



## A New Era of Compensatory Mitigation for Impacts on Natural Resources

The National Agricultural Law Center  
 October 10, 2016  
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### Compensatory Mitigation Webinar

- What is compensatory mitigation?
- Previous approaches v. current trends
- New mitigation policies
- Implications for Ag
- Mitigation banks and other sources of compensation
- Litigation risks

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### What Is Compensatory Mitigation?

- Gains in resources to offset losses of aquatic and/or species resources caused by permitted activities
  - Gains – “credits”
  - Losses – “impacts” or “debits”
- Wetlands/Streams
  - Restoration, enhancement, establishment, and/or preservation of aquatic resources to offset losses of jurisdictional waters and wetlands
  - Credits = acres of wetlands, linear feet of stream
- Species
  - Large areas of preserved and/or restored species habitat formally approved to compensate for impacts to similar species habitat
  - Credits = acres/miles of surface area, number of individuals or mating pairs of species, habitat function,

### Previous Approaches to Mitigation

- Focus on on-site mitigation, but often surrounded by development



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### Shift to Landscape-Scale Mitigation



Source: <http://willamettepartnership.org/>

- Obama Administration emphasizing need to do landscape-scale conservation and mitigation
  - Across all Federal agencies
  - Selecting land based on ecological and watershed suitability and not just price and availability

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### New Mitigation Policies



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## 2015 Presidential Memo

- *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development* (Nov. 2015)

- Establishes federal principles
  - Net benefit goal
  - Landscape-scale
  - Advance compensation
  - Long-term financial assurances
  - Avoidance of impacts to “irreplaceable” resources
- Would essentially require other agencies to adopt mitigation framework similar to Corps
- Requires BLM, USFS, and FWS to establish new mitigation policies



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## Proposed FWS Policy

- Amends 1981 FWS Policy
- Implements Presidential Memo
  - Extends to ESA species
  - “Net conservation benefit” (or at a minimum, no net loss)
  - Advance compensation
  - No impacts on “high value” habitat areas
- Would give Service significant discretion to impose mitigation requirements
- Services would implement through § 7 consultation, § 10 Incidental Take Permits, NEPA processes
- Legal authority?



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## Draft ESA-Specific Mitigation Policy

- **Service taking comment until October 17, 2016**
- Adopts the FWS mitigation principles proposed in March
  - Shift from project-by-project to landscape-scale approach
  - Encourages use of consolidated mitigation mechanisms (conservation banks; in-lieu fee; habitat credit exchange)
  - Emphasis on advance (or concurrent) mitigation
  - Goal of net gain (or at minimum, no net loss)
- Sets standards and minimum criteria for mitigation providers and permittees

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Draft ESA-Specific Mitigation Policy-  
Potential Areas for Comment

- Service acknowledges it has limited statutory authority to require mitigation
- Mitigation principles presented as “goals” but concern that they could be treated as binding requirements
  - e.g., FWS can hold up projects until applicants agree to certain mitigation
- Lack of established metrics for credits
- Interruption of projects currently under review
  - Staff may apply final policy to actions currently under review

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## USDA Wetland Mitigation Banking Program

- \$9 million available through nationwide competitive process.
- Maximum grant award is \$1 million.
- Incentivizes 3<sup>rd</sup> parties to develop mitigation banks specifically for agricultural producers subject to Wetland Conservation Compliance provisions of the 1985 Farm Bill.
- Avoids competition for mitigation credits with other large developers



Source: USDA, Natural Resources Conservation Service, Webber, NRCS Wetland Mitigation Banking Program.

## Broad Regulatory Expansion

- More expansive regulations with more agency discretion
  - WOTUS Rule
  - Critical Habitat Rules
- Broad expansion in regulatory requirements means more permitting
- Drives demand for mitigation

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### Implications for Agriculture

- **Increased permitting requirements for Ag**
  - Impacting more federally protected resources
- **Rise in mitigation banks**
  - More farmland to be taken out of ag use for mitigation purposes
  - Can be business opportunities in this area
  - But can also be high risk
    - High transaction costs, doesn't allow for flexibility
- **Question about compatible uses**
  - E.g., can you still have cattle grazing on mitigation lands?
    - Different answers from different Corps Districts

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### Mitigation Mechanisms



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### Compensatory Mitigation Mechanisms

Mitigation Mechanism	Credits	Description	Liability Transferable
Permittee-Responsible	No	- Permittee or contractor does compensatory mitigation project	No
Mitigation/Conservation Bank	Yes	- One or more sites where resources are restored, established, enhanced, and/or preserved for purpose of offsetting permitted impacts - Sells compensatory mitigation credits to permittees	Yes
In-lieu Fee Program Site	Yes	- Sponsored by government or non-profit natural resource management entities - Collects fees from permittees to do larger compensatory mitigation projects	Yes
Habitat Credit Exchange Site	Yes	- Environmental market that operates as a clearinghouse for credit transactions between mitigation providers and permittees - Indirect transactions	Yes
Other 3 <sup>rd</sup> -party Mitigation Site	No	- Established by third party to compensate for impacts for a single action taken by permittee	Yes

### Different Compensation Sources

#### U.S. Army Corps of Engineers: 2008 Mitigation Rule Retrospective

- Increasing reliance on mitigation bank and in-lieu fee program credits

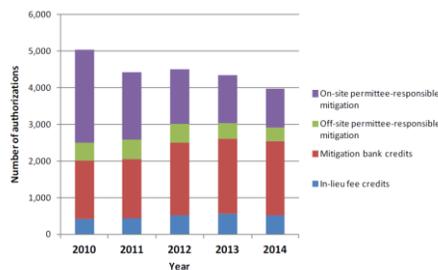


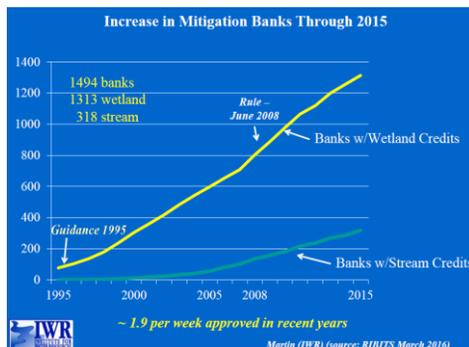
Figure 13. Number of all authorizations (individual permits and general permits) requiring compensatory mitigation, by mitigation source, during the period of 2010-2014

### What is a Mitigation Bank?

- Sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor
- Operation and use governed by mitigation bank instrument
- Market-oriented approach
- Advantages of third party compensation
  - Watershed/landscape scale
  - Responsibilities are clear
  - Severance of liability
  - Reduce time to permit
- Highly regulated

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### Increase in Mitigation Banks



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**Wetlands Mitigation Bank**

- Site where wetlands resources restored, established, enhanced, and/or preserved for purpose of offsetting losses of jurisdictional wetlands
- Wetlands banking is most established
  - As of 2015, at least 600,000 acres approved for banking
  - Average of 10,000 acres of permitted wetland impacts requiring mitigation annually
- Annual wetland mitigation market size - \$1.2 billion



Source: <http://www.cityofchesapeake.net/>

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**Banks Providing Wetland Credits**

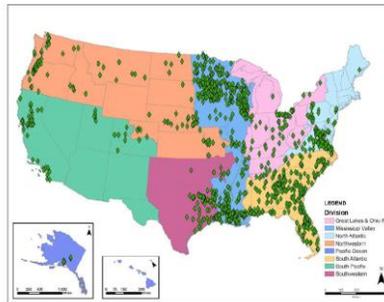
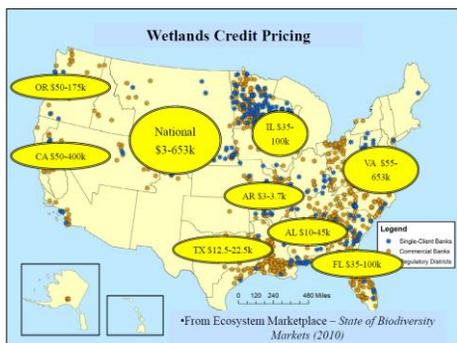


Figure 22. Locations of approved mitigation bank sites providing wetland credits as of 2014

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**Wetlands Credit Pricing**



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**Stream Mitigation Bank**

- Increased regulatory focus on stream mitigation since 2008 Mitigation Rule
  - Number of banks providing stream mitigation credits has more than doubled since 2008
- Annual Stream Mitigation Market Size – \$2.2 billion



Source: Charlotte Observer

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**Banks Providing Stream Credits**

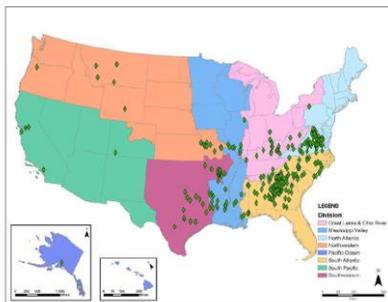


Figure 23. Locations of approved mitigation bank sites providing stream credits as of 2014

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**Conservation Banks**

- Large areas of preserved and/or restored species habitat formally approved to compensate for impacts to similar species habitat
- No regulations with specific requirements/instructions or performance criteria
  - (FWS draft ESA policy contains some guidance)
- Less than 200 conservation banks have been approved



Source: <http://www.wyofile.com>

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**Approved Conservation Banks**



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**Wetlands/Stream v. Species Banks**

- | <u>Wetlands/Streams</u>                                                                                                                                                                                                                  | <u>Species</u>                                                                                                                                                                                                                                            |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• CWA requires mitigation</li> <li>• Clear requirements and performance standards from Corps 2008 Mitigation Rule</li> <li>• “No net loss”</li> <li>• Service areas tied to watersheds</li> </ul> | <ul style="list-style-type: none"> <li>• No ESA mitigation reqs</li> <li>• FWS policy under development (public comment period open)</li> <li>• Net gain (or at a minimum, no net loss)</li> <li>• Service areas tied to species range/habitat</li> </ul> |

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**Litigation Risks**

- Potential challenges to new mitigation policies
  - Does FWS have statutory authority to require net gains through mitigation?
- Mitigation bank challenges
  - Challenges to mitigation bank approvals
    - *Sierra Club v. St. Johns River Water Management District* - failure to do NEPA review
  - Challenges on Corps requiring permittee to obtain credits from one bank v. another
    - *Walther & Pioneer Reserve v. United States*-breach of contract claim

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