

# Corps / EPA Compensatory Mitigation Rule Background & Principles



Regulatory Branch  
U.S. Army Corps of Engineers

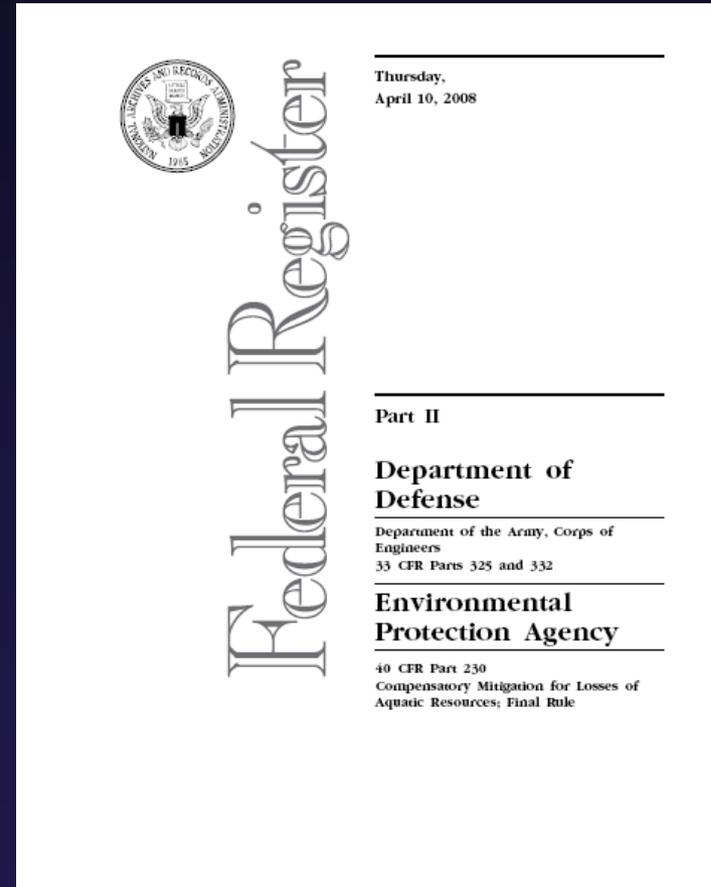
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency

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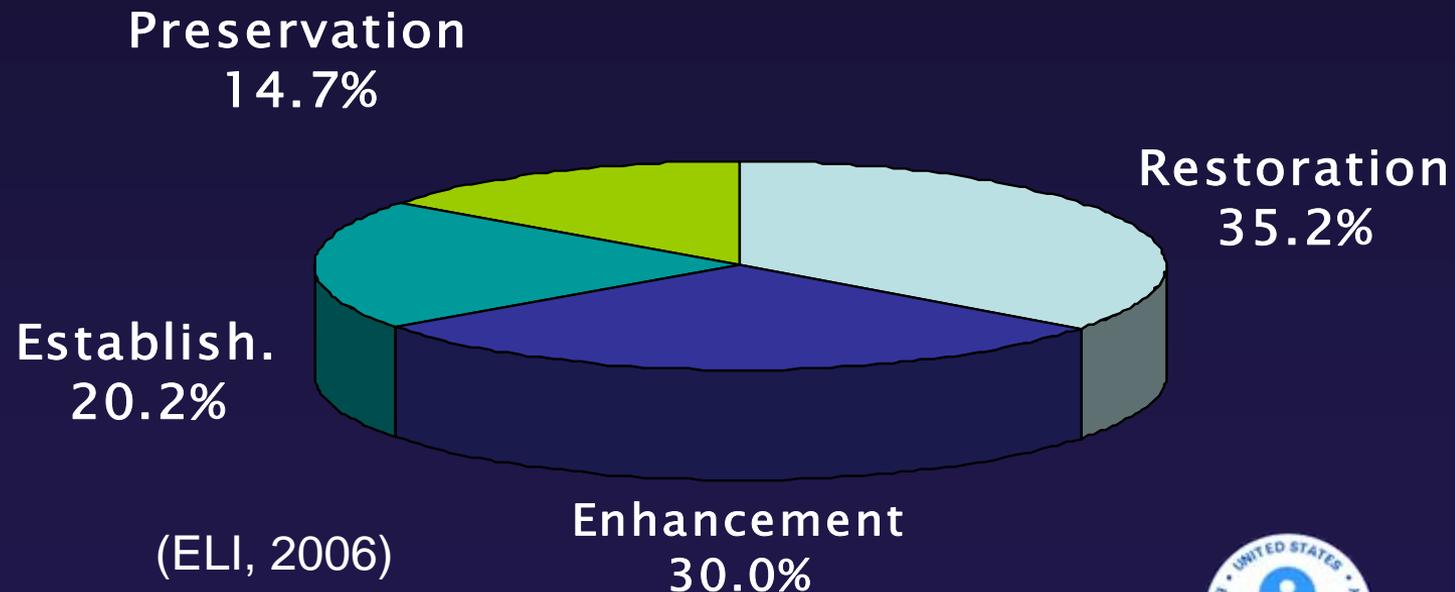
# Overview

- Background
- Major themes
- Changes from original proposal
- Stakeholder reaction
- Overview of rule



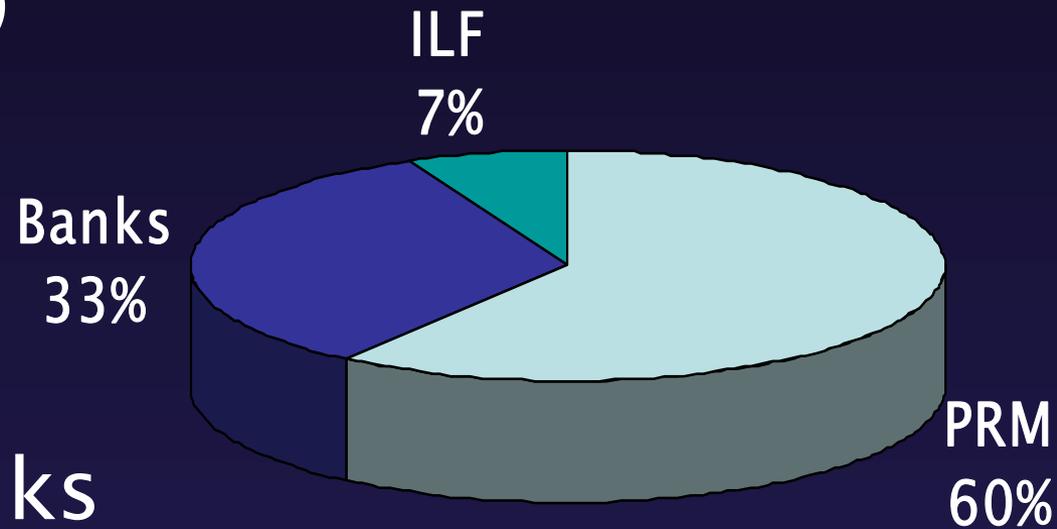
# Compensatory Mitigation

- 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)



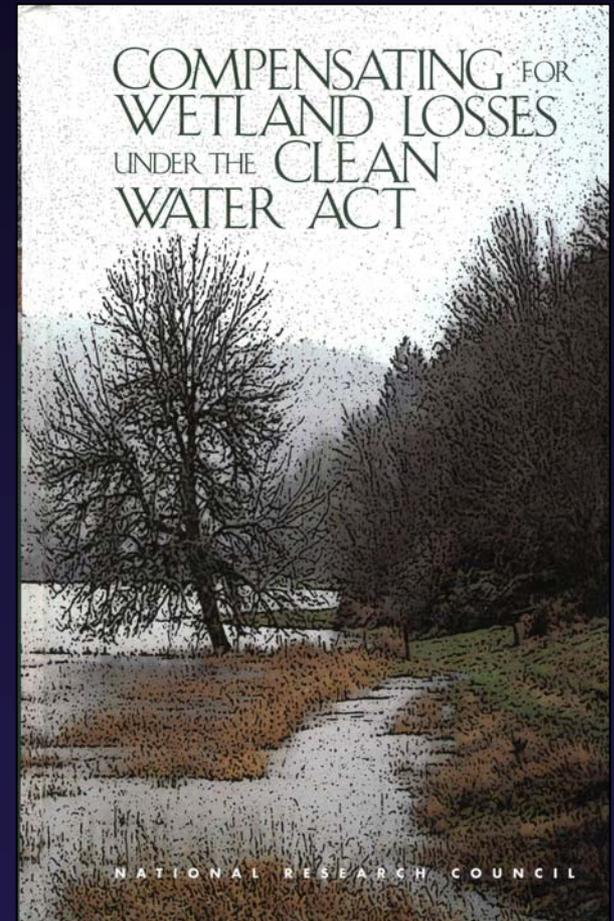
# Third-Party Mitigation

- 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
- 2002 – National Mitigation Action Plan
- 11/03 – Congressional directive
- 3/28/06 – Proposal in Fed Reg
- 6/30/06 – Close of comment period
- 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

- Sustainable compensatory mitigation
- Equivalent and effective standards
- Use of best available science
  - Addresses all applicable NRC recommendations
- Predictability and efficiency
- Expansion of public participation



# Proposed Rule

- Received 12,103 comment letters
  - 854 distinct letters
  - 11,249 form letters
- Most distinct letters express general support: “*necessary addition*”
- Some distinct letters/most form letters expressed opposition/suggested revisions



# Key Changes to Final Rule

1. Does not alter existing Regulations – Section 404(b)(1) Guidelines
2. Clarifies stream mitigation standards
3. Proper balance of binding requirements and discretion
4. Clarifies the watershed approach
5. Retains ILF mitigation – but with significant reforms...



# 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



# Stakeholder Reaction

- “[NAHB] has been pushing for the need to provide all kinds of mitigation options and **better incorporate science in the decision-making process**, and the new mitigation rule appears to do that”
  - Susan Asmus, National Association of Homebuilders – Associated Press, 3-31-08
- “This rule **strengthens regulatory requirements** for all three compensatory mitigation mechanisms and addresses several areas of policy that have not received adequate attention to date, including stream mitigation, ecological performance standards, and the watershed approach.”
  - Jessica Wilkinson, Environmental Law Institute – ELI Press Release, 4-1-08



# Stakeholder Reaction

- *“Despite mountains of evidence saying it's simply not possible to recreate the values and functions of streams and wetlands, the EPA and the Corps are **pushing forward this misguided policy**”*
  - Joan Mulhern, EarthJustice – InsideEPA, 3-31-08
- *“They have **moved forward significantly** on some of the administrative issues that have dogged mitigation”*
  - Julie Sibbing, National Wildlife Federation – Science, 4-11-08



# Stakeholder Reaction

- *“Rich Mogensen, past president of the National Mitigation Banking Association, believes ‘The Rule’... will promote a tripling in the size of the US wetland mitigation banking sector – from roughly 500 banks today to 1500 within the next three-to-five years, with continued growth thereafter.”*
  - Rich Mogensen, Mitigation Banker – in EM.com, 4-27-08



# Stakeholder Reaction

- *“It could be the best of all worlds...or it could be the same old same old.”*
- *“When we put together the National Research Council study, we said there were many advantages to mitigation banks...but now we have to wait and see how it works out. **It's all in the implementation.**”*
  - Dr. Joy Zedler, Chair 2001 NRC Wetlands Mitigation Study Committee – EM.com, 4-27-08



# Effect on Guidelines/Policies

## Replaces:

- 1995 mitigation banking guidance
- 2000 in-lieu fee guidance
- Regulatory Guidance Letter 02-02
- Certain provisions of 1990 Mitigation MOA

Reaffirms avoidance and minimization requirements [404(b)(1) Guidelines]



# Rule Highlights

- General considerations and requirements
  - Sections 1–3
- Administrative requirements and performance standards
  - Sections 4–7
- Third-party compensation
  - Section 8



# General Considerations and Requirements

## Sections 1–3

- Administrative background
- Definitions
- Compensation hierarchy
- Watershed approach
- General requirements



# General Considerations and Requirements

- Other F/S/T/L programs
  - Must fully offset 404 impacts
  - No “double dipping”
- Federally funded projects (e.g., WRP, CRP, Partners for Wildlife) may not generate compensation credits
  - “Supplemental” projects



# Administrative Requirements and Performance Standards

## Sections 4–7

- Mitigation plan requirements
- Ecological performance standards
- Monitoring of mitigation
- Management of mitigation



# Third-Party Compensation

## Section 8

### Mitigation Banks/ILF

- Must have instrument signed by DE
- Interagency review team (IRT)
- ILFs retained but with reforms
- Similar instrument requirements
- Similar timeframes for instrument development
- Dispute resolution process
- Modification of instruments



# Implementation

- Provisions (sections 1–7) applicable to all types of mitigation were effective **June 9, 2008**
- Banks
  - All approved by **July 9, 2008** are grandfathered
  - Any modification of instruments triggers compliance with requirements
- ILFs
  - Existing ILFs and those approved by **July 9, 2008**: 2–yr transition period
    - Additional 3 years possible if “*good cause*”



# 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/>

