

# 2008 Compensatory Mitigation Rule

Overview and General Requirements

June 2011



# Rule Structure

- General considerations and requirements (Sections 1-3)
  - Administrative background
  - Definitions
  - Compensation hierarchy
  - Watershed approach
  - General requirements
- Administrative requirements and performance standards (Sections 4-7)
  - Mitigation plan requirements
  - Ecological performance standards
  - Monitoring of mitigation
  - Management of mitigation

# Rule Structure

- Mitigation banks and in-lieu fee programs (section 8)
  - Must have instrument signed by district engineer
  - Interagency review team (IRT)
  - 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**
- Mitigation banks
  - All approved by **July 9, 2008** are grandfathered
  - Any modification of instruments triggers compliance with requirements
- In-Lieu Fee Programs
  - Existing ILFs and those approved by **July 9, 2008**
    - Two year transition period
  - Additional three years possible if “*good cause*”

# General Mitigation Requirements

# Complete Application

(33 CFR 325.1)

Mitigation statement required for individual §404 permit applications

- Mitigation statement: how avoidance, minimization, and compensation will be accomplished



# General Considerations

*(33 CFR 332.3(a))*

- Objectives
  - Offset impacts
  - Practicable
  - Environmentally preferable
- Requirements commensurate amount and type of impacts
- Methods
  - Restoration
  - Enhancement
  - Establishment
  - Preservation



# Type and Location of Mitigation

*(33 CFR 332.3(b))*

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

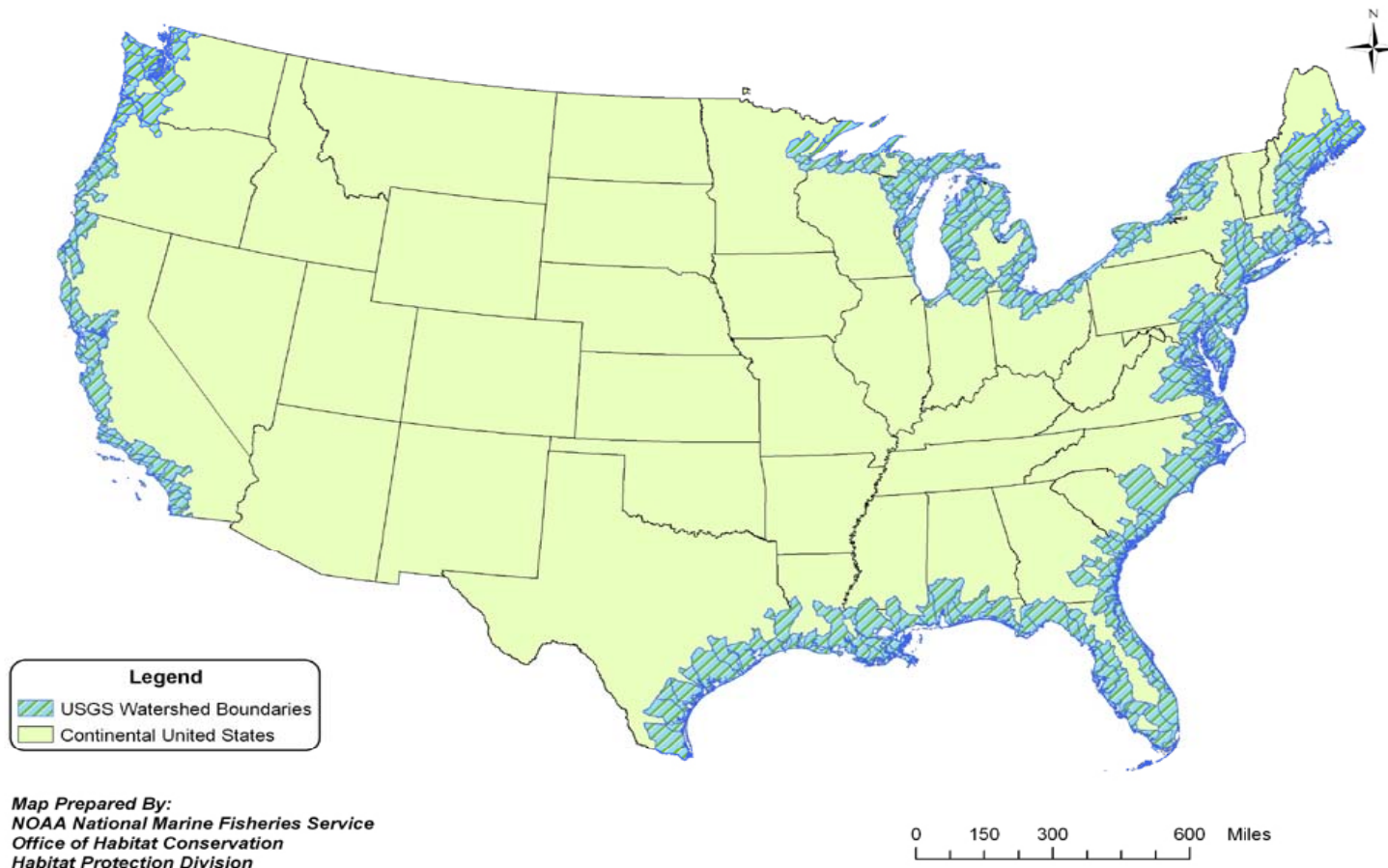
- Consider:
  - Habitat diversity
  - Connectivity
  - Land use trends
  - Compatibility with adjacent uses
  - [see also 332.3(d)]
- Marine resources
- Risks to aviation
- Coastal watersheds





# Defining “Coastal”

Figure 1: Coastal Watersheds Based Upon U.S. Geological Survey Hydrologic Units.





## Coastal Wetlands Trends 1998-2004 (including Great Lakes)

- Average annual net loss of 59,000 acres
- Freshwater wetlands experienced 82% of that loss
- About 70% of the loss was to development
- The Gulf of Mexico experienced the majority of the wetland loss

# Preference Hierarchy for Mitigation

*(33 CFR 332.3(b))*

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
- Consider what is “environmentally preferable” (33 CFR 332.3(a)(1))
  - Also consider likelihood of success, risk, uncertainty, and temporal loss

# Watershed Approach

*(33 CFR 332.3(c))*

- Existing watershed plans
- Without suitable plan, use available information on condition and needs
- Consider landscape position and sustainability
- Provide suite of functions
- Level of information and analysis commensurate with impacts

# General Mitigation Requirements

- Mitigation type (332.3(e))
  - In-kind preferred
  - Difficult to replace resources (e.g., bogs, fens, streams)
- Amount of compensation (332.3(f))
  - 1:1 minimum\*
  - Should use assessment method, where practicable
- Timing (332.3(m))
  - Temporal Losses

# General Mitigation Requirements

*(33 CFR 332.3(d) and (i))*

- Site selection
  - Physical and chemical characteristics
  - Watershed scale features
  - Size and location
  - Adjacent land use
  - Foreseeable effects of project

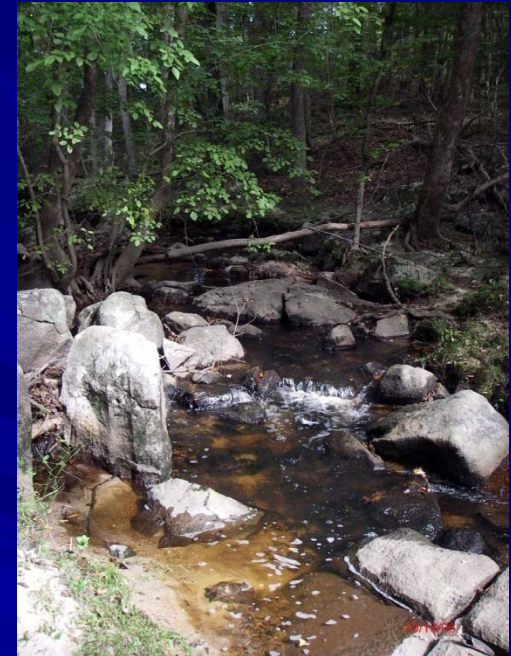
- Buffers



# General Mitigation Requirements

*33 CFR 332.3(h)*

- Use of preservation\*:
  - Provides important functions
  - Contributes to watershed sustainability
  - Appropriate and practicable
  - Permanently protected
  - Under threat of destruction or adverse modification



\* Preferably in conjunction with restoration and other methods

# General Mitigation Requirements

*(33 CFR 332.3(j))*

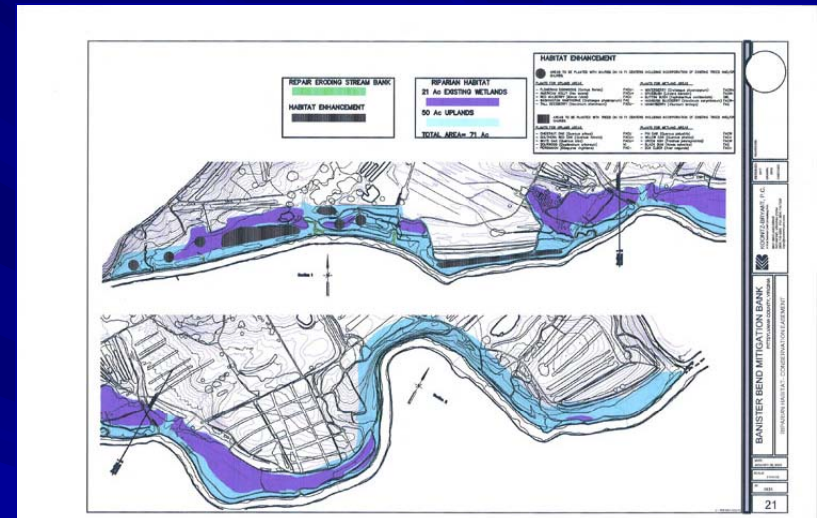
- Mitigation may be sited on public or private lands (332.3(a)(3))
- May also satisfy requirements of other Federal, State, Tribal, or local programs
  - Must provide appropriate compensation to offset 404 impacts
  - No “double dipping”
- Federally funded projects (e.g., WRP, Partners for Wildlife) may not generate compensation credits
  - “Supplemental” projects



# Mitigation Plan Components

(33 CFR 332.4(c))

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



# General Mitigation Requirements

*(33 CFR 332.3(k),(n))*

- Enforceable permit conditions
  - Individual permits: Final mitigation plan approved prior to permit issuance
  - General permit: Final mitigation plan approved prior to initiating work
- If using mitigation bank or in-lieu fee program, provide:
  - Baseline (impact) information
  - Determination of credits
- Financial assurances to ensure a “high level of confidence”

# Ecological Performance Standards

(33 CFR 332.5)

- Objective and verifiable
- Based on best available science assessed in a practicable manner
- Enforceable



# Ecological Performance Standards

*(33 CFR 332.5)*

- Focus on a measurable outcome, NOT completion of an action
- Include clear measures:
  - Qualitative or
  - Quantitative



# Monitoring

(33 CFR 332.6)

- To determine if the mitigation 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 report submittal

# Management of Mitigation Projects

*(33 CFR 332.7)*

- Site protection
- Maintenance Plan
- Adaptive management plan
- Long-term management
  - Identify responsible party
  - If long-term management is required, funding arrangements must be described



# If You Have 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/CECW/Documents/cecwo/reg/materials/33cfr332.pdf>