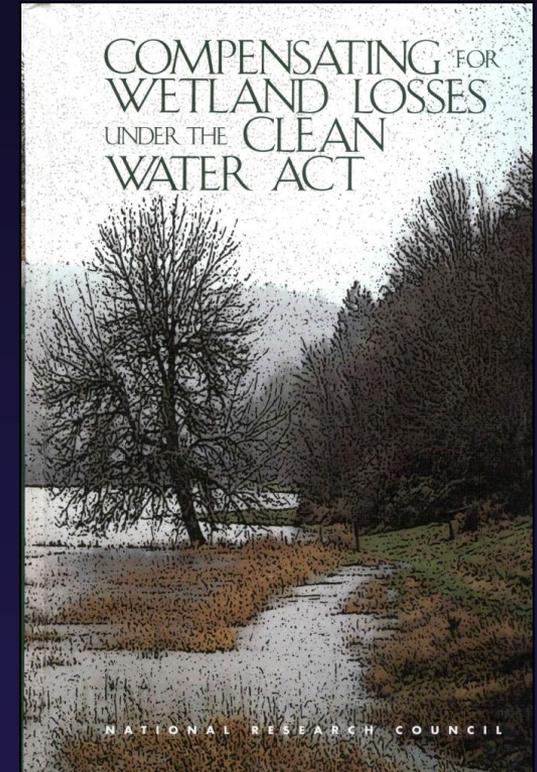


# 2008 Compensatory Mitigation Rule: *Overview and Highlights*



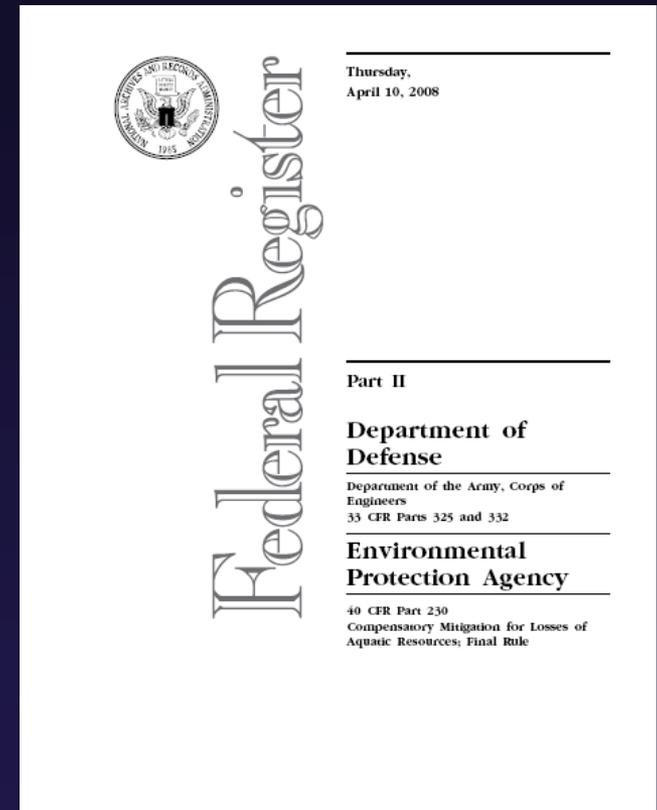
# Background/Drivers

- 1999 – EPA/Corps seek NRC study
- 2001 – NRC study published
- 2004 National Defense Authorization Act
  - Congressional directive calling for “equivalent standards for use in all forms of compensatory mitigation”
- 3/28/06 – Proposal in Fed Register
- 4/10/08 – Final Rule in Fed Register
- 6/9/08 – Effective date of Rule



# Mitigation 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

# 1. Purpose and General Considerations (33 CFR 332.1)

“The purpose [of the Rule] is to establish standards and criteria for all types of compensatory mitigation:

- On-site & off-site PRM,
- Mitigation banks, and
- ILF mitigation.”

*The Mitigation Rule is federal regulation that must be adhered to for activities authorized by Dept. of the Army permits. It is not optional, nor is it simply informal guidance or a set of friendly recommendations.*

### 3. General Compensatory Mitigation Requirements (332.3)

- Objectives
- 4 Compensation Methods
  - Restoration preferred
- 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
- Financial assurances

# Watershed Approach Overview

## (332.3(c)(1))

*“A watershed approach would improve permit decision making.”*

–NRC 2001

- Goal = “strategic selection of compensatory mitigation sites”
- Watershed approach considers:
  - Landscape position,
  - Habitat requirements of important species,
  - Source of watershed impairment.
  - Target resource type,
  - Habitat loss or conversion trends,
  - Current development trends,
  - Resiliency to watershed changes,

# Site Selection Criteria

## (332.3(d))

Site must be ecologically suitable for providing the desired aquatic resource functions:

- Hydrological conditions: soil characteristics and other physical & chemical characteristics,
- Watershed-scale features (e.g. habitat diversity, connectivity, etc.),
- Size and location of the site relative to hydrologic sources,
- Compatibility with adjacent land uses & watershed mgmnt plans,
- Reasonably foreseeable effects of the project on other important aquatic or terrestrial resources,
- Other relevant factors: development trends, land use changes, habitats, position within the stream network, WQ goals, floodplain management goals, etc.



*Look beyond the boundaries of your site!!*



# Amount of Mitigation (332.3(f))

*“Mitigation projects should be planned with and measured by a broader set of functions than currently employed.”*

–NRC 2001



- The amount of mitigation must be sufficient to replace lost aquatic resource functions
- Condition or functional assessment methods should be used when available
- Credit valuation must be based on functions, not cost or difficulty



# 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)

*“Performance expectations in Section 404 permits have often been unclear”*  
–NRC 2001



- Objective and verifiable
- Based on best available science assessed in a practicable manner
- Enforceable
- Hydrology standards should consider variability exhibited by reference resources



## 6. Monitoring (332.6)

To determine if the mitigation project is meeting performance standards



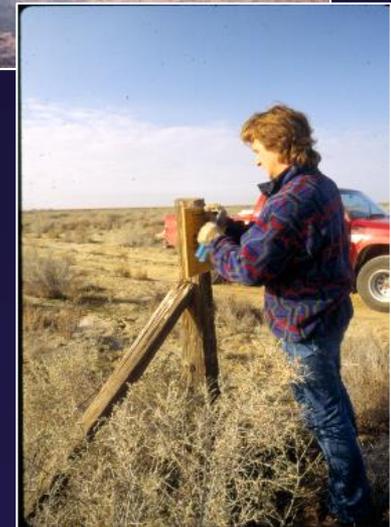
Mitigation plan must include:

- Parameters to be monitored
- Length of monitoring period
  - Not less than five years
- Party responsible
- Content of monitoring reports
- Frequency of report submittal



# 7. Management (332.7)

- Site protection instrument
  - Goal is “permanent protection”
  - Ideally held by “third party”
- Maintenance Plan
- Adaptive management plan
  - If things don’t go as planned...
- Long-term management
  - Identify responsible party
  - Describe necessary tasks and funding arrangements



# Long-term management

*“The presumption that once mitigation sites meet their permit criteria they will be self-sustaining in the absence of any management or care is flawed.”*

–NRC 2001



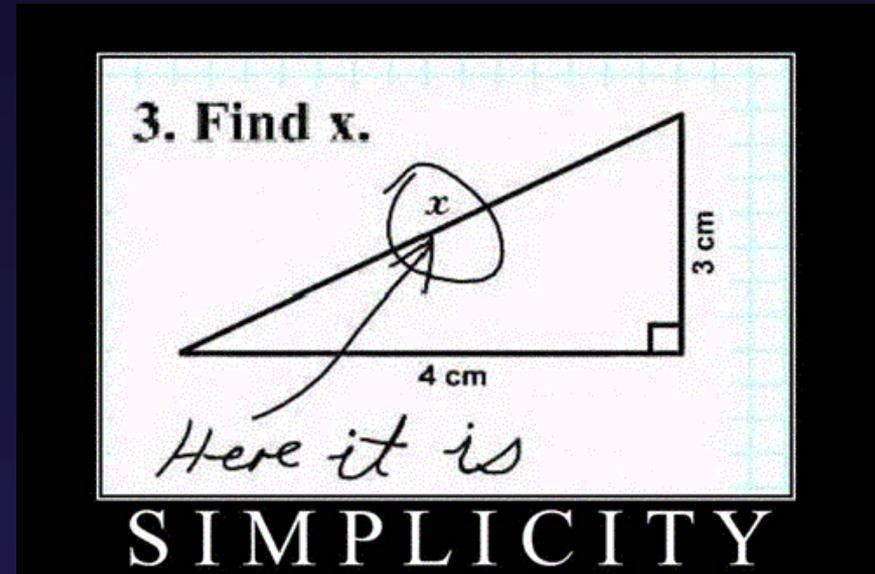
# 8. Mitigation Banks & ILF Programs (332.8)

- Must have an approved Instrument
- Must comply with all of the standards in the Final Mitigation Rule
- Interagency Review Team, roles & responsibilities
- Sponsor, roles & responsibilities
  - Qualifications of the Sponsor must be presented.
  - “The Sponsor is responsible for preparing all documentation associated with establishment of the bank or ILF program.”
  - Sponsor is ultimately responsible for operation, implementation, monitoring and management of the bank or ILF site.



# Take Home Messages

- Think. Look. Document.
- Don't oversimplify, but don't overcomplicate either. Good site selection avoids either.
- Hydrology is complex & highly variable over space and time.
- Plan for the unexpected.
- Build in resiliency.



# If You Have Questions

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- Compensatory Mitigation Website:
  - <https://www.epa.gov/cwa-404/compensatory-mitigation>

