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OPINION 15-0002

Mr. James Marchand
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11-C COASTAL RESOURCES
15-A CONSTITUTIONAL LAW
90-A-1 PUBLIC FUNDS AND CONTRACTS

33 U.S.C. § 1251 *et seq.*; 33 CFR §§ 325 AND 332
La. Const. Art. VII, Sec. 9 and 14; Art. IX, Sec. 1;
La. R.S. 9:1272 *et seq.* La. R.S. 17:3390; La. R.S. 17:3361 *et seq.*;
43; La. R.S. 49:308; La. R.S. 39:366. *et seq.* L.A.C. Pt I, § 724

A public university may establish a mitigation bank on its property and may contract with a qualified third party to serve as the mitigation banker, provided that the use of property is not gratuitous and the university receives fair market value for the use of its land. A cooperative endeavor would not be required for such purposes. La. R.S. 39:366.1 *et seq.* would be applicable only if the public university contracts with the mitigation banker outside of a competitive bid or competitively negotiated contract.

Dear Mr. Marchand:

You have requested an opinion from this office regarding the implementation of wetland mitigation banking pursuant to the federal Clean Water Act, Section 404 Permit Program and applicable state laws on property owned by Louisiana State University ("LSU").

According to your request, LSU and the LSU College of Agriculture (together, the "LSU AgCenter") seek to teach its students about wetland mitigation, to use the LSU AgCenter research expertise to implement mitigation plans, to use the LSU AgCenter extension expertise to educate those working in this area, and to be a critical resource for the forestry sector in performing all phases of mitigation practices. LSU owns property that is allocated to and utilized by the LSU AgCenter for its extension services and other programs.

Your request indicates that LSU is created as a body corporate pursuant to La. Const. art. VIII, §7(A),¹ and is authorized to own property separately from the State of Louisiana and its agencies. The LSU AgCenter is considering the possibility of dedicating certain of its properties to the restoration, creation, enhancement, and preservation of wetlands in accordance with the federal Clean Water Act, Section 404 Permit Program and applicable state laws, including the Louisiana Coastal Zone Management Program ("CZM")², which is administered by the Louisiana Department of Natural Resources ("DNR"). Specifically, LSU intends to create, or have created through

¹ La. Const. art. VIII, §7(A) provides that the LSU Board of Supervisors is a body corporate. For purposes of this Opinion, it is assumed that the LSU Board of Supervisors would, on behalf of LSU, approve, supervise and manage this project subject to its powers as provided by law.

² La. R.S. 49:21421 *et seq.*

a third party private nonprofit, a mitigation bank on certain of its properties. Once the mitigation bank is established, the mitigation banker would sell mitigation "credits" to persons desiring a permit under the Section 404 of the Clean Water Act ("CWA")³ and the CZM. In order to accomplish this project, LSU would grant a conservation servitude over the subject property. In addition, LSU would contract with a third party private nonprofit organization to act as the mitigation banker. The mitigation banker would lease the property from LSU, and LSU would request the lessee to pay LSU a reasonable fair market value rental rate for the lease of the property. The property being considered for this project is agricultural land, and the rental rate would be in accord with the lease value of agricultural property, taking into account LSU's reservation of its intended use of the property for research and teaching purposes. The mitigation banker would manage the subject property in accordance with the CWA Section 404 Permit Program and applicable state laws and regulations. Further, under the CWA Section 404 Permit Program, the mitigation banker would be responsible for securing administrative approval of the bank, developing an approved biological and hydrological mitigation enhancement plan to establish the credits within the bank, providing site security, constructing necessary site improvements, implementing the approved plan, negotiating and contracting sales of mitigation credits, providing certificates of such sales, responding to all United States Army Corps of Engineers' ("USACE") reporting requirements, and maintaining the site mitigation enhancements in perpetuity. Finally, the mitigation banker would be obligated through the agreement with LSU to deposit a portion of the money collected through the sale of mitigation credits into a trust, which monies could be used to enhance the LSU AgCenter's research and teaching programs.

Within the above basic frameworks, your request presents the following questions:

1. Is LSU authorized to create and establish a mitigation bank for the restoration, creation, enhancement, and preservation of wetlands or other aquatic habitats in accordance with the federal Clean Water Act, Section 404 Permit, and the Louisiana Coastal Zone Management Programs?
2. Is LSU authorized to contract with or engage a third party to act as the mitigation banker for the establishment and creation of the mitigation bank and the sale of credits?
3. Does the transaction require the use of a cooperative endeavor agreement?
4. With regard to an agreement between LSU and a third party acting as mitigation banker, what, if any, review by or reporting to the Louisiana Joint Legislative Committee on the Budget pursuant to La. R.S. 39:366.1 *et seq.* would be required?

I. INTRODUCTION

³ 33 U.S.C. § 1251 *et seq.*

Compensatory mitigation involves actions taken pursuant to CWA § 404 permits to offset unavoidable adverse impacts to wetlands, streams, and other aquatic resources. Generally, 33 CFR § 325 provides the procedure for applying for and obtaining certain permits from the USACE allowing for construction and/or other types of projects in or near the "waters of the United States,"⁴ including wetlands. Part 332 of Title 33 of the CFR provides for the compensatory mitigation for losses of aquatic resources. More specifically, 33 CFR § 332.1(a)(1) states that the purpose of Part 332 is to:

[E]stablish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army (DA) permits pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403)....[and to] implement section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108-136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation.⁵

Wetland mitigation banks can be categorized into three varieties: existing wetlands, restored wetlands, and created wetlands. They provide a means by which developers can offset their projects' deleterious effects on existing wetlands through the preservation, restoration, or creation of wetlands elsewhere. Mitigation banks are described as a form of "compensatory mitigation ... achieved through a process where a permittee restores, creates, or protects another wetland in exchange for or, to replace the one destroyed."⁶ Essentially, developers invest in banks that allow them to purchase "destruction credits" for other wetland areas.⁷

In addition, projects within Louisiana's coastal zone that require wetland mitigation must adhere to the requirements set forth in the CZM, as well as any corresponding regulations.

⁴ The CWA applies only to "navigable waters," which are defined as "the waters of the United States, including the territorial seas." (Clean Water Act § 502(7)). Although federal regulations of the Environmental Protection Agency and the USACE define the term, what qualifies as "waters of the United States" has been a longstanding jurisprudential issue. (See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006)).

⁵ See also La. Atty. Gen. Op. No. 12-0166.

⁶ Katherine E. Yates, *Wetlands Mitigation and Mitigation Banking in Louisiana*, 59 LA. L. REV. 591, 593 (1999).

⁷ La. Atty. Gen. Op. No. 10-0139, Footnote 6, citing Yates, *supra*.

II. OPINION REQUEST

In your request, you ask for the legal opinion of our office, based on our interpretation of applicable federal and state laws and regulations, on four questions, each of which will be addressed below.

1. Is LSU authorized to create and establish a mitigation bank for the restoration, creation, enhancement or preservation of wetlands or other aquatic habitats in accordance with the federal Clean Water Act, Section 404 Permit, and the Louisiana Coastal Zone Management Programs?

There are no limitations in either the CWA or the CZM as to the type of entity authorized to establish a mitigation bank. Indeed, with regard to Section 404 of the CWA, the requirements of establishing a mitigation bank focus upon the “fundamental objective” to “offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [USACE] permits.”⁸ Mitigation plans for all wetland compensatory mitigation projects must contain the following elements: objectives; site selection criteria; site protection instruments (e.g., conservation easements); baseline information (for impact and compensation sites); credit determination methodology; mitigation work plan; maintenance plan; ecological performance standards; monitoring requirements; long-term management plan; adaptive management plan; and financial assurances.⁹ Thus, the allowance of the establishment of a mitigation bank is contingent upon the mitigation banker’s ability to meet certain ecological and physical standards regarding the property sought to be restored for mitigation banking, as well as financial assurances.¹⁰ Additionally, 33 CFR § 332(3) provides (emphasis added):

Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

Similarly, the CZM and its corresponding regulations lack any limitations as to the type of entity (or person, as provided by the statute) that may establish a mitigation bank in

⁸ 33 CFR § 332(1).

⁹ See Fed. Reg. Vol. 73, No. 70, p. 19,597, citing 33 CFR § 332.4(c).

¹⁰ See, e.g., 33 CFR §332.4, which provides (in pertinent part):

When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project.

the Louisiana Coastal Zone. Specifically, La. R.S. 49:214.23, which sets forth the general definitions of the CZM, defines "person" as "any individual, partnership, association, trust, corporation, public agency or authority, or state or local government body." Further, the applicable regulations provide that the Louisiana Department of Natural Resources shall consider wetland mitigation banking proposals from "federal and state agencies, boards, commissions, departments, political subdivisions, corporate bodies,"¹¹ local governments, local governing bodies, and private persons."¹² Thus, for the aforementioned reasons, it is the opinion of this office that LSU, through its Board of Supervisors, has the authority to establish mitigation banks on property owned by LSU, provided that all other requirements set forth by applicable law are met.

2. Is LSU authorized to contract with or otherwise engage a private nonprofit organization to act as the mitigation banker for the establishment and creation of the mitigation bank and the sale of credits?

3. Does the transaction require the use of a cooperative endeavor agreement?

As a general matter, a landowner interested in establishing a mitigation bank may contract with a third party to act as the mitigation banker, provided that the third party is qualified pursuant to the CWA and, when applicable, the CZM. However, any person or entity (including a private nonprofit) desiring to be a mitigation banker must show that it is capable and qualified pursuant to applicable laws and regulations and secure administrative approval of the bank. More specifically, the proposed mitigation banker must demonstrate: financial assurances of maintaining the mitigation bank, the ability to develop an approved biological and hydrological mitigation enhancement plan to establish the credits within the bank, the ability to secure the mitigation bank site, the ability to construct necessary site improvements, implement the approved plan, negotiate sales of mitigation credits, provide certificates of such sales, respond to all USACE reporting requirements, and maintain the site mitigation enhancements in perpetuity.¹³ You have asked this office to assume that the private nonprofit would be capable of securing necessary administrative approval.

Since the proposed transaction involves contracting with an entity for activities which will take place on public property, it must be examined in light of La. Const. art. VII §14(A). The constitutional norm for the lawful use of public funds and property is found in Article VII, Section 14 of the Louisiana Constitution, and Paragraph (A) generally prohibits the loan, pledge, or donation of public funds and property.¹⁴

¹¹ Pursuant to La. Const. art. VIII, §7(A), the LSU Board of Supervisors is a corporate body.

¹² LAC 43: I. 724 (F) (2)

¹³ 33 CFR § 332.4

¹⁴ Exceptions to this prohibition are found in Paragraph (B), all of which are inapplicable to the issues at hand.

La. Const. art. VII §14(A) is violated when public funds or property are gratuitously alienated.¹⁵ With regard to the expenditure of public funds, this office has consistently opined that:

[I]n order for an expenditure or transfer of public funds to be permissible under Art. VII, § 14(A), the public entity must have the legal authority to make the expenditure and must show: (i) a public purpose for the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue; (ii) that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and (iii) that the public entity has a demonstrable, objective and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds. The *Cabela's* standard places a strong emphasis on the reciprocal obligations between the parties to ensure that there is not a gratuitous donation of public funds.¹⁶

In short, pursuant to La. Const. art. VII §14(A), LSU may not gratuitously donate the use of its property to the mitigation banker with no expectation of receiving an equivalent value in exchange for the banker's use of the LSU property.

Paragraph (C) of Section 14 authorizes the state to engage in cooperative endeavors for a public purpose with other governmental agencies, public or private corporations, or individuals. The Louisiana Supreme Court has ruled that all cooperative endeavors authorized by Section 14(C) must also meet the general standard for the non-gratuitous alienation of public funds or property established by Section 14(A).¹⁷ Therefore, only if the use of public funds or property is authorized by a valid legal obligation will a cooperative endeavor be considered a constitutionally-sanctioned cooperative endeavor.¹⁸

La. Const. art. VIII, Section 7 provides, in pertinent part:

Section 7. (A) Creation; Powers.

The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested in this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

¹⁵ *Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales*, 2005-2298 (La. 9/6/06, 20), 938 So.2d 11, 23. (the "*Cabela's* case"). See also, e.g., La. Atty. Gen. Ops. Nos. 09-0059 and 10-021.

¹⁶ La. Atty. Gen. Op. Nos. 12-0058, and 12-0135.

¹⁷ See *City of Port Allen v. La. Risk Management, et al* 439 So. 2d 399 (La. 1983)(modified on other grounds by *Cabela's* 938 So.2d 11.

¹⁸ La. Atty. Gen. Op. No. 99-105.

The constitutional and legal duty of LSU and the LSU System (including the LSU AG Center) is to promote and facilitate the public education of its students through all appropriate means.¹⁹ This office has previously opined that the public purpose obliged by this duty is best stated by the preamble to the education article (Article VIII) of the Louisiana Constitution, which provides as follows:

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop his full potential.²⁰

Here, LSU seeks to allow a private entity to use its property for mitigation banking purposes, with a primary objective of making money. Because the mitigation bank would also provide educational opportunities for LSU students, a public purpose exists, allowing LSU to enter into a cooperative endeavor with a third party mitigation banker. Therefore, a cooperative endeavor agreement could exist between LSU and a qualified private nonprofit organization, as a public purpose is present. However, a cooperative endeavor agreement is not the exclusive instrument upon which LSU can achieve its plan.

In La. Atty. Gen. Op. No. 99-105, this office cited to Article VIII, Section 7 of the Louisiana Constitution for the proposition that LSU possesses, through the authority vested within the LSU Board of Supervisors, the:

broad and sweeping authority to exercise all power to direct, control, supervise and manage the LSU System. This includes the power and authority to enter into contracts and agreements, leases with private entities, the promotion of the activities of alumni associations, foundations and other nonprofit organizations and, in general, to perform such other functions as are necessary or incidental to the supervision and management of the university system.

La. R.S. 17:3361 *et seq.*, authorizes State colleges and universities to enter into long term leases of their lands to private nonprofit corporations or private entities for construction of certain types of improvements. Such leases may be entered into without compliance with either the Lease of Public Lands Law (La. R.S. 41:1211 *et seq.*) or the Public Bid Law (La. R.S. 38:2211 *et seq.*) if the private entity has been selected pursuant to a competitive bid or competitive bidding process.²¹ Thus, Louisiana law specifically allows LSU and other public universities to lease their property.²²

¹⁹ *Guste v. Nicholls College Foundation*, 564 So.2d 682,688 (La. 1990).

²⁰ La. Atty. Gen. Op. No. 03-0111.

²¹ La. R.S. 17:3361(E); *see also* La. Atty. Gen. Op. No. 04-0382.

²² In addition, La. R.S. 17:3390 (A) provides, in pertinent part, with respect to alumni associations, foundations, and other private nonprofit organizations as follows:

Further, Louisiana law seems to anticipate agreements between landowners and third parties for the purposes of conservation. For instance, the Conservation Servitude Act provides that "holders" of conservation servitudes may be charitable conservation corporations, associations, or trusts.²³

This office has previously opined that, with regard to public property, there are no impediments to the State granting conservation servitudes to third-party, non-State entities as long as such agreements are accomplished in cooperation with the State Land Office and in accord with applicable rules and regulations regarding the granting of servitudes on State lands.²⁴

At any rate, in light of the statutory authority that allows LSU to lease its property, it is the opinion of this office that a cooperative endeavor agreement is not the only means by which LSU may allow for the creation of a mitigation bank through a third party private non-profit organization.

Here, LSU intends to contract with a private nonprofit to act as the mitigation banker, which would be authorized through the agreement to sell mitigation credits associated with the banker's restoration, creation, enhancement, or preservation of wetlands on public property. Based upon your facts, LSU would require the mitigation banker to pay LSU a reasonable fair market value rental rate for the lease of the property. The property at issue is agricultural land, and the rental rate would be in accord with the lease value of agricultural property, taking into account LSU's reservation of its intended use of the property for research and teaching purposes. In addition, the mitigation banker would be obligated to deposit a percentage of the money collected from the sales of mitigation credits into a trust, from which LSU would seek grants.

The legislature finds that private support enhances the programs, facilities, and research and educational opportunities offered by public institutions of higher education in Louisiana. Therefore, each higher education management board and institution is hereby encouraged to promote the activities of alumni associations, foundations, and other private, nonprofit organizations that raise private funds for the support of public institutions of higher education. Further, it is recognized that private, nonprofit organizations under the direction and control of private individuals who support institutions of higher education are effective in obtaining private support for those institutions.

²³ La. R.S. 9:1272.

²⁴ La. Atty. Gen. Op. No. 12-0166 states:

While it might appear that La. Const. Art. IX, Sec. 3 and La. R.S. 9:1108 prohibit the State from granting servitudes on State water bottoms, it is the opinion of this office that such prohibitions only prohibit the alienation and transfer of full ownership of State water bottoms to others. Furthermore, La. C.C. Art. 723 specifically provides that predial servitudes may be established on public things, including property of the State, its agencies, and political subdivisions.²⁴ In fact, the State regularly grants servitudes on public property in favor of both public and private entities.

Under the facts presented, it appears LSU would satisfy the provisions of La. Const. art. VII §14(A) because the lessee would pay a reasonable fair market value rental rate to LSU for the lease of the property.²⁵

It is the opinion of this office that LSU may contract with the private nonprofit, provided that LSU, as lessor, is guaranteed to receive equivalent or better value for the use of the property. Under the facts presented, such a guarantee would be provided in the form of rental payments equivalent to or better than the fair market value of the leased property. What such an equivalent or better value might be is a fact-specific question that is beyond the purview of this opinion and is more properly a question for a court of competent jurisdiction. A cooperative endeavor agreement is not required.

4. What, if any, review by or reporting to the Louisiana Joint Legislative Committee on the Budget pursuant to La. R.S. 39:366.1 *et seq.* would be required related to an agreement between LSU and a third party acting as mitigation banker?

The answer to this question hinges upon whether the agreement is subject to the exemption found in La. R.S. 17:3361 *et seq.* and is simply a lease made through competitive process, or if the agreement includes a cooperative endeavor agreement. If the agreement is not a cooperative endeavor and is a lease made pursuant to La. R.S. 17:3361 *et seq.* and through a competitive process, then La. R.S. 39:366.1 *et seq.* does not apply. If the agreement is a cooperative endeavor agreement, then La. R.S. 39:366.1 *et seq.* is applicable.

As previously noted, La. R.S. 17:3361 *et seq.* authorizes state universities to lease immovable property provided that the lease requires the lessee to construct improvements on the leased premises which will further the educational, scientific, research, or public service functions of the Board of Trustees. Additionally, these provisions exempt the state university from public bid law and public procurement law, but the lease must be awarded through a competitive process.

The purpose of La. R.S. 39:366.1 *et seq.* (the "Accountability for State Resources Act") is to:

ensure that the elected leaders of state government are informed and accountable for the use made of state resources that are obligated, dedicated, or otherwise are committed to the operation, management or control of or are necessary to the confection of agreements with non-

²⁵ However, the amount of money derived from the sales of mitigation credits, placed into a trust, and thereafter granted to LSU, is speculative and therefore would not constitute a guarantee that LSU would receive equivalent value in exchange for the banker's use of the LSU property. Therefore, it is imperative that LSU receive rent payments from the mitigation banker for the use of its property. Nonetheless, this office does not perceive any impediment to obligating the mitigation banker to place additional funds into a trust from which LSU may receive grants.

public persons that are entered into pursuant to a public purpose or to ensure the protection of the interests of the state.²⁶

It is the opinion of this office that the Act contemplates accountability of any cooperative endeavor agreement that is not competitively bid or competitively negotiated. As you point out in your request, La. R.S. 39:366.3 (emphasis added) defines a cooperative endeavor for purposes of applying the Accountability for State Resources Act:

1) "Cooperative endeavor" means any agreement including one of cooperative financing, **other than a competitive bid or competitively negotiated contract, whether contracted pursuant to Chapter 10 of Title 38 or Chapter 16 or 17 of Title 39 of the Louisiana Revised Statutes of 1950 or pursuant to a request for proposals, request for qualifications, solicitation for offers, or other recognized process for competitively seeking qualified contractors, to which the state is a party and pursuant to which the state has obligated state resources, whether funds, credit, property, or things of value of the state to a nonpublic person for the accomplishment of a public purpose or in the public interest....**

This office researched the applicability of the Accountability for State Resources Act as it relates to La. R.S. 17:3361 and found no applicable jurisprudence or commentary. However, it is clear that La. R.S. 17:3361 exempts LSU from the requirements of the Chapter 10 of Title 38 and Chapters 16 and 17 of Title 39 with regard to leasing its immovable property to a private nonprofit organization. However, as previously stated, LSU must use a competitive process in leasing its property in order to be exempted from public bid and procurement law. Thus, if LSU leases the property pursuant to La. R.S. 17:3361 and through a competitive process, then the provisions of La. R.S. 39:366.1 *et seq.* would be inapplicable.

III. CONCLUSION

In conclusion, it is the opinion of this office that LSU is authorized to create and establish a mitigation bank upon its property, provided that it meets the requirements of the CWA, and, where applicable, the CZM. In addition, LSU may contract with a qualified private nonprofit to perform as a mitigation banker upon LSU property, provided that the nonprofit is qualified pursuant to applicable federal and state laws and regulations, and provided that any alienation of public property is not gratuitous and/or the lessee pays fair market value for rent. LSU may, but is not required, to enter into a cooperative endeavor agreement in order for a third party private nonprofit to act as the mitigation banker of LSU property. Finally, the provisions of the Accountability for State Resources Act apply only if LSU does not contract with the mitigation banker pursuant to a competitive bid or competitively negotiated contract.

²⁶ La. R.S. 39:366.2.

We hope this sufficiently answers your inquiry; however, if we may be of further assistance please do not hesitate to contact our office.

Sincerely yours,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Duncan S. Kemp, IV", written over a horizontal line.

DUNCAN S. KEMP, IV
Assistant Attorney General

JDC:DK, IV:jb