

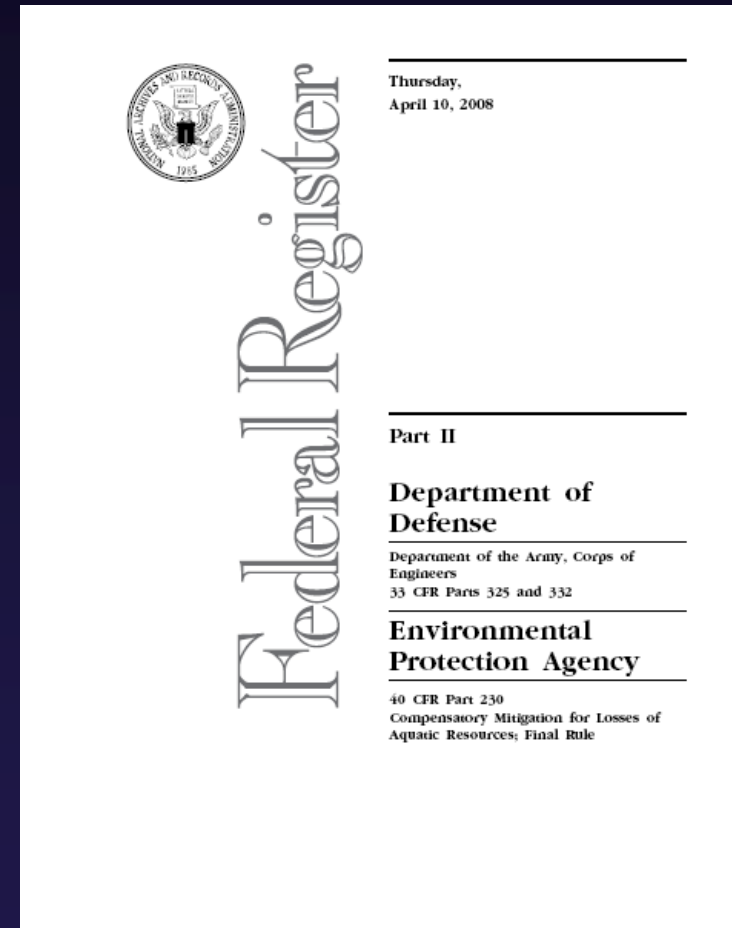
2008 Compensatory Mitigation Rule: *Overview and Highlights*

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U.S. Environmental Protection Agency
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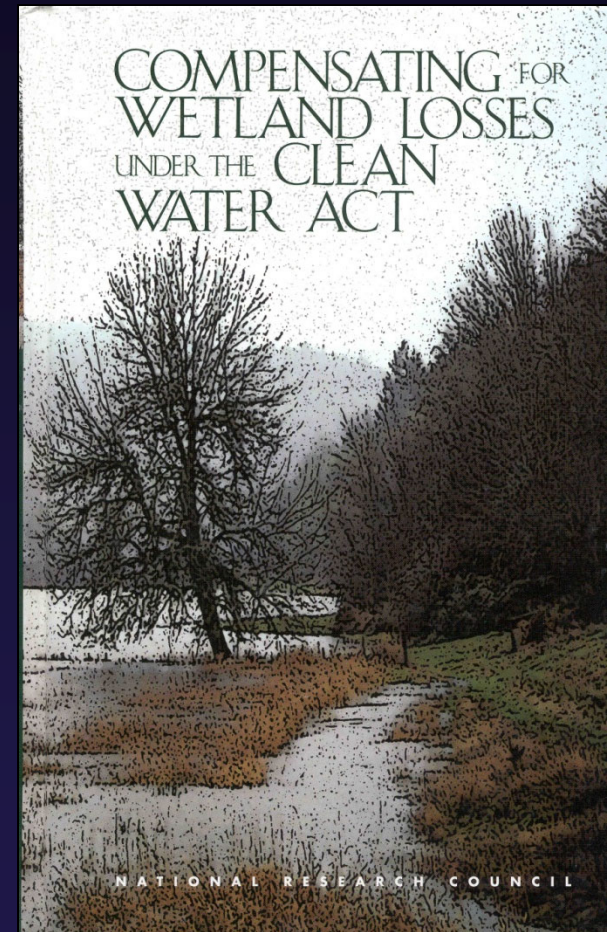
Outline

- Background
- Rule goals
- Rule structure – 8 sections
- Highlight key provisions in each section



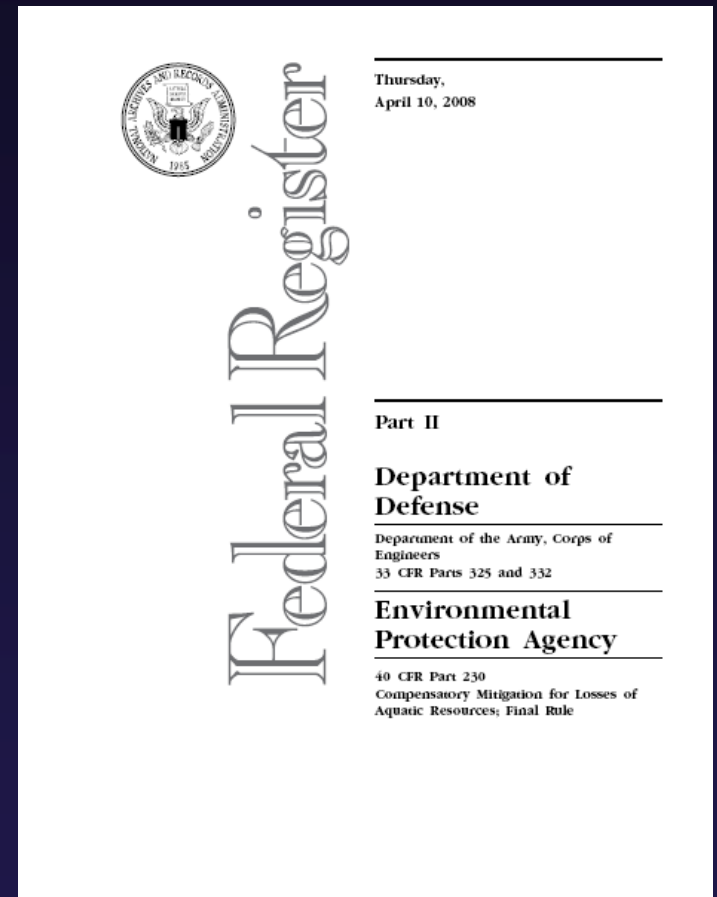
Background/Drivers

- 1999 – EPA/Corps seek NRC study
- 2001 – NRC study published
- 11/03 – Congressional directive,
 - 2004 National Defense Authorization Act
- 3/28/06 – Proposal in Fed Reg
- 4/10/08 – Final Rule in Fed Reg
- 6/9/08 – Effective date of Rule



Compensation Rule: Goals

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



Rule Table of Contents

Corps: 33 CFR 332 / EPA: 40 CFR 230

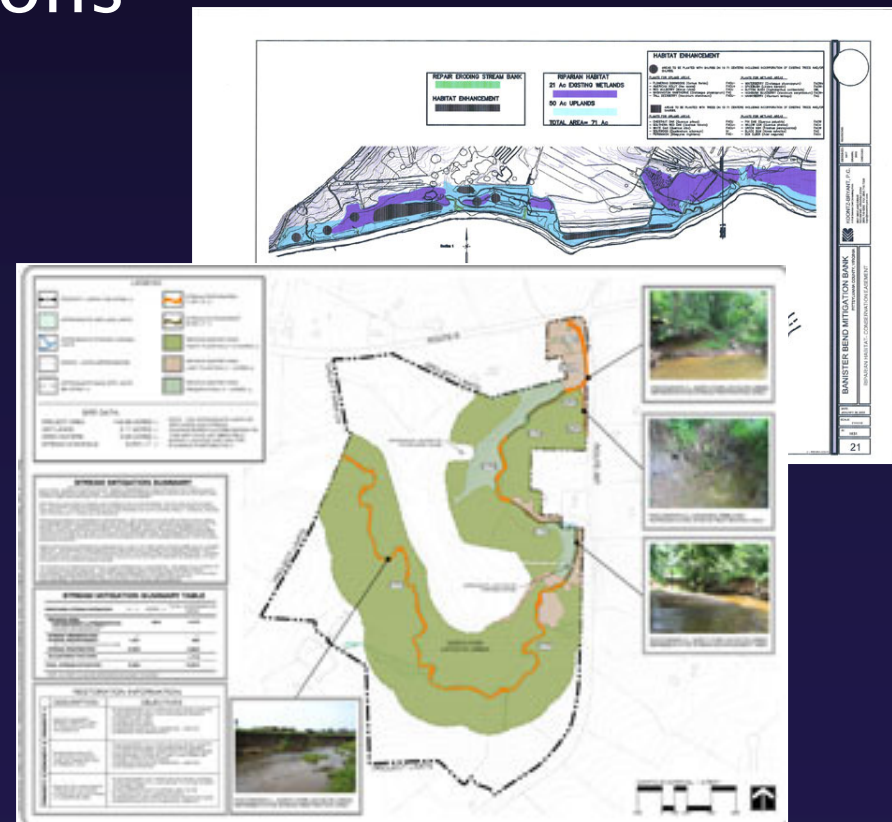
1. Purpose and general considerations
2. Definitions
3. General compensatory mitigation requirements
4. Planning and documentation
5. Ecological performance standards
6. Monitoring
7. Management
8. Mitigation banks and in-lieu fee (ILF) programs

Complete Application

(33 CFR 325.1(d)(7) & 332.4(b))

Mitigation statement required for individual §404 permit applications

- Mitigation statement: how avoidance, minimization, and compensation will be accomplished
- PN describes proposed avoidance, minimization and amount, type, and location of any proposed compensatory mitigation



1. Purpose and General Considerations (332.1)

- *Purpose*
 - Standards/criteria for all three compensation mechanisms: PRM, banks, ILF
 - Equivalent standards (per NDAA of 2004)
- *Applicability* – not “when” but “how”
- *Sequencing* – still avoid and minimize first
- What about previous guidance?

2. Definitions (332.2)

- 43 definitions
- Most based on previous definitions
- New ones include:
 - Adaptive management
 - Advance credits
 - Temporal loss
 - Watershed approach
 - Watershed plan



Watershed



3. General Compensatory Mitigation Requirements (332.3)

- Objectives
- 4 Compensation Methods
- Type and location
- Compensation hierarchy
- Watershed approach
- Site selection criteria
- Amount
- Preservation criteria
- Buffers
- Relation to other programs
- Timing of plan approval
- Party responsible
- Timing of project implementation
- Short-term financial assurances

Type and Location of Mitigation (332.3(b))

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

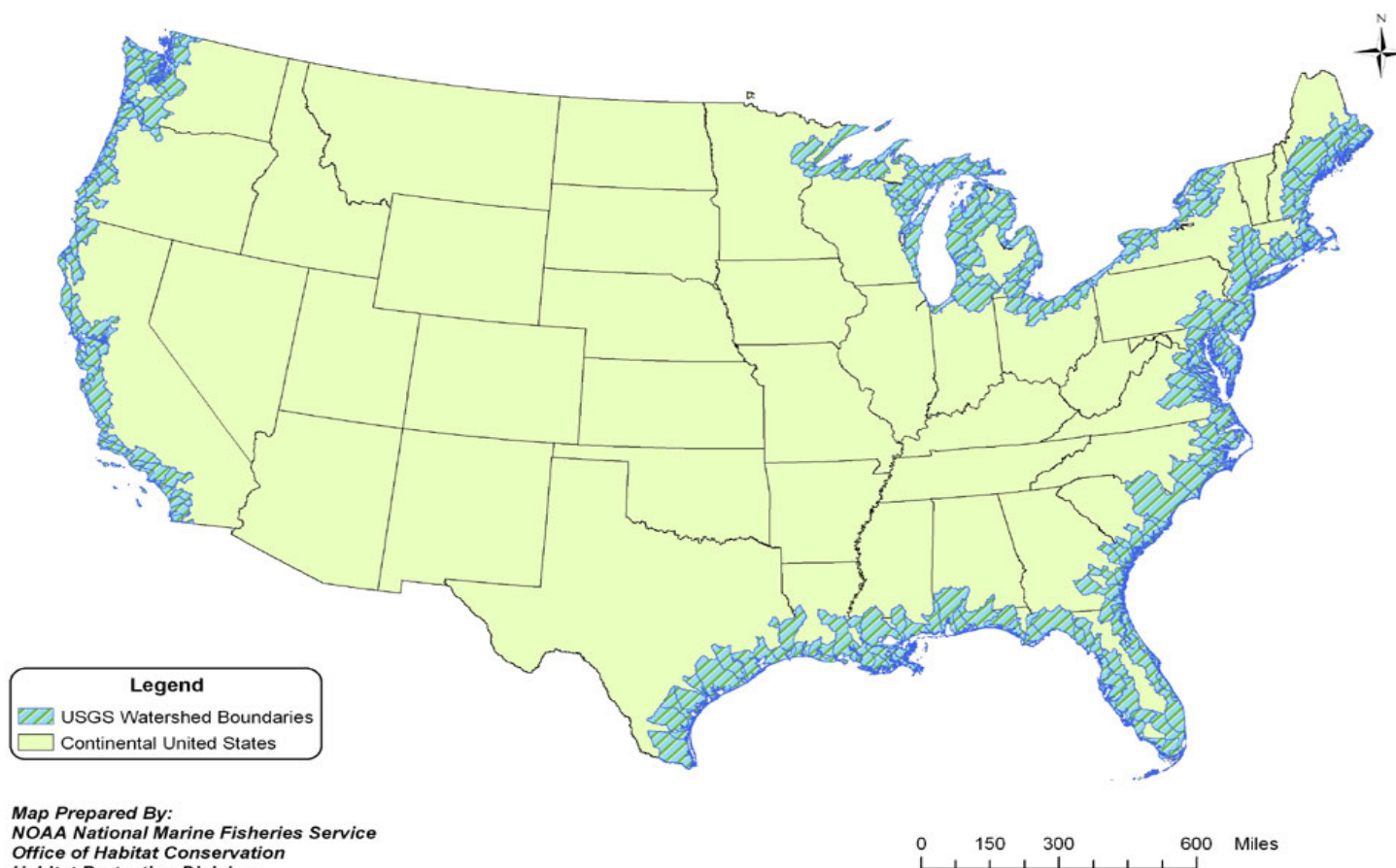
- Consider:
 - Habitat diversity
 - Connectivity
 - Land use trends
 - Compatibility with adjacent uses
 - [see also 332.3(d)]
- Marine resources
- Risks to aviation
- Coastal watersheds





Defining “Coastal”

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





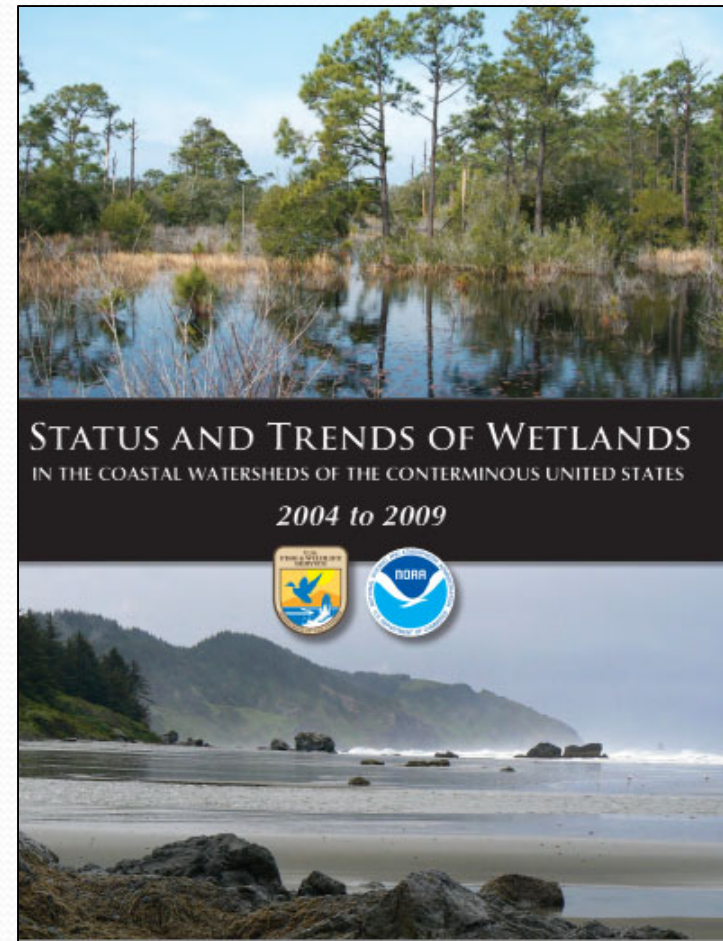
Coastal Wetlands Trends (including Great Lakes)

1998-2004

- Average annual net loss of 59,000 acres

2004-2009

- Average annual net loss of 80,160 acres
- 25% increase from previous reporting period



Preference Hierarchy for Compensation (332.3(b))

1. Mitigation bank credits/In-lieu fee released credits
 2. In-lieu fee advance credits
 3. Permittee-responsible mitigation
 - Using a watershed approach
 - On-site and/or in-kind
 - Off-site and/or out-of-kind
- Consider what is “environmentally preferable” (33 CFR 332.3(a)(1))
 - Also consider likelihood of success, risk, uncertainty, and temporal loss

Type and Amount of Mitigation

(332.3(e) and (f))

- Mitigation type
 - In-kind preferred
 - Difficult to replace resources (e.g. bogs, fens, streams)
- Amount of compensation
 - 1:1 minimum*
 - Should use assessment methods



Watershed Approach Overview

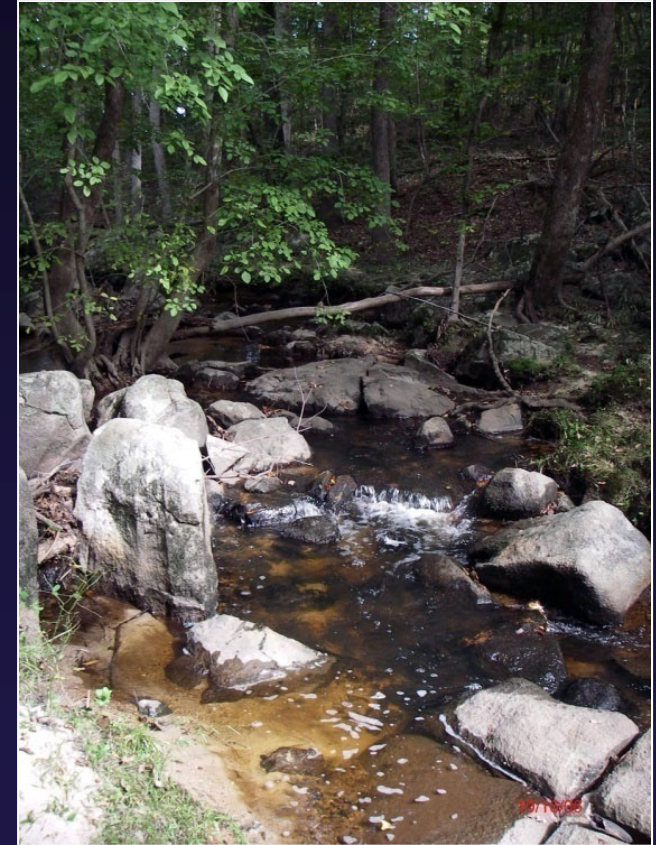
(332.3(c)(1))

- Watershed approach is a general framework for better decision-making for compensatory mitigation
- Ultimate goal: “maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites”
- Watershed approach must be used
 - “to the extent appropriate and practicable”
- May use an existing watershed plan
 - Watershed plan may identify priority sites for aquatic resource restoration and protection
 - If no plan or suitable plan, watershed approach should be based on information from sponsor or other sources
 - Does not require development of a watershed plan

Preservation Criteria

(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



Relation to Other Programs

(332.3(a) and (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



Kimball Island Mitigation Bank, Sacramento County, CA. – a joint Conservation-Wetland Mitigation Bank. It provided both Endangered Species Act and Clean Water Act credits.

4. Planning and Documentation (332.4)

Mitigation Plan Components (332.4(c))

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

5. Ecological Performance Standards (332.5)



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



6. Monitoring (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



7. Management (332.7)

- Site protection instrument
 - Goal “permanent protection”
- Maintenance Plan
- Adaptive management plan
- Long-term management
 - Identify responsible party
 - Describe necessary tasks and funding arrangements



8. Mitigation Banks and ILF Programs (332.8)

- Must have instrument signed by DE
 - Instrument requirements
 - Service areas, credit release schedules, reporting
 - Instrument review/modification process
- **Interagency review team (IRT)**
- Dispute resolution process
- Grandfathering provisions
 - Banks approved by 7/9/08 – grandfathered
 - ILFs approved by 7/9/08 – had until 6/9/13 to get certified under the rule

New Rulemaking

- Six areas of potential focus
 - Bank/ILF review process
 - Eliminate IRT
 - Retain, revise IRT review process
 - Financial assurances
 - ILF program account
 - Multi-purpose banks
 - State/Tribal assumption
 - Stream mitigation crediting



If You Have Questions

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- RIBITS Website for Bank/ILF Tracking:
 - <https://ribits.usace.army.mil>
- EPA Compensatory Mitigation Website:
 - <https://www.epa.gov/cwa-404/compensatory-mitigation>

