

**A TRAINING COURSE FOR MITIGATION  
BANKING & IN-LIEU FEE PROGRAM  
INTERAGENCY REVIEW TEAMS**

**June 2011**

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*Overview of Federal Mitigation  
Third Party Mitigation Policy  
and Regulations*

*Session 1*

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U.S. Army Corps of Engineers

*Palmer Hough*

U.S. Environmental Protection Agency



*Overview of Federal  
Third Party Mitigation Policy and Regulations  
Session 1*

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- Brief History of Mitigation Banking and In-Lieu Fee Mitigation
- Third Party Mitigation in the Context of the 2008 Compensatory Mitigation Regulations

# *Brief History of Third Party Mitigation*



•Courtesy: Sam Collinson

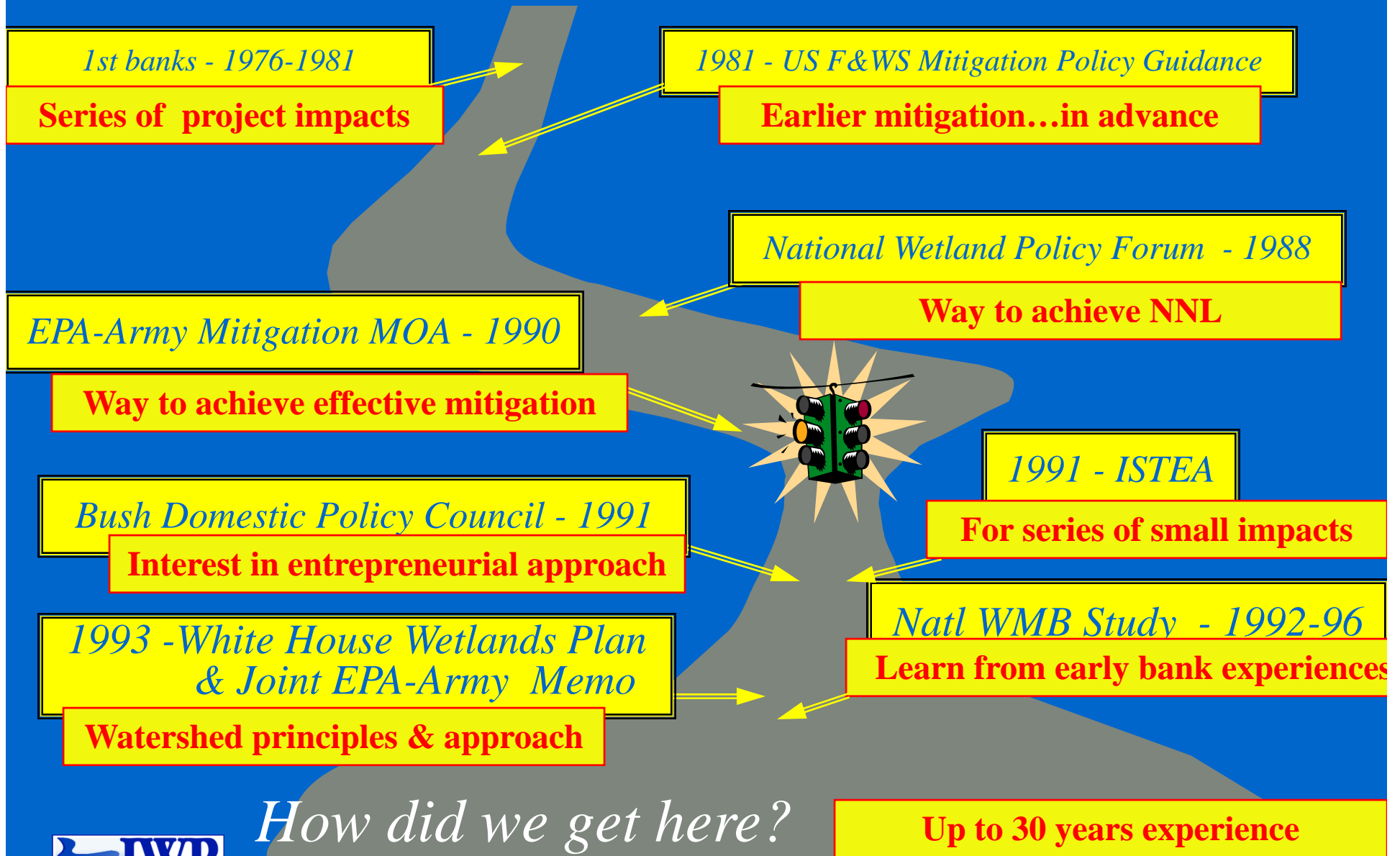
# FROM FIELD CONCEPT TO GUIDANCE (1995)



## Another Theme: Mitigation failures

- Best known studies of mitigation success/failure in Florida
  - by Ann Redmond & Kevin Erwin
- Problems included:
  - lack of oversight &
  - wetland creation on-site

# FROM FIELD CONCEPT TO GUIDANCE (1995)



# Findings from National Wetland Mitigation Banking Study

- Some early banks with problems --
  - Little Corps involvement in agreements
- Long time to plan & receive approval
- No entrepreneurial banks at study start

# FROM FIELD CONCEPT TO GUIDANCE

*1st banks - 1976-1981*

*1981 - US F&WS Mitigation Policy Guidance*

*National Wetland Policy Forum - 1988*

*EPA-Army Mitigation MOA - 1990*

*Bush Domestic Policy Council - 1991*

*1991 - ISTEPA*

*Natl WMB Study - 1992-96*

*1993 - White House Wetlands Plan  
& Joint EPA-Army Memo*

*Fed Banking Guidance - 1995*

*How did we get here?*

**Up to 30 years experience**



# Federal Guidance

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**December 1995**

- **Five agencies**
- **Encouraged banks to contribute to watershed goals**
- **Encouraged private sector financing**
- **Interagency Review Process – MBRTs & strive for consensus**

# DEFINED: A MITIGATION BANK

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## *(2008 Compensatory Mitigation Rule)*

- “... a site, or suite of sites,
- where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved
- for the purpose of providing compensatory mitigation for impacts authorized by DA permits.
- In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor.
- The operation and use of a mitigation bank are governed by a mitigation banking instrument.”

# Federal Mitigation Banking Guidance

## *Why banking - Contributions toward achieving NNL*

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- **May be ecologically advantageous for maintaining integrity of aquatic ecosystem to consolidate compensatory mitigation than to require many small, isolated or fragmented mitigation projects.**
- **Can bring together financial resources, planning, and scientific expertise not practicable to project-specific compensatory mitigation**
- **More efficient use of limited agency resources**
- **Typically planned and designed in advance of project impacts**

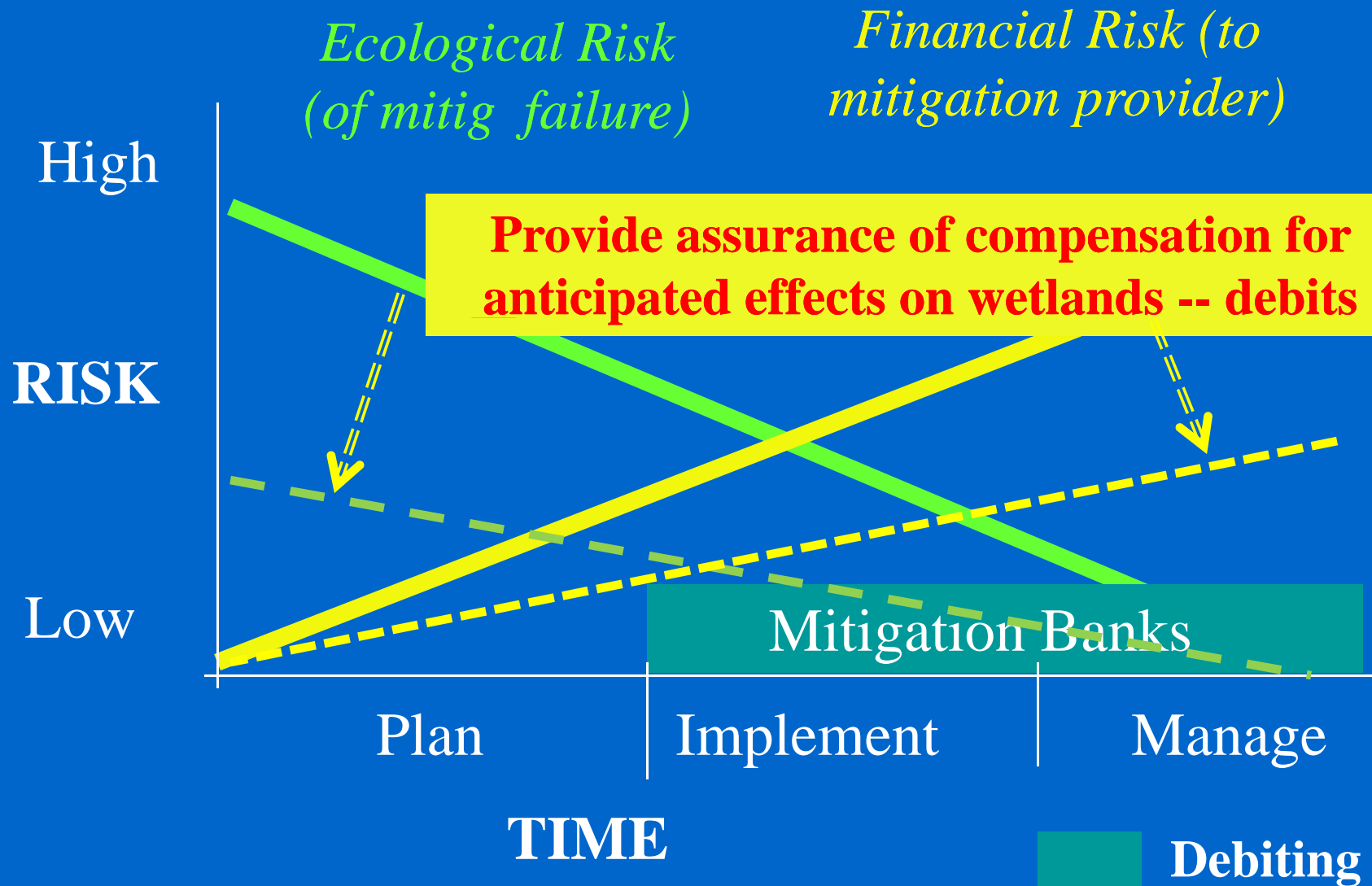
# Federal Mitigation Banking Guidance

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## Why entrepreneurial banking?

- ~~Maybe initial infatuation with private sector – third party?~~
- Can bring together financial resources, planning, & scientific expertise not available to gov't or others
- Entrepreneurial spirit could foster development & improvement of wetland design & research
- Competition, i.e., market-oriented approach could result in many banks across landscape, offering array of compensation options

# Mitigation Risk & Timing of Credit Availability



# TYPES OF WETLAND MITIGATION BANKS

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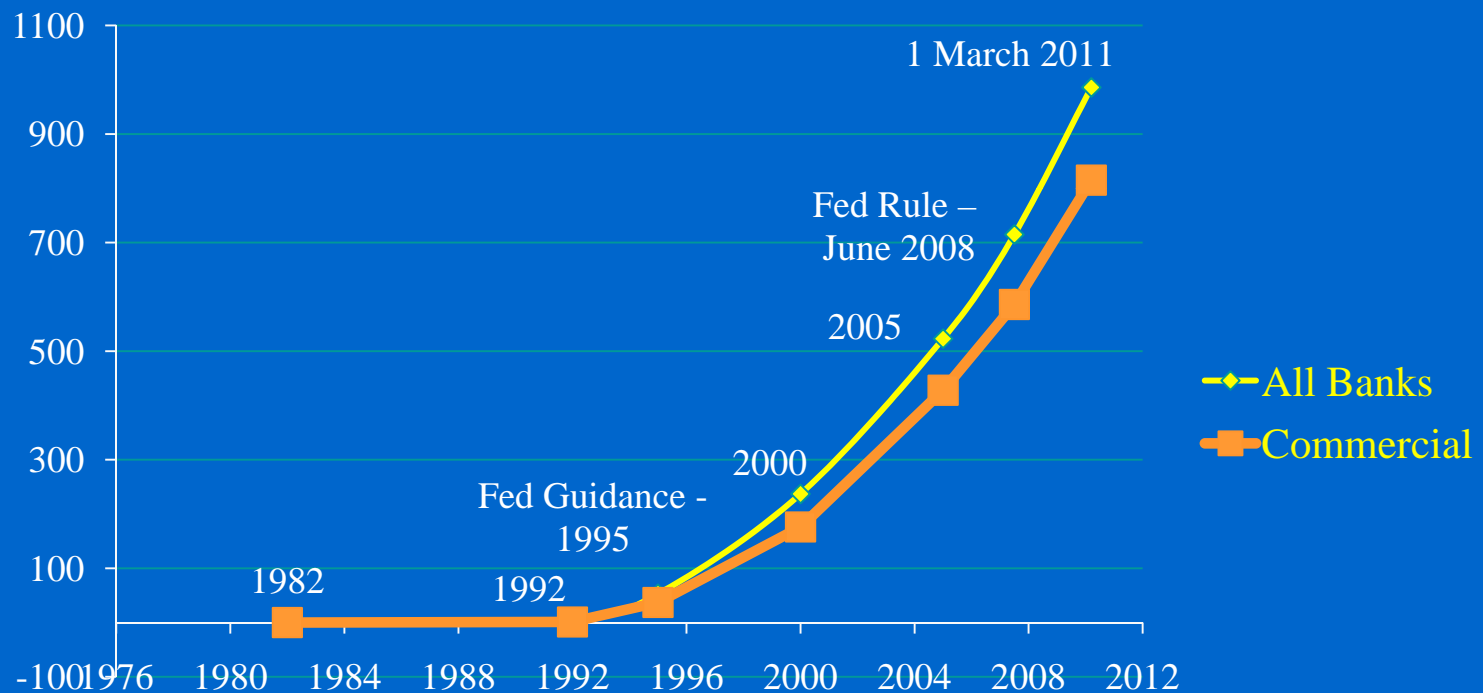
**Single Client**

**Commercial**

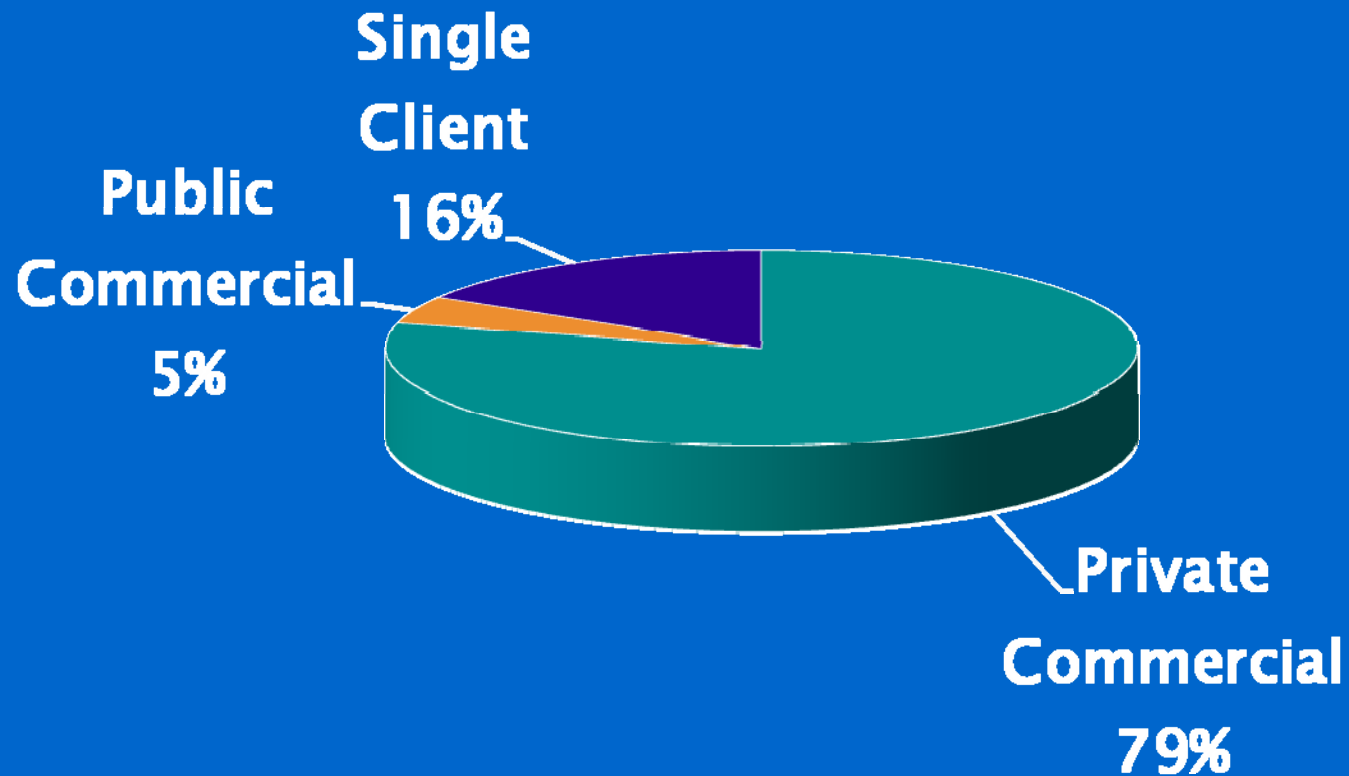
- **Private (entrepreneurial)**
- **Public**
- **Private non-profit**

# Mitigation Banks in RIBITS as of March 2011

## *Date of Approval*



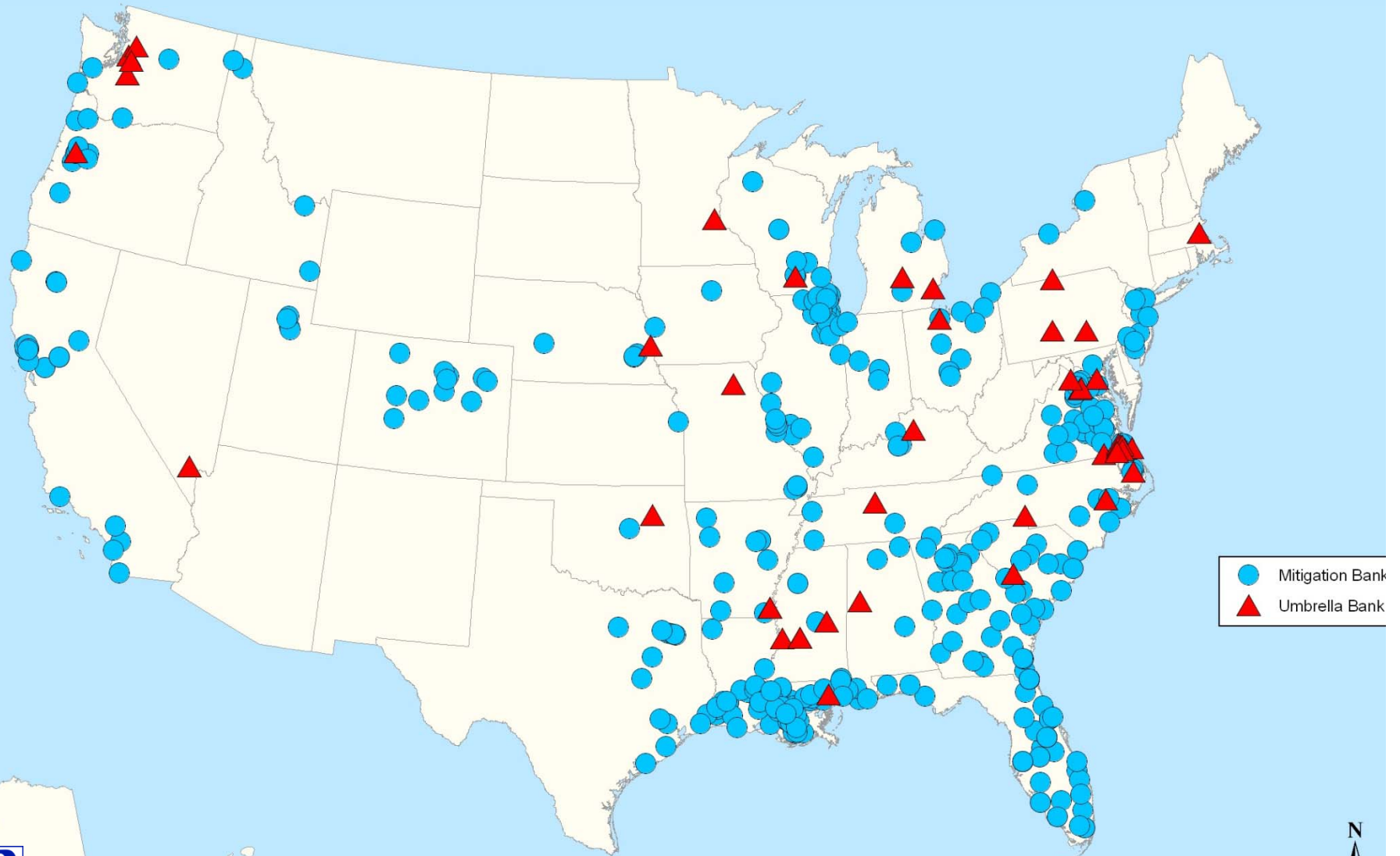
# Type of Bank



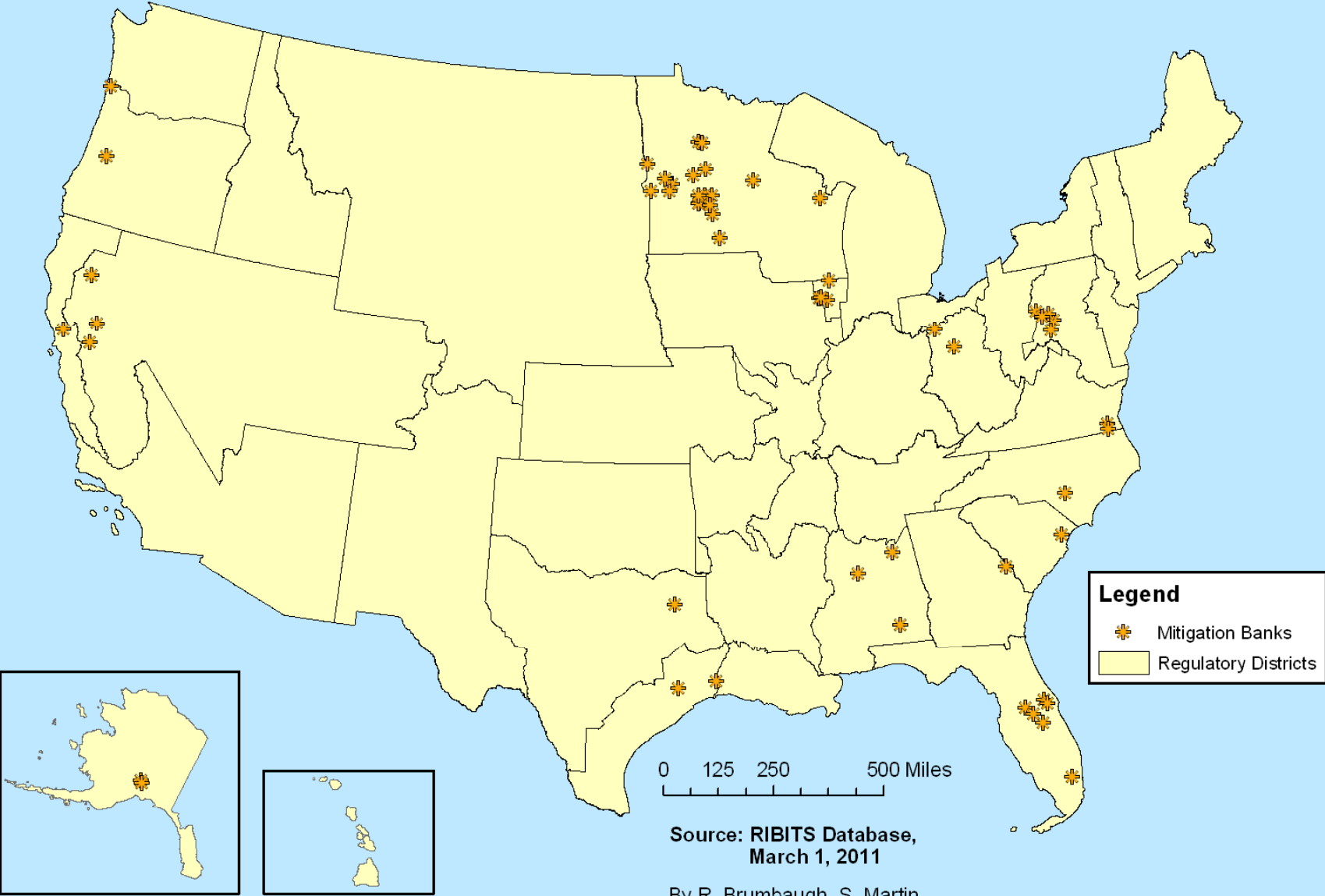
Source: RIBITS, March 2011

# Mitigation Banks 2005

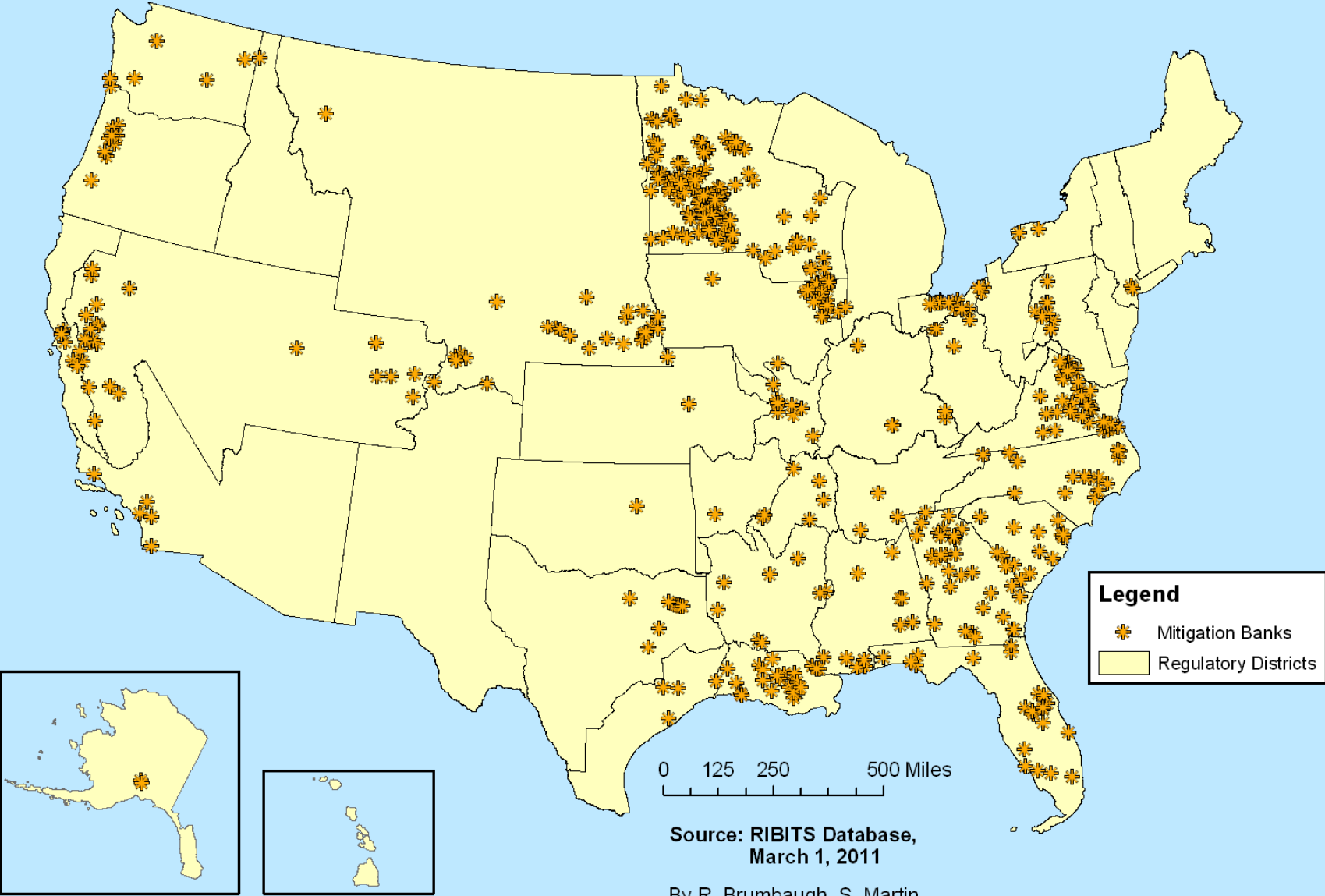
## Umbrella and Non-Umbrella



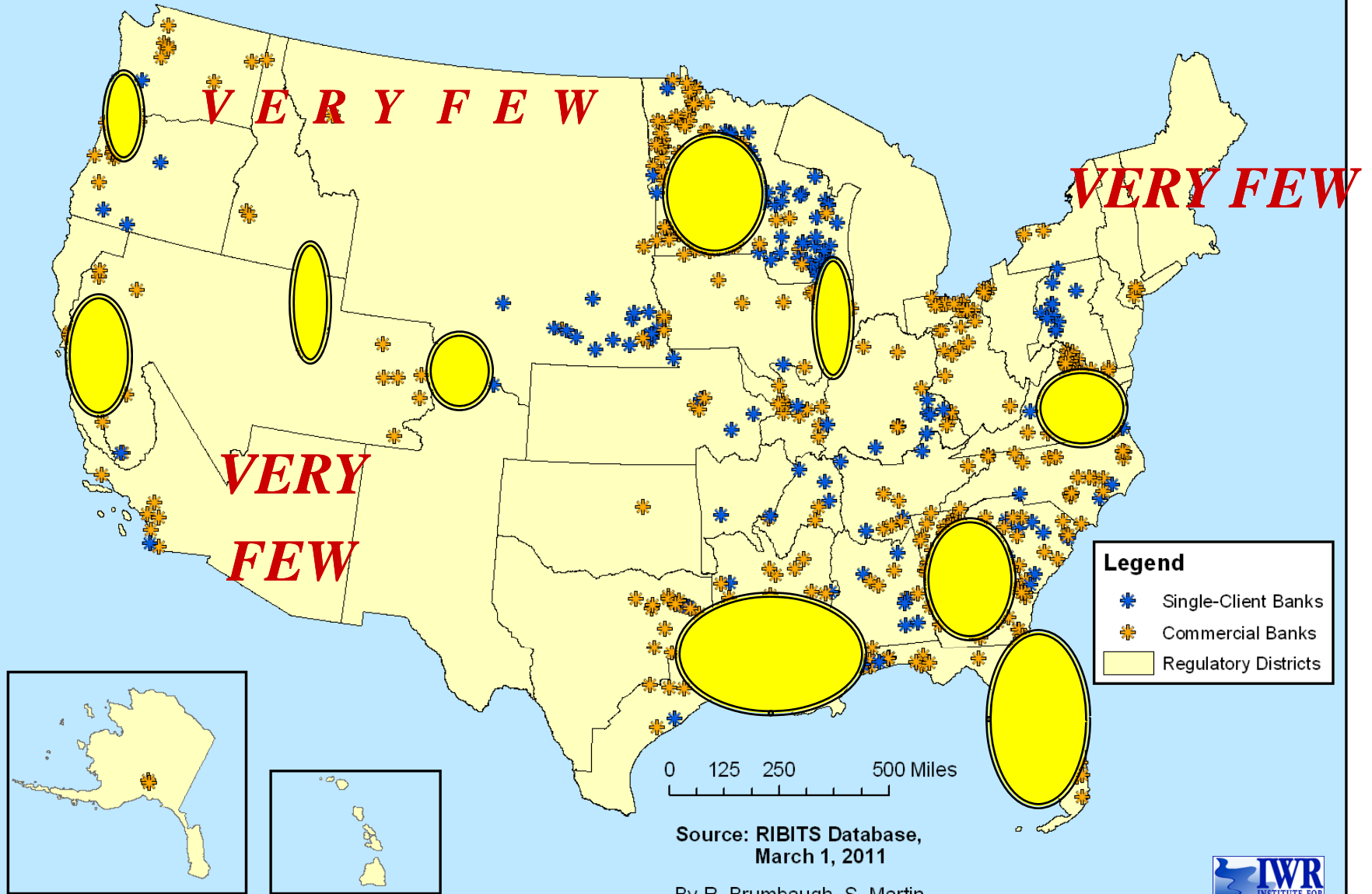
# All Approved Mitigation Banks, 1995



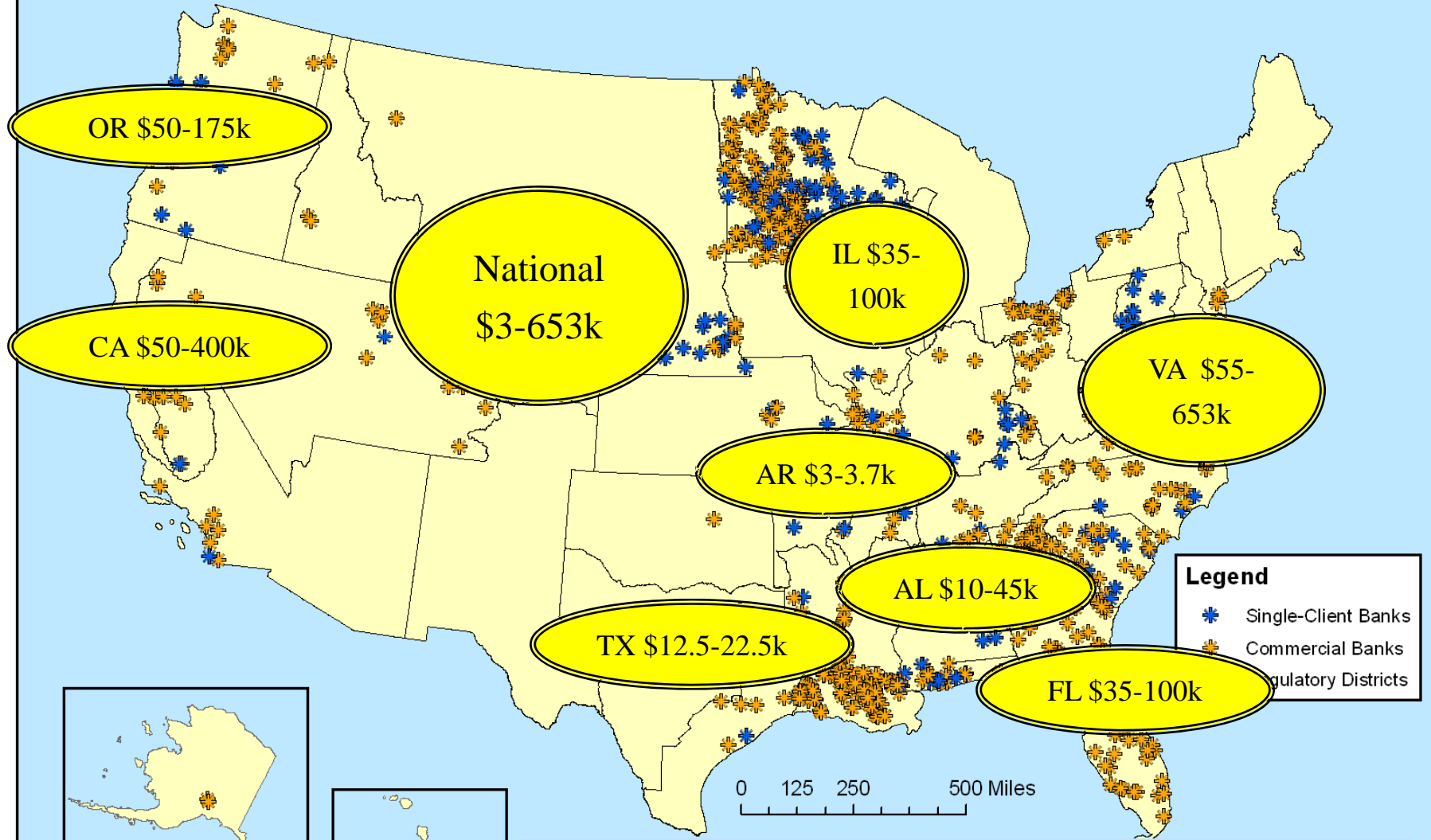
# All Approved Mitigation Banks, 2005



# All Approved Mitigation Banks, March 1, 2011



# Wetlands Credit Pricing



•From Ecosystem Marketplace – *State of Biodiversity Markets (2010)*

# MITIGATION BANKING

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Between Guidance & Rule – 1996 - 2008

- **1998**      **TEA-21**
  
- **1998**      **Emergence of In-Lieu Fee (ILF)  
Arrangements**

# In-Lieu Fee Arrangements

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- **Federal In-Lieu Fee Guidance Characterization (2000):**

*“In-lieu fee mitigation occurs in circumstances where a permittee provides funds to an in-lieu fee sponsor instead of either completing project-specific mitigation or purchasing credits from a wetland mitigation bank approved under the Banking Guidance.”*

## Early use of in-lieu fees: 1980s –mid 1990s

- **Arkansas Nature Conservancy Program, 1987**
  - **Wetlands Mitigation Trust Fund (Dade County, FL), 1987**
  - **Freshwater Wetlands Mitigation Trust Fund (Dade County, FL), 1982**
  - **Maryland Nontidal Wetlands Compensation Fund, 1988**
  - **Longleaf Pine Flatwood Wetlands Mitigation Trust, Louisiana, 1992**
  - **Vicksburg District Program (GP) – LA, MS, AR, 1987**
  - **Winfield Creek & Cricket Creek (DuPage County, IL) , 1993**
  - **Florida Mitigation Park Program 1986**
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- *National Wetlands Mitigation Banking Study Working Paper: Case Studies & Lessons About Fee-Based Compensatory Wetlands Mitigation, 1993*
  - *American Petroleum Institute Disc Paper 77: Alternative Wetland Mitigation Programs, 1995*

## **Sponsors of In-Lieu Fee Programs**

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(Source: Environmental Law Institute 2006)

- **Private Non-Profit Conservation Organizations (59%)**
- **State Agencies (24%)**
- **Local Governments (14%)**
- **Public University (2%)**

## Increased Use & Problems with In-Lieu Fee Arrangements

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- **Emergence of In-Lieu Fee (ILF) Arrangements**
  - 87 active ILFs (72 administered by Corps) by 2000 – *Environmental Law Institute, 2002*
- **Problems & Issues**
  - Tracking in-lieu fee activity
  - Accrual of funds without project implementation
  - Accountability/responsibility for success
  - Use of preservation

# THIRD PARTY MITIGATION

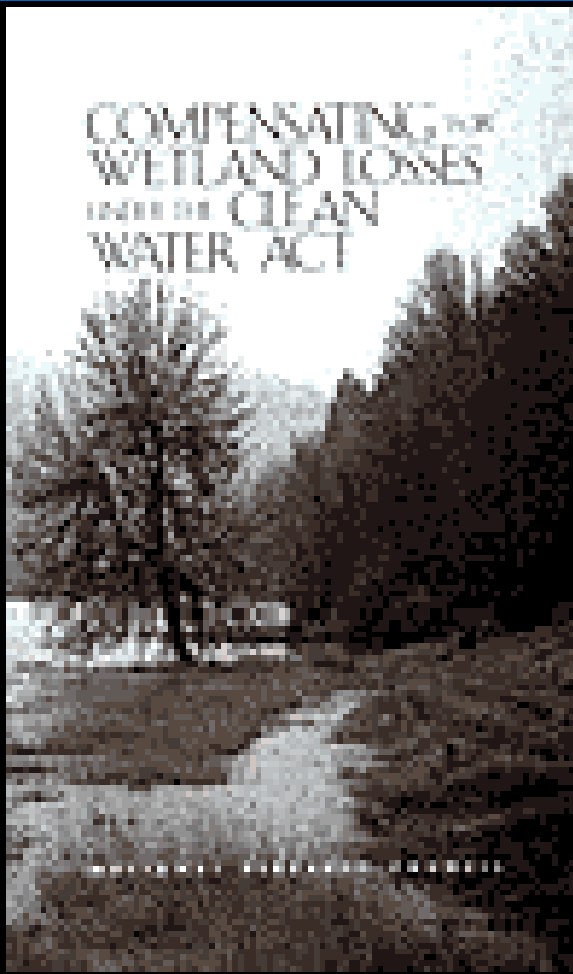
Between Guidance & Rule – 1996 - 2008

- 1998            **TEA-21**
- 1998            **Emergence of In-Lieu Fee (ILF) Arrangements**
- 2000            **Federal Interagency ILF Guidance**
- 2001            **General Accounting Office Report on ILF Arrangements**
- 2001            **National Research Council:**  
*“Mitigating Wetland Losses”*



# THIRD PARTY MITIGATION

Between Guidance & Rule – 1996 - 2008



## Some Conclusions

Performance expectations unclear,  
compliance not assured nor attained

Watershed approach: improves permit  
decision making

Third-party compensation advantages

# THIRD PARTY MITIGATION

Between Guidance & Rule – 1996 - 2008

- 1998 TEA-21
- 1998 Emergence of In-Lieu Fee (ILF) Arrangements
- 2000 Federal Interagency ILF Guidance
- 2001 General Accounting Office Report on ILF Arrangements
- 2001 National Research Council: *“Mitigating Wetland Losses”*
- **2002 Corps Regulatory Guidance Letter  
(RGL 02-02)**

# THIRD PARTY MITIGATION

Between Guidance & Rule – 1996 - 2008

- 1998 TEA-21
- 1998 Emergence of Interagency
- 2000 Federal Interagency
- 2001 General Accounting
- 2001 National Research
- 2002 Corps Regulation

## Regulatory Guidance Letter

- Stream mitigation
- Concurrent or advance mitigation
- NRC guidelines

- **2003-2005 Federal Interagency Mitigation Action Plan**

# MITIGATION BANKING

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Between Guidance & Rule – 1996 - 2008

## MORE MAJOR ACTIONS

- **1997-2007** Various Court Cases (including SWANCC 2001, Carabell-Rapanos 2006)
- **2004** National Defense Authorization Act  
 DOD Mitigation Rule
- **2007** Water Resources Development Act, Section 2036, Mitigation for Fish & Wildlife & Wetlands Losses

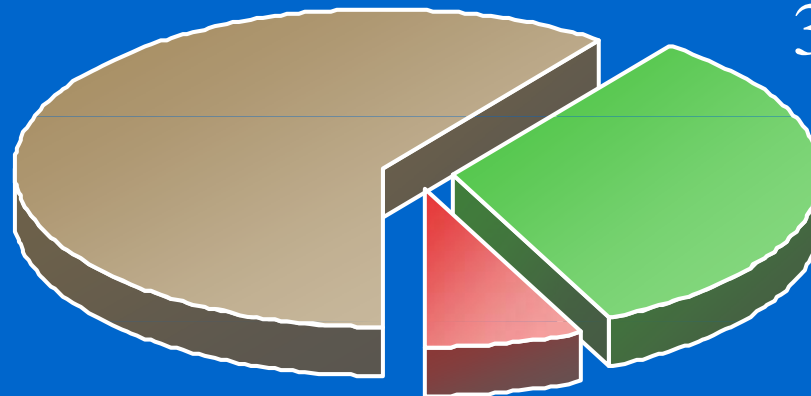
# Types of Compensatory Mitigation

Permittee-  
Responsible

60%

Mitigation Banks

33%



In-Lieu Fees 7%