

# In-Lieu Fee Programs

*Session 7*



# Overview

## Part A

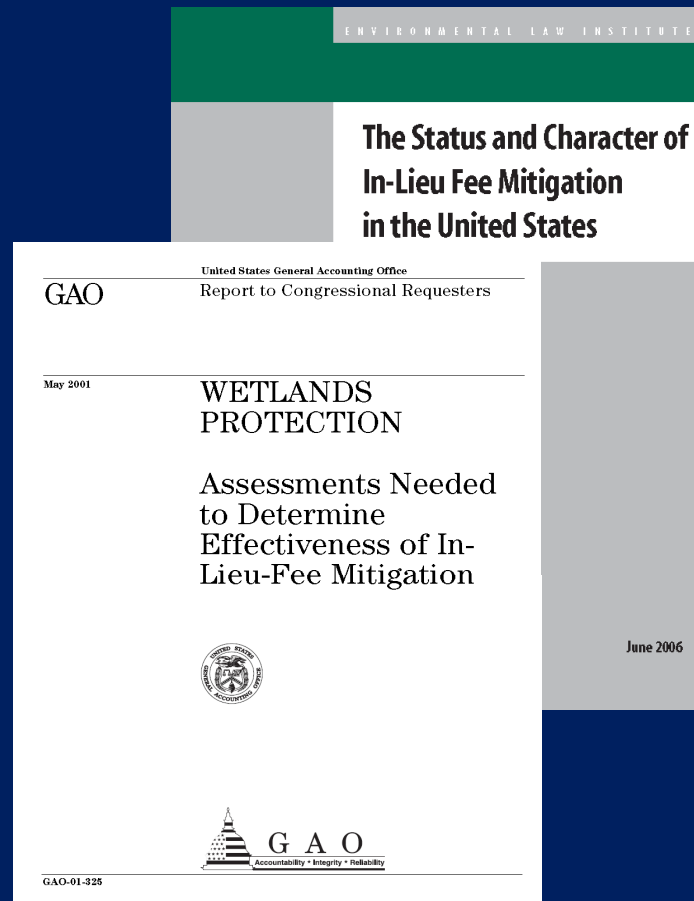
- Background/Status of ILFs
- Instrument development
- ILF sponsors
- Service Areas
- ILF program account
- Legal responsibility
- Compensation Planning Framework

## Part B

- Advance credits
- Credit release schedule
- Fee schedules for advance credits
- ILF project development
- ILF project approval
- Financial assurances

# Background: Problems with Pre-Rule ILF Practice

- Some ILFs:
  - Lacked transparency and accountability with ILF funds management
  - Did not collect sufficient funds
  - Did not implement projects in a timely manner
    - Temporal losses
  - Co-mingled ILF funds with non-ILF funds
    - Subsidizing compensation?
- 2006 Proposed Mitigation Rule
  - Included phase-out of ILFs



# Why keep ILF programs?

- 3<sup>rd</sup> party mitigation where there are no banks
- Compensation for a variety of aquatic resources
- Sponsor, Corps, and IRT can collaborate on site selection
  - Sponsor conducts analysis of watershed needs
- Sponsors typically have interest in resource restoration & conservation
- Rather than eliminate ILF, attempt to reform it



# ILF Reforms for Equivalency

- The final rule retains ILF programs but with significant reforms:
  - Limits on who can be sponsor
  - Advance planning requirement
  - Cap on “advance” credits
  - Financial accounting requirements
  - Provisions to address timing of projects
  - Similar admin/ecological standards as banks
  - Same public/IRT review process as banks

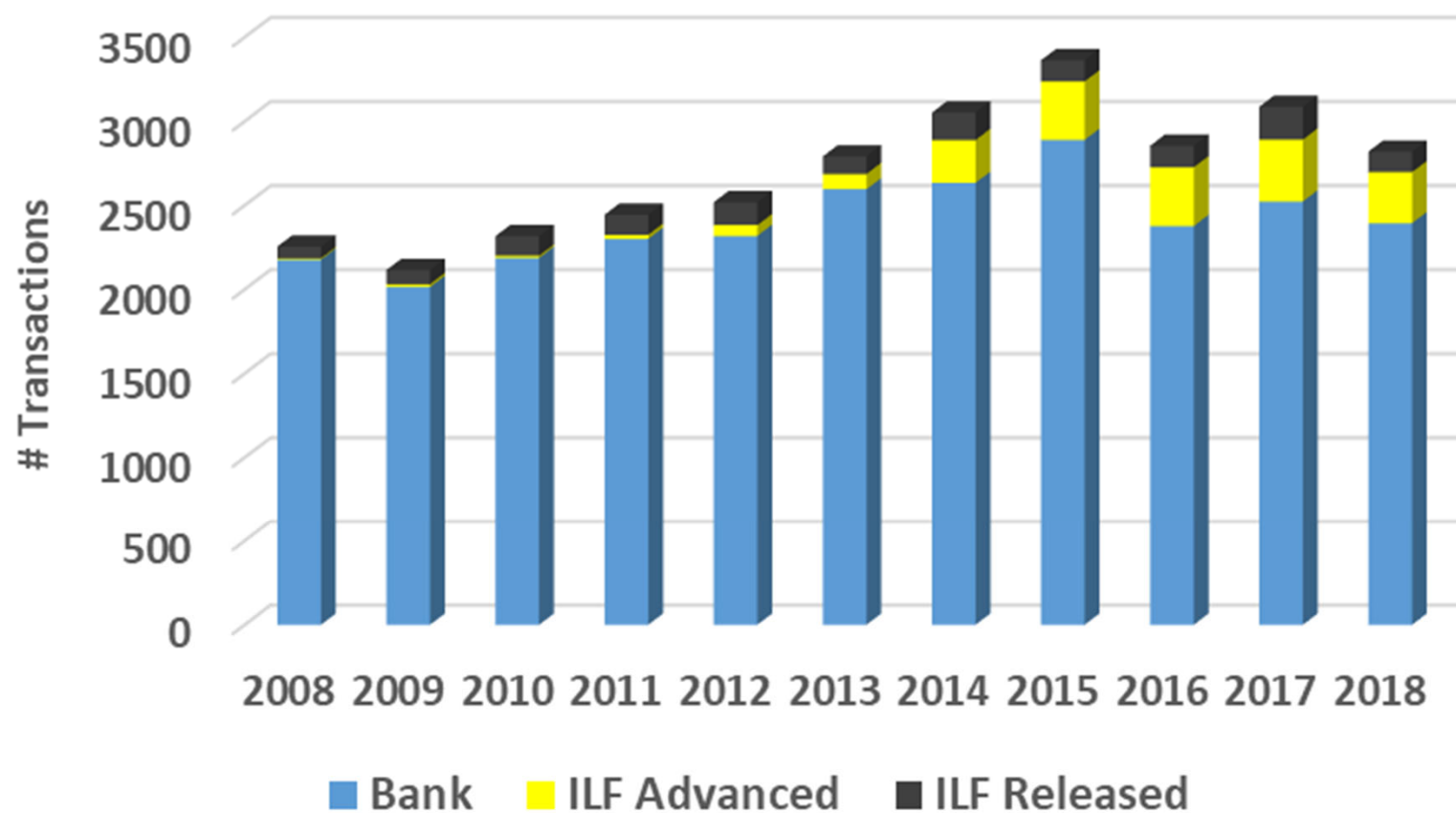
## Status of ILFs (May 2018)

- 24 pre-rule ILFs approved
  - 47 active pre-rule ILFs
  - 7 not seeking approval
- 33 new ILFs approved
- 57 *total approved*
- 30 pending ILF proposals

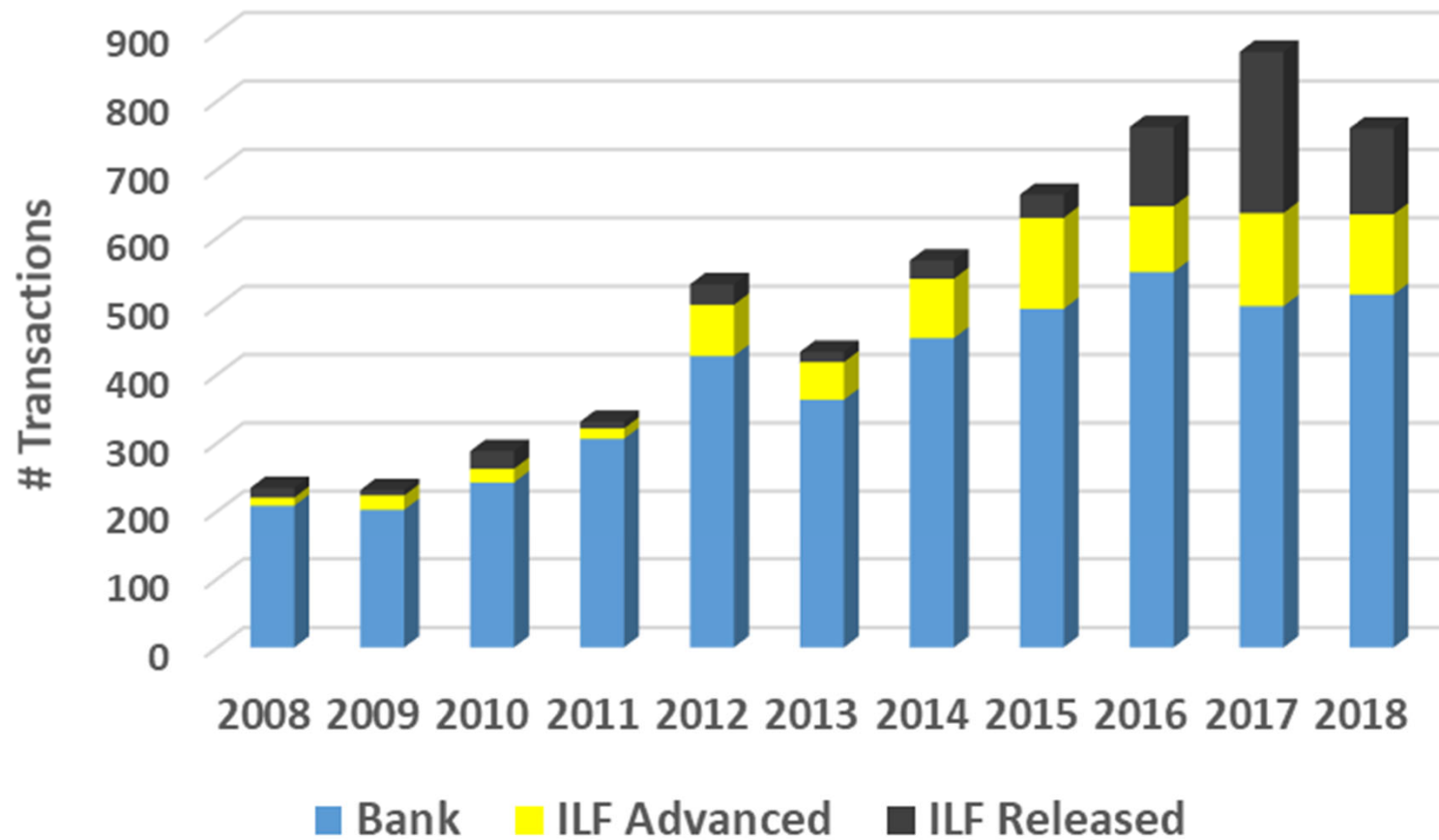
# Service Areas for Approved ILF Programs



## Wetland Compensation Transactions



## Stream Compensation Transactions



# Overview: ILF Instrument Development

- Draft prospectus
- Prospectus
- Draft instrument
- Final instrument



## Prospectus includes:

*33 CFR 332.8(d)(2):*

- Objectives
- How ILF will be established and operated
- Proposed service area
- Need and technical feasibility
- Ownership arrangements
- Qualifications
- Compensation planning framework
- Description of ILF program account

# ILF Instrument Includes:

*33 CFR 332.8(d)(6):*

- Service area(s)
- Accounting procedures
- Provision stating legal responsibility
- Default and closure provisions
- Reporting protocols
- Compensation planning framework
- Advance credits and fee schedule
- Method for determining fees and credits
- Description of in-lieu fee program account
- Any other information required by DE



# Site-specific ILF plans

## Mitigation Plan Components (33 CFR 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

And: a Credit Release Schedule (33 CFR 332.8(o)(8))

# ILF Sponsors

- Eligibility “a governmental or non-profit natural resources management entity” [332.2]
  - “...operate explicitly in the public interest, rather than to serve the needs of investors...” [FR 73, 19614]
- Qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including past experience [332.8(d)(2)(vi)]

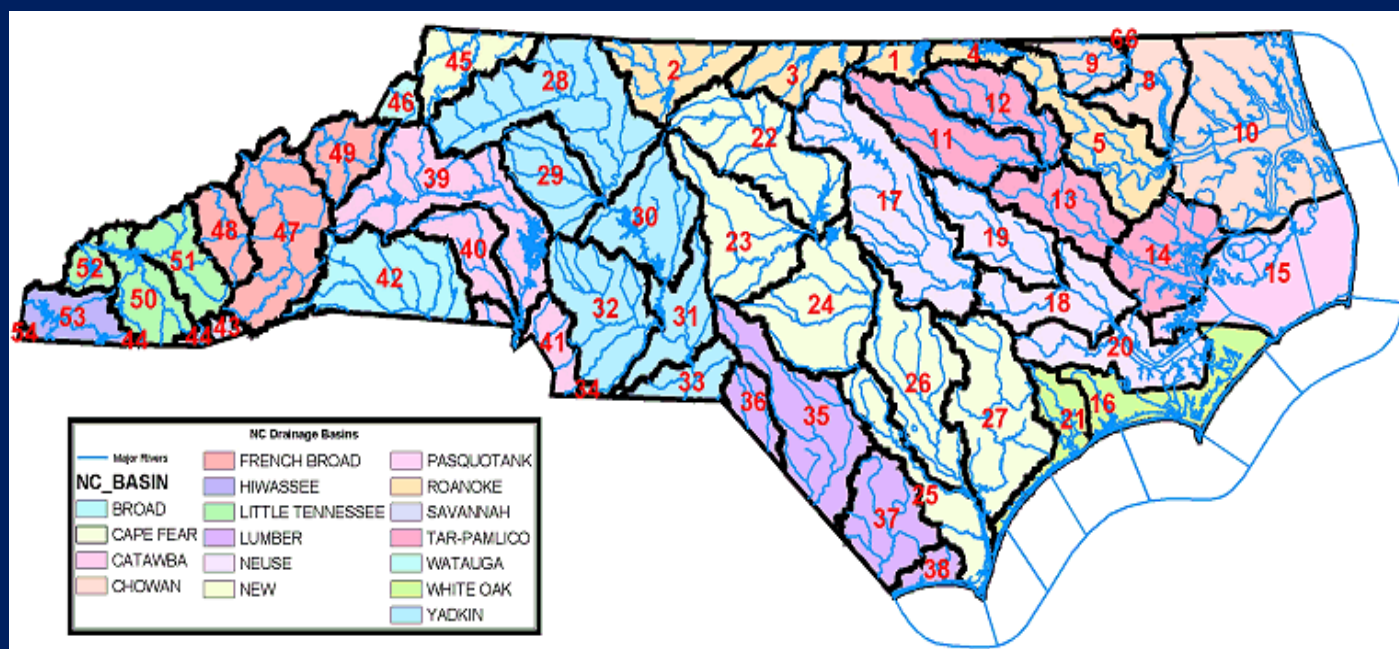
# Service Area

*33 CFR 332.8(d)(6)(ii)(A)*

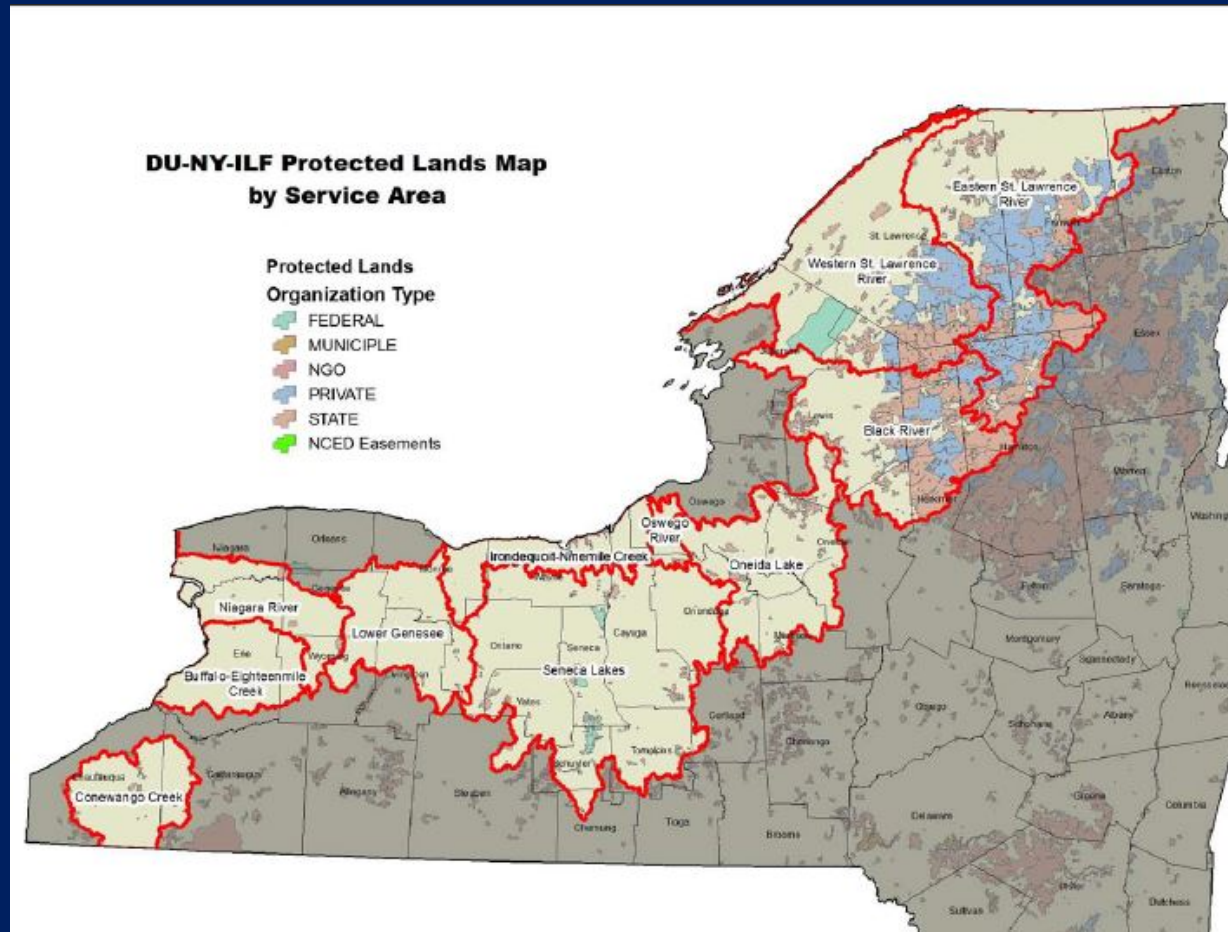
- **Service area:** Geographic area within which the ILF program is authorized to provide compensatory mitigation credits.
- **ILF program** may have multiple service areas, but impacts & compensatory mitigation must be accounted for by service area.

# Service Areas – statewide

## NC Department of Mitigation Services

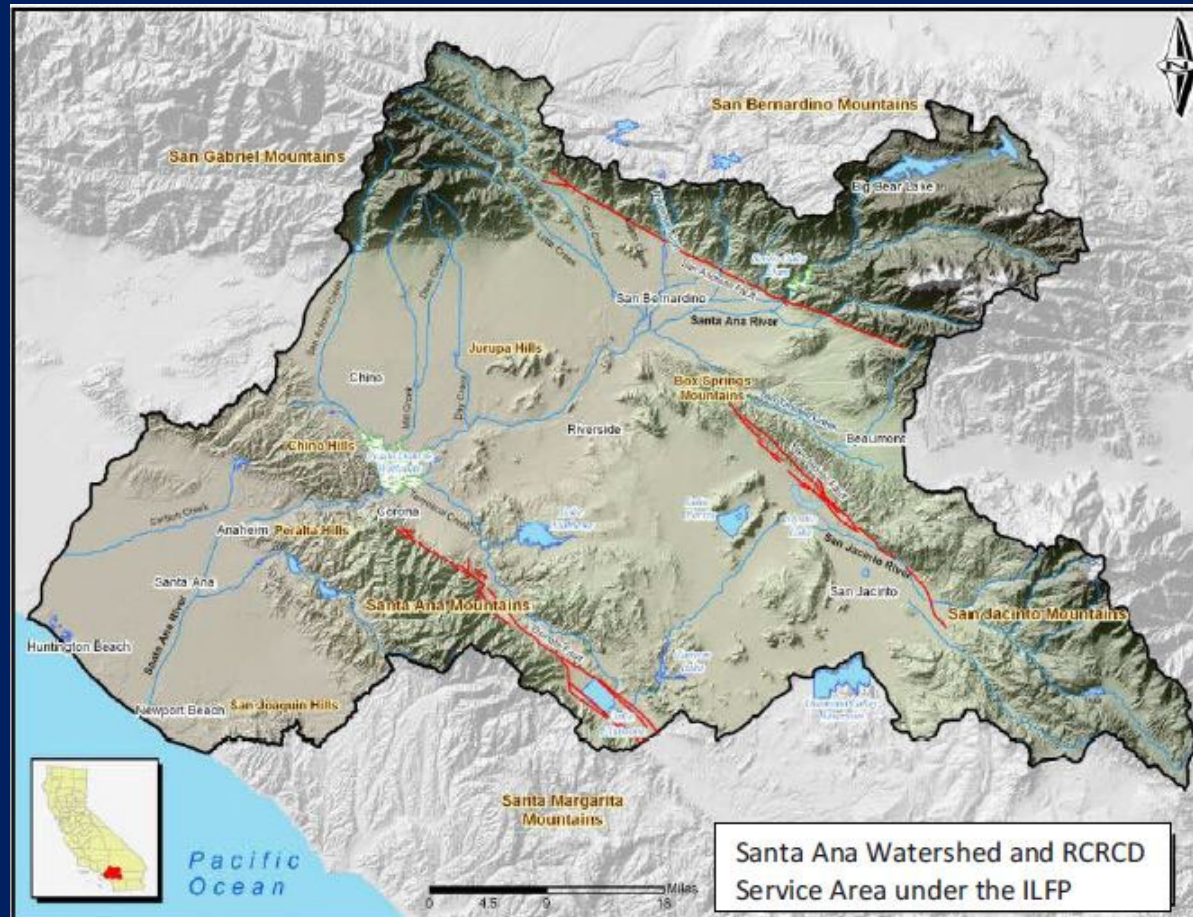


## Service Areas – large portions of state



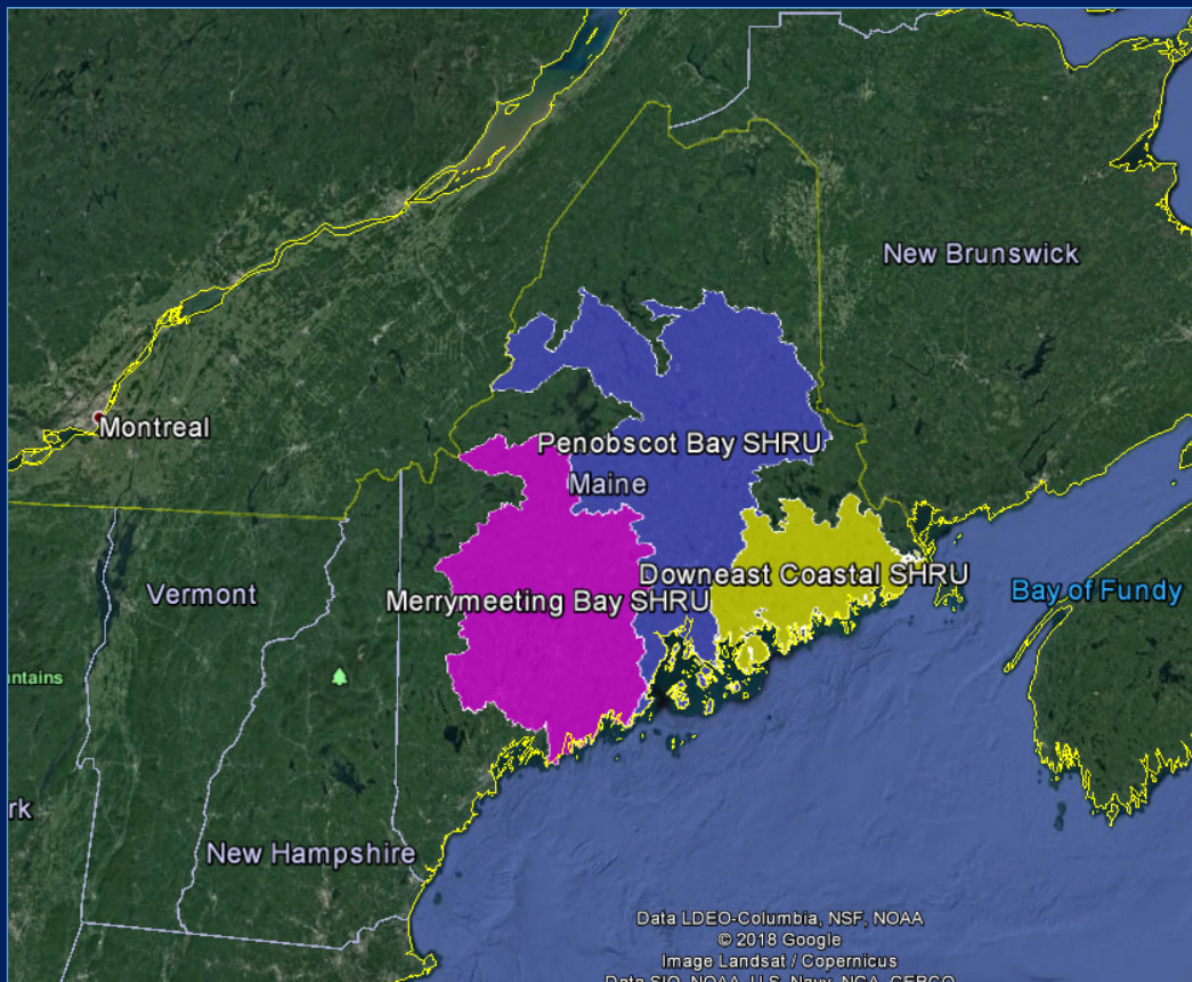
# Service Areas – discrete portions of state

## Riverside Corona RCD, CA





## Service Areas – Based on Habitat Recovery Units



Atlantic Salmon  
Restoration &  
Conservation  
Program

# ILF Program Account

*33 CFR 332.8(i)*

- ILF sponsor must establish an ILF program account :
  - After instrument approval but before accepting any fees
  - At FDIC member institution
  - Account funds for mitigation projects only
    - Non ILF funds must be kept in separate accounts
  - Interest income remains in account – be used for mitigation
  - Can funds for long-term management be transferred? MSM(CUC(1



## Slide 20

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**MSM(CUC(1** Do you want to add "subject to audit"?

Martin, Steve M (Steven) CIV USARMY CEIWR (US), 5/14/2019

# ILF Program Account

*33 CFR 332.8(i)*

- ILF program account funds may only be used for:
  - *“selection, design, acquisition, implementation and management of ILF compensatory mitigation projects”*
  - Except for a *“small percentage”* that can be used for administrative costs
    - Amount approved by Corps in consultation with IRT
    - Specified in the ILF program instrument

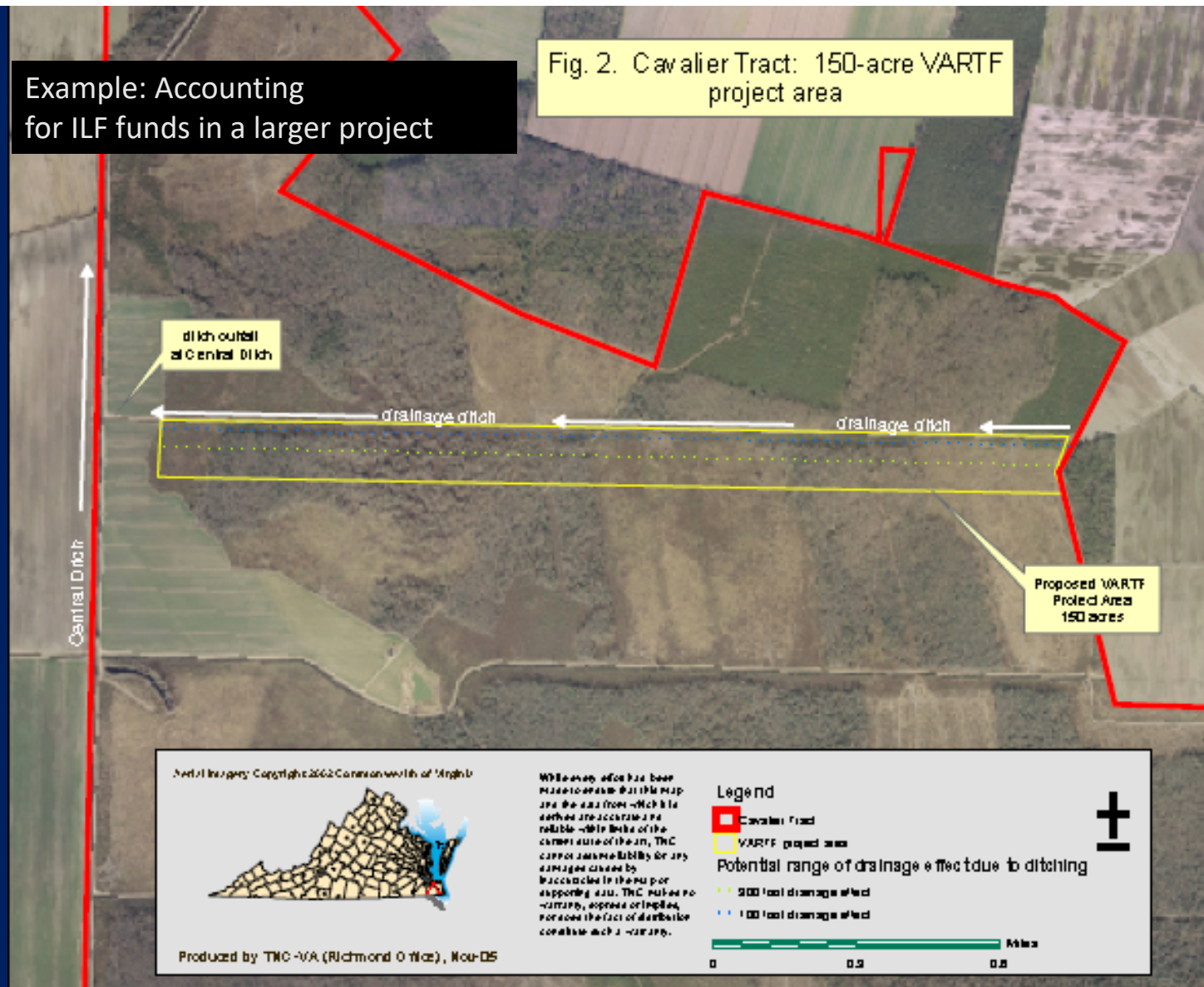
# ILF Program Account

*33 CFR 332.8(i)*

- Corps responsible for project approval
  - Corps may approve alternative compensatory mitigation if ILF project not implemented within required time frames
- Annual reports
  - Fees collected, funds expended
  - List of permits using ILF program
  - Credit balances, by service area
  - Account expenditures
- Can ILF funds be leveraged with non-ILF funds?

Example: Accounting  
for ILF funds in a larger project

Fig. 2. Cavalier Tract: 150-acre VARTF  
project area



# ILF Program Account - Audits

*33 CFR 332.8(i)(4)*

- Rule says: “The district engineer may audit the records pertaining to the program account.”
- Not clear:
  - How often they will/should occur
  - How they will be paid for
  - What they cover (e.g., programmatic vs financial)
  - How they will be disseminated
- How can the ILF instrument anticipate these questions?

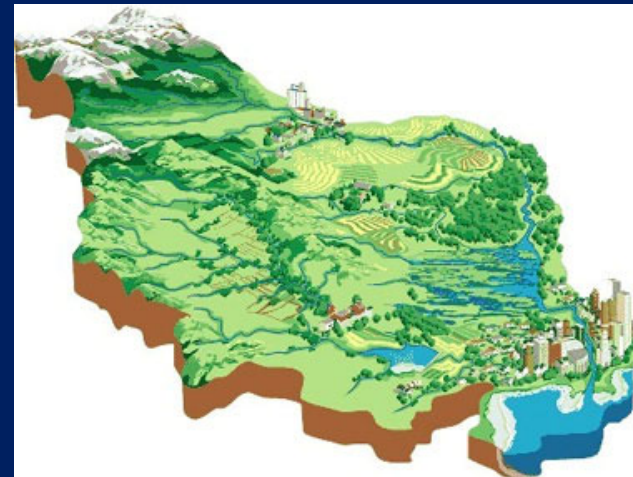
# Legal Responsibility

## *33 CFR 332.8(d)(6)(ii)(C)*

- Instrument must state legal responsibility for compensatory mitigation lies with sponsor once a permittee secures credits
  - Identify parties responsible for implementation, performance, and long-term management of projects
  - Documentation to DE

# Compensation Planning Framework (CPF)

- **Objective:** a mechanism to identify sites that meet aquatic resource needs in watershed
- Guides selecting, securing, and implementing compensatory mitigation projects
  - Like a watershed plan
  - Supports watershed approach



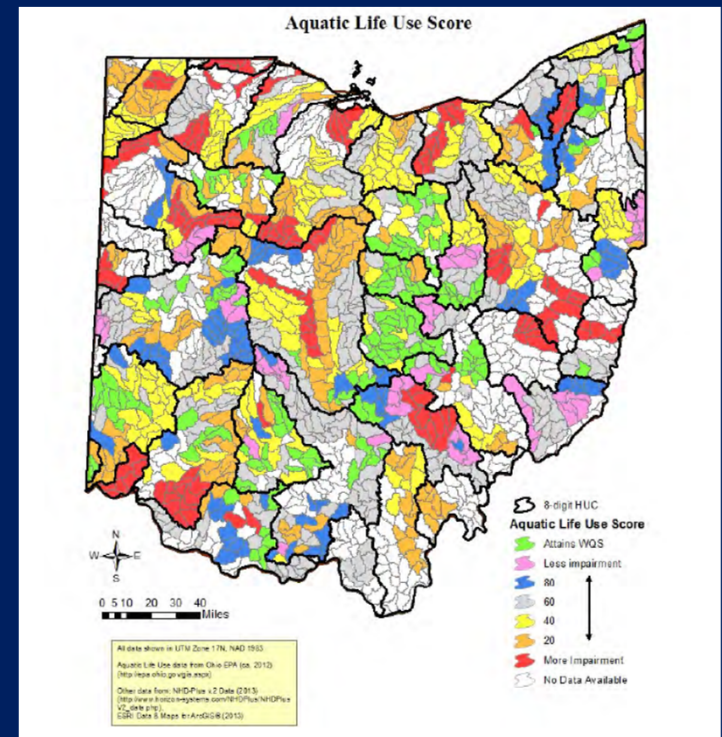
# Compensation Planning Framework

- Components (33 CFR 332.8(c)):
  1. Service area (watershed-based)
  2. Analysis of historic aquatic resource loss and current condition
  3. Threats to aquatic resources
  4. How threats are addressed
  5. Aquatic resource goals and objectives
  6. Prioritization strategy for selecting/implementing projects
  7. Use of preservation
  8. Description of stakeholder involvement
  9. Long-term protection and management
  10. Evaluation and reporting



# Existing Planning Resources

- Wetland Conservation Plans
- Water quality reports
- State Wildlife Action Plans
- ESA habitat conservation plans
- Fish Habitat Partnership Analyses
- Landscape Development Index (LDI)
- TMDL implementation plans
- Flood management plans



## Slide 28

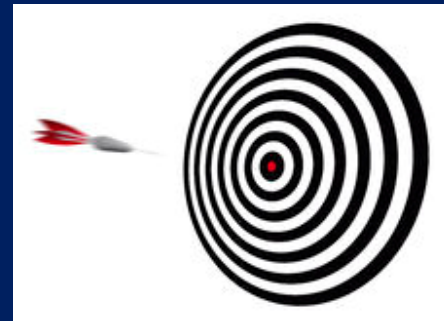
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**MSM(CUC(2** May also want to cite example of HCP-ILF tie-in - for example, Western Placer County ILF is a 404 integration with an HCP. South Sacramento County may be approved within the next mont as well

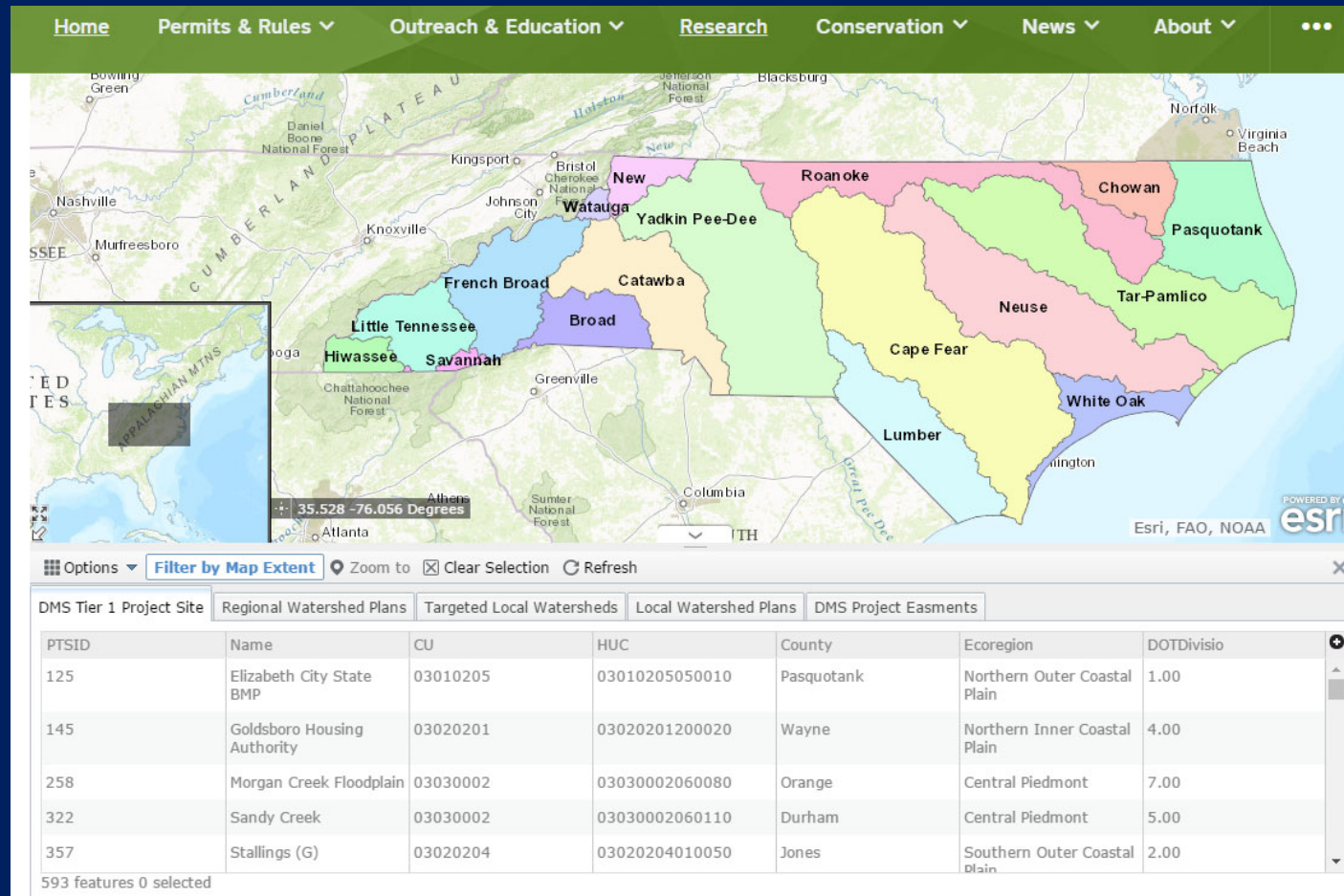
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# Site Selection Approaches

- Opportunistic
- Focus on demand & timing
- Scoring and weighting processes
- Sites pre-identified

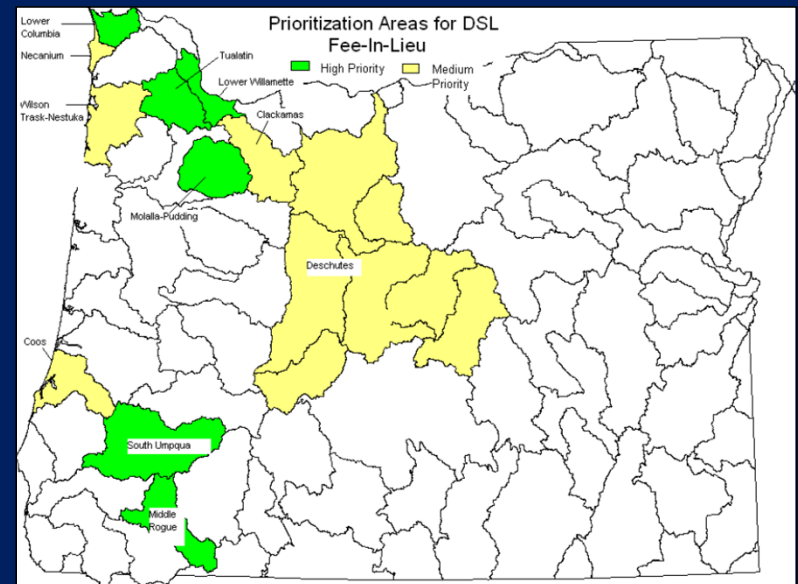


# NC DMS



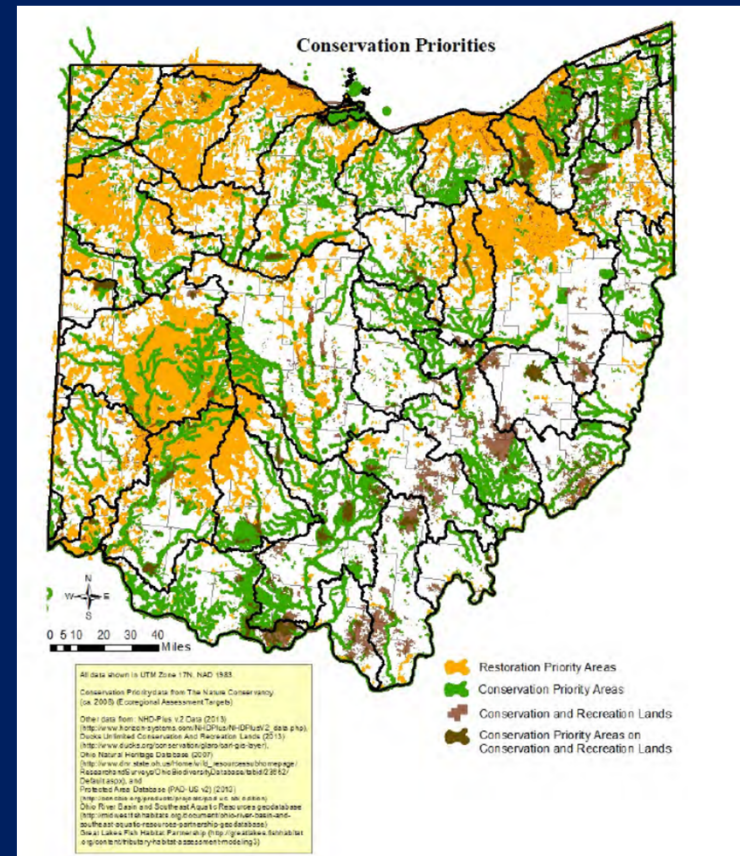
# OR Dept of State Lands

- Identified priority watersheds
- Established criteria for site selection
  - Likelihood of success
  - Multiple functions/services
  - Support regional conservation efforts
  - Capacity of applicant & project team
  - Project costs
  - Long-term management

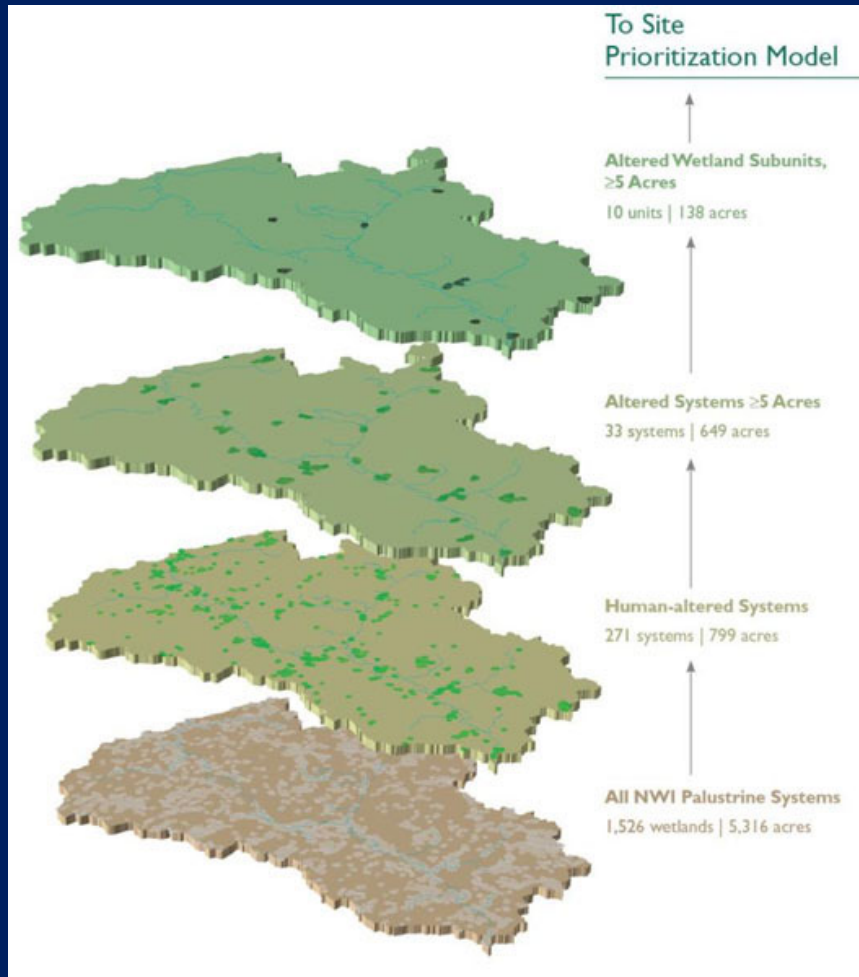


# TNC OH ILF

- Prioritize site selection:
  - Address specific needs of watershed
  - Capture multiple occurrences each aquatic system
  - Network of hydrologically connected aquatic systems
  - Surrounding land use
  - Species access to necessary habitat, proximity to other protected areas
  - Conservation priority areas







## NH ILF Program - Merrimack River Watershed

Site must be > 5 ac

Consider:

- Ecological integrity
- Significant habitat
- Flood flow control potential
- Groundwater use potential
- Water quality functions
- Sustainability
- Landscape position

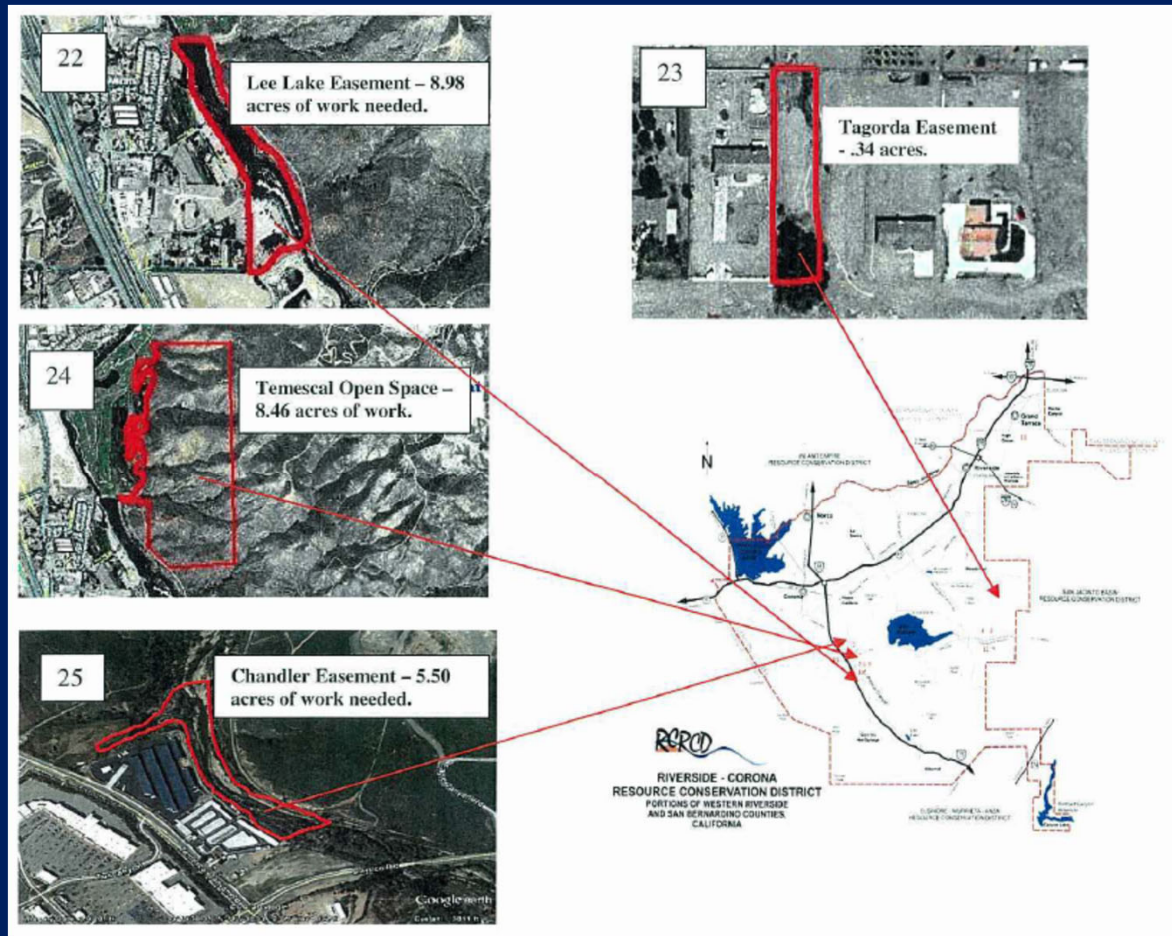
# ME Natural Resource Conservation Program

- Project Review Criteria (& weights)
  - Potential to meet program goals (30%)
  - Landscape context (20%)
  - Project readiness/feasibility (20%)
  - Sponsor capacity (15%)
  - Cost effectiveness (10%)
  - Other benefits (5%)





# Riverside Corona RCD, CA



## ILF Program Advance Credits

*33 CFR 332.8(d)(6)(iv)(B)*

- Limited number (capped) specified for each service area in the instrument
- Available for sale prior to being fulfilled in accordance with mitigation project plan
- Once debited represents a mitigation obligation
- As projects produce ***released*** credits, ***advance*** credits are fulfilled and available again.

## ILF project implementation

- Land acquisition and improvements must be initiated by **3rd growing season** after first advance credit is **secured** by permittee



# ILF Program Advance Credits

*33 CFR 332.8(n)*

Number of advance credits based on:

- Compensation planning framework
- Service area size
- Resources available to program
- Sponsor's past project performance
- Financing needed for mitigation projects
- Other considerations



# How to determine the number of advance credits in a service area?

Possible approaches:

- No advance credits
- % of *ALL* permitted impacts over time period
- % of *ALL* required mitigation over interval
- More credits for experienced/reliable sponsor than inexperienced
- Others?

# Some Approaches to Advance Credits

- Everglades NP
- ME NRCP
- GA LT
- Riverside-Corona RCD
- La Paz County ILF (AZ)





## NC DMS Advance Credits Calculation

- Based on projected mitigation needs for next 5 years
- Calculated by River Basin and 8-digit CU
  - NCDOT: 5-year forecast of mitigation need (TIP and other transportation plans)
  - MOU ILF (other ILF customers): Annual average of payments over last 7 years



# NC DMS Advance Credits Calculation

## Cape Fear Example

### Cape Fear Calculation for Stream Mitigation

NCDOT 5 Year Forecast:	101,062
MOU ILF 7 yr Average * 5:	<u>64,835</u>
Subtotal:	165,897

Rounded to nearest 5000	
Grand Total Cape Fear Basin:	170,000



ILFs have released credits in a program service area  
*when:*

Credits from  
projects meeting  
performance  
standards

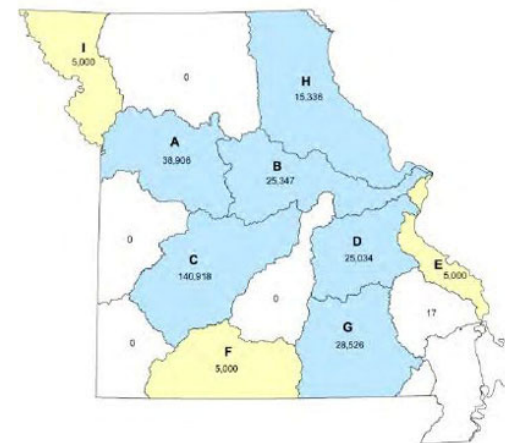
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Debits of  
advance  
credits

These Released credits are = to bank credits

Examples: NC DMS, VA ARTF, ME NRCP

# MO CHF Stream Stewardship Fund



	Proposed Service Area with advanced SSTF Credits
	Proposed Service Area with released SSTF Credits
	Proposed Non-service Area

Label	EDU	Released Credits	Advanced Credits
A	Central Plains/Blackwater/Lamine	38,906	
B	Ozark/Moreau/Loutre	25,347	
C	Ozark/Osage	140,918	
D	Ozark/Meramec	25,034	
E	Ozark/Apple/Joachim		5,000
F	Ozark/White		5,000
G	Ozark/Black/Current	28,526	
H	Central Plains/Cuivre/Salt	15,336	
I	Central Plains/Nishnabotna/Platte		5,000

# Credit Release Schedule

- Specified in each site's mitigation plan
- Tied to performance-based milestones
- Reserve *significant* share of credits for release only after attainment of performance standards
- Credit release approval by DE in consultation with IRT
- Can mirror bank credit release schedules



## Initial Credit Release:

ILF projects can mirror mitigation banks

% of total expected ILF **project** credits once:

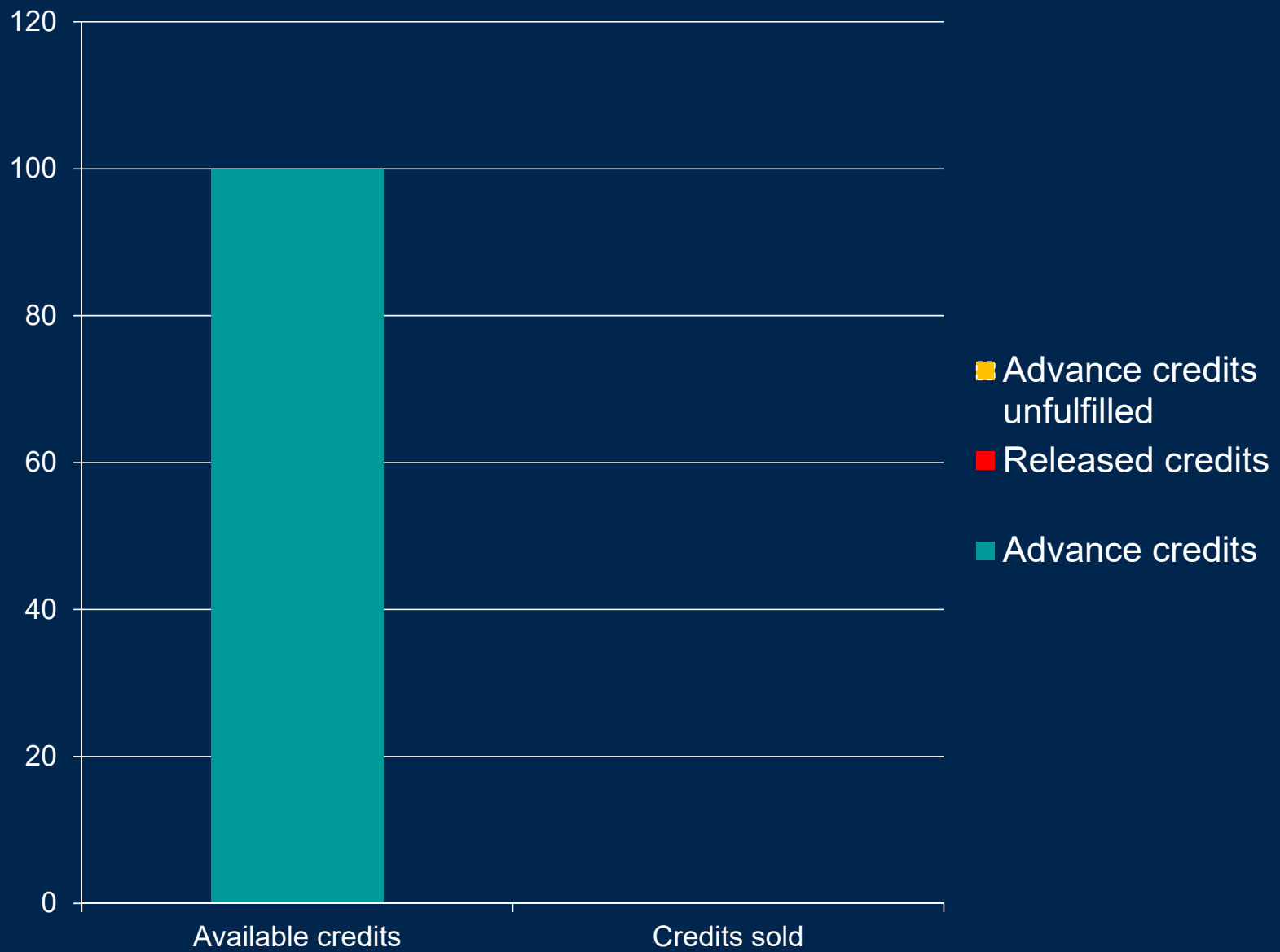
- Project plan approved
- ILF site has been secured
- Financial assurances or contingency funding
- Any other requirements set by Corps

## Louisville District (KY) ILF Credit Release Schedule

Credit Release Stage	Description	% of Total Credits
1st	Implemented Site Protection Instrument and 404 authorization	15%
2nd	"As Built Report"	5%
3rd	Year 1 Performance Standards	15%
4th	Year 2 Performance Standards	15%
5th	Year 3 Performance Standards	15%
6th	Year 4 Performance Standards	15%
Final	Year 5 Performance Standards, Long Term Management, final JD or wetland delineation (if required)	20%

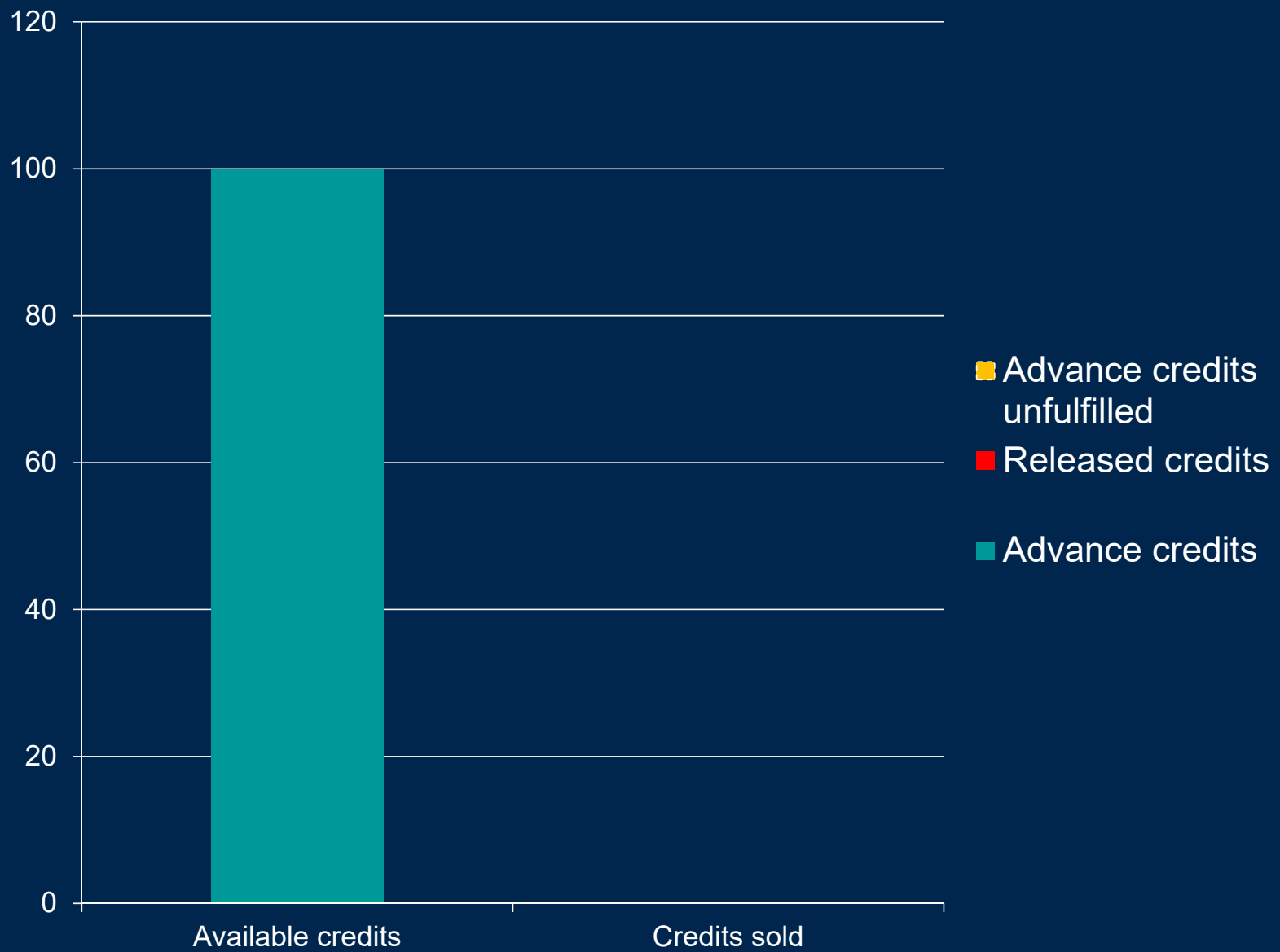
## **Example of Debiting and Releasing Advance Credits**

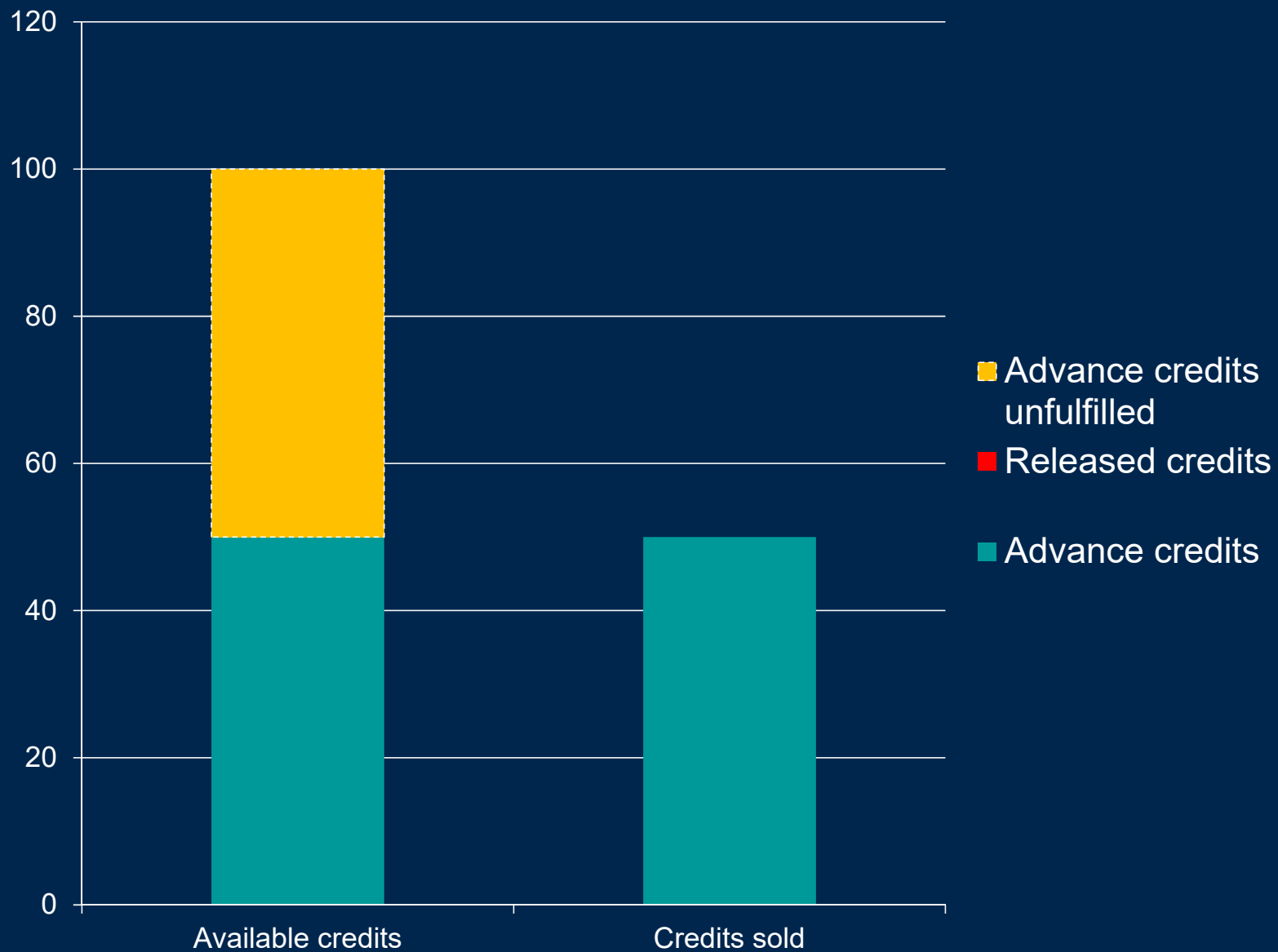




In the first year of ILF operation

50 advance credits are sold

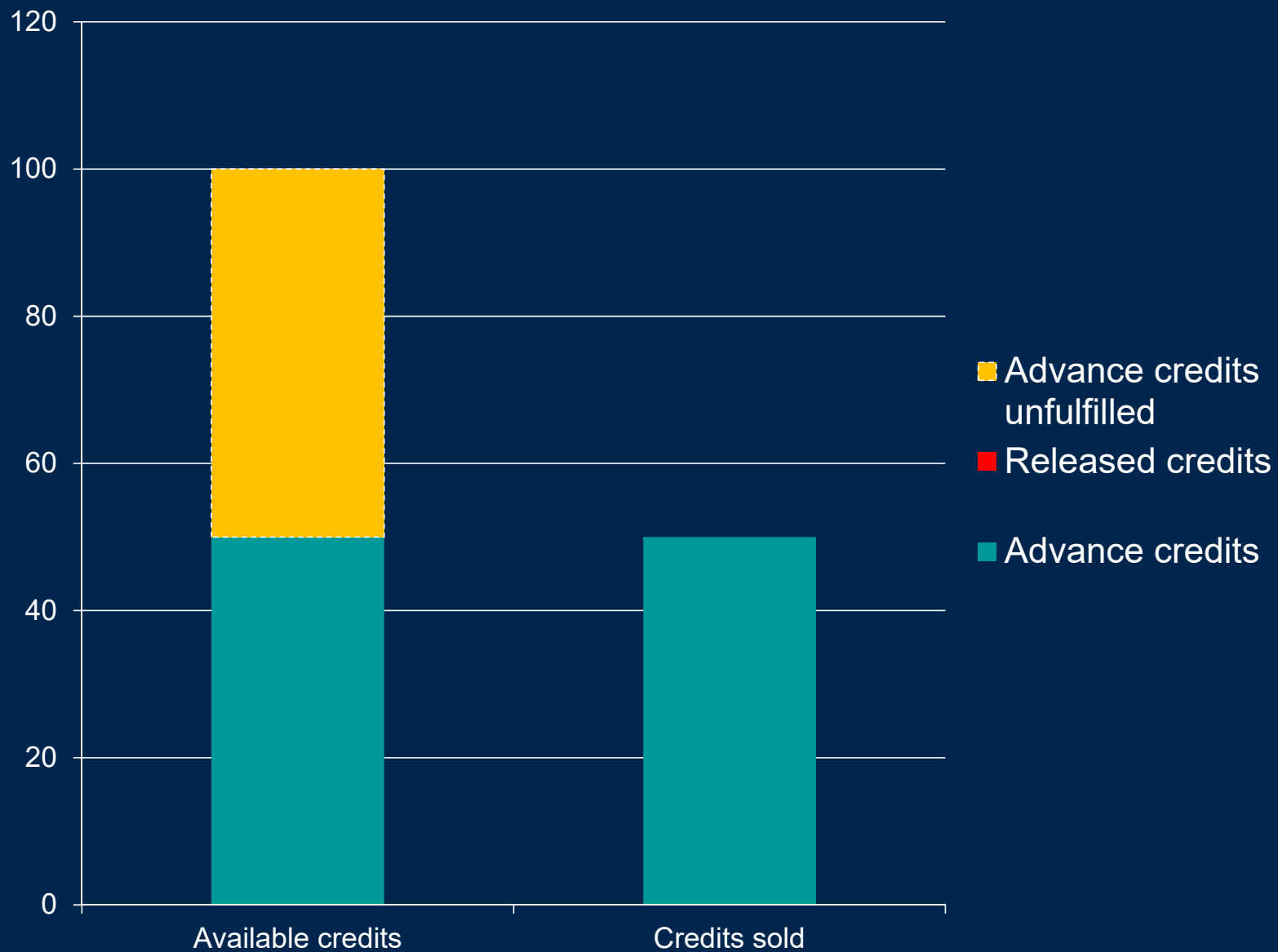


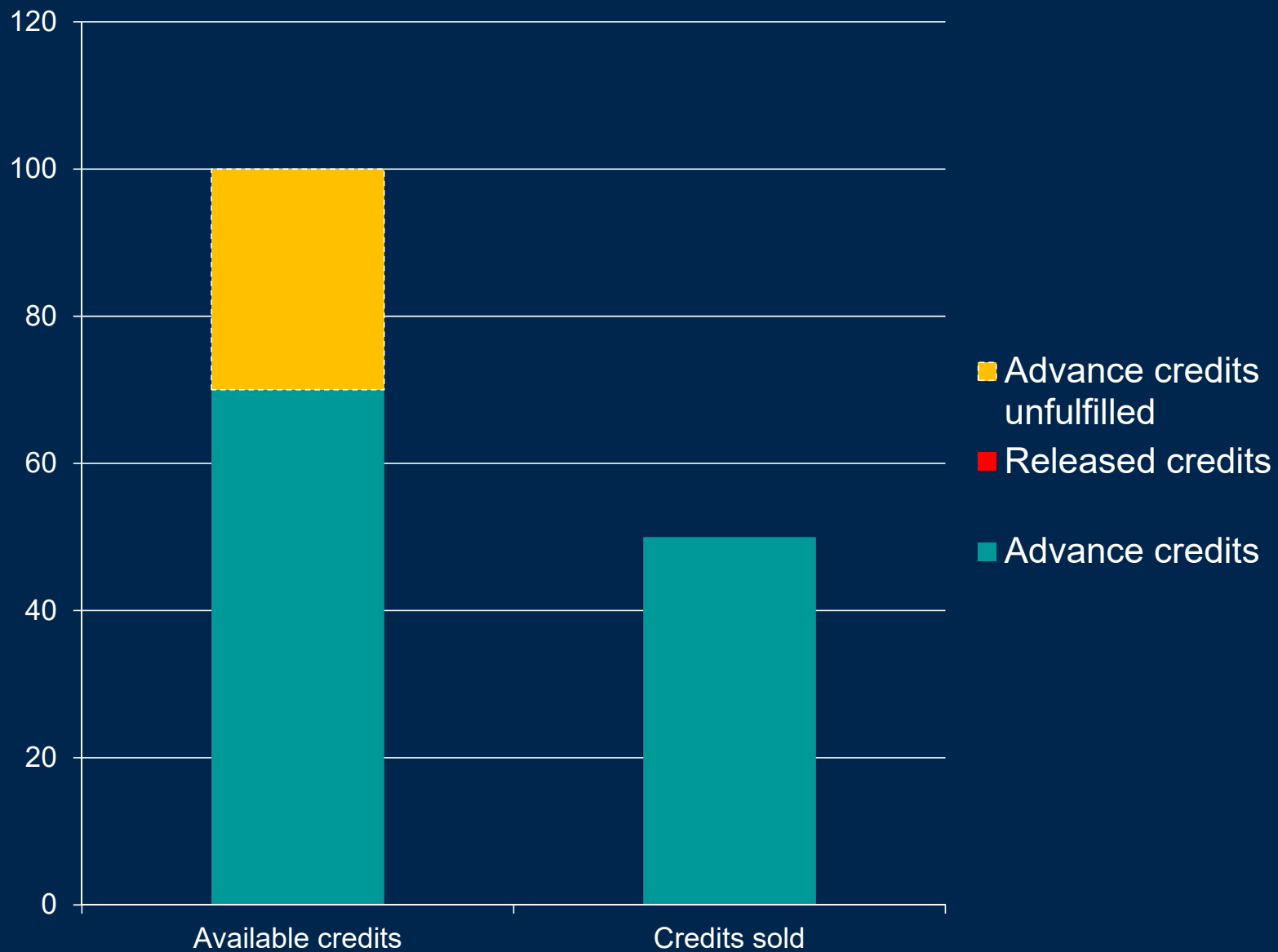


1 year after first debit occurs

100 acre site approved & project initiated  
With a potential yield of 100 credits

20 credits released (initial credit release)



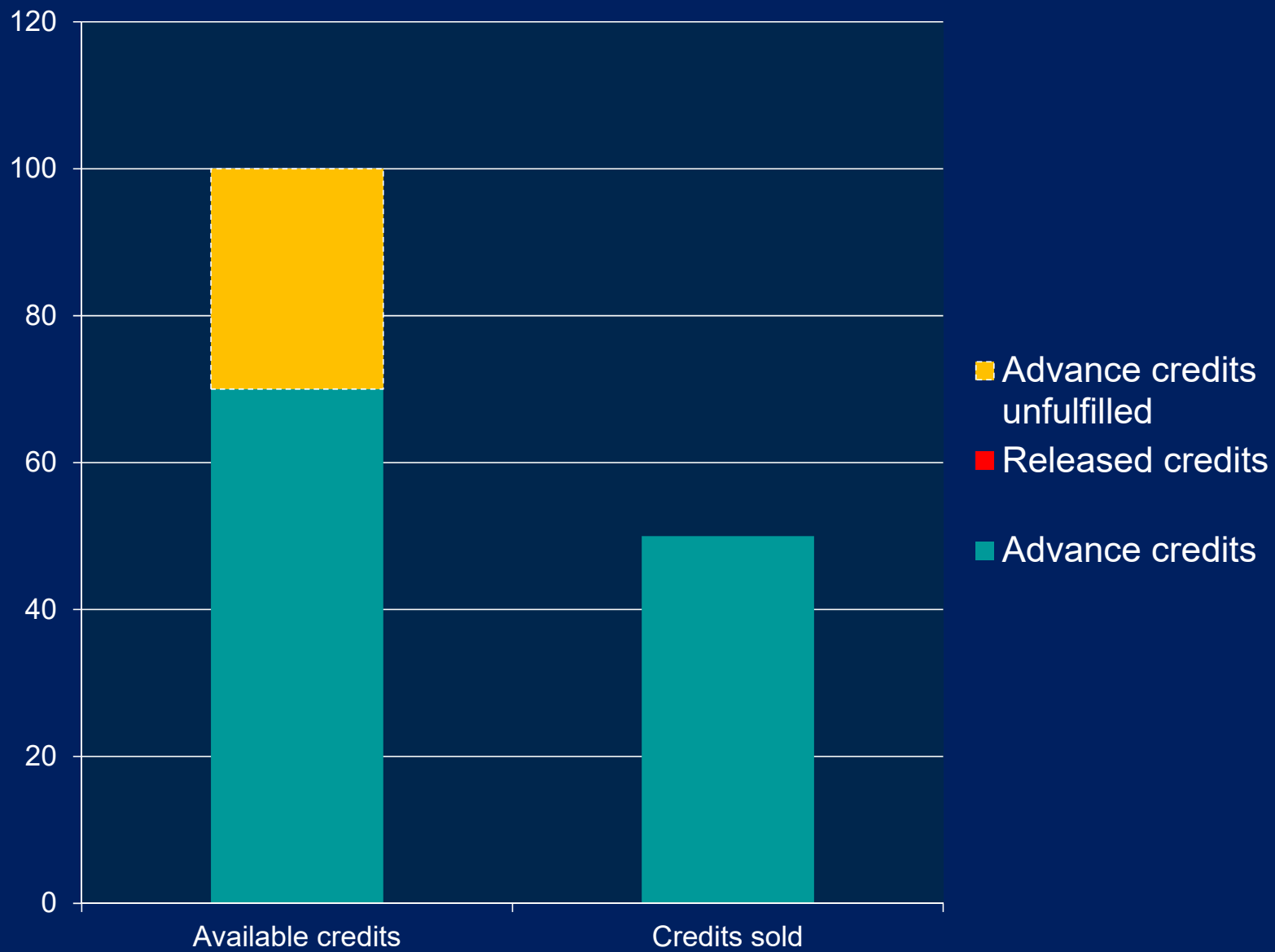


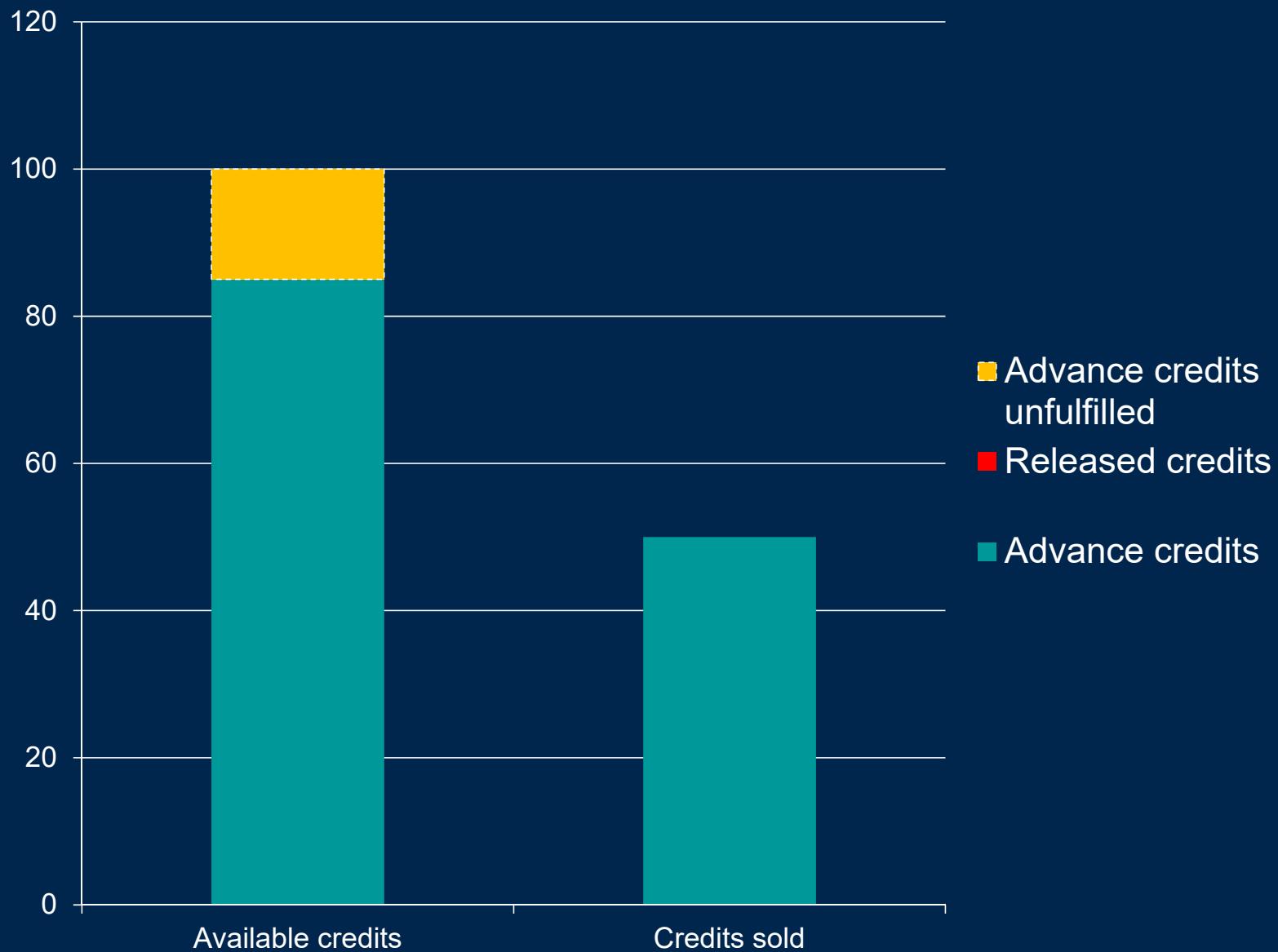


2<sup>nd</sup> year after 1<sup>st</sup> debit occurs

Year 1 project performance standards met

15 more credits released  
(15% of project potential)

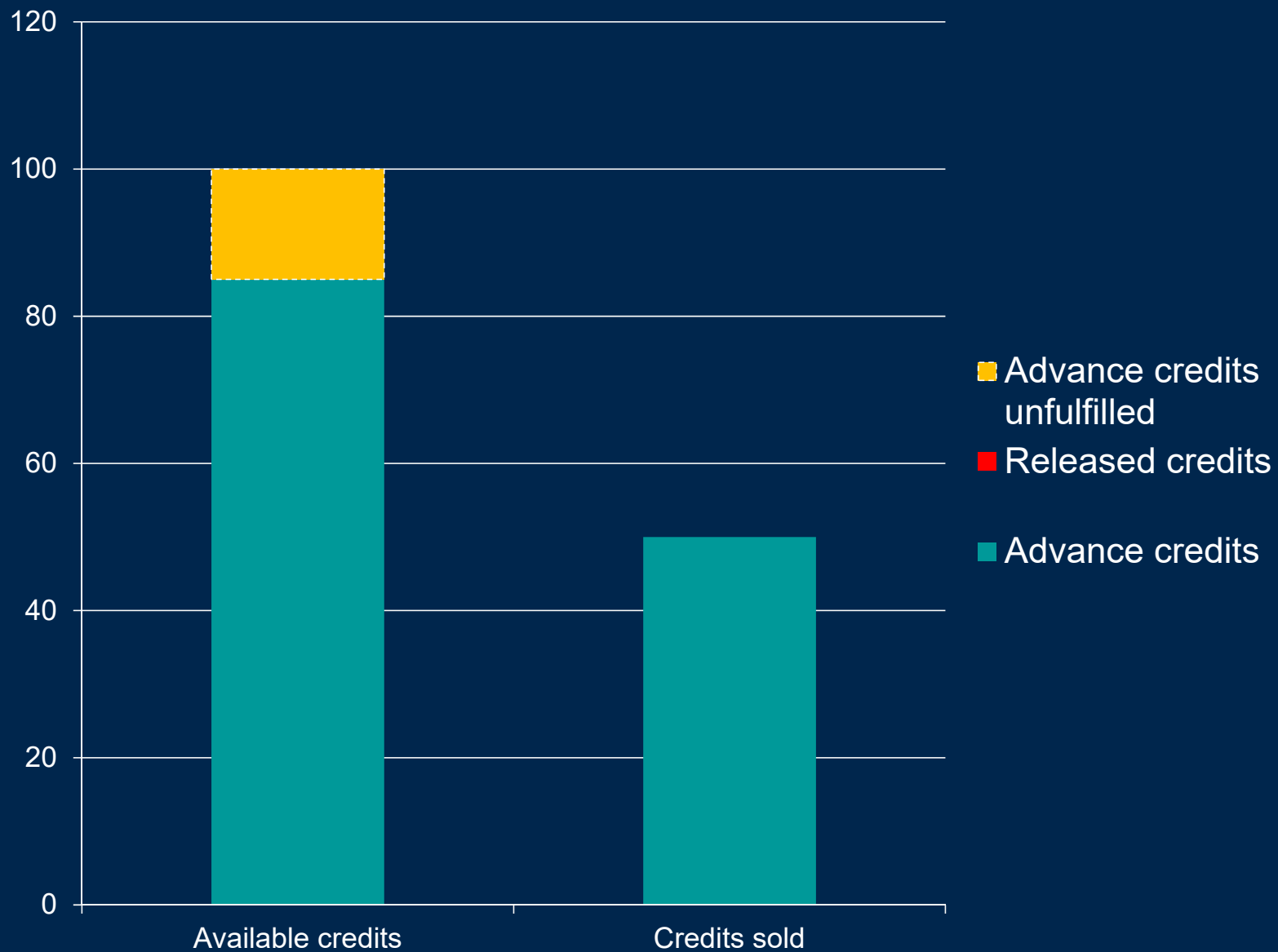


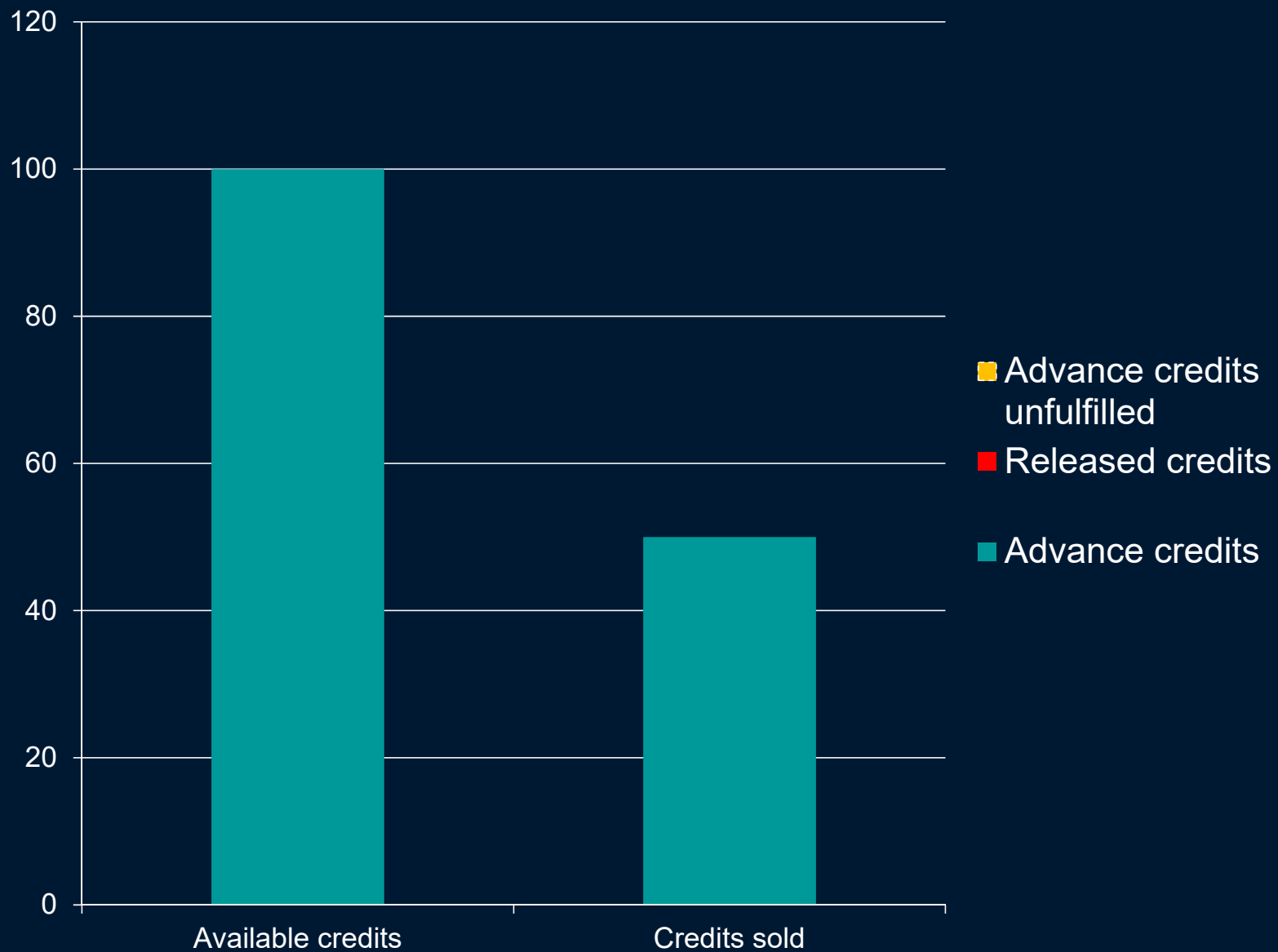


3<sup>rd</sup> year after 1<sup>st</sup> debit

Performance standards continue to be met

15 more credits released  
(15% of potential credits)



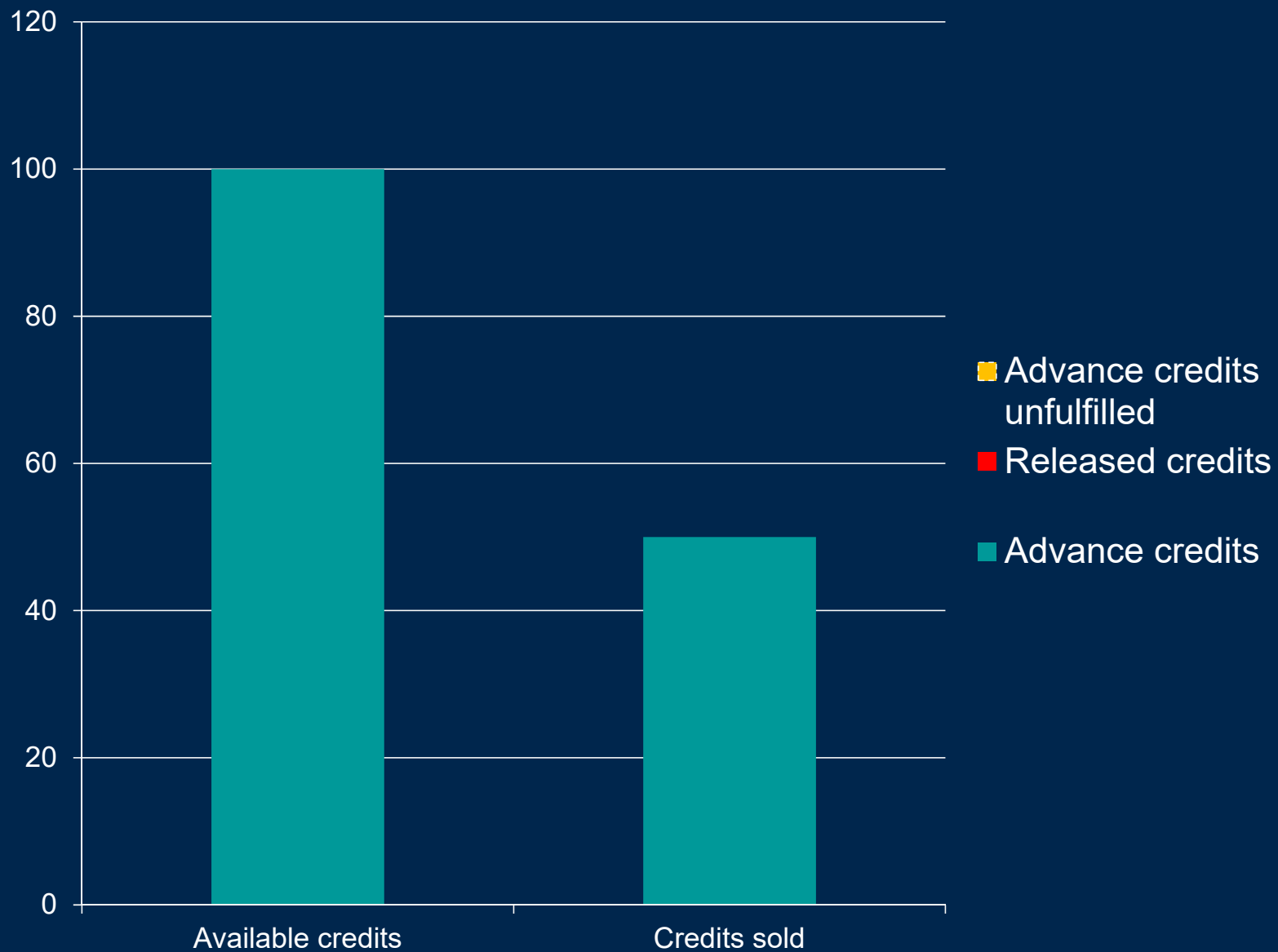


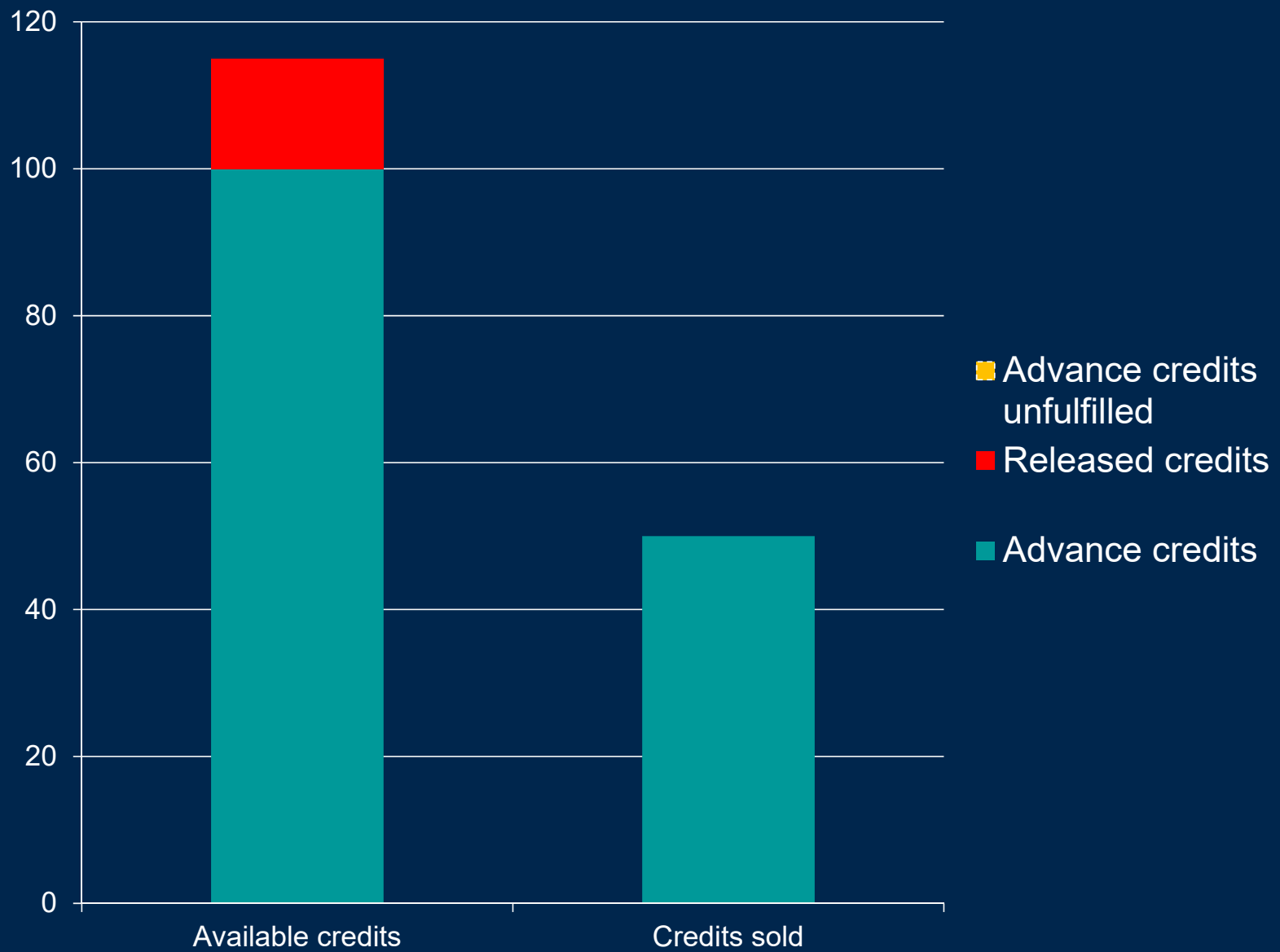
4<sup>th</sup> year after 1<sup>st</sup> debit

Performance standards met

15 more released credits  
(15% of potential credits)







# Fee Schedule

*332.8(d)(6)(iv)(B)*

- Credit costs determined by the sponsor  
*332.5(o)(5)*
- Cost per credit must be based on:
  - Expected costs
  - Full cost accounting, including contingencies
- Fees may also be based on:
  - Type of aquatic resource credits being purchased
  - Location of compensation project
  - Size of impacts
- Released credits treated differently than advance credits



# Approaches

Fixed fees

Calculators

Formulas

Updated fees: regular or project-by-project

Admin Fees: Range from 5 to 27%

Average 15%

Sliding scale approach



# NC DMS Fee Schedule

Resource Category	Unit	Fee per Unit - Higher Fee HU	Fee per Unit - Lower Fee HU
Riparian Buffer	Sq.ft	\$4.38	\$0.97
Stream	Lin.ft	\$507	\$507
Non-riparian wetland	Acre	\$106,599	\$60,187
Riparian wetland	Acre	\$106,599	\$60,187
Coastal wetland	Acre	\$560,000	\$560,000

# Maine Fee Schedule

## Resource dependent formula

Base Rate = [Regional construction & monitoring costs] + [County unimproved land cost]

### X Multipliers

2:1 for  $\geq 20K$  sf

2:1 for areas of special significance

4:1 for vernal pools and shorebird habitat

+ Additional fees for impacts to uplands that affect aquatic organisms (e.g. vernal pool species)

## NFWF Fee Schedule – Sacramento ILF

Table 2. Vernal Pool Credits

A	B	C	D	E	F
No. of Credits Purchased	Unit Price Per Credit	Base Price (\$) (# Credits x B)	Contingency Amount (\$)	Administrative Fee Amount (\$)	Total Price (\$) (C + D + E)
0.01 – 0.25	\$265,000		$(0.30 \times C)$	\$10,000	
0.26 – 0.50	\$265,000		$(0.30 \times C)$	$(0.15 \times C)$	
0.51 – 1.00	\$265,000		$(0.30 \times C)$	$(0.15 \times C)$	
1.01 – 3.00	\$265,000		$(0.20 \times C)$	$(0.15 \times C)$	
3.01 – 5.00	\$220,000*		$(0.15 \times C)$	$(0.16 \times C)$	
5.01 +	\$175,000*		$(0.10 \times C)$	$(0.20 \times C)$	

\*Bulk-price discount to be applied if applicable for a particular Advance Credit Transfer

## Complex formula – King Co

S I T E	# Credits	Land	Select/ Design	Const	M & M	Contin- gency	L T M	Admin	CPI	Cost / Credit
X	N	\$\$	\$	\$	\$	\$	\$	\$	\$	\$/N
Y	N-2	\$\$\$	\$	\$\$\$	\$	\$\$	\$	\$\$	\$	\$\$/(N-2)
Z	N+P	\$	\$\$	\$	\$	\$	\$\$	\$	\$	\$/((N+P))

$$\Sigma \frac{(\text{Costs of each element})}{\text{\# Credits from project}} = \text{Cost/credit}$$

Weighted average cost for all projects = Credit price



## Approaches to ILF project development:

- Design and build
- Design-Bid-Build
- Request for Proposals
- Purchase Bank Credits



# Approaches to Project Approval

- Opportunistic
- Permitting process
- Regular Public Schedule



## ME NRCP Annual Project Approval Timeline

	June	July	Aug	Sept	Oct	Nov	Dec	
LOI								
Proposal								
PN								
Review Committee								
Approval Committee								
Awards								

# Additional Requirements

- Financial assurances
- Site protection
- Reporting protocols
- Default and closure
- Long-term management and associated funding



## Combined 404/ESA programs

- Offsets impacts to aquatic resources (404) and at-risk species
- Instrument must be consistent with 2008 Mitigation Rule

### 2 Approaches:

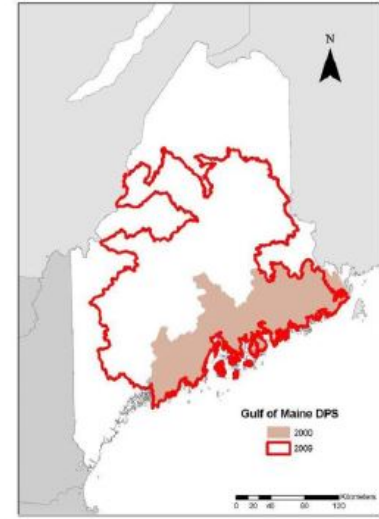
- Develop a joint authority CWA-ESA ILF
- Overlay ILF program on Habitat Conservation Plan

Joint authority program:

## Example Maine ILF Program

404 compensation contribution to recovery objectives

- Area covered: Gulf of Maine Distinct Population Segment
  - DPS covers all anadromous Atlantic salmon in 87 watersheds in Maine
  - >40 watersheds include suitable habitat but are unoccupied or inaccessible



# Why an Atlantic salmon ILF?

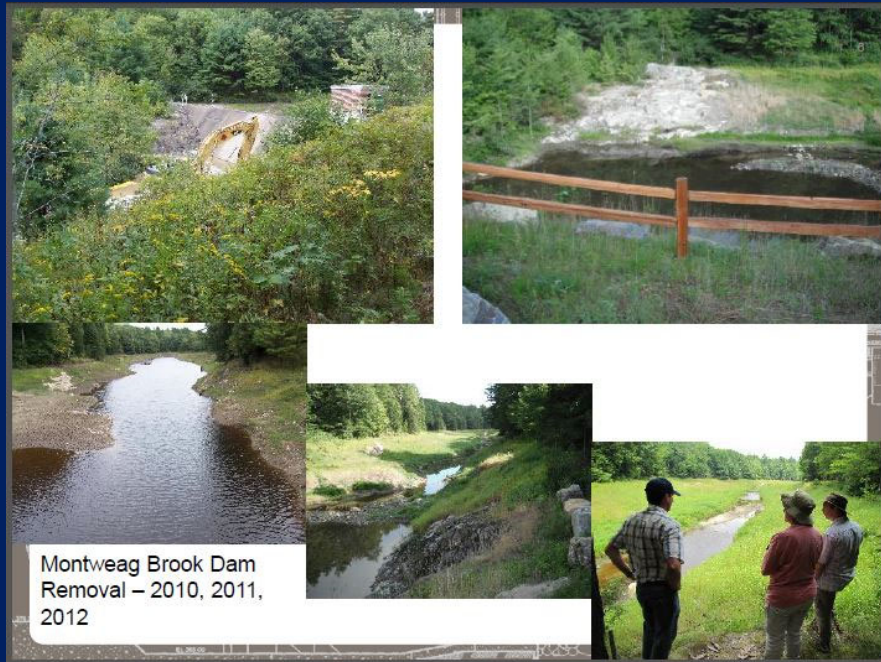
## Problem

- 404 permitted activities like road crossings and culverts have potential to affect Atlantic salmon
- Providing appropriate compensation for 404 impacts through projects contributing to recovery
- Compensation only after proper mitigation sequencing

## Objectives

- Increase extent and quality of salmon natural resources
- Improve fish passage for salmon and other at risk species





Mitigation projects would contribute to recovery (fish passage) including:

Dam removal

Culvert replacement

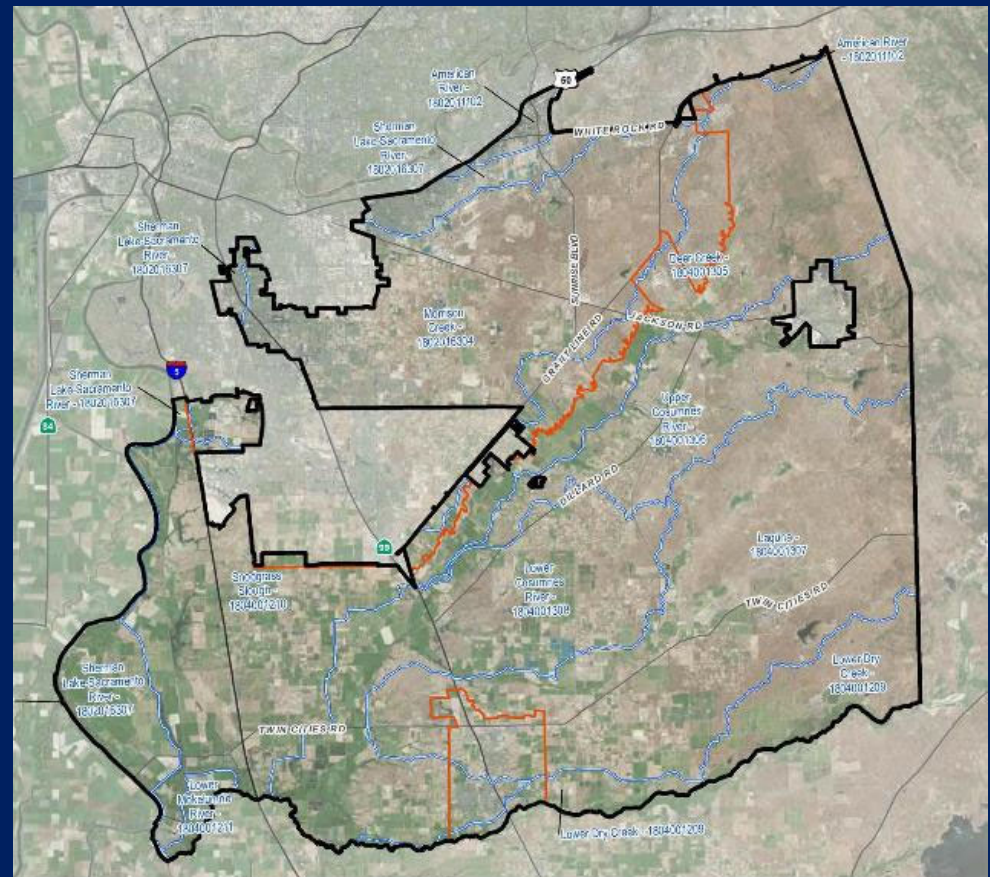




# OVERLAY EXAMPLE: SOUTH SACRAMENTO HABITAT CONSERVATION PLAN (SSHCP)

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- The SSHCP Plan Area consists of approximately 317,656 acres with 36,282 acre preserves
- Draft EIS/EIR published 2017
- HCP approval in 2019
- ILF Program Instrument approval in 2019



## In the future expect:

More ILFs that benefit listed species

More Joint-authority ILFs that provide offsets for:

- Wetland/stream & water quality  
(nutrients/sediments/temperature)
- Wetland/stream & listed species

# *Discussion?*

