NATIONAL MITIGATION BANKING ASSOCIATION

April 14, 2015

Honorable Orrin Hatch, Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

Honorable Ron Wyden, Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch, Ranking Member Wyden:

The National Mitigation Banking Association (NMBA) appreciates your bipartisan leadership, and the opportunity to share with the Committee's working groups our ideas on how best to simplify our nations tax code to ensure a fairer, simpler, and more efficient system.

NMBA members are committed to restoring and conserving America's wetlands, streams, and other habitat resources through sound economic and environmental practices. NMBA promotes federal legislation and regulatory policy that encourages mitigation banking as a means of compensating for adverse impacts to our nation's environment.

We believe Congress has an opportunity to make a major contribution to advancing conservation by providing tax clarification for mitigation banks. Specifically we are seeking clarification of the tax treatment of mitigation bank credit sales.

BACKGROUND:

What is a mitigation bank?

- Applicants for federal permits who cannot avoid or minimize adverse environmental impacts from their projects or actions are required to compensate for the remaining adverse impacts.
- Private owners of ecologically significant but degraded land work with investors to protect, restore and maintain the land, gaining federally-approved "credits." Federal permittees can purchase these compensatory mitigation credits from mitigation banks established by NMBA members.

Issues:

- Recognition of Income in Private Letter Rulings – landowners preserving property through mitigation banking receive mitigation credits over time that will then be sold to permittees. IRS Private Letter Rulings recognize these credits as income before any revenue has actually been received.
- Ordinary Income vs. Sale of a Capital Asset – tax courts have generally confirmed that credits are capital assets; however, ambiguity about whether a mitigation banker is a "dealer" subject to ordinary income creates a disincentive for additional investment interest in mitigation banking.

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The clarifications sought by NMBA are simple: *The grant of a property interest as a condition of establishing a mitigation bank is not a taxable event and the gain or loss attributable to the sale or exchange of a mitigation bank credit by the sponsor of the mitigation bank who earned such a credit would be considered the sale or exchange of a capital asset held for more than 1 year and not substitution of income.*

The proposed change would:

1. Clarify that the regulatory requirement of a grant of property interest to create a mitigation bank is not the sale of an asset and, thus, not taxable at that event;

2. Settle the dealer classification issue in favor of investment in mitigation banks;

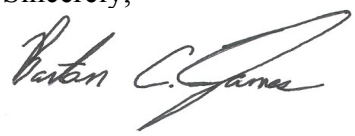
3. Allow the sale of conservation land to a mitigation bank partnership in which the landowner has a majority interest to be taxed as capital gains; and

4. For a land sale as described in (3) above, allow the use of installment reporting, which is currently prohibited by the dealer status.

Attached you will find the Association's document, "NMBA Case for Tax Clarification", which will provide additional context to our concern. Simplification of our tax system has the power to unleash the pent up growth in our economy leading to increased investments, job creation and wage growth that will benefit all Americans.

We applaud your leadership and dedication to improving our nation's tax system and look forward to working with you to make our nation's tax system fairer, simpler, and more efficient system. Please let me know if we can assist or provide additional information to you or your staff. I may be reached at [redacted] or [redacted]

Sincerely,



Barton C. James
Executive Director
National Mitigation Banking Association

CC:

The Honorable John A. Boehner
The Honorable Nancy Pelosi
The Honorable Mitch McConnell
The Honorable Harry Reid
The Honorable Paul Ryan
The Honorable Sander Levin
The Honorable Jacob J. Lew
The Honorable Jason Furman