

Corps / EPA Wetlands Compensatory Mitigation Rule: Stream Mitigation

Brian Topping

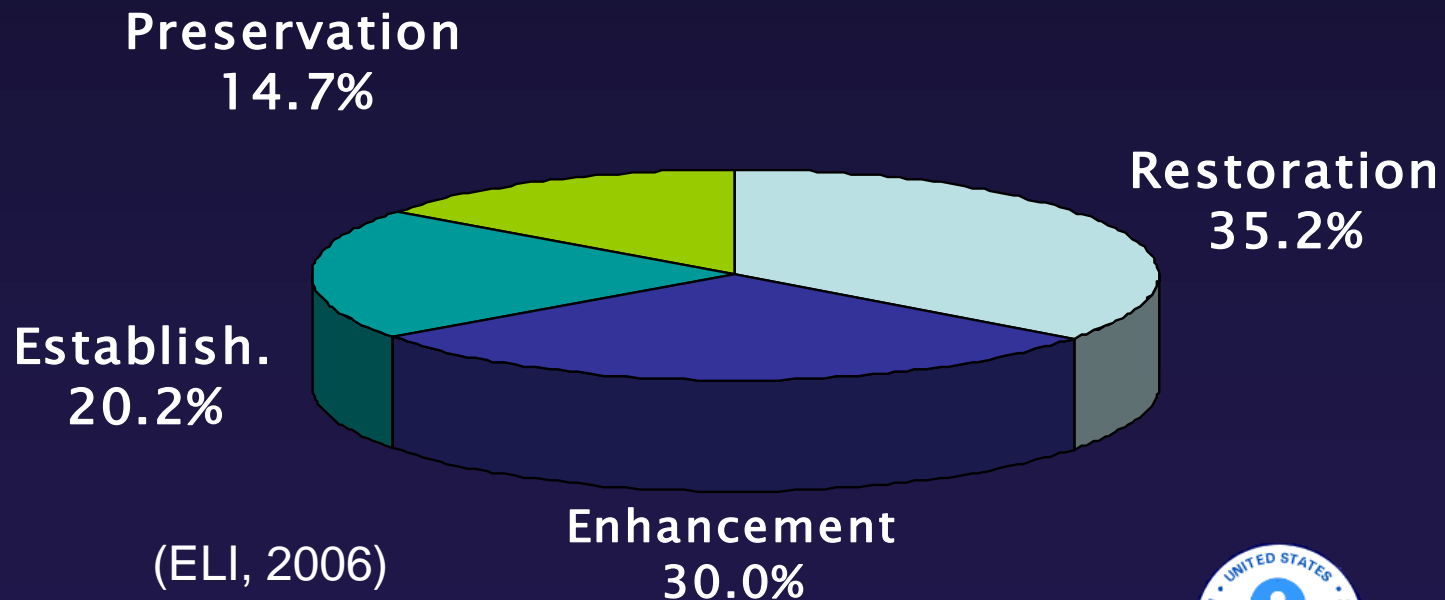
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

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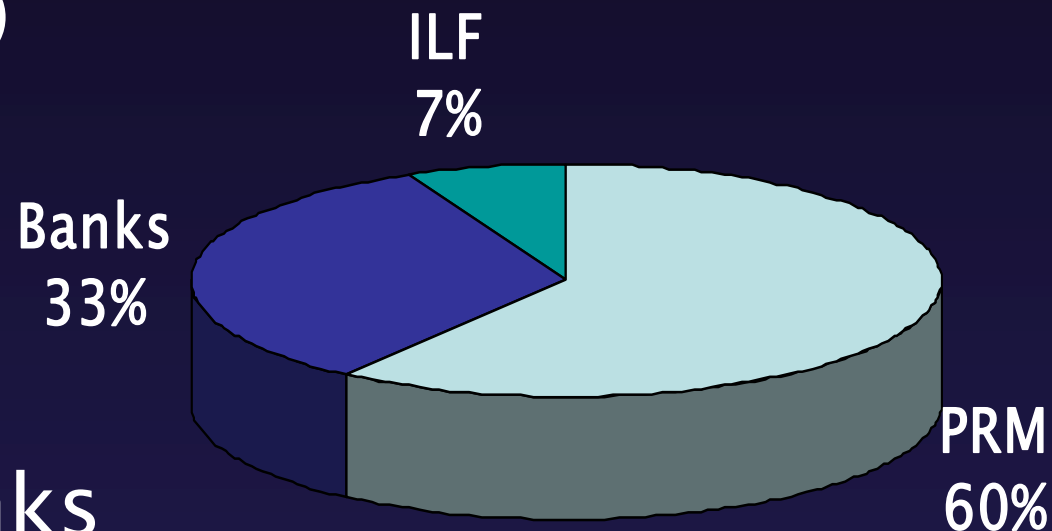
Compensatory Mitigation

- Action taken to replace aquatic resources lost to authorized and unavoidable impacts
 - *“No Net Loss”*
- Methods:



Providing Mitigation

- Permittee-responsible mitigation (PRM)
- Third-party mitigation
 - Mitigation Banks
 - In-Lieu Fee (ILF)



(USACOE, 2005)



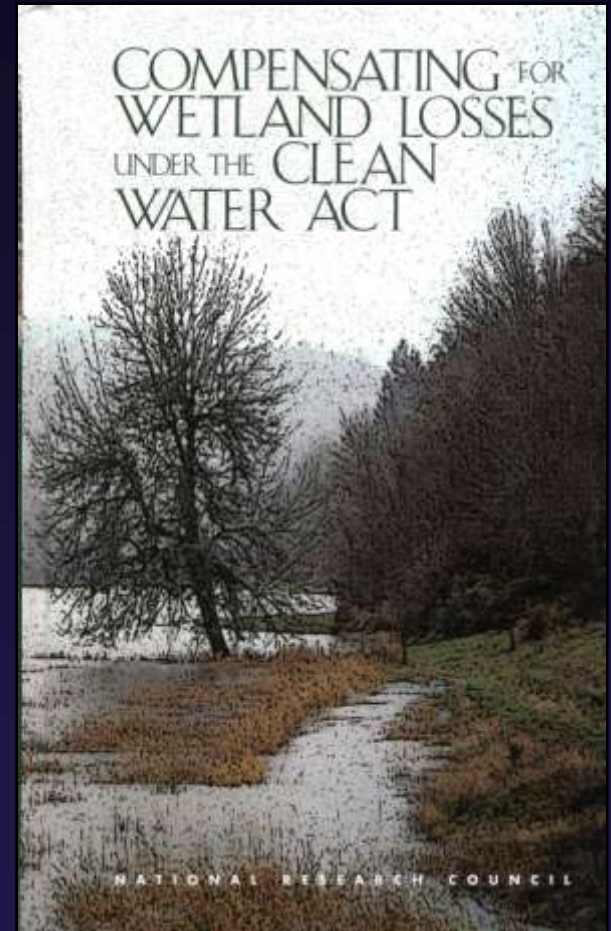
Third-Party Mitigation

- Mitigation Banks:
 - Initiated in advance of impacts
 - Credit release tied to performance
 - Most sponsored by entrepreneurs
 - 450 banks/198 pending (2005)
- In-Lieu Fee programs:
 - Initiated after impacts
 - Most sponsored by government or non-profits
 - 46 programs/11 pending (2006)



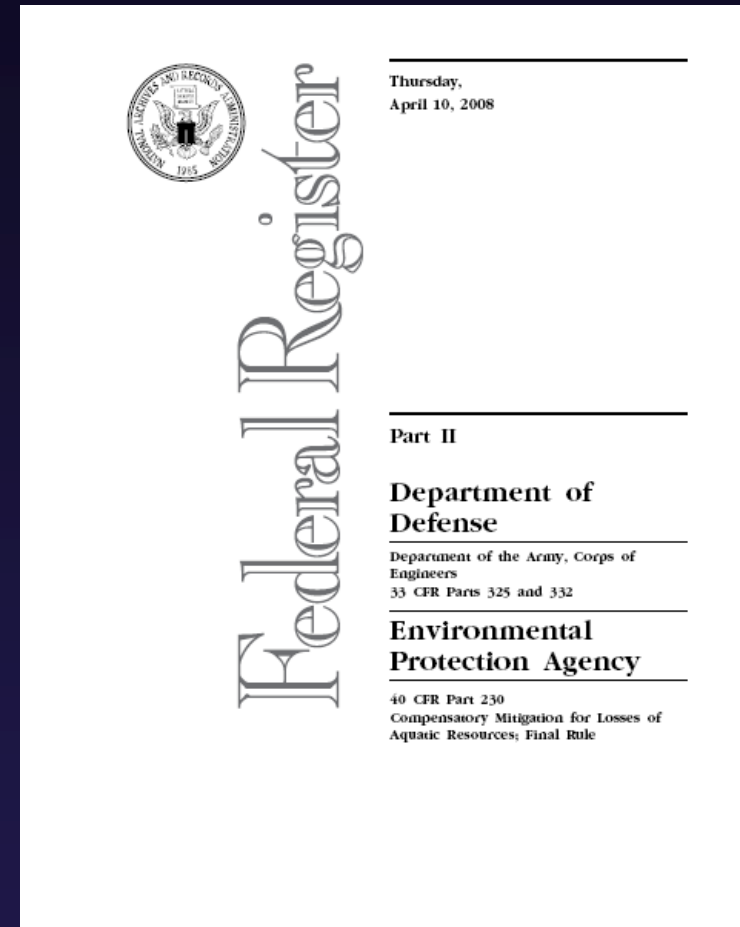
Timeline

- 1999 – EPA/Corps seek NRC study
- 2001 – NRC study published
- 11/03 – Congressional directive
- 3/28/06 – Proposal in Fed Reg
- 3/31/08 – Final Rule released
- 4/10/08 – Final Rule in Fed Reg
- 6/9/08 – Effective date of rule
- 7/9/08 – Effective date new banks/ILFs



Major Themes of New Rule

- Equivalent and effective standards
- Use of best available science
- Predictability and efficiency
- Expansion of public participation
- Wetland and Stream Mitigation



Equivalency: Mitigation Plans

1. Project objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information (at impact site and compensation site)
5. Credit determination methodology
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances



Mitigation Work Plan

- 33 CFR 332.4(c)(7); 40 CFR 230.94(c)(7): Detailed written specifications and work descriptions for the compensatory mitigation project, including...
 - Geographic boundaries, Construction methods, Water source(s) and connection(s), Desired plant community, Grading plans, Soil management and erosion controls

For Stream Projects...

- Planform geometry
- Channel form, e.g. cross-sections
- Watershed size
- Design discharge

Riparian area plantings



ILF Reforms for Equivalency

- The rule retains ILF mitigation but with significant reforms:
 - Advance planning requirement
 - Cap on “advance” credits
 - Financial accounting requirements
 - Only non–profits or governments
 - Same administrative/ecological standards as banks
 - Same public/IRT review process as banks



Best Available Science: Watershed Approach

- *“A watershed approach would improve permit decision making”*
 - National Research Council Report 2001
- Rule addresses a watershed approach:
 - With a watershed plan
 - Without a watershed plan



Compensation Hierarchy

1. Credits from a mitigation bank
2. Credits from an in-lieu fee program
3. PRM using a watershed approach
4. PRM on-site
5. PRM off-site



Ecological Performance Standards

- *“Performance expectations in Section 404 permits have often been unclear”*
 - National Research Council Report 2001
- Rule requires:
 - Objective and verifiable performance standards
 - *“Must be based on the **best available science** that can be measured or assessed in a practicable manner”*



Predictability and Efficiency: Standardize Timelines

Interagency Review Team (IRT)

- DE must use a *“consensus-based”* approach

Timeline for bank/ILF approval

- Four distinct phases – optional pre-review, prospectus review, instrument review, finalization
- Federal review process – 225 days
- Dispute resolution process – 150 days



Sound and Enforceable Administrative Requirements

- Real estate instruments for site protection
 - Goal is permanent protection of the site
- Financial assurances to ensure construction and implementation
 - *“high level of confidence”*



Difficult to Replace Resources

- 33 CFR 332.3(e)(3); 40 CFR 230.93(e)(3):
...if further avoidance and minimization is not practicable, the required compensation should be provided through in-kind rehabilitation, enhancement, or preservation
- E.g. bogs, fens, springs, streams, Atlantic white cedar swamps



Long-term Stewardship

- *“The presumption that once mitigation sites meet their permit criteria they will be self-sustaining in the absence of any management or care is flawed.”*
 - National Research Council Report 2001
- Rule requires:
 - Long-term management plans
 - Funding to cover stewardship tasks



Enhanced Public Participation

- New requirements for Permit Application Public notices
 - *How impacts will be avoided, minimized and compensated for*
- Public notices for proposed Bank/ILF projects
- Monitoring reports available



Implementation

- *“It could be the best of all worlds...or it could be the same old same old...It's all in the implementation.”*
 - Dr. Joy Zedler, Chair 2001 NRC Wetlands Mitigation Study Committee – EM.com, 4–27–08



Training

- Interagency Review Team training
 - June 2008 (again in June 2009)
- Corps/EPA staff MitRule training
 - August/September 2008
- Multi-agency MitRule training:
 - Baltimore, MD – November 20–21
 - Emeryville (Oakland), CA– December 9–10
 - Dallas, TX – January 27–28



Questions?

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Compensatory Mitigation Website:

– <http://www.epa.gov/wetlandsmitigation/>

Rule posted on the Corps HQ Website:

– <http://www.usace.army.mil/cw/cecwo/reg/>

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