



In-Lieu Fee Program Training
September 13-14, 2011

Mitigation and the §404 Permitting Program



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Compensatory Mitigation: Overview

- Background and drivers
- Methods
- Mechanisms
- 2008 Corps/EPA Compensatory Mitigation Rule

Background & Drivers

- The Objective of the Clean Water Act of 1972
 - ▣ To: “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”

- Section 404 regulates:
 - ▣ Discharge of dredged or fill material into waters of the United States, including wetlands

Background & Drivers

- The §404 Program is guided by the goal of achieving:
 - ▣ “no overall net loss” of wetland acreage **and** functions

- Before the Corps may issue a permit it must follow the 3-part:
 - ▣ Mitigation sequence

Background & Drivers

- Under the mitigation sequence, proposed impacts must first be:
 - ▣ Avoided “to the maximum extent practicable”
 - ▣ Minimized to the extent “appropriate and practicable”
 - ▣ “Appropriate and practicable compensatory mitigation” is required for all remaining unavoidable adverse impacts

Methods

- Restoration
- Enhancement
- Establishment
- Preservation

Restoration



Shallow marsh wetlands restored to compensate for highway impacts (Minnesota).

Restoration

- **Policy:** Restoration should generally be the first option considered.
- **No net loss role:** Results in a gain in aquatic resource functions and (generally) area.

Establishment (Creation)



Freshwater created wetland (Massachusetts).

Establishment (Creation)

- **No net loss role:** Results in a gain in aquatic resource area and functions.

Enhancement



Increased hydroperiod to enhance habitat functions (Puerto Rico).

Enhancement

- **No net loss role:** Results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Does not result in a gain in aquatic resource area.

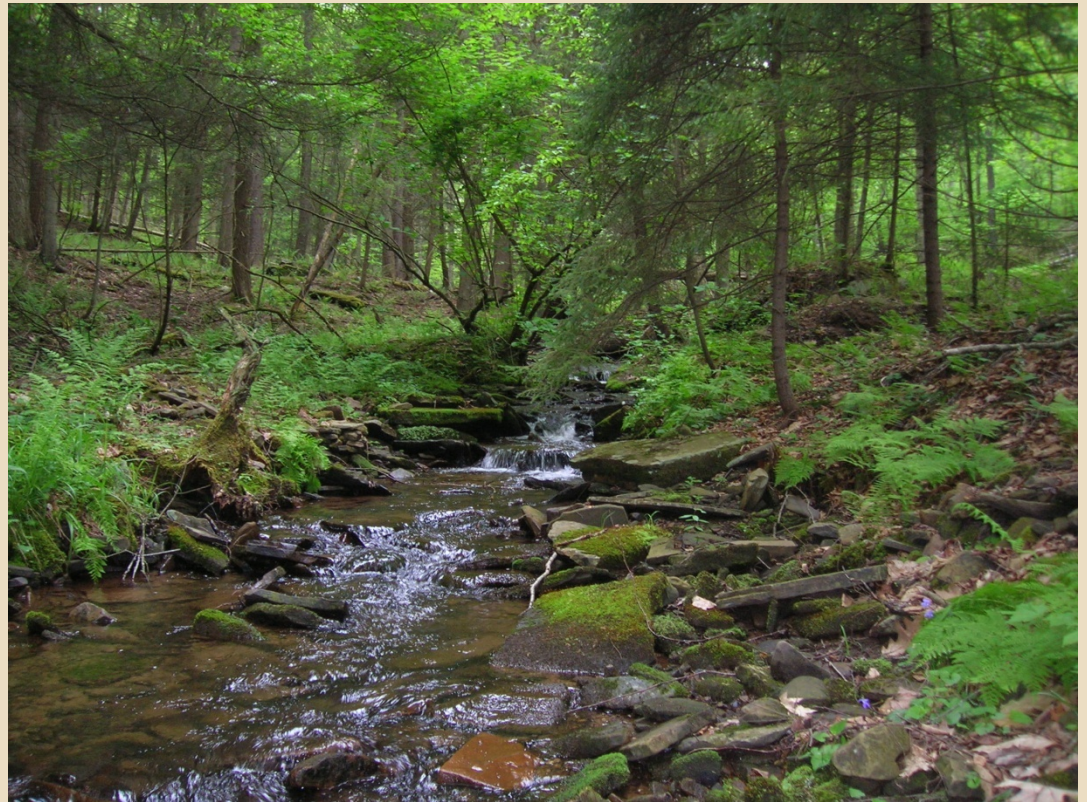
Preservation



The Nature Conservation (North Carolina)

Preservation

- **No net loss role:** Does not result in a gain of aquatic resource area or functions.



Stream preservation: Highland County, Virginia (TNC)

Preservation

- **Policy:** May be used when **all** of the following five criteria are met:
 1. The resources to be preserved provide important physical, chemical, or biological functions for the watershed;
 2. The resources contribute significantly to the ecological sustainability of the watershed;
 3. Preservation is determined by the Corps to be appropriate and practicable;
 4. The resources are under threat of destruction or adverse modifications; and
 5. The preserved site will be permanently protected.

Preservation



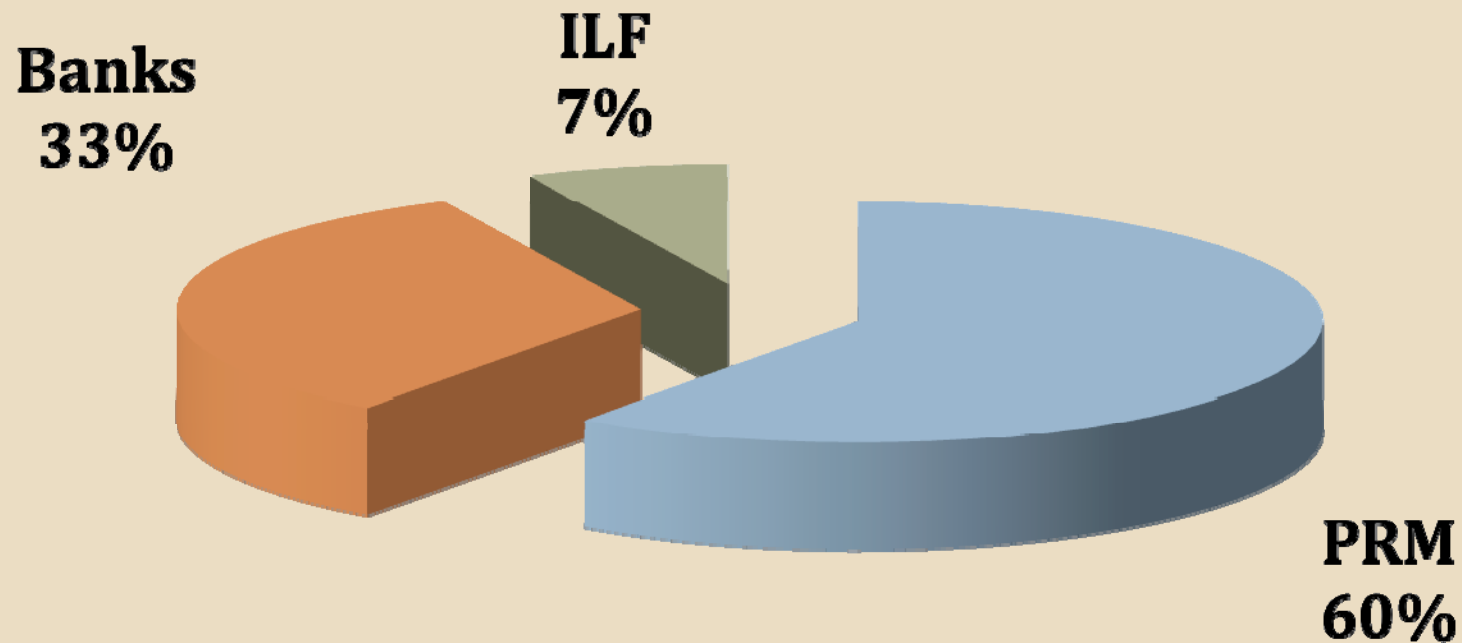
- Shall be done in conjunction with restoration, establishment and/or enhancement
- May be waived if in association with watershed approach
- Ratios must be higher

Fauquier Co., Potomac River watershed

Mitigation Mechanisms

- Permittee-responsible mitigation
- Third party mitigation
 - Mitigation banking
 - In-lieu fee mitigation

Mitigation Mechanisms



**Percent of compensatory mitigation
required**

(USACOE, 2005)

Permittee-Responsible Mitigation

- Permittee:
 - Proposes
 - Revises
 - Implements
 - Monitors
 - Remediates
 - Manages
 - Protects



Hydroseeding mitigation site in Portland, ME (Ladd, USACOE)

Mitigation Banking

A site, or suite of sites, where resources are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation



Restored perennial and seasonal marsh and riparian forest at Wildlands Mitigation Bank, Placer County, California

In-Lieu Fee Mitigation

- A program involving the R, C, E, P of aquatic resources through funds paid to a government agency or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits.



Riparian enhancement, North Carolina In-Lieu Fee Program (NC EEP)

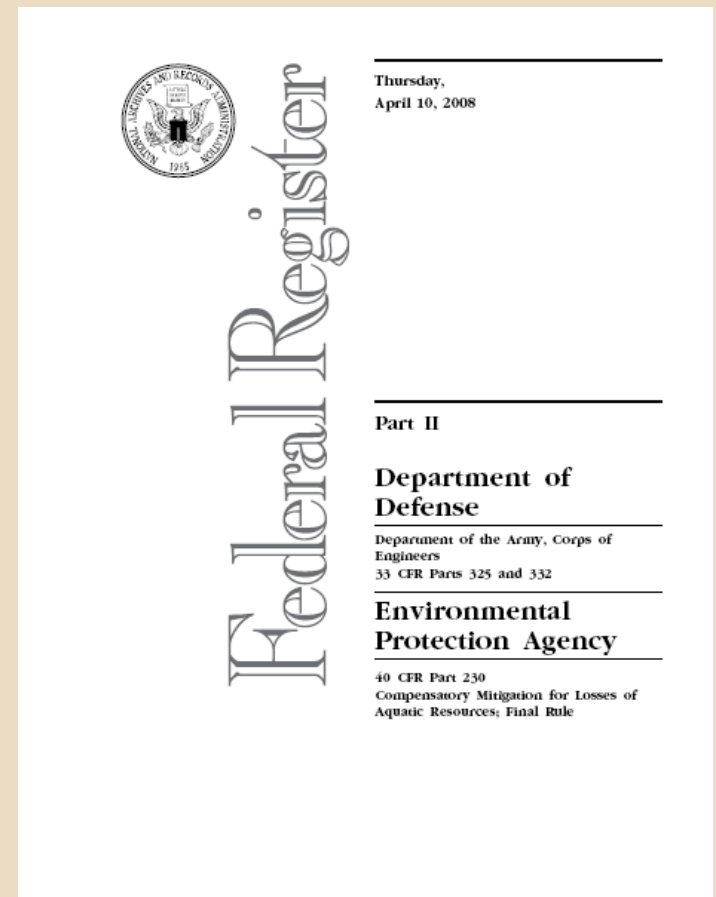
Differences Between Banks & ILF

- Mitigation banks:
 - ▣ Sponsor: public or private
 - ▣ Site secured & mitigation initiated in advance of debits
 - ▣ Single or multiple project sites
 - ▣ Corps has no authority over bank expenditures

- In-lieu fee programs:
 - ▣ Sponsor: government or non-profit conservation organization
 - ▣ Fees usually received before securing/implementing project
 - ▣ Multiple project sites
 - ▣ Corps approves project funding

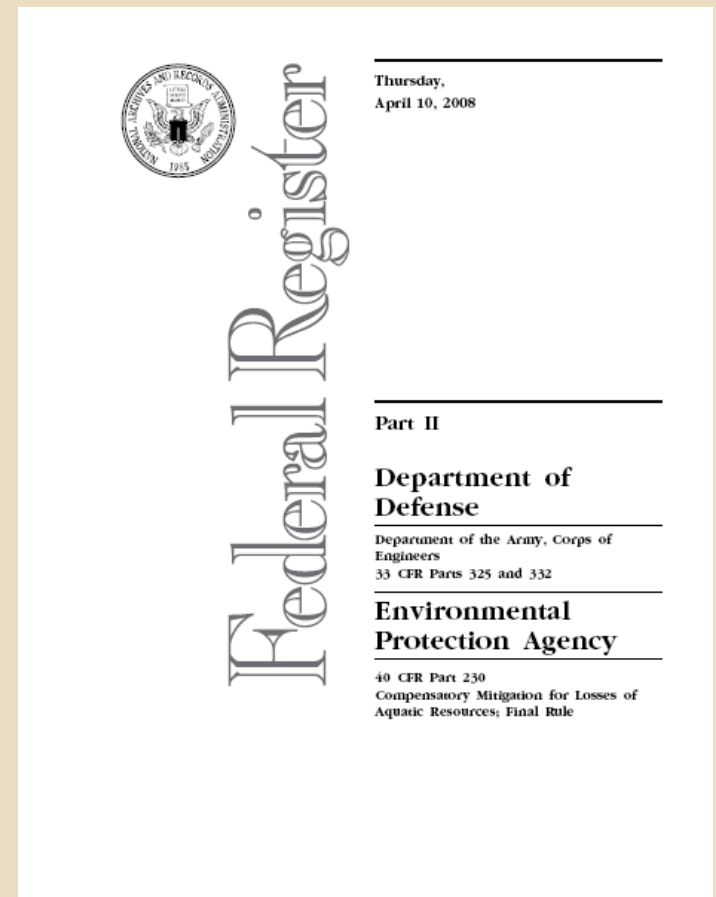
2008 Compensatory Mitigation Rule: Highlights

- Goals
- The Watershed Approach
- The Preference Hierarchy
- In-lieu fee compliance



2008 Compensatory Mitigation Rule: Goals

- Apply equivalent standards to permittee-responsible, mitigation banks and in-lieu fee mitigation to the maximum extent practicable
- Ensure permanent protection of all compensatory mitigation sites



The Watershed Approach

- Main Objective: Maintain and improve the quantity and quality of aquatic resources
- If an appropriate plan exists – use it
- If none exists – take a watershed approach
 - ▣ A structured consideration of watershed needs
 - ▣ An analytic process for making compensatory mitigation decisions

Watershed Approach: Data Needs

- ❑ Current trends in habitat loss or conversion
- ❑ Cumulative impacts of past development activities
- ❑ Current development trends
- ❑ The presence and needs of sensitive species
- ❑ Site conditions that favor or hinder the success of compensatory mitigation projects
- ❑ Chronic environmental problems such as flooding or poor water quality



The Preference Hierarchy for Mitigation

- Should be located within the same watershed as the impact site
- Should be located where it is most likely to successfully replace lost functions and services
- Should take into account watershed scale features

The Preference Hierarchy for Mitigation

1. Mitigation bank credits
2. In-lieu fee program credits
3. Permittee-responsible mitigation under a watershed approach
4. On-site and/or in-kind permittee-responsible mitigation
5. Off-site and/or out-of-kind permittee-responsible mitigation

The Preference Hierarchy for Mitigation

- Consider what is “environmentally preferable”
- Also consider likelihood of success, risk, uncertainty, and temporal loss



Maine in-lieu fee program

ILF Program Compliance with Rule

- ILF programs in existence before July 9, 2008
 - May continue to operate until June 9, 2010
 - Then must meet new requirements or terminate operation
 - May secure an extension of up to 3 years: June 9, 2013
- ILF programs approved or modified on or after June 9, 2008 must comply with regulations

ILF Program Compliance with Rule

- Pre-rule: 47 active programs
 - 7 not seeking reauthorization
 - 35 granted extensions
- Post-rule: 7 approved programs (August 2011)
 - 3 pre-rule programs
 - 4 new programs
 - 13 pending programs



Questions?