

Compensatory Mitigation Primer

Steven Martin
Environmental Planner
Institute for Water Resources



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US Army Corps of Engineers
BUILDING STRONG®



Clean Water Act of 1977

- ▶ Objective is 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



Corps Regulatory Roles and Responsibilities

- To protect the Nation's aquatic resources, while allowing reasonable development through fair and balanced decisions.
- The §404 Program is guided by the goal of achieving “no overall net loss” of wetland acreage **and** functions
 - The Corps can only permit the “Least Environmentally Damaging Practicable Alternative” (LEDPA)
 - Before the Corps may issue a permit it must follow a 3-part **mitigation sequence**



Proposed losses must first be:

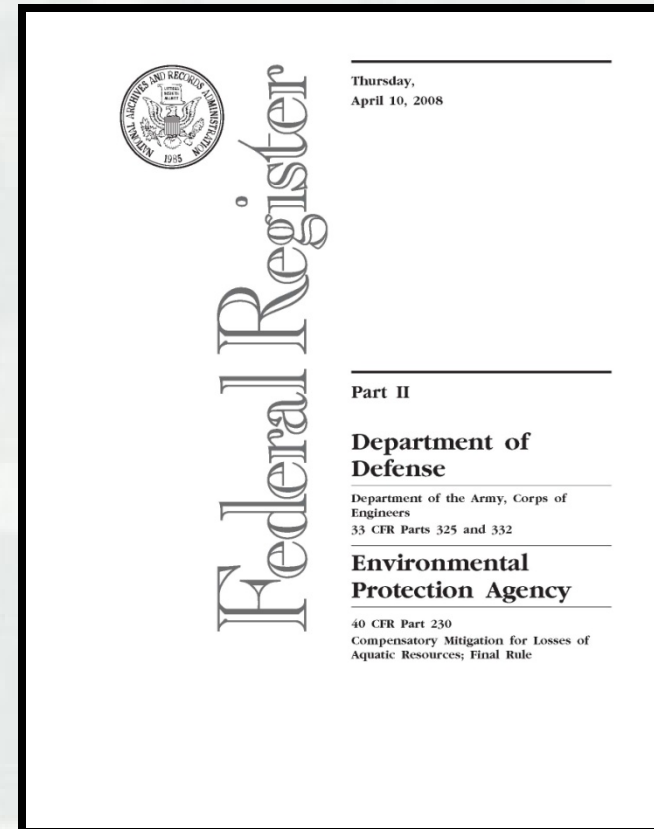
- **Avoided** “to the maximum extent practicable”
- **Minimized to the extent** “appropriate and practicable”
- **“Appropriate and practicable compensatory mitigation”** is required for the remaining unavoidable adverse impacts

This compensatory mitigation is often referred to simply as **“mitigation”**



2008 Corps-EPA mitigation rule

- Establishes requirements for mitigation for impacts to aquatic resources
- “Where” and “how” mitigation is conducted
- Governs all forms of mitigation
- Equivalent standards for all forms
- Preference for 3rd party mitigation



General Considerations

- Objectives
 - ▶ Offset impacts
 - ▶ Practicable
 - ▶ Environmentally preferable
- Mitigation methods
- Commensurate with impacts



General Mitigation Requirements

- Mitigation type
 - ▶ In-kind preferred
 - ▶ On-site/off-site or both
 - ▶ Difficult to replace resources (e.g. bogs, fens, streams)
- Timing
- Amount of compensation



Type & Location of Mitigation

Within same watershed as impact AND where most likely to replace lost functions

- Consider:
 - ▶ Habitat diversity
 - ▶ Connectivity
 - ▶ Land use trends
 - ▶ Compatibility with adjacent uses
- Mitigation may be sited on public or private lands



Permittee-Responsible Mitigation

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



Third-Party Mitigation

- 1 or more sites where resources are restored, established, enhanced, and/or preserved to offset permitted impacts
- Permittees acquire mitigation credits
- Sponsor assumes responsibility for the mitigation
- Operation & use are governed by an instrument



Third-Party Mitigation

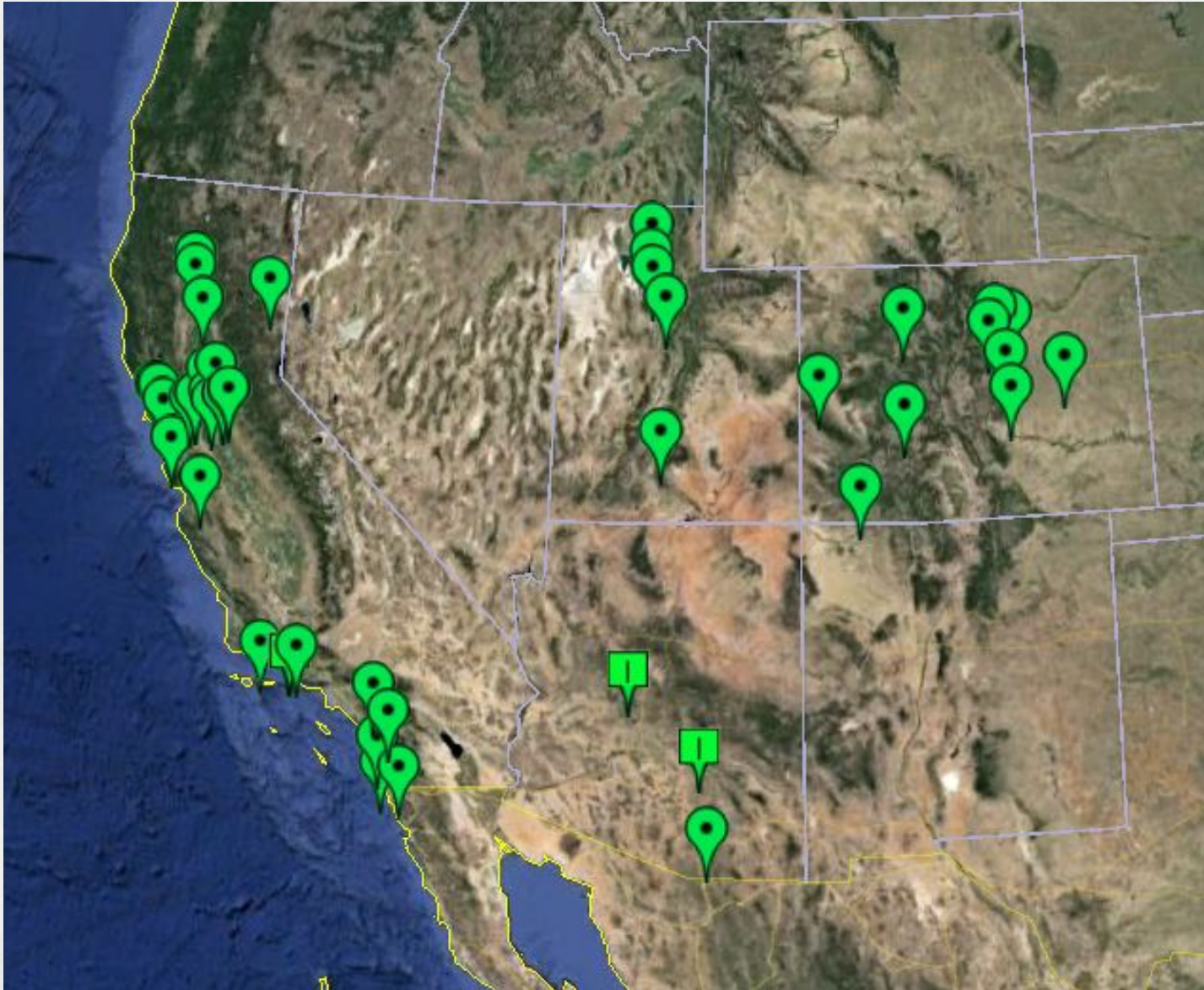
■ Mitigation Banks:

- Initiated in advance of impacts
 - ▷ Credit release tied to performance
- Most sponsored by entrepreneurs
- 1208 operational sites/277 pending (Sept 2013)

■ In-Lieu Fee programs:

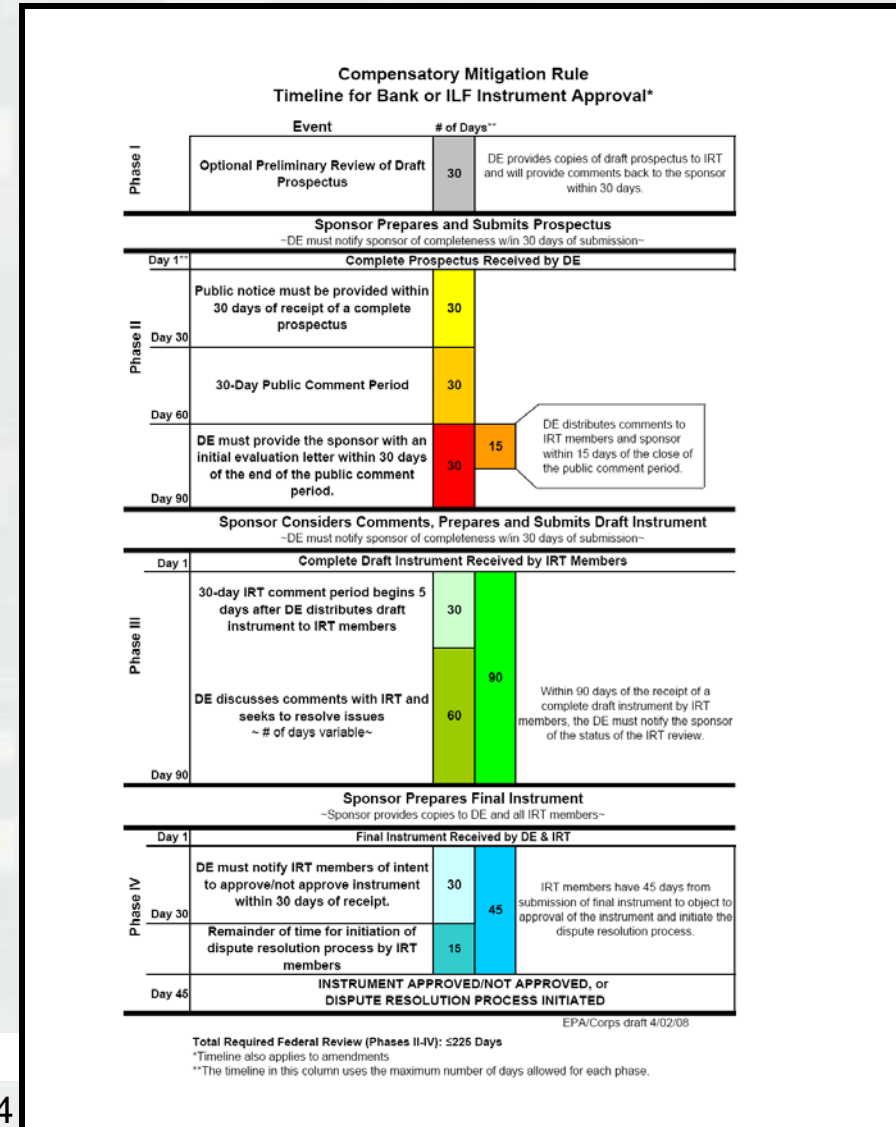
- Initiated after impacts
- Sponsored by government or non-profits
- 32 approved, 20 pending (Sept 2013)





Third-Party Instrument Development

- Draft prospectus
- Prospectus
- Draft instrument
- Final instrument



Preference Hierarchy for Mitigation

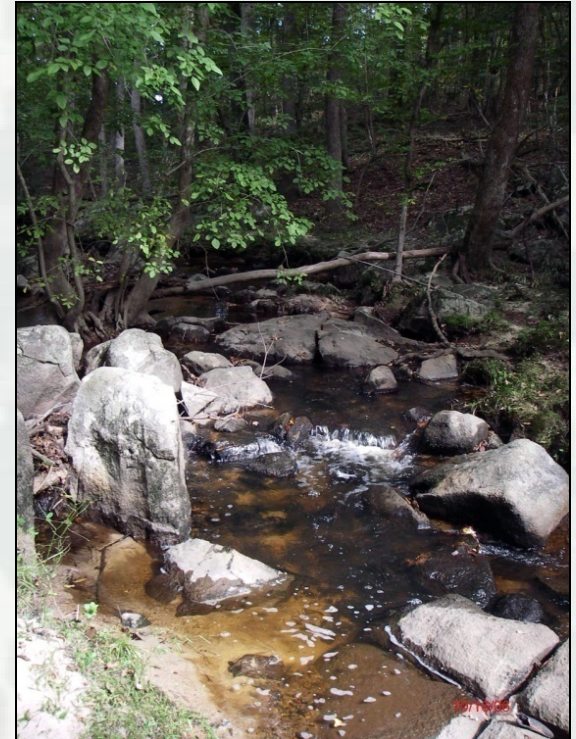
1. Mitigation bank credits
2. In-lieu fee program credits
3. Permittee-responsible mitigation **under a watershed approach**
4. On-site and/or in-kind **permittee-responsible mitigation**
5. Off-site and/or out-of-kind **permittee-responsible mitigation**



Preservation as Mitigation

Requirements

1. Provides important functions
2. Contributes to watershed sustainability
3. Appropriate & practicable
4. Permanently protected
5. Under threat of destruction or adverse modification



Mitigation and other programs

Other F/S/T/L Regulatory programs

- ▶ Must fully offset 404 impacts
- ▶ No “double dipping”
- ▶ Can be used for ESA offsets



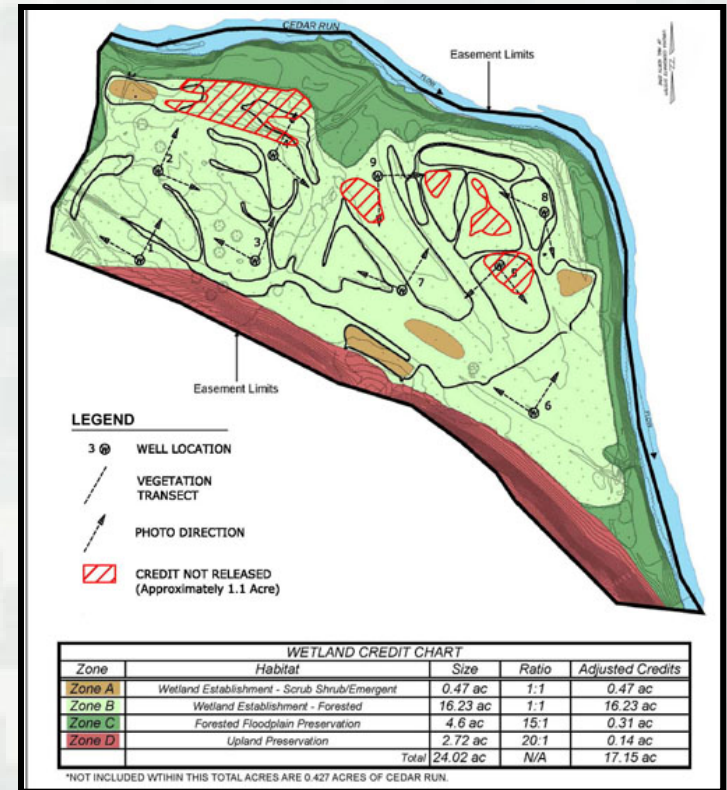
Federally funded projects (e.g., NRCS WRP, USFWS Partners for Fish and Wildlife)

1. May **NOT** generate compensation credits
2. May be undertaken in conjunction **BUT** *supplemental to* federal funded conservation



Mitigation Plan Components

1. Objectives
2. Site protection instrument
3. Baseline information
4. Work plan
5. Maintenance plan
6. Performance standards
7. Monitoring requirements
8. Financial assurances
9. Site selection factors
10. Credit determination
11. Long-term management plan
12. Adaptive management plan



Site Protection

“...mitigation project *must be provided long-term protection* through real estate instruments or other available mechanisms, as appropriate.”



Work plan

Detailed description of work to be conducted

- Project boundaries
- Construction methods, timing, and sequence
- Source(s) of water
- Methods for establishing desired plant community
- Plans to control invasive plant species
- Proposed grading plan
- Soil management
- Erosion control measures



Performance Standards

- Ecological
- Objective and verifiable
- Assess whether the project is meeting its objectives
- Based on best available science assessed in a practicable manner
- Enforceable



Monitoring

- To determine if project is meeting performance standards



Mitigation plan must include:

- Parameters to be monitored
- Length of monitoring period
- Party responsible
- Content of monitoring reports
- Frequency of submittal



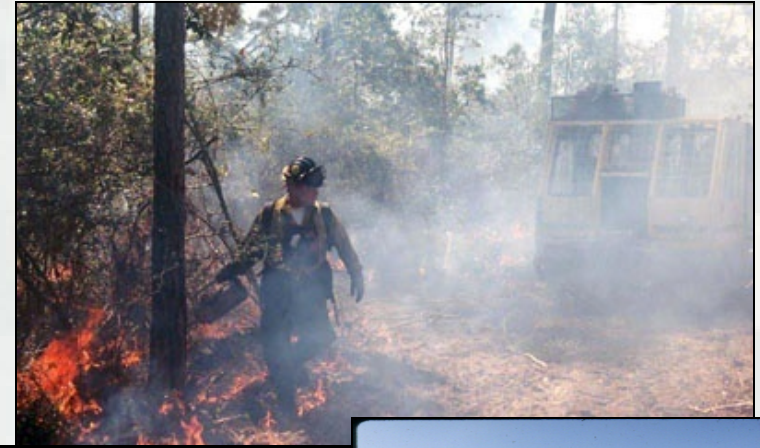
Financial Assurances

“... (Corps) shall require sufficient financial assurances to ensure a high level of confidence that the mitigation project will be successfully completed, in accordance with applicable performance standards.”



Management of Mitigation Projects

- Maintenance Plan
- Long-term management plan identifies:
 - ▶ Responsible party(ies)
 - ▶ Management requirements
 - ▶ Costs
 - ▶ Funding



More Management

- Adaptive Management Plan
 - ▶ Plan
 - ▶ Construction
 - ▶ Performance standards
 - ▶ Monitoring
 - ▶ Management
 - ▶ activities



Questions?

