sup> They are designated for restoration, enhancement, and preservation of those natural resources.<sup>107</sup> Sometimes

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104. LAND TRUST ALLIANCE, WETLAND AND STREAM MITIGATION: A HANDBOOK FOR LAND TRUSTS (2012), available at [http://www.elistore.org/Data/products/d22\\_04.pdf](http://www.elistore.org/Data/products/d22_04.pdf).

105. Morgan M. Robertson, *The Neoliberalization of Ecosystem Services: Wetland Mitigation Banking and Problems in Environmental Governance*, 35 GEOFORUM 361, 363 (2004); *Federal Guidance*, *supra* note 46 (describing wetland mitigation banking); Bonnie, *supra* note 1 (describing conservation banking).

106. *Federal Guidance*, *supra* note 46 (describing wetland mitigation banking); Bonnie, *supra* note 1 (describing conservation banking); Rebecca Lave, Morgan M. Robertson, & Martin W. Doyle, *Why You Should Pay Attention to Stream Mitigation Banking*, 26 ECOLOGICAL RESTORATION 287 (2008) (describing stream mitigation banking).

107. *Federal Guidance*, *supra* note 46.

they are also sites for creation or enhancement of resources.<sup>108</sup>

Wetlands mitigation banks seek to provide for the replacement of the chemical, physical, and biological integrity of wetlands resources prior to the “unavoidable” impacts permitted under Section 404.<sup>109</sup> The number of wetland mitigation banks is large and growing. The Army Corps of Engineers began approving mitigation banks in the late 1980s.<sup>110</sup> From 1995 to 2005, there was a 780% increase in the number of banks.<sup>111</sup> In 2005, there were 405 mitigation banks in thirty-one states (with twenty of those sold out).<sup>112</sup> That number has more than doubled since. As of January 2010, there were more than 950 wetland and stream mitigation banks, covering over 960,000 acres.<sup>113</sup>

Habitat conservation banks protect habitats for listed and at-risk species.<sup>114</sup> As off-site mitigation, these banks exist to offset adverse impacts to species occurring elsewhere.<sup>115</sup> Sometimes it is a habitat that has been designated as “critical.”<sup>116</sup> Conservation banking has had a shorter history than wetland banking, with the first governmental approval coming in the early 1990s.<sup>117</sup> This aligns with the shorter history of habitat conservation planning (occurring first in the late 1980s with San Bruno Mountain in California) versus wetlands mitigation under the Clean Water Act (spurred by the 1977 amendments to the Clean Water Act).<sup>118</sup> As of January 2009, the U.S. Fish and Wildlife Service approved over ninety conservation banks, covering over 90,000

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108. Kelly Chinners Reiss, Erica Hernandez, & Mark T. Brown, *Evaluation of Permit Success in Wetland Mitigation Banking: A Florida Case Study*, 29 WETLANDS 907, 907 (2009).

109. *Federal Guidance*, *supra* note 46.

110. Deborah L. Mead, *History and Theory: The Origin and Evolution of Conservation Banking*, in CONSERVATION AND BIODIVERSITY BANKING: A GUIDE TO SETTING UP AND RUNNING BIODIVERSITY CREDIT TRADING SYSTEMS 9, 10 (Nathaniel Carroll, Jessica Fox, & Ricardo Bayon eds. 2008).

111. Reiss et al., *supra* note 108, at 908.

112. *Id.* A sold out bank is one where all of the credits have already been disbursed to permit applicants and no further mitigation credit can come from the bank.

113. WETLAND BANKING, NAT'L MITIGATION BANKING ASS'N, *available at* <http://www.mitigationbanking.org/pdfs/2010-wetlandconservation.pdf> (last visited Dec. 20, 2012).

114. Fox & Nino-Murcia, *supra* note 30; Bonnie, *supra* note 1.

115. WETLAND BANKING, *supra* note 113.

116. Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFF. L. REV. 1095, 1100 (2010) (explaining the definition and role of critical habitat).

117. WETLAND BANKING, *supra* note 113.

118. Lindell L. Marsh, *Conservation Planning Under the Endangered Species Act: A New Paradigm for Conserving Biological Diversity*, 8 TUL. ENVTL. L. J. 97, 98 (1994) (describing the San Bruno Mountain project and the beginning of habitat conservation planning); Hough & Robertson, *supra* note 12, at 17.

acres of habitat.<sup>119</sup> Federal guidelines issued in 2003 outline the rules for bank operation.<sup>120</sup>

Mitigation banks can be owned and operated by public or private entities.<sup>121</sup> Early banks were public, often operated by state departments of transportation to consolidate mitigation for their own projects.<sup>122</sup> Private mitigation bank operators can be either for-profit companies or nonprofit conservation organizations.<sup>123</sup> Like the early public banks, the first private wetlands mitigation bank was created to provide credits for the bank owner.<sup>124</sup> When the bank had excess credits, it sought (and received) permission to sell those credits to others.<sup>125</sup> Today, the majority of mitigation banks are private entrepreneurial ventures.<sup>126</sup> Where privately held, mitigation bank land must be encumbered by a conservation easement requiring the land to remain undeveloped and protected for that resource.<sup>127</sup> Mitigation banks are governed by federal,

119. *Conservation Banks*, NAT'L MITIGATION BANKING ASS'N, <http://www.mitigationbanking.org/conservationbanks/index.html> (last visited Jan. 22, 2013).

120. Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24,753 (Dep't of Interior May 8, 2003); U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, GUIDANCE FOR THE ESTABLISHMENT, USE, AND OPERATION OF CONSERVATION BANKS (May 2, 2003), available at [http://www.fws.gov/endangered/esa-library/pdf/Conservation\\_Banking\\_Guidance.pdf](http://www.fws.gov/endangered/esa-library/pdf/Conservation_Banking_Guidance.pdf).

121. Morgan Robertson & Nicholas Hayden, *Evaluation of a Market in Wetland Credits: Entrepreneurial Wetland Banking in Chicago*, 22 CONSERVATION BIOLOGY 636, 638 (2008).

122. Hough & Robertson, *supra* note 12, at 24.

123. The Nature Conservancy is an example of a nonprofit land conservation organization that owns and operates mitigation banks. See *Mississippi: Old Fort Bayou Mitigation Bank: About*, THE NATURE CONSERVANCY, <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/mississippi/placesweprotect/old-fort-bayou-mitigation-bank.xml> (last visited Dec. 20, 2012). The Nature Conservancy sometimes enters into joint partnerships with private banking companies or funders and sometimes with public agencies. David Urban, Michael Dennis, & Richard Martin, Workshop at the Land Trust Alliance Rally in Salt Lake City, Utah: Land Trusts' Interaction with Mitigation Banking: A Perspective From Both Sides (Oct. 1, 2012) (description available at <http://www.landtrustalliance.org/training/rally/rally-2012-salt-lake-city/rally-2012-workshop-grid>) (last visited Sept. 1, 2013) (discussing partnership between The Nature Conservancy and Ecosystem Investment Partners); *Mississippi: Red Creek Consolidated Mitigation Bank*, THE NATURE CONSERVANCY, <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/mississippi/placesweprotect/red-creek-consolidated-mitigation-bank.xml> (last visited Dec. 20, 2012) (describing mitigation bank co-sponsored by TNC and the Mississippi Department of Transportation).

124. See Mead, *supra* note 110, at 9-10.

125. Hough & Robertson, *supra* note 12, at 24.

126. See *id.* at 25 (giving statistics for wetland mitigation banks).

127. Memorandum from Director of Fish and Wildlife Service to Regional Directors, Regions 1-7, Manager, California Nevada Operations 2-3 (May 2, 2003), available at [http://www.fws.gov/endangered/esa-library/pdf/Conservation\\_Banking\\_Guidance.pdf](http://www.fws.gov/endangered/esa-library/pdf/Conservation_Banking_Guidance.pdf); see also Reiss et al., *supra* note 108, at 913 (noting that wetland mitigation banks on public lands do not have conservation easements).

state, and local laws.<sup>128</sup> For banks to qualify for participation in federal mitigation schemes under the Clean Water Act or Endangered Species Act, they must operate under a Mitigation Bank Agreement and follow the federal guidelines for mitigation banking.<sup>129</sup> On top of these federal rules, there may be state laws governing the banks or local land-use and zoning ordinances that come into play.<sup>130</sup>

Mitigation banks appear superior to individual projects because they are usually on larger parcels that are contiguous to other protected areas.<sup>131</sup> The protection is not done on an ad-hoc basis, and land protection can occur in advance of permitted projects.<sup>132</sup> Mitigation banks enable consolidation of resources and planning and expertise.<sup>133</sup> It is easier to oversee and manage banks.<sup>134</sup> Arguably, efficiency is increased with their use.

While mitigation banks may be desirable because they protect land pre-permit issuance, it may be that the presence of mitigation banks makes the approval of permits all the more likely. That is, the banks may facilitate development and encourage the use of preservation as mitigation because of the ease of purchasing mitigation bank credits without needing to think critically about an individual project or ecosystem. Mitigation banks have enabled the conversion of thousands of acres of wetlands and endangered species habitats, facilitating development of those lands.

The public has a strong interest in ensuring that mitigation banks are worthwhile. Several reviews of mitigation projects in general and mitigation banking in particular present worrisome pictures. When considering mitigation banking, we can look at whether they have been successful ecologically and administratively. Ecologically, we would hope to see mitigation banks providing meaningful resources that compensate for lost ecosystem functions. This is challenging to assess as it involves in-depth investigation of a bank's ecology and keeping track of it over time. Administratively, we can assess whether banks have complied with rules regarding monitoring and reporting. These aspects of the program interact. Where there is a lack of administrative oversight, ecological outcomes may suffer.

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128. See Memorandum from Director of Fish and Wildlife Service, *supra* note 127, at 11.

129. See, e.g., *id.* at 2-3 (describing process for conservation banks).

130. See, e.g., *id.* at 3 (describing California's state requirements for banks).

131. Reiss et al., *supra* note 108, at 907.

132. *Id.* at 908.

133. *Id.* at 907-08.

134. *Id.* at 908.

To begin with, it can be hard to determine the state of banking success because of the difficulty in accessing information about the banks. Availability of permits and other documents vary greatly by mitigation bank.<sup>135</sup> Additionally, studies of wetland mitigation banks have noted that monitoring reports are not always available for review.<sup>136</sup> This represents an administrative failure. Mitigation projects appear to often fail to comply with permit conditions.<sup>137</sup> There are pervasive problems with monitoring, submitting reports, and performing long-term maintenance.<sup>138</sup> Additionally, some banks fail to implement procedures outlined in their permits or mitigation banking agreements.<sup>139</sup>

Public agencies overseeing banks have not always kept up with their obligations either. A 2005 study by the Government Accountability Office revealed that the Army Corps of Engineers had inadequately performed its oversight duties.<sup>140</sup> In fact, the GAO explained that, “Until the Corps takes its oversight responsibilities more seriously, it will not know if thousands of acres of compensatory mitigation have been performed and will be unable to ensure that the section 404 program is contributing to the national goal of no net loss of wetlands.”<sup>141</sup> But there does appear to be greater confidence with banking than with permit-driven projects as it is easier for the Corps to monitor banks, and in some areas bank operators can develop relationships (and trust) with the government agencies that oversee them.<sup>142</sup>

Ecologically, things are also worrisome. Several studies of wetland mitigation conclude that mitigation projects have failed to replace lost wetland functions even where the overall number of acres under protection has risen.<sup>143</sup> Some studies indicate numbers actually improve

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135. *Id.* at 909.

136. *Id.* at 909.

137. Rebecca L. Kihslinger, *Success of Wetland Mitigation Projects*, 30 NAT'L WETLANDS NEWSLETTER no. 2 p.14 (2008).

138. See Mitsch & Wilson, *supra* note 25; Whigham, *supra* note 25; Hough & Robertson, *supra* note 12, at 24; Robertson, *supra* note 105 at 363.

139. Kihslinger, *supra* note 137, at 15 (citing Michigan study where only twenty-nine percent of permits examined implemented the required amount of mitigation measures).

140. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-898, WETLANDS PROTECTION: CORPS OF ENGINEERS DOES NOT HAVE AN EFFECTIVE OVERSIGHT APPROACH TO ENSURE THAT COMPENSATORY MITIGATION IS OCCURRING (2005), *available at* <http://www.gao.gov/products/GAO-05-898> [hereinafter GAO-05-898]; *see also* Sakyi, *supra* note 42, at 1035.

141. GAO-05-898, *supra* note 140, at 27.

142. Hough & Robertson, *supra* note 12, at 25.

143. Kihslinger, *supra* note 137, at 14.

for mitigation banks as opposed to permittee-driven projects, but the overall results are still dismaying.<sup>144</sup> Other scientists argue that ecological outcomes are no better with mitigation banks than with other mitigation strategies.<sup>145</sup>

Current policies encourage the use of mitigation banks. While there may be both administrative and ecological benefits to this decision, it puts a lot reliance on private actors to carry out public permitting programs. While some mitigation banks are publicly operated, many are privately owned by either nonprofit organizations like The Nature Conservancy or for-profit companies. These for-profit or entrepreneur (or enviropreneur as PERC labels them)<sup>146</sup> operators are increasingly running the bulk of mitigation banks.<sup>147</sup>

Mitigation banking shifts administrative burdens to private entities specializing in the field. When a permittee purchases credits from a mitigation bank, it is the bank that assumes responsibility for the mitigation project.<sup>148</sup> It is not clear what happened if the mitigation banks fail to achieve their ecological goals. The permit will not be revoked because the permittee has satisfied her commitment by purchasing the credits. But there is little oversight, especially after banks are sold out. For example, some bank operators transfer the land after the bank is established and sold-out.<sup>149</sup> Now neither the permittee nor the bank operator is involved with the permit-required mitigation. There is no system to ensure that mitigation projects are performing at the promised level of efficiency, and it is not clear what would happen if they were not. There is a heavy reliance on good faith of bank

144. *Id.* at 14.

145. Hough & Robertson, *supra* note 12, at 25.

146. PROP. § ENV'T RESEARCH CTR., <http://perc.org/programs/perc-enviropreneurs/enviropreneur-institute> (last visited Dec. 21, 2012); *Q&A with Enviropreneur Kelly Sands Siragusa On Conservation Banking*, PERC: THE PERCOLATOR (THE PERC BLOG), <http://perc.org/blog/qa-enviropreneur-kelly-sands-siragusa-conservation-banking> (last visited Mar. 16, 2013).

147. Mark Landry, Antje Siems, Gerald Stedge & Leonard Shabman, *Applying Lessons Learned from Wetlands Mitigation Banking to Water Quality Trading* 4-9 (White Paper Prepared for the Environmental Protection Agency 2005), available at <http://www.eli.org/pdf/wqtforum/LanSiemStedShab05.pdf>.

148. *Id.* at 6 (explaining that permittees are no longer responsible for the success of mitigation programs where they have purchased credits from a bank—in contrast to permittee-driven projects where they retain such responsibility).

149. See, e.g., *Panzners Donate Living Laboratory to UA*, [http://www.uakron.edu/im/online-newsroom/news\\_details.dot?newsId=4f2fd318-c44b-4183-a1c2-3f977e4b974e&crumbTitle=Panzners%20donate%20living%20laboratory%20to%20UA](http://www.uakron.edu/im/online-newsroom/news_details.dot?newsId=4f2fd318-c44b-4183-a1c2-3f977e4b974e&crumbTitle=Panzners%20donate%20living%20laboratory%20to%20UA)

(describing donation of sold-out wetland mitigation bank land to the University of Akron who now bears the burden of protecting the wetland ecosystem at a high level of functionality).

operators.<sup>150</sup>

As operators of the mitigation banks, private actors have a lot of control over what lands to protect and how to protect them. While the banks must be certified, without adequate (and continual) oversight, the bank operators make the decisions regarding what types of ecological restoration to do.<sup>151</sup> They can also determine the fate of the bank after the credits have all been sold. In these ways, bank operators play a more important role in shaping mitigation projects than regulators do. What first appeared a ministerial task shifts to policy-making as these private actors determine the contours, rules, and future of natural resource conservation.

## 2. Land Trusts and Conservation Easements

Many public agencies encourage mitigation banks, but even more call upon the power of land trusts and conservation easements.<sup>152</sup> Land trusts are nonprofit land conservation organizations.<sup>153</sup> Among their land conservation strategies are holding fee simple title and conservation easements over property that they have identified as worthy of protection.<sup>154</sup> Some land trusts also work with public agencies to monitor and manage lands owned by others.<sup>155</sup> An even smaller number operate mitigation banks.<sup>156</sup>

Land trusts often hold conservation easements associated with compensatory mitigation.<sup>157</sup> These exacted conservation easements are created to satisfy mitigation requirements in numerous laws including local land-use ordinances, state laws protecting natural resources, and

150. Sakyi, *supra* note 42, at 1036.

151. See generally MITIGATION BANKING: THEORY AND PRACTICE 37-54 (David Salvesen, Lindell L. Marsh, Douglas R. Porter eds., 1996) (describing the mitigation banking process).

152. See, e.g., Jessica Owley & Stephen Tulowiecki, *The Future of Private Forests: Conservation Easements and the Forest Legacy Program*, 33 PUB. LAND & RESOURCES L. REV. 47, 71 (2012) (discussing the role of land trusts in the Forest Legacy Program); Jessica Owley, *Use of Conservation Easements by Local Governments*, in GREENING LOCAL GOVERNMENT 237 (Patricia Salkin & Keith Hirokawa eds. 2012) [hereinafter Owley, *Use of Conservative Easements*] (discussing conservation easement use by local governments); Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. CHI. L. REV. 341, 343-45 (2010) (providing example of conservation easement use by the town of Marlboro).

153. LAND TRUST ALLIANCE, LAND TRUSTS, <http://www.landtrustalliance.org/land-trusts> (last visited Dec. 21, 2012).

154. See, e.g., Owley, *Use of Conservative Easements*, *supra* note 152, at 244-46 (describing conservation easement holdings of the Town of Dunn in Wisconsin and New York City).

155. Owley & Tulowiecki, *supra* note 152, at 89-90.

156. See, e.g., *supra* note 123.

157. See, e.g., *Building Indus. Ass'n v. Cnty of Stanislaus*, 118 Cal. Rptr. 3d 467, 478 (2010) (describing potential role of land trusts in an agricultural land mitigation program).



federal laws like the permitting programs of Section 404 of Clean Water Act and Section 10 of the Endangered Species Act.<sup>158</sup> As holders of exacted conservation easements, land trusts have the task of stewarding an essential element of the environmental regulatory regime. They oversee and have enforcement responsibility for one of the major mitigation methods.

Conservation easements are non-possessory rights in land that have environmental purposes.<sup>159</sup> When a conservation easement burdens land it either prohibits the landowner from doing something she would have otherwise been permitted to do or it enables someone else to do something on her land that she would have been otherwise able to prohibit.<sup>160</sup> Some conservation easements do both—restricting the landowner's behavior and giving the land trust rights or obligations to conduct activities on the land. The rules for conservation easements generally come from state law.<sup>161</sup> These state laws define rules for conservation easements including acceptable purposes and holders.<sup>162</sup> They also sometimes detail the methods for termination or modification of the agreements.<sup>163</sup> Almost all states allow government agencies and nonprofit organizations with conservation goals to hold conservation easements.<sup>164</sup>

Conservation easements look like private contracts but are actually servitudes,<sup>165</sup> usually burdening land in perpetuity.<sup>166</sup> They are a favored tool of permit-issuing agencies for preservation components of compensatory mitigation. For example, where a mitigation program requires preservation of existing wetlands, agencies require some guarantee that the preservation will be more than temporary.<sup>167</sup> One way to do this is to require a permit applicant to purchase credits from a

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158. Owley, *Exacted Conservation Easements*, *supra* note 69; Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEBRASKA L. REV. 1043 (2006); Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VERMONT L. REV. 261 (2011).

159. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK*, 14-15 (2d ed. 2005).

160. 4 POWELL ON REAL PROPERTY § 34A.01

161. *Id.*

162. 4 POWELL ON REAL PROPERTY § 34A.03[1]; Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 26, 27-31 & 35-40 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

163. Mayo, *supra* note 162, at 42-45.

164. California and Oregon add recognized tribes to the list while Arizona does not recognize the ability of government entities to hold CEs.

165. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 cmt. d (2000).

166. Mayo, *supra* note 162, at 40-42.

167. W.A. Weems & Larry W. Cantor, *Planning And Operational Guidelines For Mitigation Banking For Wetland Impacts*, 15 ENVTL IMPACT ASSESSMENT REV. 197, 206 (1995).

mitigation bank and then oversee the mitigation bank with various rules and requirements as discussed above. Another approach is to use property law tools to restrict potential conflicting land uses on the preserved wetlands. Traditional covenants may work in some jurisdictions and on some properties, but increasingly agencies are requiring conservation easements. These perpetual restrictions can circumscribe the use of land and help to ensure that the wetlands remain wetlands.<sup>168</sup>

There are no specific requirements for land trusts holding exacted conservation easements. State conservation easement laws sometimes outline the details of what types of organizations are permissible holders, but these standards are broad and it is not even clear that they would apply to land trusts operating under a federal scheme.<sup>169</sup> There is no specification as to size, capacity, or experience of the land trust.<sup>170</sup> There are no regulations requiring them to follow certain procedures. The Land Trust Alliance has created an accreditation program for land trusts and has its own standards and practices that it urges land trusts to follow.<sup>171</sup> Accreditation, a form of private standard setting, is voluntary, and the Alliance is limited in the number of land trust accreditation applications it can process each year.<sup>172</sup> Moreover, the public agencies governing mitigation processes have not required accreditation.

As with mitigation bank operators, land trusts play a significant role in federal permitting programs, and this trend is steadily increasing. Both the number of land trusts (now numbering around 1,700) and the number of conservation easements is increasing.<sup>173</sup> Conservation easement use in mitigation projects is well established and trend reversal seems unlikely. As holders of exacted conservation easements, land

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168. Perhaps this is overstating the ability of conservation easements. They can seek to prevent land uses that would conflict with wetlands, but few conservation easements include affirmative obligations or active management. See Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 *LAW & CONTEMP. PROBLEMS* 199 (2011). Where wetlands are at risk due to climate change or offsite actions, conservation easements will not be able to ensure that the wetland remains a wetland, only that property owners do not drain or fill the wetland directly.

169. See Owley, *Exacted Conservation Easements*, *supra* note 69, at 54.

170. See Owley & Tulowiecki, *supra* note 152, at 89-90.

171. *Accreditation*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/training/accreditation> (last visited Jan. 22, 2013).

172. *Getting Accredited*, LAND TRUST ACCREDITATION COMM'N, <http://www.landtrustaccreditation.org/the-process> (last visited Jan. 22, 2013).

173. Katie Change, LAND TRUST ALLIANCE & LINCOLN INST. OF LAND POLICY, 2010 NATIONAL LAND TRUST CENSUS (Nov. 16, 2011), *available at* <http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report> (indicating that there may be some leveling off in the number of land trusts while the number of acres of land protected and number of conservation easements contains to increase).

trusts play a fundamental role in shaping mitigation programs. There are even fewer rules governing conservation easement use than governing mitigation banks. It is common for permits to require conservation easements without detailing where the conservation easement will be, who will hold it, or what its terms will be. Public agencies rarely maintain a legal interest in the conservation easements (by becoming co-holders or third-party enforcers for example).

Even where permits include conservation easement details, the land trusts remain in control of the mitigation. Unlike the situation with mitigation banks, there are no requirements for monitoring reports or continued public oversight. Presumably the land trusts have a free hand in amending, terminating, and enforcing the conservation easements. While accreditation repercussions or obligations related to tax or charitable trust law maintain checks on the land trusts, the environmental laws (and the environmental permitting agencies) do not have a voice in key decisions regarding the conservation easements. In fact, the land trusts' power to shape the conservation easement boundaries and rules means that they have the power to shape mitigation policy.

### C. *Benefits of Private Mitigation Programs*

The above outline of private mitigation programs already indicates where some concerns relating to this form of privatization might emerge. There are, however, many strengths that private actors can bring to the table. For example, private conservation organizations may have greater expertise in land conservation techniques, may be able to operate more quickly and flexibly, and may have motivation to find innovative ways to increase land protection.<sup>174</sup>

Land trusts and mitigation bank operators work closely with the land and may have sophisticated understandings of the parcels on which they operate. Land trust staff, for example, is often composed of long-standing community members.<sup>175</sup> They may have even better understanding of local weather patterns and ecological features than the public agencies. In particular, they might have superior knowledge of

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174. Starr, *supra* note 71, at 129 (explaining that local contractors develop knowledge and expertise associated with their areas of operation).

175. See, e.g., *Land Trust Staff*, DESCHUTES LAND TRUST, <http://www.deschuteslandtrust.org/about-us/staff> (displaying land trust staff profiles demonstrating long term involvement in the local community) (last visited Jan. 4, 2013); *Staff*, SOLANO LAND TRUST, <http://www.solanolandtrust.org/Staff.aspx> (last visited Jan. 4, 2013) (same); *Flathead Land Trust Staff*, FLATHEAD LAND TRUST, FLATHEAD LAND TRUST, <http://www.flatheadlandtrust.org/about%20us/staff.html> (last visited Jan. 4, 2013) (same).

local access points and potential struggles (trespassing, dumping, lack of community support). Moreover, permittees may feel more comfortable working with private organizations than with government agencies where relations may be hostile, or permit applicants resentful.<sup>176</sup>

Many proponents of privatization assert that it is more efficient to allow private organizations to take on public duties instead of increasing government bureaucracy.<sup>177</sup> In conserving land, private agencies may be able to acquire important parcels quicker and may have access to additional funding sources.<sup>178</sup> Land trusts can often work quickly to protect lands in advance of threats.<sup>179</sup> They can harness public support and acquire large parcels faster than government agencies and potentially with less local opposition.<sup>180</sup>

Private organizations may also be able to provide services similar to those provided by public agencies but at reduced costs.<sup>181</sup> Many land trusts for example use volunteers for monitoring conservation easements.<sup>182</sup> Even paid employees may be cheaper than public employees because of reduced overhead costs including salaries, benefits, and costs associated with bureaucracies. Some theorists argue, however, that efficiency arguments are “bogus.”<sup>183</sup> For example, Buchheit argues that often privately-run systems like schools, hospitals, and prisons are more costly.<sup>184</sup>

Private organizations may be more innovative as well.<sup>185</sup> When it comes to management decisions regarding the lands, they may have a freer hand than agencies do to experiment with different land conservation techniques or rules. Land trusts could consider conservation easement amendments or even land swaps. Mitigation

176. EVE ENDICOTT, *LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS* 5 (1993).

177. Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 212 (1937).

178. ENDICOTT, *supra* note 176, at 19-21.

179. *Id.* at 17-22.

180. *Id.* at 4-5.

181. Many scholars have acknowledged and documented the budgetary constraints on environmental agencies. *See, e.g.*, JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* 114-15 (1995).

182. Dominic Parker, *Cost-Effective Strategies for Conserving Private Land: An Economic Analysis for Land Trusts and Policy Makers*, PERC 17 (2002), [http://perc.org/sites/default/files/land\\_trusts\\_02.pdf](http://perc.org/sites/default/files/land_trusts_02.pdf).

183. Paul Buchheit, *Fives Ways Privatization Degrades America*, NATION OF CHANGE (Aug. 13, 2012), available at <http://www.nationofchange.org/five-ways-privatization-degrades-america-1344864526>; *see also* Starr, *supra* note 71, at 128-129 (explaining that cost savings do not always accompany privatization).

184. Buchheit, *supra* note 183; Starr, *supra* note 71.

185. Freeman, *supra* note 70, at 848; Jaffe, *supra* note 177, at 212.

banks can experiment with different restoration, creation, and enhancement techniques in attempts to increase the value of their banks. Profit-maximizing motives will align with a desire to increase wetland function and habitat value. This may lead to more innovation and experimentation than we would expect to see with public agencies that do not feel the same economic pressure.

#### *D. Concerns with Private Mitigation*

While private actors may have strengths that could improve environmental outcomes, the concerns regarding their involvement are substantial. The concerns appear on two fronts. First, there are theoretical and moral concerns regarding private actors making mitigation policy. In presenting those concerns, I offer a variety of examples of how public participation is marginalized, accountability is questionable and transparency is lacking. Another way to examine the use of private actors is to consider outcomes. In thinking about the actual effects of the private actors we may be particularly concerned by their capacity to carry out their stewardship obligations and their effectiveness as land restorationists and conservationists.

##### 1. Democratic Legitimacy

Assessing democratic legitimacy calls on us to ask whether the people exercising the authority are morally authorized to do so.<sup>186</sup> Such an inquiry must begin with examining the authority being exercised. When contracting out, we need to consider who has the policy-making authority and who has the day-to-day management.<sup>187</sup> We are likely more concerned with the first category than the second. Here, we have private actors making decisions about mitigation. They decide how the mitigation will be conducted, whether it will be enforced, and how long it will persist. An operating underlying assumption is that land conservation and protection of natural resources is an appropriate role for government, in fact a duty of public agencies.<sup>188</sup> By relying upon

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186. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT CAN BE DONE ABOUT IT* (2007).

187. See Avihay Dorfman & Alon Harel, *The Case Against Privatization*, PHILOSOPHY & PUB. AFFAIRS 7-9 (2013 forthcoming), available at <http://ssrn.com/abstract=2103365> (discussing the types of decisions private actors make); see also Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1513 (2001) (questioning the constitutionality of some delegations).

188. I make this assumption somewhat blithely here but fully understand that many would not agree with it. I save that debate for another day, so we can remain focused on the actions of the

private actors (combined with minimal oversight of those actors), government agencies contract out a significant part of their environmental permitting programs. Alternatively, it could be democracy enhancing to use private actors.<sup>189</sup> Folks may be more likely to get involved in local groups. They may be more willing to abide by rules that they helped to establish. Basic principles of democracy require public participation in the democratic process and accountability (including review of actions). Assessing levels of participation and accountability requires some level of reviewability.

#### a. Public Participation

Citizen participation is often listed as one of the primary elements of democracy.<sup>190</sup> Citizens participate in environmental permitting programs through a few different avenues. Initially, they can participate in the public review processes. Both Section 404 permits and incidental take permits go through lengthy public review processes.<sup>191</sup> Rules from the governing statutes as well as the Administrative Procedure Act require public notice and comment processes for the issuance of any permits. Additionally, the issuance of a federal permit triggers review under the National Environmental Policy Act.<sup>192</sup>

Unfortunately, it is rare for the conservation easements or land trusts to be subject to such review. Often neither (1) the identity of the land trusts that will be involved nor (2) the details of the conservation easements are known at the time the permit is deliberated and discussed. While some agencies are moving toward including sample conservation easements in the permits of associated environmental review documents,<sup>193</sup> the timing of the permit approval process means that some of the core elements of the agreements escape review. This is less so for mitigation banks because they are more commonly established before permit issuance. In such cases, the public may be able to review

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private mitigation actors.

189. Freeman, *supra* note 70, at 848.

190. See, e.g., *Democracy for All*, STREET LAW, [www.streetlaw.org/democlession.html](http://www.streetlaw.org/democlession.html) (last visited Mar. 19, 2013).

191. 33 C.F.R. § 327 (2013) (describing public hearings and comment procedures applicable to Section 404 permits, issuance of which triggers NEPA review); HCP HANDBOOK, *supra* note 66, at ch. 6.

192. COUNCIL ON ENVIRONMENTAL QUALITY, A CITIZEN'S GUIDE TO NEPA REVIEW: HAVING YOUR VOICE HEARD 5 (2007); HCP HANDBOOK, *supra* note 191, at 6-3 (describing NEPA review in Section 10 permits).

193. See, e.g., Sample Conservation Easement from St. John's Water Management District, at [http://www.sjrwmd.com/rules/pdfs/conservation\\_easement\\_corps.pdf](http://www.sjrwmd.com/rules/pdfs/conservation_easement_corps.pdf) (last visited Apr. 10, 2013).

mitigation banking agreements or conservation easements burdening land within banks, but as the agreements are already completed before permits are issued review processes for those projects are unable to influence the terms of such agreements or the management of the mitigation lands. Once mitigation programs are in place, there is no requirement for public review of any changes to the land or documents.

Citizens can also participate in environmental permitting programs as public enforcers or whistleblowers. Both the Clean Water Act and the Endangered Species Act contain citizen suit provisions enabling suits for permit enforcement.<sup>194</sup> This law enables private individuals (who can show standing) to enforce wetland fill permits and incidental take permits. This gets murky with conservation easements though. It is not clear whom one would bring a citizen suit against. The permittees have absolved themselves of responsibility through the purchase of mitigation bank credits or conservation easements. Thus, bringing an action for permit violations doesn't really work. It is not clear citizens would have a cause of action against the private contractors. Particularly if courts hold that such conservation easements are governed by state conservation easement statutes, few citizens would be able to challenge such violations. Indeed, many states limit conservation easement enforcers to the holder and potentially the state Attorney General.

#### b. Accountability

Some of the factors that hinder public participation also affect accountability. Accountability concerns emerge when it appears that the private contractors are insulated from legislative, executive, and judicial oversight.<sup>195</sup> This is certainly a concern with private mitigation enforcers. To begin with, the private actors conducting mitigation and making mitigation policy are not popularly elected. As revealed above, it is also infrequent that members of the public even participate in the choice of public actor (which land trust, which bank) that carries out the mitigation duty. When we are unhappy with actions by agencies, we can

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194. 33 U.S.C. 1365 (2013); 16 U.S.C § 1540(g) (2013).

195. These same accountability concerns also surround agencies themselves. Many administrative law scholars have discussed concerns of accountability in the so-called "Fourth Branch" of government. *See, e.g.,* Freeman, *supra* note 70, at n.1; JERRY L. MASHAW, GREED CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101 (1997). I am not arguing here that agencies are perfect, simply that concerns we already have with accountability and democracy are still present and often increased when private actors are involved.

react by bringing legal challenges or by voting for new executive officers or legislative representatives.<sup>196</sup> When unhappy with actions by private actors, we can try those same avenues, hoping that actions against public officers and branches will send the message that we are dissatisfied with the private actors, but that is an attenuated message that is difficult to convey.<sup>197</sup> And the judicial review options simply seem absent.

We might also have concerns about contracting out because the private actors involved are not necessarily expected to serve the public interest. Public choice theory tells us that bureaucrats rationally pursue their own interests.<sup>198</sup> Following this theory, private groups will also work to benefit themselves at the expense of others. This can be in conflict with ideals of civic republicanism that tells us that government is supposed to be a moral force for the common good (not a vehicle for personal gain).<sup>199</sup> A company running a mitigation bank may just be seeking to engage in a profitable business venture. Their oversight of the wetlands they are protecting may seek to ensure functioning wetlands or meet certain requirements simply to meet contractual requirements not because the company wants to do all it can to protect wetlands. For land trusts and mitigation banks, their clients are the landowners and permittees, not the government agencies overseeing the mitigation programs. This may offer some indication as to motivations of these private actors. They may be more focused on things like maximizing profits, making donors happy, and maintaining amiable relationships with neighbors. Democratic legitimacy and accountability are strengthened by impartiality. That can be lacking here.

This concern may be lessened for land trusts compared to entrepreneurial mitigation banks. As nonprofit charitable organizations, land trusts do have an obligation to support the public interest. Under many conservation easements statutes, the organizations must have conservation as one of their core goals or values.<sup>200</sup> In this way, these organizations have obligations to the public through state laws regarding

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196. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

197. Starr, *supra* note 71, at 125.

198. Daniel A. Farber & Anne Joseph O'Connell, *Introduction: A Brief Trajectory of Public Choice Theory and Public Law*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 4 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

199. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52 (1997) (defining liberty in terms of non-domination).

200. See, e.g., ALA. CODE § 35-18-1 (2013); FLA. STAT. ch. 704.06(3) (2013).



charitable organizations.<sup>201</sup> In her work, Jody Freeman suggests that private organizations may have mechanisms that increase the likelihood that public interest will be served even if the organizations are private and thus not subject to typical restrictions that agencies must abide by.<sup>202</sup> Both land trusts and mitigation bank operators are constrained by a host of laws as well as industry norms. Thus, there are practices and attitudes governing their work that may be even more effective than agency oversight. The organizations must be responsive to their members, boards, and investors. Where nonprofit organizations are involved, we might have even greater solace as they may not operate in ways simply designed to maximize profits or client satisfaction. Land trusts also have organization norms from the Land Trust Alliance and external standards for charitable organizations that may make them more responsive to the public interest than the owner of the for-profit wetlands mitigation bank.

### c. Transparency

Although both the permits and conservation easements are public documents, they are not equally easy to track down. Where one can obtain a permit, it may be difficult to also get a copy of the conservation easement that embodies the mitigation required in the permit. The mitigation details may be hidden from view. Thus, we have to overcome the threshold issue of obtaining information. It is impossible to get comprehensive information on how and where conservation easements are being created and whether they are being monitored. An extensive effort to track conservation easements through online registries, county recorder office documents, and spatial data in California revealed piecemeal tracking systems, leading scholars to recommend new tracking systems that include information on conservation easement locations, terms, and greater monitoring of the monitors.<sup>203</sup>

It can be challenging just to learn when there is a problem. For example, I examined the Section 10 incidental take permit for San Bruno Mountain.<sup>204</sup> Examining the associated Habitat Conservation Plan

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201. Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment after Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 281 (2012).

202. See *infra* note 70 and accompanying text.

203. Amy Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1239, 1281 (2009); see also James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 LAW & CONTEMP. PROBS. 51 (2011) (describing the need for a transparent, comprehensive, and easy to use conservation easement database).

204. Jessica Owley, *Exacted Conservation Easements* 146-148 (2005) (unpublished Ph.D.

reveals references to the developers' intention to use habitat easements to meet mitigation needs.<sup>205</sup> The plan did not explain in any detail what the conservation easements would look like, where they would be located, or who would hold them.<sup>206</sup> Tracking down those conservation easements was challenging. Repeated phone calls and emails to the public agencies, consultants, and developers only unearthed one conservation easement (even though many acknowledged that conservation easements were used pervasively in the project).<sup>207</sup> Thus, even where I knew conservation easements were operating, I could not locate copies of them or learn who held them.

Beyond locating permits and associated mitigation documents, it can be difficult to determine when permits violations occur. First, if we can't find the documents, we have no way of knowing whether the mitigation programs are being carried out correctly (if at all). Under the Endangered Species Act and the Clean Water Act, citizens can bring suit against permit violators (or indeed any violators of the statute).<sup>208</sup> But the struggle of finding the information makes it challenging to learn of when permit violations occur.

Furthermore, because conservation easements and mitigation bank practices lack consistency, it can be even harder to assess them. To understand the mitigation requirements, one must look at each individual agreement because the terms could be quite different. The permits and mitigation bank agreements differ by state, by agency office administering the program, by the private contractor involved. Additionally, individual landowners and permittees may add other requirements or provisions. When the conservation easements are written by different holders and there is no agency guidance or model conservation easement, there is a lack of consistency in permitting. Mitigation requirements in permits may effectively vary because of the nuances and requirements of the different holders involved.

## 2. Conservation Outcomes

The preceding section presented theoretical concerns with privatization of mitigation. That is, we have concerns regarding who is

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dissertation, Univ. of California, Berkeley) (on file with author) [hereinafter, Owley, dissertation].

205. SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN. I-3, SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN IMPLEMENTATION AGREEMENT, §V; see Owley, dissertation, *supra* note 204, at 148-49.

206. See Owley, dissertation, *supra* note 204, at 150-55.

207. *Id.* at 146-48.

208. 16 U.S.C. § 1540(g) (2013).

the appropriate entity to make mitigation policy and there are many structural reasons that make us worry about the legitimacy of the current system. An important question though is whether privatization matters on the ground.<sup>209</sup> Do we see different results when private actors structure and carrying out conservation programs? What are the actual conservation outcomes? Unfortunately, because of the problems with obtaining information about the system, it is hard to assess conservation outcomes. We can however, examine some of the aspects of these private organizations to obtain information about their capacity for successful conservation work.

Capacity concerns abound with land trusts and mitigation banks. Although many programs require conservation banking agreements, there are no statutes, regulations, or even agency guidance outlining acceptable private organizations for these programs. Outside state conservation easement laws putting constraints on holders, there are no standards to which they must comply. Many land trusts are run by volunteers. There are no requirements about volunteer or staff qualification. Nothing requires specific expertise or levels of experience.

Recently, the Land Trust Alliance led an effort to standardize land trusts by asking their land trust members to adopt the Alliance's Standards and Practices and by creating an accreditation program.<sup>210</sup> The environmental permit programs do not require land trusts to have adopted the Standards and Practices or to be accredited.<sup>211</sup> Of course, self-regulation makes some nervous because there can be a lack of hard performance standards, little transparency or public involvement, and it can be hard to monitor the standards set by others.<sup>212</sup> Voluntary

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209. See Susan Rose-Ackerman, *Triangulating the Administrative State*, 78 CAL. L. REV. 1415, 1425 (1990) (suggesting that the important issue in administrative law is achievement of public policy goals, not determining and ensuring reviewability).

210. LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES, (2004), available at <https://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>; *Accreditation*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/training/accreditation> (last visited April 10, 2013).

211. I take no position on the adequacy or appropriateness of LTA's Standards and Practices or accreditation process. I simply point out that even though these external standards have emerged, the public permitting agencies have not required land trust partners to comply with those standards. Nor have they set standards for the land trusts either.

212. Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761, 2775-76 (2012) (discussing concerns with self-regulation in the context of law societies); Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?*, 21 FORDHAM ENVTL. L. REV. 1, 52 (2010); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 647 (2000).

measures could pose “a serious threat to the legitimacy of environmental regulation.”<sup>213</sup>

Capacity and oversight concerns merge with the issue of enforcement. Repercussions for lack of enforcement are unclear. What do we do when private groups are not good at environmental protection? There are lots of flaws with public actors, but the response is a bit clearer. We have a general sense of what our legal and political options are when we don't think a public agency is doing the right thing, but this gets harder when we are looking at the actions of a private party. What happens when the land trust does not enforce the conservation easement? This may happen by mistake (the land trust does not realize that there is a violation) or quite consciously. The land trust may decide that the infractions are not worth the expense of enforcement and litigation. The land trust may determine that the property is not really that valuable.<sup>214</sup> Thus, whether the decision not to enforce is due to a lack of capacity or is a strategic one, it is not clear what recourses are available when enforcement does not occur.

A similar issue arises with mitigation banks. Without consistent study and oversight, it is hard to know whether mitigation banks are delivering promised ecological benefits. In 2001, the National Resource Council reviewed federal wetlands mitigation and found several disturbing things.<sup>215</sup> First, there was a high rate of noncompliance with mitigation plans.<sup>216</sup> The long-term monitoring and management of the mitigation projects was limited (often with inadequate funding).<sup>217</sup> Other studies supported these findings,<sup>218</sup> including a 2005 study from the Government Accountability Office.<sup>219</sup> The GAO study noted that

213. Freeman, *supra* note 70, at 833.

214. I do not mean to convey that this is something that would happen commonly. Land trusts tend to be watchful diligent enforcers. In fact, they are likely better at overseeing conservation easements than public holders are. The point here is that it is not clear what to do when a land trust does not live up to this ideal (something that would occur infrequently but is still likely to occur).

215. NAT'L ACAD. OF SCI. NAT'L RESEARCH COUNCIL (NRC), COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001).

216. *Id.* at 6; Kihlsinger, *supra* note 137, at 14.

217. NRC, *supra* note 215, at 138.

218. See, e.g., D. J. Spieles, *Vegetation Development in Created, Restored, and Enhanced Mitigation Wetland Banks of the United States*, 25 WETLANDS 51-63 (2005). See also R. Eugene Turner, Ann M. Redmond, & Joy B. Zedler, *Count It by Acre of Function—Mitigation Adds Up to Net Loss of Wetlands*, NAT'L WETLANDS NEWSLETTER (Environmental Law Institute, Washington D.C.) vol. 23, no. 60, 2001, at 5, available at [http://ftp.epchc.org/EPC\\_Wetlands\\_FTP/Hart/Imp%20Comp%20Mit%20Tampa%20Bay%20Water%20sheds/Literature/Ck081-ch18.pdf](http://ftp.epchc.org/EPC_Wetlands_FTP/Hart/Imp%20Comp%20Mit%20Tampa%20Bay%20Water%20sheds/Literature/Ck081-ch18.pdf).

219. GAO-05-898, *supra* note 140, at 27.

the permit performance and success criteria were inadequate.<sup>220</sup> Mitigation sites were not well located and there was inadequate agency support for compliance monitoring, tracking, training, or research.<sup>221</sup> The studies generally demonstrated that projects minimized the avoidance option (what should have been prong one of a mitigation program) and jumped to focusing on compensation.<sup>222</sup>

It is not clear what a concerned citizen could do upon discovering a poorly operated mitigation bank. There are no avenues for public oversight or enforcement. Land trusts involved with holding conservation easements on mitigation banks admit that many of them protect marginal sites and provide little habitat.<sup>223</sup> Old mitigation banks (especially those that have changed ownership) face problems with the continual maintenance needed to maintain the purported ecological value of the site.

As I have written elsewhere, we may be able to find some legal hooks to allow enforcement by government agencies, attorneys general, or even through citizen suits.<sup>224</sup> An added conundrum is who to enforce against and what are we enforcing. Are we enforcing the conservation easement, the mitigation banking agreement, or are we enforcing the permit? The conservation easement was a requirement of the permit and incorporated into the permit by reference usually. Is that enough to make conservation easement terms permit terms? If so, then violation of the conservation easement could be considered violation of the permit and enforced by any party that would have the ability to enforce the permit. But enforcement of the permit may not be entirely satisfying if the remedies are permit revocation or fines from the permit holder. Overall, we are left with a lot of uncertainty regarding these private mitigation operations.

#### IV. CONCLUSION: HARNESSING STRENGTHS WHILE MINIMIZING HARMS

Current market problems have led to cash-strapped governments. Public agencies without funding for conservation turn to conservation

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220. *Id.* at 17.

221. *See also* Reiss et al., *supra* note 108, at 909 (describing a study in Florida).

222. James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 653 (2000); Shirley Jeanne Whitsitt, *Wetlands Mitigation Banking*, 3 ENVTL. LAW. 441, 454 (1997); J. B. Ruhl & R. Juge Gregg, *Integrating Ecosystem Services into Environmental Law: A Case Study of Wetlands Mitigation Banking*, 20 STAN. ENVTL. L.J. 365, 370 (2001); Hough & Robertson, *supra* note 12, at 23.

223. Confidential interviews with Land Trust Staff and Attorneys.

224. *See supra* notes 152-158.

easements and mitigation banks as an attractive option. This move is an unrecognized form of privatization or contracting out.<sup>225</sup> As with other instances of privatization, we must consider the appropriateness of the privatization of mitigation and then assess what the appropriate contours of the privatized actions should be. Some believe privatization is the solution to all budget woes. Trying to figure out environmental conservation is challenging and expensive.<sup>226</sup> Privatization is not a magic pill though.<sup>227</sup> We do not suddenly figure out a solution to this conundrum by handing the task over to private organizations.

The nontrivial concerns raised above concerning democratic legitimacy, capacity, and enforcement indicate a need to change the current structure of private mitigation efforts. There are three main options. First, we could limit the role of private actors, decreasing or restricting the amount of contracting out. Second, we could treat the private actors more like public actors applying public information and accountability laws to these entities. Third, we could explore alternative routes to enhance accountability and address other concerns.

Who are the legitimate actors here? We assume that public actors are legitimate while private actors are not. We need to assess what makes agencies more legitimate than private groups to explore how private organizations can increase their legitimacy. In assessing how to proceed, we need to consider whether we should accept the increasing contracting out as the correct approach, an inevitable but troublesome concept or something that we can and should prevent. Is private authority in some realms so ill-advised that we should avoid or minimize it? Without clear data on conservation outcomes, it is hard to determine whether privatization of mitigation has been a good thing. Enabling the use of private entities in addition to public actors appears to increase the capacity for conservation work (perhaps while simultaneously increasing the capacity for development and conversion of important ecological systems).

Even without conservation outcomes, we may feel that mitigation and permit compliance is an inappropriate duty for agencies to delegate. There are some tasks that we may feel are best done by government.<sup>228</sup>

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225. These reasons illustrate why we see contracting out at all levels of government. See, Freeman, *supra* note 70, at 820. Indeed local governments with smaller staff and reduced bureaucracy may be the most likely to seek external assistance for carrying out permitting and mitigation programs.

226. See generally Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999).

227. Starr, *supra* note 71, at 124.

228. Jody Freeman describes this distaste for public actors as a “visceral skepticism” and

This argument is particularly persuasive when thinking about incarceration or the military.<sup>229</sup> Dorfman and Harel argue that there are some governmental duties where delegation to a private entity is inappropriate because to do so would affect the fundamental nature of the action.<sup>230</sup> Indeed, they argue that execution by government is necessary to yield the “inherently public goods” associated with the action.<sup>231</sup> Perhaps environmental permitting should also fall under this category. The permitting program as a form of regulatory policy with both civil and criminal penalties may seem inappropriate in the hands of private entities. If we view conservation as an important public duty, perhaps it is equally important that the public duty be publicly carried out. This would demonstrate a public backing of land conservation as something important.

Instead of an outright ban on the involvement of private actors, perhaps it makes more sense to limit the scope of their actions and increase oversight. To begin with, we should examine the types of actions undertaken by public actors. There are fewer concerns with contracting out ministerial duties than contracting out policy making. One of the challenges with mitigation is that actions that appear ministerial have policy-making implications. Striving to limit private actions to ministerial tasks is a good step forward. However, this is challenging because there is often a fine line between the two.<sup>232</sup> For example, where do we classify writing the terms of a conservation easement? Coming up with the terms could be policy setting as those terms may determine whether the conservation easements can be extinguished or the process for changing them. Moreover, it is often even more difficult to assess which actions belong in the “private” category and which are “public.”<sup>233</sup>

To alleviate some concerns with privatization or contracting out, others have suggested that we treat private actors more like public

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asserts that there is a “cultural resistance to private bodies playing a formal role in regulation.” Freeman, *supra* note 70, at 843; Starr, *supra* note 71, at 133.

229. Many find the idea of private incarceration particularly concerning because of it involves private actors constraining the liberty of others.

230. Dorfman & Harel, *supra* note 187, at 1-2.

231. *Id.* at 3.

232. See Freeman, *supra* note 70, at 824 (articulating the blurring that occurs between policy-making and implementation functions).

233. See Freeman, *supra* note 70, at 857; Catherine Donnelly, *Privatization and Welfare: A Comparative Perspective*, 5 LAW & ETHICS HUM. RTS. 336, 348 (2011) (discussing privatization of government services in the welfare context); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003).

ones.<sup>234</sup> For example, maybe we make the conservation easements or mitigation bank agreements and associated conservation easements subject to notice and comment processes. Perhaps we subject private mitigation to Administrative Procedure Act-style review.

Extending legal requirements of agencies over private groups doing public sector work could turn the private organizations into mini agencies.<sup>235</sup> But this may cause them to lose the very characteristics that give them strength. This added bureaucracy may not yield intended goals. Additionally, efforts by the various groups may be slowed by red tape or some might choose not to participate. Many participants and supporters of land trusts for example, turn to those groups in part because they did not like working with public agencies.<sup>236</sup> Moreover, agencies haven't always shown themselves to be better at getting the job done. In a study of conservation easement holders in the San Francisco Bay Area, public agencies holding conservation easements did not necessarily demonstrate better stewardship and enforcement.<sup>237</sup>

Bringing in a public voice through notice and comment and increasing transparency and access for private mitigators could be the start of improved processes. Simply increasing public scrutiny could result in better enforcement and heightened stewardship. Adding some level of review of private actions would go even further. We could add levels of agency review rather simply by writing into the mitigation banking agreements and the conservation easements clear roles for agencies. For example, including the permitting agencies as third-party beneficiaries or co-holders on conservation easements would give a clear route for public involvement at the agency level. We could also see explicit judicial review enter into the mix. While parties to these agreements can bring judicial actions regarding enforcement or to challenge terms, there is no clear mechanisms for agencies or members

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234. Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1555 (2001) (discussing potential implications of privatization on the Administrative Procedure Act and the Freedom of Information Act).

235. Starr, *supra* note 71, at 130 (1987) (describing this shift as a "socialization of private provision").

236. John Carleton, *Land Trusts: Indispensable Partners in Local Planning*, *FISH & WILDLIFE PLANNER* (2008), available at <http://wdfw.wa.gov/publications/00659/wdfw00659.pdf> (last visited Apr. 10, 2013); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 *DENV. U. L. REV.* 1077, 1078 (1996).

237. BAY AREA OPEN SPACE COUNCIL, *ENSURING THE PROMISE OF CONSERVATION EASEMENTS* 14 (1999) (studying violations of conservation easements in the San Francisco Bay Area and finding that, although around seventy-five percent of land trusts monitored their conservation easements regularly, only thirty percent of public entities did so).



of the public to do.<sup>238</sup> Uncertainty in state standing requirements along with a lack of a citizen suit provision for conservation easements hampers enforcement challenges by anyone other than the signatories to the agreement.<sup>239</sup>

Finally, perhaps there is a third way. We could reduce privatization, treat privatization more like public action, or perhaps explore alternative mechanisms that could offer ways to legitimate private regimes. This is an area worthy of exploration. It may be that external forces like market pressures, norms, and threats of public involvement offer possibilities for improved mitigation results.<sup>240</sup> In the same way that increased transparency can cause private actors to clean up their act, threats of customer withdrawal or public involvement may be able to yield better outcomes.<sup>241</sup> For example, as the Internal Revenue Service increases scrutiny on land trusts<sup>242</sup> and state Attorneys General<sup>243</sup> pay close attention to private organizations and companies, land trusts and mitigation bank operators may become more diligent in their duties.

As understanding of environmental ills increases, so too does the need for a public response to those problems. Finding ways to bring in nongovernmental actors could increase the level of environmental protection, but such moves are beset by privatization concerns. In the

238. There are, however, cases where courts have deemed private actors to be so agency-like that the courts impose the same review mechanisms on them as public agencies would be subjected to. These cases have mostly emerged in British courts with a reluctance to follow them by American Courts. Cf. *Regina v. Panel on Take-Over and Mergers*, 1 Q.B. 815, 820-22 (1987) (self-regulatory panel subject to judicial review) with *Jackson v. Met. Edison Co.*, 419 U.S. 345, 352 (1974) (holding that utility was not subject to state action doctrine).

239. Carol Nicole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 85, 109 (2005).

240. Fiorino, *supra* note 226, at 448 (describing potential impacts of negative publicity); see also Freeman, *supra* note 70, at 849 (suggesting alternative accountability mechanisms).

241. See, e.g., V. REES, *HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND* 38-40 (1994) (arguing that self-regulation in the nuclear industry is successful because if the threat of enforcement from the Nuclear Regulatory Commission).

242. *Conservation Donations Audits*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/tax-matters/audits/conservation-donation-audits> (last visited Jan. 22, 2013); Jason A. Richardson, *Increased Scrutiny on Conservation Easement Donations: How a Crackdown on Tax Fraud by the IRS Could Impact Environmental Protection*, 1 ENV'T L & ENERGY LAW & POL'Y J. 273 (2005).

243. See, e.g., Kimberly Miller, *Florida Attorney General Files Suit Against Land Trusts, Calling Business Unfair and Deceptive*, THE PALM BEACH POST (Sep. 26, 2012); Memorandum from Robert Klein, Chair of Easement Amendment Working Group to the members of the General Assembly (Jan. 15, 2013), available at <http://www.leg.state.vt.us/reports/2013ExternalReports/285680.pdf>.

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end, there are only two things we can ascertain for certain at this point. First, we need more information about the private mitigation efforts to understand fully what is going on over time. Are they working well? Are they doing their job? Even members of the land trust community question the legitimacy of the mitigation work they are doing.<sup>244</sup> Second, counterintuitively, improved private mitigation must be accompanied by public investment in the process through increased oversight and involvement of the private actors.

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244. Confidential interviews with Land Trust Staff and Attorneys.