



# Overview of 2008 Mitigation Rule Requirements for In-Lieu Fee Programs and Post-Rule Mitigation Trends

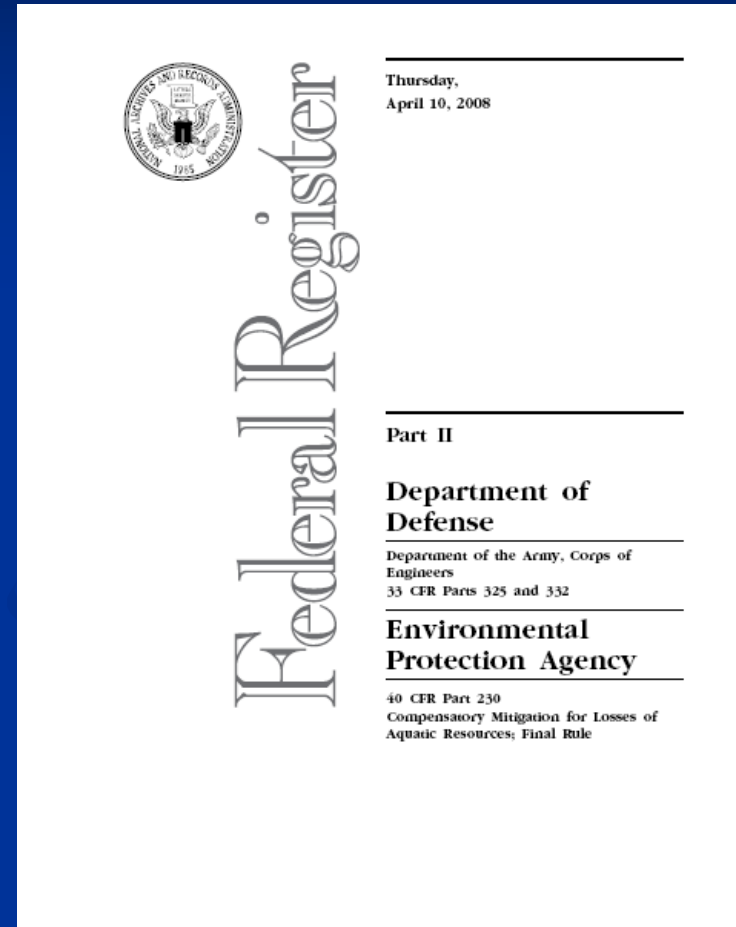
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U.S. Environmental Protection Agency

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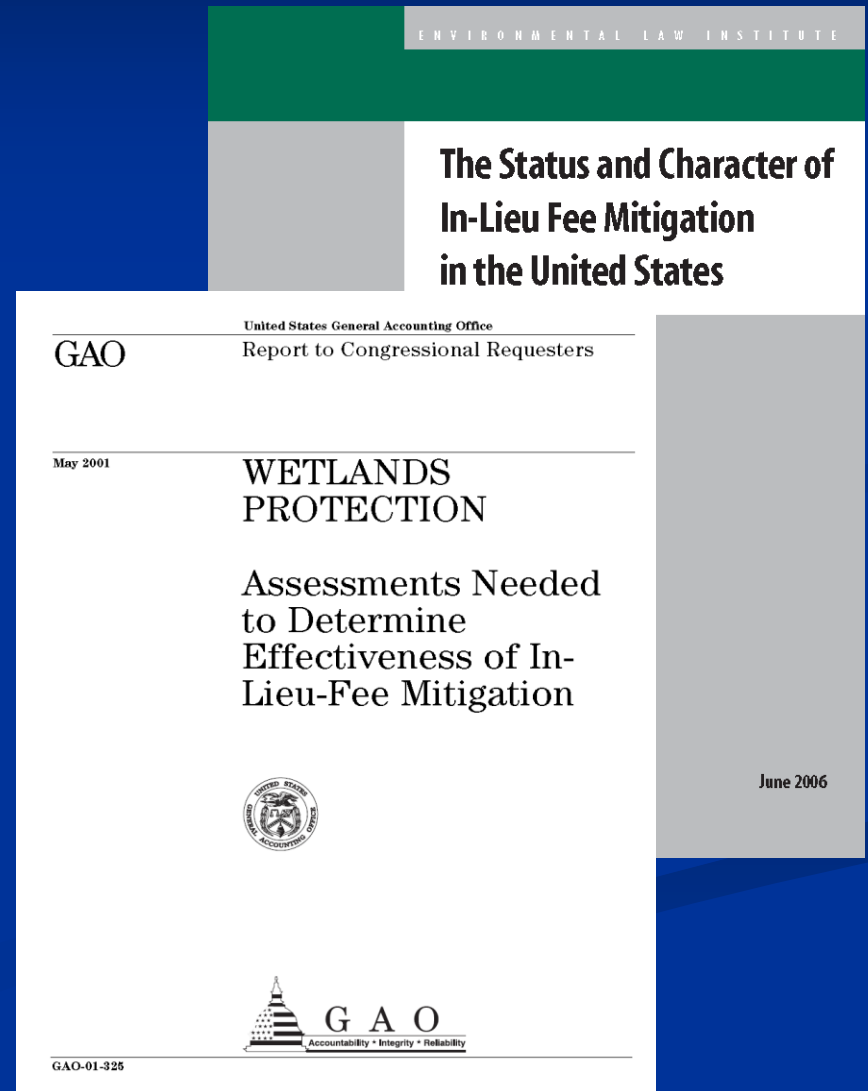
# Overview

- Pre-Rule ILF concerns
- ILF reforms in 2008  
Mitigation Rule
- Primary findings from recent report on Post-Rule compensation trends



# Background: Problems with Pre-Rule ILF Practice

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



# Why keep ILF programs?

- Provide 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 in 2008 Rule

- The final rule retains ILF programs but with significant reforms:
  1. Cap on “advance” credits
  2. Fee schedule for advance credits
  3. Advance planning requirement
  4. Limits on who can be sponsor
  5. Financial accounting requirements
  6. Provisions to address timing of projects
  7. Same public/IRT review process as banks
  8. Equivalent admin/ecological standards as banks and permittee-responsible mitigation

# 1. ILF Program Advance Credits

## *33 CFR 332.8(n)*

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

## 2. Fee Schedule

### *33 CFR 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





# 3. 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



## 4. ILF Sponsors

- Eligibility “a governmental or non-profit natural resources management entity” [33 CFR 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 [33 CFR 332.8(d)(2)(vi)]

# 5. 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
- ILF program account funds may only be used for:
  - *“selection, design, acquisition, implementation and management of ILF compensatory mitigation projects”*
- Annual reports, program audits

# 6. ILF Project Implementation

## *33 CFR 332.8(n)(4)*

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



# 7. IRT Review Process

## 33 CFR 332.8(d)

- I. Draft Prospectus
- II. Prospectus
- III. Draft Instrument
- IV. Final Instrument

### Compensatory Mitigation Rule Timeline for Bank or ILF Instrument Approval\*

		Event	# of Days**	
Phase I	Day 1**	Optional Preliminary Review of Draft Prospectus	30	DE provides copies of draft prospectus to IRT and will provide comments back to the sponsor within 30 days.
	Day 30			
<b>Sponsor Prepares and Submits Prospectus</b> ~DE must notify sponsor of completeness w/in 30 days of submission~				
Phase II	Day 1**	Complete Prospectus Received by DE		
	Day 30	Public notice must be provided within 30 days of receipt of a complete prospectus	30	DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.
	Day 60	30-Day Public Comment Period	30	
Day 90	DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.	30	15	
<b>Sponsor Considers Comments, Prepares and Submits Draft Instrument</b> ~DE must notify sponsor of completeness w/in 30 days of submission~				
Phase III	Day 1	Complete Draft Instrument Received by IRT Members		
	Day 30	30-day IRT comment period begins 5 days after DE distributes draft instrument to IRT members	30	Within 90 days of the receipt of a complete draft instrument by IRT members, the DE must notify the sponsor of the status of the IRT review.
	Day 60	DE discusses comments with IRT and seeks to resolve issues ~ # of days variable~	60	
Day 90				
<b>Sponsor Prepares Final Instrument</b> ~Sponsor provides copies to DE and all IRT members~				
Phase IV	Day 1	Final Instrument Received by DE & IRT		
	Day 30	DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.	30	IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
	Day 45	Remainder of time for initiation of dispute resolution process by IRT members	15	
Day 45	<b>INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED</b>			

EPA/Corps draft 4/02/08

Total Required Federal Review (Phases II-IV): ≤225 Days

\*Timeline also applies to amendments

\*\*The timeline in this column uses the maximum number of days allowed for each phase.

# 8. Equivalent Standards

Mitigation Plan Components (*33 CFR 332.4(c)*), in ILF site-specific plans (*33 CFR 332.8 (j)(1)*)

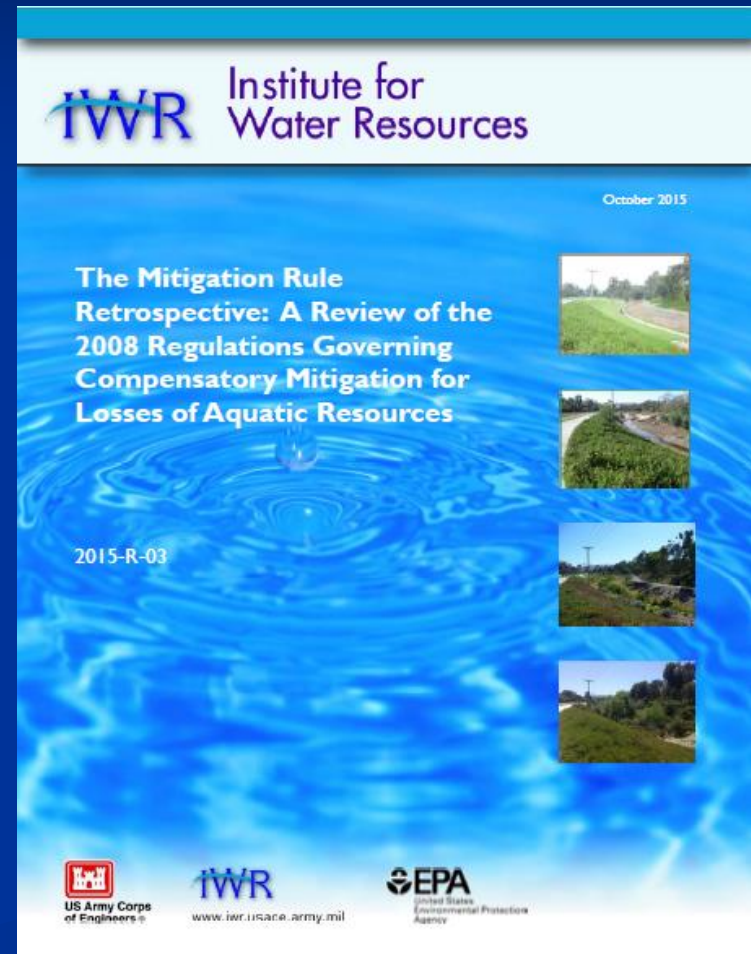
1. Objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information
5. Credit determination
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances

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

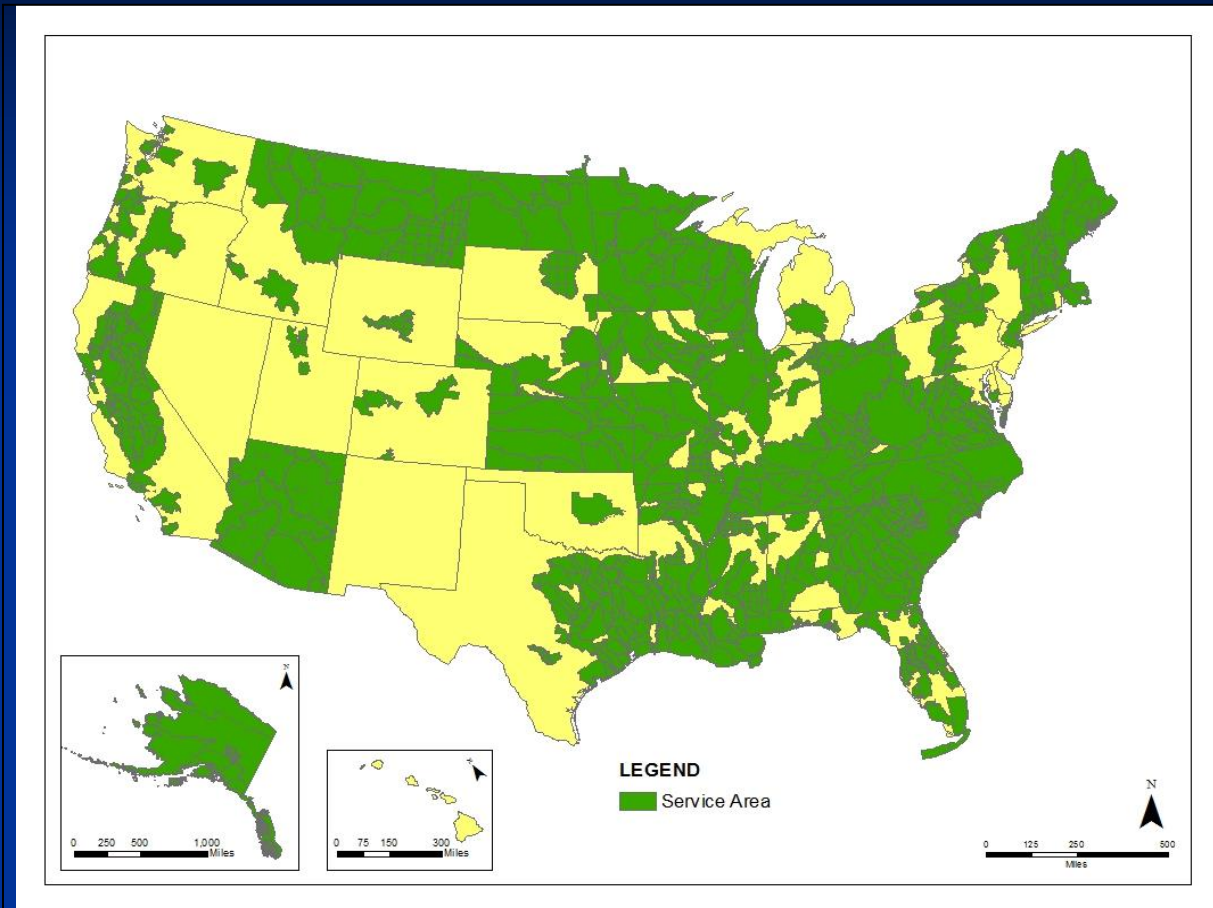


# Main Findings: Mitigation Rule Retrospective

- Summarizes progress on implementing 2008 Mitigation Rule
- Evaluates trends in
  - Aquatic resource impacts and compensation from 2010 through 2014
  - Trends in banking and ILF from mid-1990s through 2014



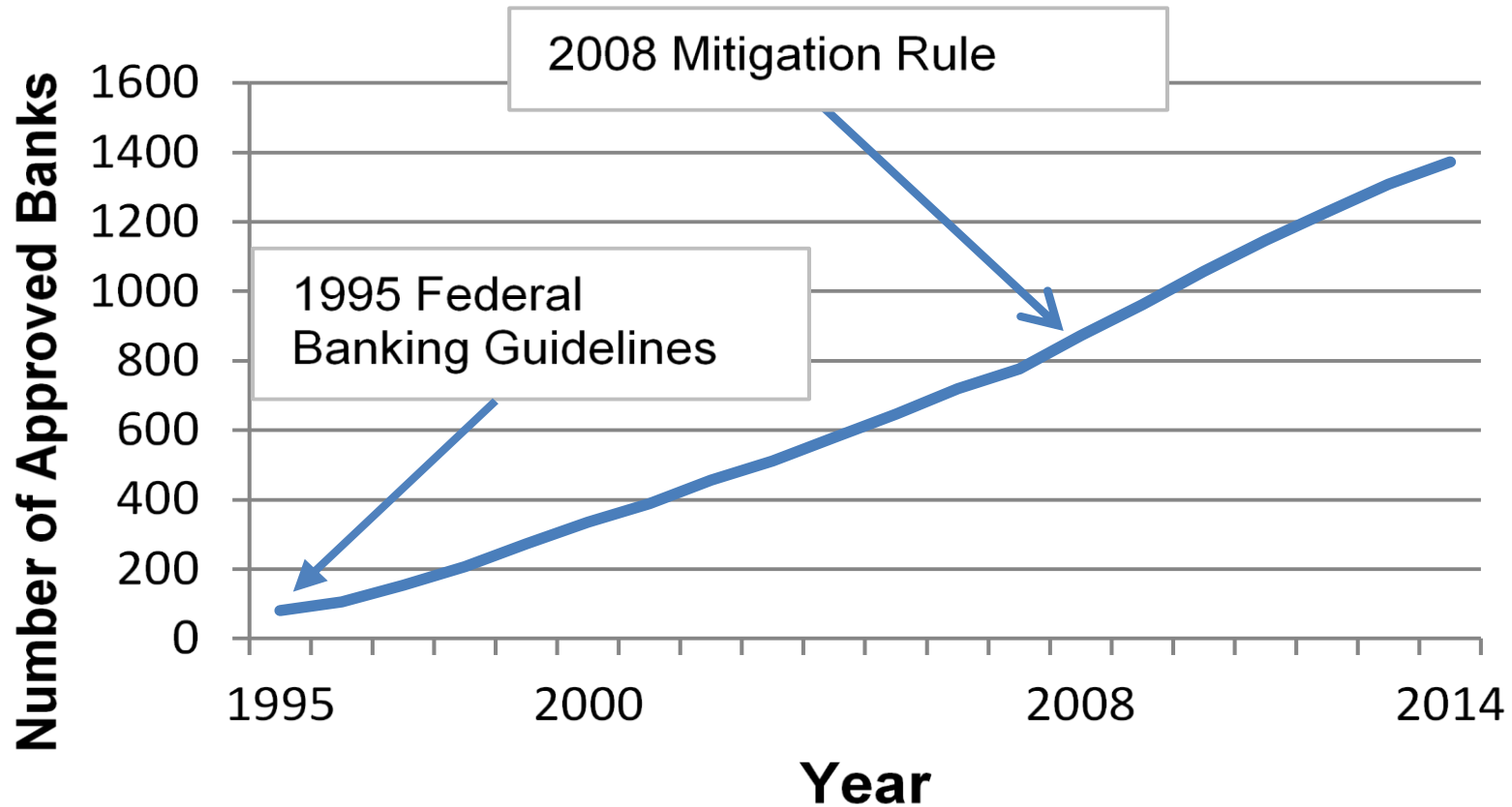
# Growth in Bank and ILF Coverage



Service Areas for Corps-approved mitigation banks and in-lieu fee programs as of 2014. Areas depicted represent largest coverage service area approved. Data obtained from RIBITS database.



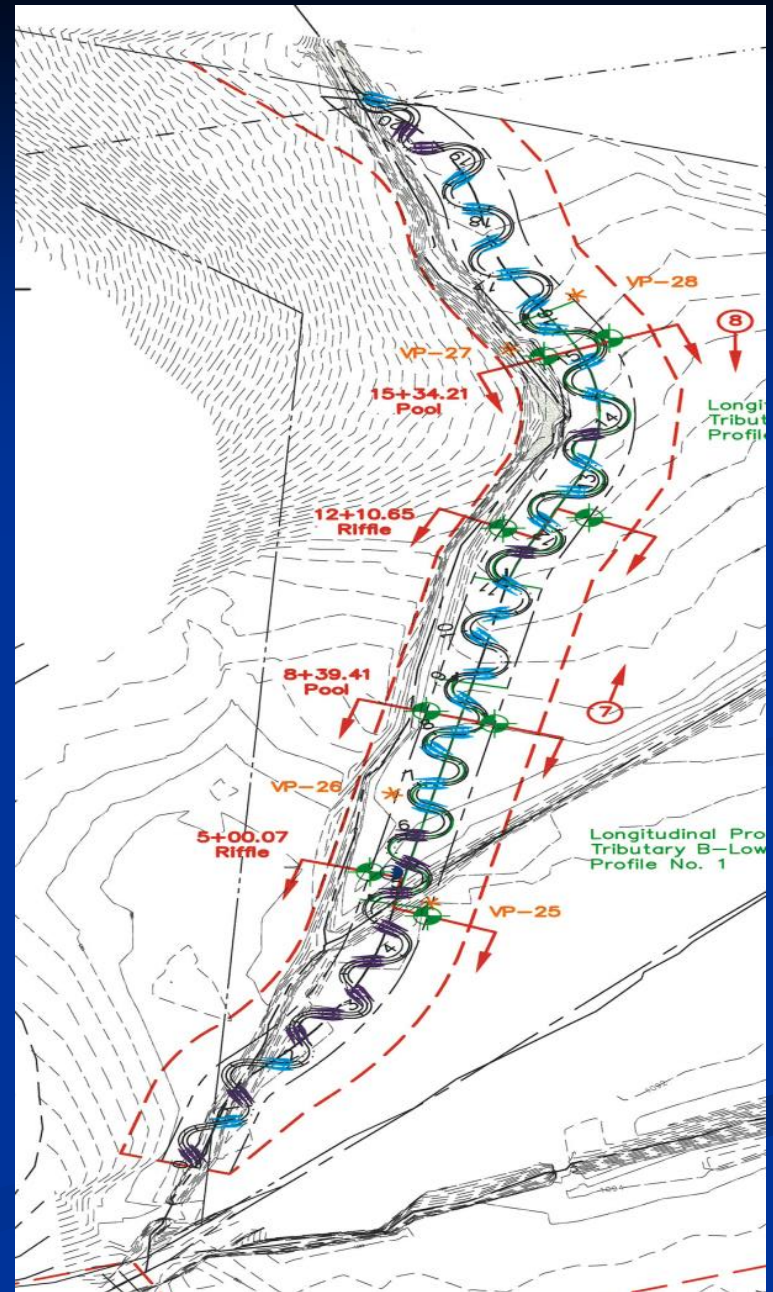
# Growth in Number of Banks and ILFs



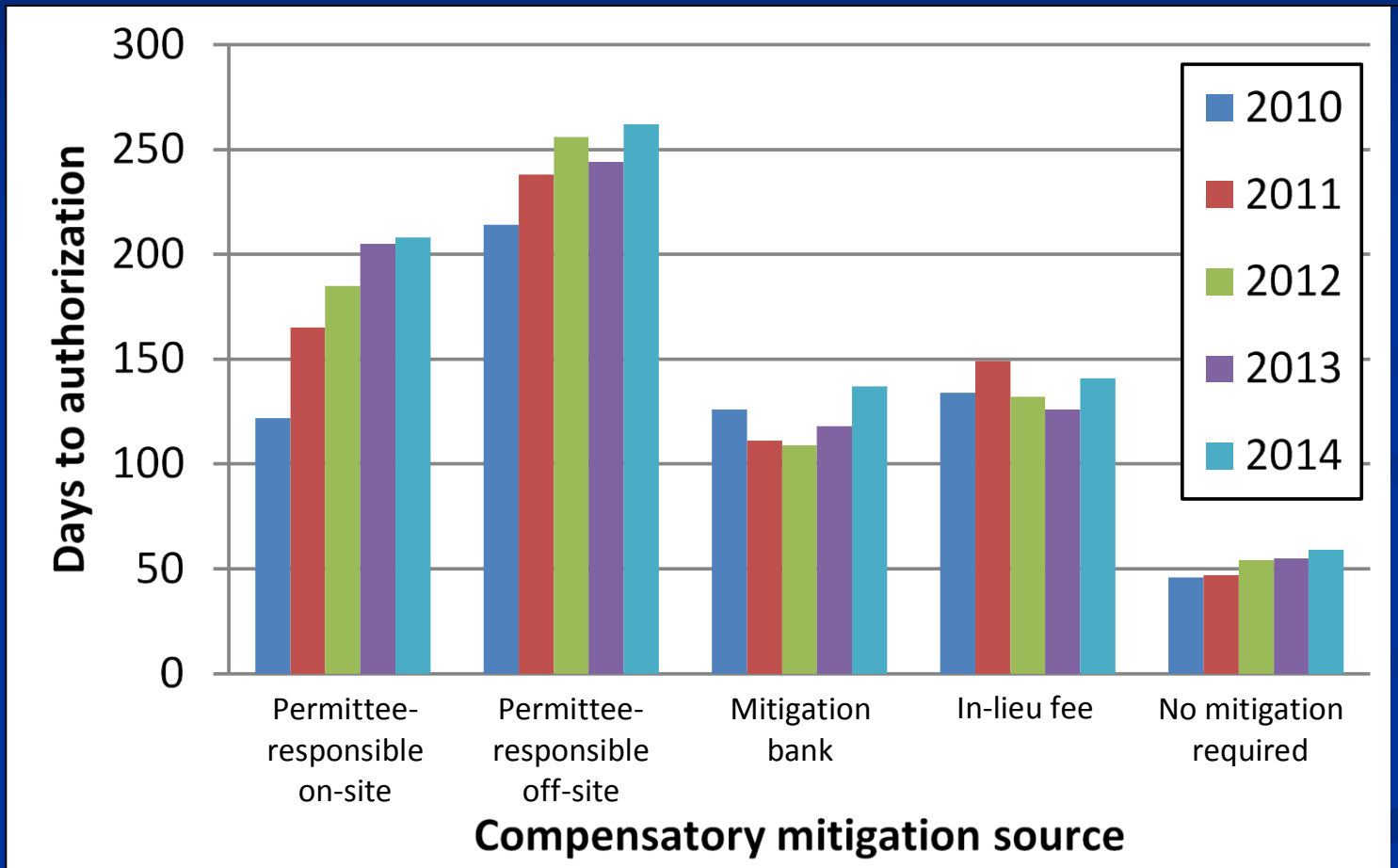
Cumulative total number of approved mitigation banks, from 1995 to 2014 – vast majority of which are private commercial banks

# Increased Focus on Stream Mitigation

- Increased scientific understanding and recognition of stream functions
- Expanded stream compensation requirements
- Number of stream MBs doubled since 2008

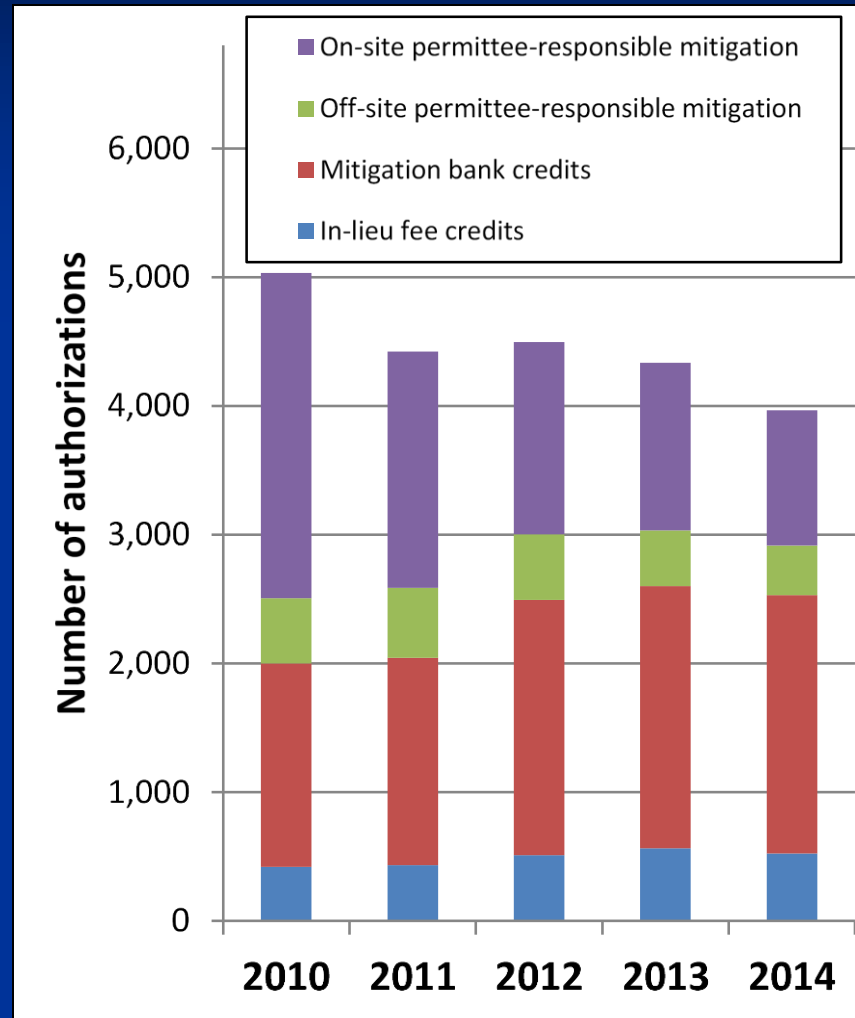


# Bank and ILF Options Save Time for Permittees



Average processing times for permit authorizations, by compensatory mitigation source, for 2010 to 2014.

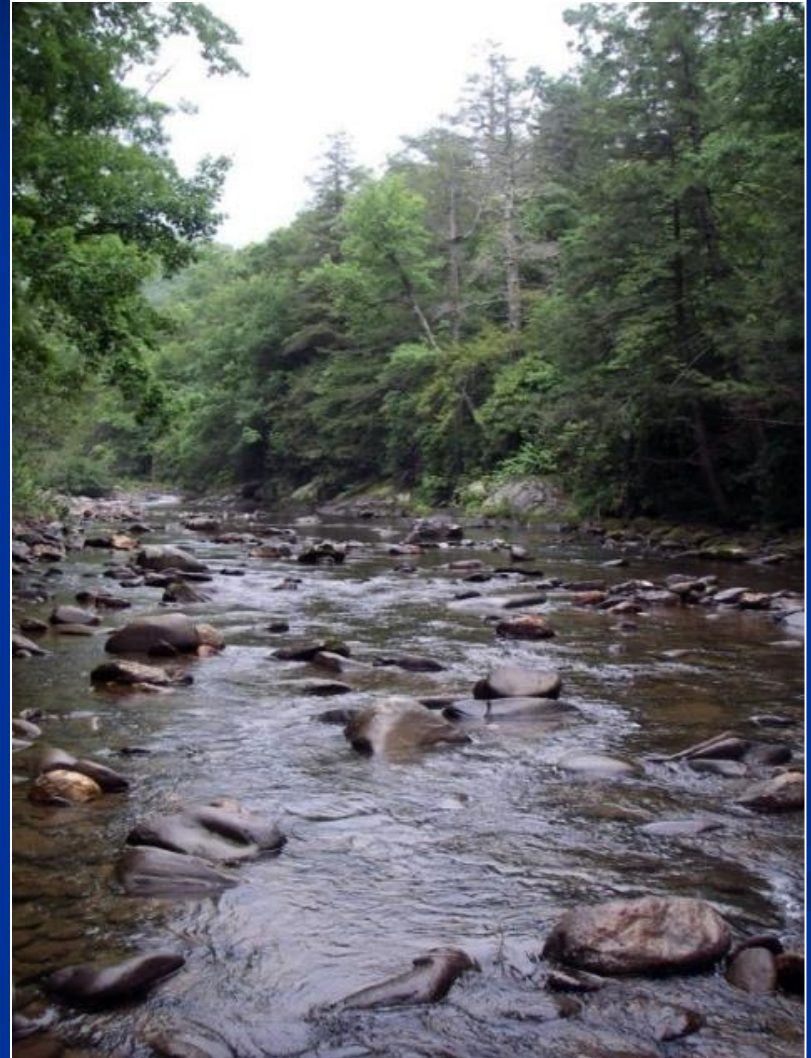
# Increasing use of Banks and ILF



Number of all authorizations requiring compensatory mitigation, by mitigation source, from 2010-2014.

# Areas of Future Focus

- Continue to invest in education and training
- Database enhancements
- State/District-level guidance and templates
- Encourage evaluations of ecological outcomes of compensation projects





# For More Information

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- RIBITS homepage: [ribits.usace.army.mil](http://ribits.usace.army.mil)
- EPA Mitigation Webpage: <http://www.epa.gov/cwa-404/mitigation>