

COMPENSATORY MITIGATION AND THE MITIGATION RULE

USACE, Jacksonville District



US Army Corps of Engineers
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What is Mitigation?



- Sequential process of avoidance, then minimization of wetland impacts, and lastly **compensatory mitigation**



- Permit applicants are responsible for proposing **compensatory mitigation** to offset unavoidable wetland impacts



Compensatory Mitigation Attributes

- Appropriate for the type, scope, and degree of project impacts
- Conducted in advance of or concurrent with the activity causing the impact
- Designed to include an offset for temporal loss of wetland function
- Enforceable through permit special conditions



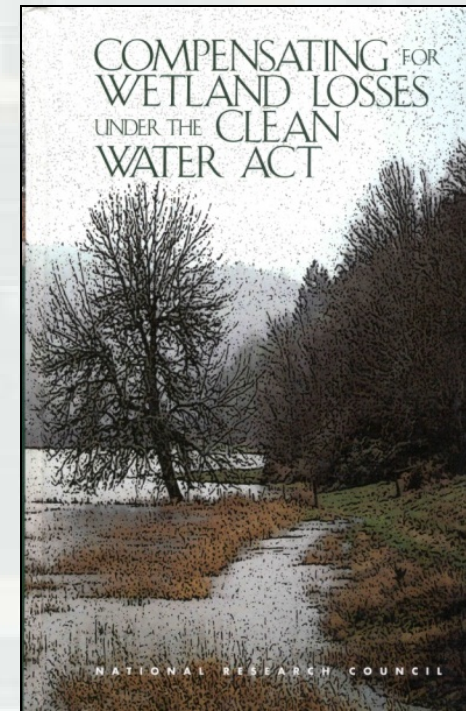
Why is Compensatory Mitigation Required?

- Compliance with the 404(b)(1) Guidelines
- To ensure permitted activity is not contrary to the public interest
- Contribute to *national* goal of “no overall net loss” of wetland acreage and function



National Research Council 2001 Report

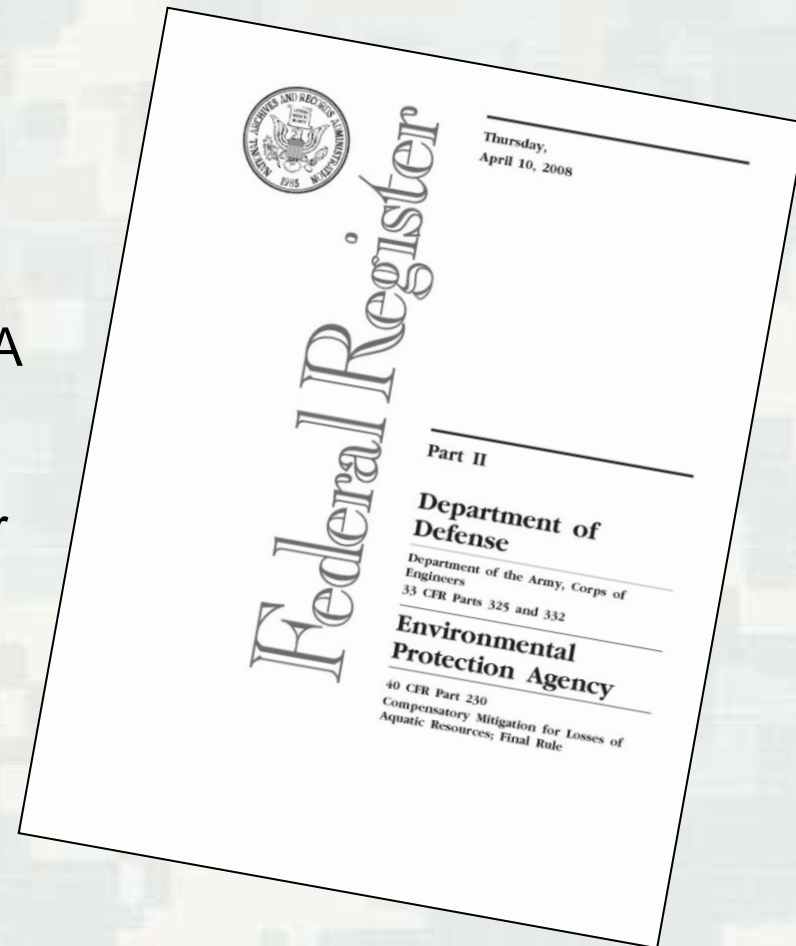
- Requested by USEPA and USACE
- Evaluated mitigation for projects approved under the Clean Water Act
- Recommended improvements to mitigation practices:
 - Base site selection for mitigation on watershed approach
 - Incorporate hydrological variability into wetland mitigation design and evaluation
 - Plan and measure mitigation projects by broader set of wetland functions
 - Incorporate monitoring and adaptive management into mitigation plans
 - Third-party mitigation (mitigation bank or in-lieu fee program) offers advantages over permittee-responsible mitigation



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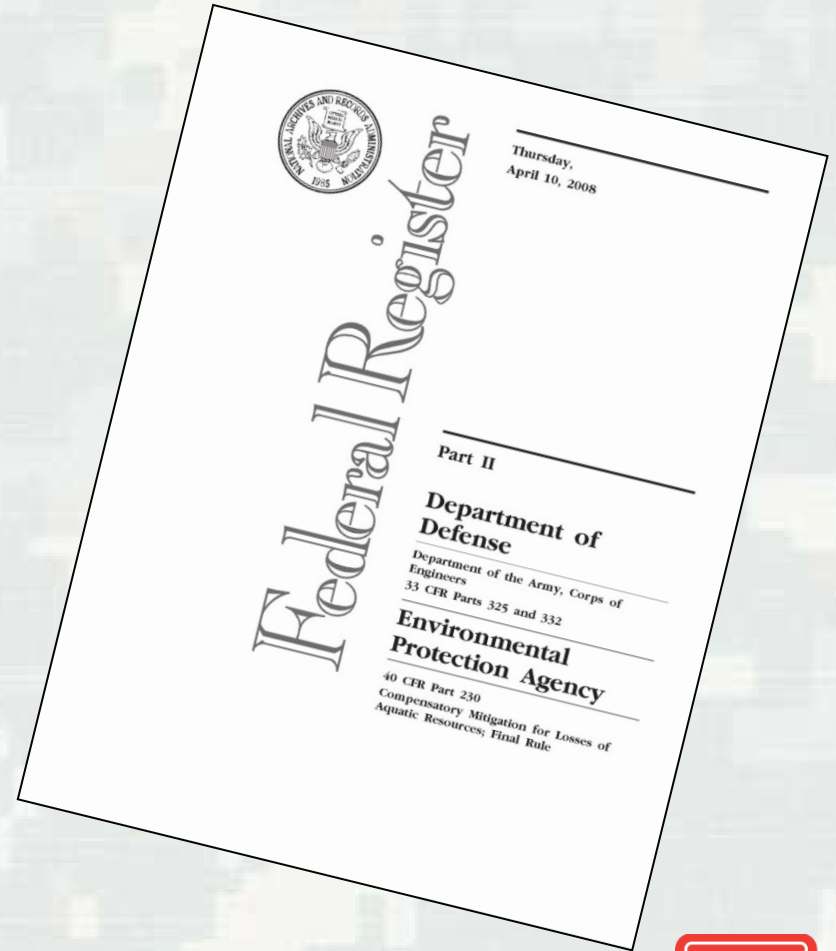
2008 Mitigation Rule Development

- **1999** – USEPA/USACE seek National Research Council (NRC) study
- **2001** – NRC study published
- **11/2003** – Congressional directive (NDAA 2004)
- **3/28/2006** – Proposal in Federal Register
- **4/10/2008** – Final Rule in Federal Register (Revisions to 33 CFR Parts 325 and 332)
- **6/09/2008** – Effective date of rule



2008 Mitigation Rule Overview

- Applies to compensatory mitigation for USACE permits
- Provides performance standards and requirements for compensatory mitigation
- Includes where and how compensatory mitigation is to be done
- Supersedes most previous mitigation guidance



Types of Mitigation

- Restoration
 - Re-establishment (Increases function and area)
 - Rehabilitation (Increases function only)
- Establishment (Increases function and area)
- Enhancement (Increases function only)
- Preservation (May increase function)



Mitigation Rule Watershed Approach

- Provides a general framework for better decision-making and consistency for compensatory mitigation
- Goal: “Maintain and improve the quality and quantity of aquatic resources within watersheds through **strategic selection** of compensatory mitigation sites”
- Watershed approach should be used to the extent appropriate and practicable



Preference Hierarchy for Mitigation

- Mitigation bank credits
- In-lieu fee program credits
- Permittee-responsible mitigation under a watershed approach
- Permittee-responsible mitigation through on-site and in-kind mitigation
- Permittee-responsible mitigation through off-site and/or out-of-kind mitigation

(33 CFR 332.3(b))



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Mitigation Banks and ILF

- Are approved by the Corps in advance
- Available credits have already met the performance standards
- Address resource needs on a watershed scale
- Responsibility for the compensatory mitigation is transferred from the permittee to the sponsor



Mitigation Plans

Level of Detail

- Commensurate with scale and scope of the impacts
- Influenced by
 - Degree of risk and uncertainty
 - Mitigation type
 - Mitigation hierarchy



Mitigation Plan Components

1. Objectives
2. Site Selection
3. Site Protection Instrument
4. Baseline Information
5. Determination of Credits
6. Mitigation Work Plan
7. Maintenance Plan
8. Performance Standards
9. Monitoring Requirements
10. Long-term Management Plan
11. Adaptive Management Plan
12. Financial Assurances

STH 83 Corridor Wetland Mitigation Compensation Site Plan
January 2012

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1. Objectives

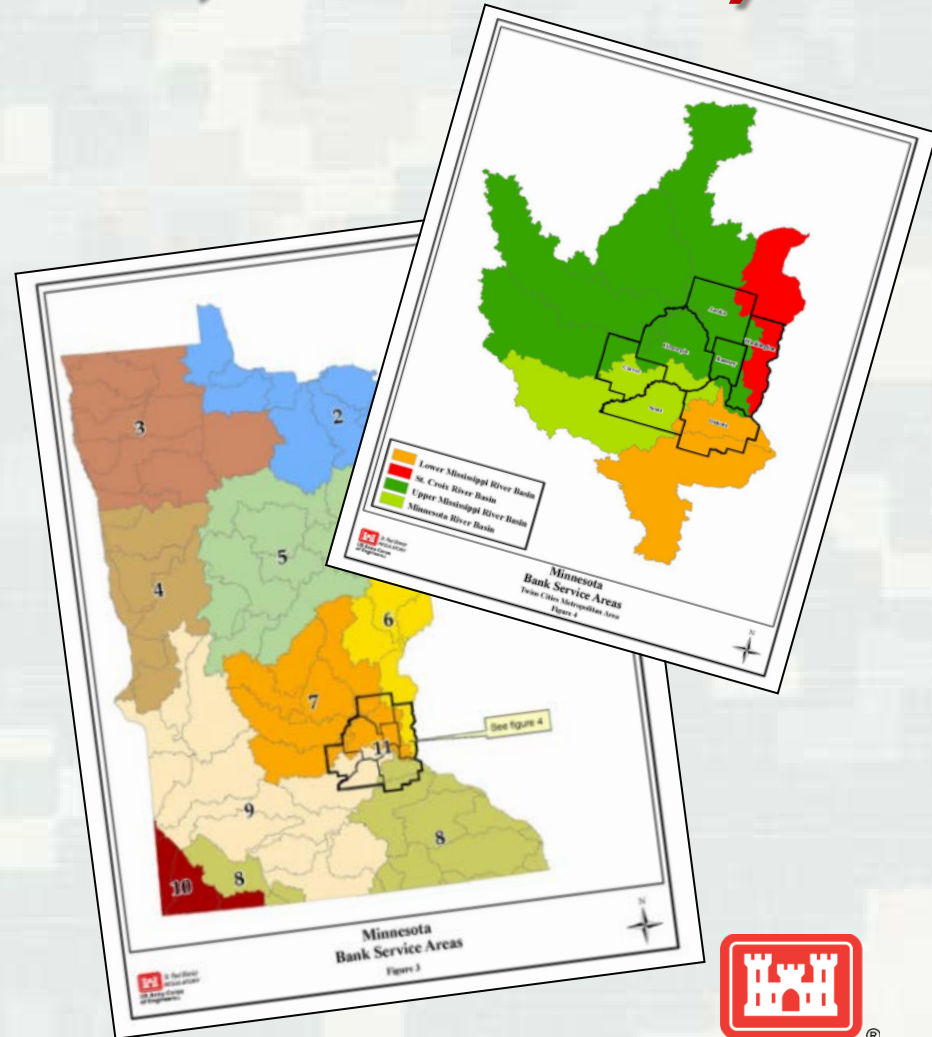
- Provide a description of the resource type(s) and amount(s) that will be provided
- Describe method of compensation (i.e., restoration, enhancement, establishment, and/or preservation)
- Describe how mitigation proposal will support needs of the watershed



2. Site Selection (Location, Location, Location!)

Factors to address include:

- Landscape position
- Ecological suitability for providing aquatic resource functions
- Watershed needs
- Hydrological conditions
- Compatibility with adjacent land



3. Site Protection Instrument

- Describes legal arrangements and proposed instrument, including site ownership, that will be used to ensure long-term protection of the mitigation site
- Long-term protection may be provided through real estate instruments such as conservation easements

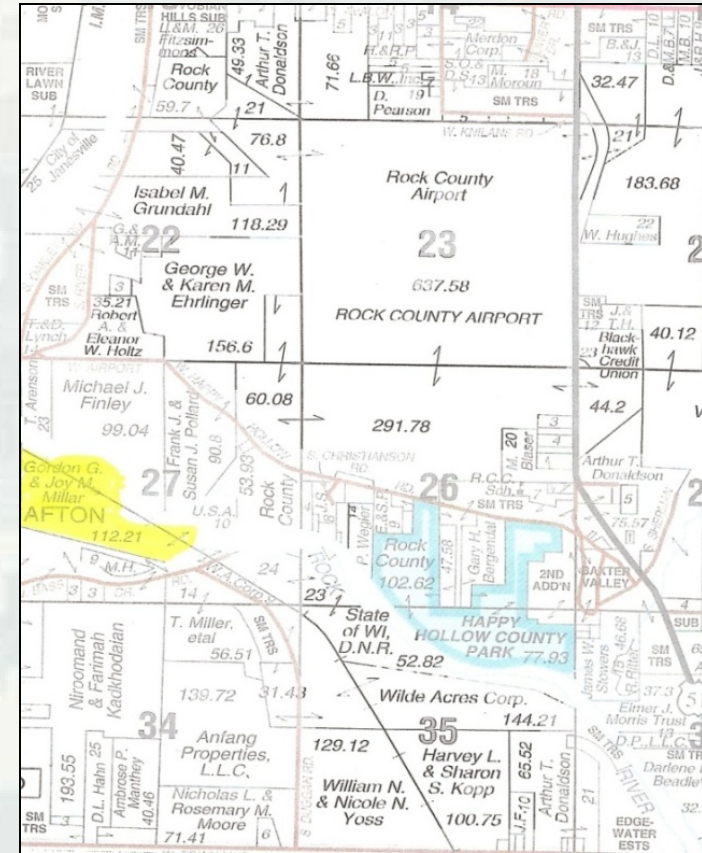
	Agreement No. _____
1	<u>ESCROW AGREEMENT</u>
2	FOR THE
3	<u>INSERT NAME] PROJECT,</u>
4	<u>INSERT NAME] COUNTY, CALIFORNIA</u>
5	
6	
7	THIS ESCROW AGREEMENT, hereinafter referred to as "the Agreement," for purposes of
8	identification hereby numbered _____, and effective as of the Effective Date defined
9	herein, is entered into by and among _____ [enter permittee information],
10	_____, as escrow agent (the "Escrow Agent"), and the United States Army Corps of
11	Engineers (the "ACOE") (collectively, the "Parties") for the purposes of the Escrow Agent establishing and
12	_____ funding an escrow account to be held by the Escrow Agent for the purpose of providing
13	financial security to ensure successful completion of the Final Habitat Mitigation and Monitoring Plan
14	dated _____ (the "HMMP") as required by the ACOE in permit no. _____ (the
15	"ACOE Permit"), as more fully defined herein, for the benefit of the ACOE, establishing the terms and
16	conditions for the withdrawal of monies held in the Escrow Account by the ACOE and addressing such
17	other matters as are expressed herein.
18	
19	RECITALS
20	A. The _____ is planning to construct [describe project and location] County, California,
21	hereinafter referred to as "the Project".
22	B. The Project will impact _____ acres of waters of the United States on the Project site.
23	C. The _____ is required to mitigate these impacts as set forth in the ACOE Permit and
24	HMMP.
25	D. The _____, Escrow Agent, and the ACOE wish to enter into this agreement to memorialize the terms
26	and conditions under which the _____ shall provide financial assurances to ensure
	1



4. Baseline Information

Description of impact and mitigation sites:

- Historic and existing ecological conditions
 - Historic and existing hydrology
 - Historic and existing plant communities
 - Soil conditions
 - Vicinity map(s)
 - Jurisdictional delineation
- * If using mitigation bank/in-lieu fee, only need information for impact site*




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5. Determination of Credits

Describe the number of credits (functional lift) to be provided and rationale:

- If using mitigation bank/in-lieu fee, identify the number and type of credits needed, and how determined (e.g., UMAM, WRAP)
- For permittee-responsible mitigation, provide an explanation, based on functional assessment, of how the mitigation project will compensate for impacts



EcoBank LLC
30000 Central Hill Road NE
Albany, OR 97100-0904
Phone: 503-327-3407
Cell: 503-879-5472
www.OregonMitigationCredits.com

Statement of Sale of Credit
for
Long Tom Mitigation Bank

Date: 2-Jun-09
No. of Credits Sold: 0.30
Impact Acres: 0.295
Impact Linear Feet: N/A

Permittee Name: Oregon Military Department
Corps Permit Number: NWP-2008-569/1
DSL Permit Number: 42154-EP
Project Name: Camp Adair Access Roads
Impact HUC: 1709000306

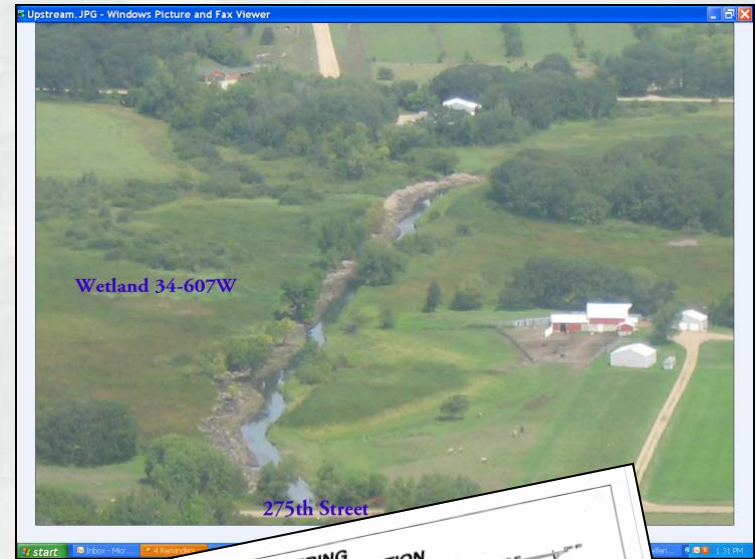
By selling these credits to Oregon Military Department
EcoBank LLC is now the party responsible for fulfilling the mitigation responsibility associated with Corps permit # NWP-2008-569/1 and DSL permit # 42154-EP.

-Natural Capital-



6. Mitigation Work Plan

- Construction methods and timing
- Sources of water
- Method for establishing desired plant community
- Invasive plants control
- Soil management, grading, erosion control (best management practices)



7. Maintenance Plan

Describe maintenance activities needed to meet performance standards:

- Prescribed fire management
- Irrigation
- Weed/
invasive species control
- Trash pick-up
- Fencing



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8. Performance Standards

- Should include ecologically-based standards that will be used to determine if the mitigation project is achieving objectives
- Should be objective, verifiable and based on best available science
- May entail use of reference aquatic resource sites and/or functional assessments



8. Performance Standards (cont'd)

- Hydrology - Duration, periodicity
- Soils - Hydric soil indicators
- Vegetation - Density, community structure, species diversity
- Stream - Sinuosity, sediment particle size, cross section, bank stabilization



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9. Monitoring Requirements

Mitigation plan must address monitoring requirements:

- Parameters to be monitored
- Length of monitoring
- Parties responsible for monitoring
- Report submittal frequency



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9. Monitoring Requirements (cont'd)

- Content and detail of monitoring reports is commensurate with scale and scope of mitigation
- Minimum of five years
 - Longer if slow development rates (forested)
 - Reduce/waive remaining if standards achieved
 - Extend if standards not met
- Monitoring report includes: as-built plans, maps, photographs, functional assessment results



9. Monitoring Requirements (cont'd)

- Regulatory Guidance Letter 08-03
- 33 CFR Part 332



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10. Long-Term Management (Sustainability)

- Describes how compensatory mitigation project will be managed after performance standards have been met
- Identifies annual cost estimates
- Identifies long-term financing mechanisms
- Identifies qualified responsible party (permittee by default)



10. Long-Term Management (cont'd)

Describe funding mechanisms:

- Non-wasting endowments, trusts, contractual arrangements with future responsible parties
- Address inflation & other contingencies



10. Long Term Management Activities (cont'd)

- Fencing, signage
- Prescribed fire management
- Water-control structures maintenance
- Resource inventories
- Inspections
- Species management
- Encroachment, vandalism protection



11. Adaptive Management Plan

- Addresses under- or non-performing mitigation/unforeseen changes
- Identifies who is responsible
- Guides decisions on revising plans
- Examples: floods, droughts, herbivory, unexpected site conditions



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12. Financial Assurances

- Financial mechanism to ensure that:
 - Project is completed
 - Resources are available to correct projects that don't meet performance standards, or replace unsuccessful projects
- Long-term management funding is separate matter



Implementation Financial Assurances vs. Long-Term Financial Assurances

- Implementation assurances help guarantee
 - Project is constructed
 - Project meets performance standards
- Long-term assurances
 - Provide resources for management AFTER performance standards are met
 - Help ensure project is sustainable



Amount of Financial Assurances

- Based on full cost of providing mitigation
- Could include costs for:
 - Land
 - Planning, design and engineering
 - Construction and planting
 - Monitoring and maintenance
 - Reasonably foreseeable remedial work
 - Contingencies
 - Legal and administrative



Allowable Forms of Assurances

- Letter of credit
- Escrow account
- Performance bond
- Casualty insurance
- Other appropriate instruments, subject to agency approval



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Financial Assurances Summary

- A number of options available for establishing financial assurances
- Mitigation provider is responsible for proposing assurance mechanism
- Assurances limit but **CANNOT** eliminate risk of failure
- USACE cannot be the beneficiary of assurances, but approves plan
- Work on financial assurances should begin before permit issuance



Permit Requirements for Mitigation Plan

- Individual permits (Standard Permits and Letters of Permission)
 - Final mitigation plan must be approved prior to permit issuance

- Minor permits (General Permits, Nationwide Permits)
 - Permit conditions may supplement mitigation plan
 - Final mitigation plan must be approved prior to initiating work

- If using mitigation bank or in-lieu fee program, provide only:
 - Baseline (impact) information
 - Determination of credits
 - Statement of credit availability



Compensatory Mitigation Summary

Mitigation is a sequential process:

- Avoid
- Minimize
- Provide for compensatory mitigation for unavoidable impacts to wetlands

Mitigation Rule:

- “Levels the playing field” by requiring 12 mitigation plan components for **all** types of compensatory mitigation (mitigation banks, in-lieu fee, and permittee-responsible)
- Establishes a watershed-based preference hierarchy for compensatory mitigation
- Requires financial assurances for **both** mitigation project implementation **and** long-term management



Compensatory Mitigation Reporting

Permittees are responsible for:

- Monitoring mitigation annually for a period of 5 years or more.
- Reports that are:
 - ▶ Accurate and concise,
 - ▶ provide overview of site conditions and functions, and
 - ▶ provide information on how the site is meeting performance standards.
- Reporting actions taken using adaptive management.
- Submitting monitoring reports until released by the Corps.



Mitigation Compliance

Permittees are responsible for:

- Complying with all of the permit terms and conditions.
- Maintaining permittee-responsible mitigation in perpetuity beyond the monitoring period.



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Tools & Contacts

- **Federal ledgers are online:**
 - RIBITS - Regulatory In lieu fee and Bank Information Tracking System
 - <http://geo.usace.army.mil/ribits/index.html>
- **Monitoring Reports can be sent to:**
 - SAJ-RD-enforcement@usace.army.mil



Questions?



Photo provided by: Tim Douma



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