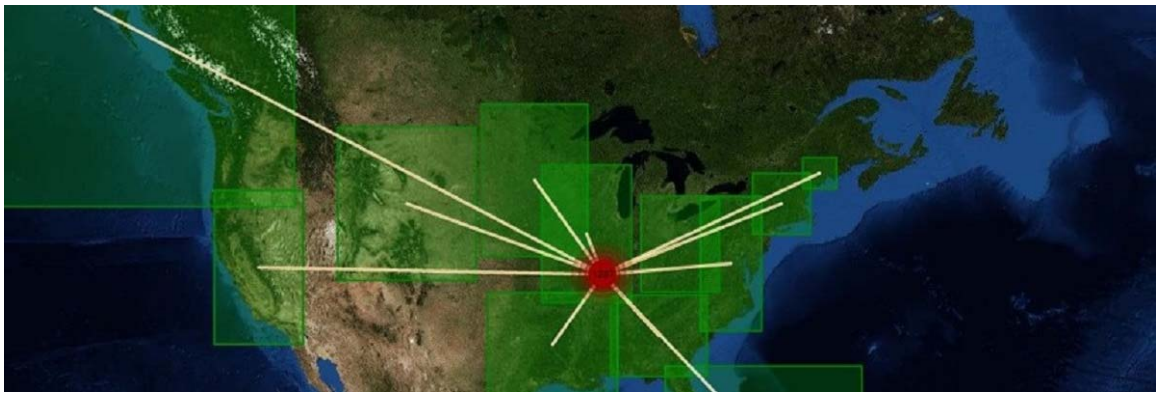


IMPROVING IMPLEMENTATION
OF THE
2008 MITIGATION RULE

National Environmental Banking Association

Authors: Michael Sprague, Donna Collier and Ben Guillon

Contents

Preface

This report highlights recommendations for government officials and agencies for improving implementation of the 2008 Mitigation Rule (Rule) for compensatory mitigation.

These suggestions follow study of data provided by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency for Section 404 of the Clean Water Act.

The National Environmental Banking Association (NEBA) considers these improvements vital for the continued development of high-quality mitigation banking.

NEBA represents businesses committed to high standards for environmental restoration and preservation of our wetlands and natural habitats through the use of ecosystem service banks. The Association's members have established and operated mitigation, conservation and other banks throughout the United States since the early 1990's.

NEBA members know that under consistent, common sense government policy, private investment offers the most effective avenue to address the growing number of environmentally damaged resources, resulting in a net gain for the environment in many cases.

NEBA advocates for private sector solutions and involvement in implementing environmental and habitat conservation in a manner that supports economic growth.

Restoration and conservation investments need consistency to attract innovative third-party capital sources while providing certainty to consumers of compensatory mitigation credits.

NEBA is committed to the highest standards for compensatory mitigation, and believes that only by strictly adhering to the 2008 Mitigation Rule can all forms of mitigation be considered on a level playing field.

Market-based solutions to environmental issues involve mutually willing buyers and sellers of compensatory mitigation credits. Understandably, absent a consistency of high standard projects, consumers of credits will opt for the cheapest available credits, irrespective of any true ecological value, just to meet their compliance.

Studies have shown that advance compensation projects, most commonly mitigation and conservation banks, are consistently the most efficient means for enabling compliance.

History has shown that inconsistent quality standards for different forms of mitigation offsets has allowed significantly ecologically inferior projects, often the cheapest option, to be used as offsets. It is no surprise then that those lower quality projects simply add to cumulative losses instead of offsetting them with genuine, high quality restoration.

Introduction

Private commercial mitigation banks have continued to develop across the United States in response to the Federal Compensatory Mitigation for Losses of Aquatic Resources; Final Rule 2008 (Rule).

According to Palmer Hough and Rachel Harrington of the U.S. Environmental Protection Agency in their recent retrospective on the Rule:

"One of the most notable trends over the past 10 years has been the continued growth in the mitigation banking industry.

In June 2008, a total of 706 mitigation banks with §404 credits had been approved. Between June 2008 and July 2018, an additional 873 mitigation banks with §404 credits were approved— more than a 120% increase."

They note that: "In the 10 years since the 2008 rule, the rate of approvals has averaged about 86 banks per year."

This trend confirms solid implementation of the rule for many states and districts across the U.S. Variability, or program inconsistency, remains in numerous districts and states today.

Growth has been particularly strong in the subset of mitigation banks that provide credits to offset impacts to streams.

All this has happened in spite of the fact that post-2008 was marked by a historic downturn in the commercial and residential development market, a significant driver of permit requests and compensatory mitigation demand. This happened despite variability in some districts and states.

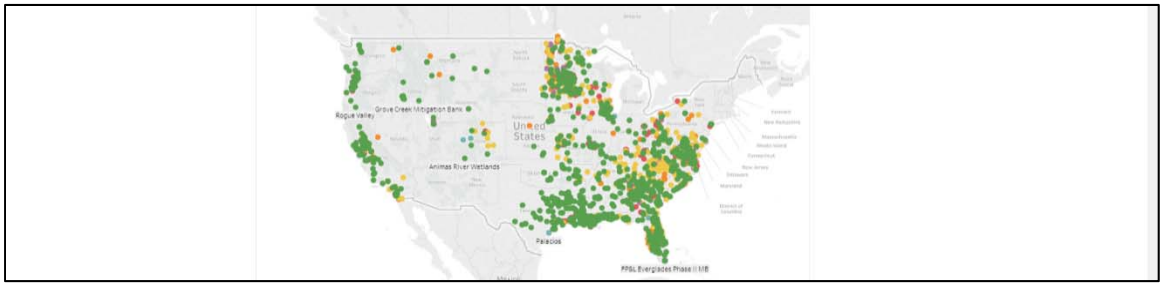
One vital improvement of the 2008 rule was the requirement that all compensation projects have a mitigation plan in place that addresses the 12 elements.

Although all compensation projects are required to address each of these components in their mitigation plans, the status as to these components being required by all compensatory mitigation mechanisms is unclear.

This lack of consistency is a common theme in the following suggestions for program improvements.

"We disagree that the rule will adversely affect the economic viability of mitigation banks and encourage losses of wetlands in floodplains. By further clarifying the requirements and timelines for mitigation bank approval, and by establishing a preference for mitigation bank credits we believe the final rule will in fact enhance the economic viability of mitigation banks."

(2008 Rule)



Improving Implementation

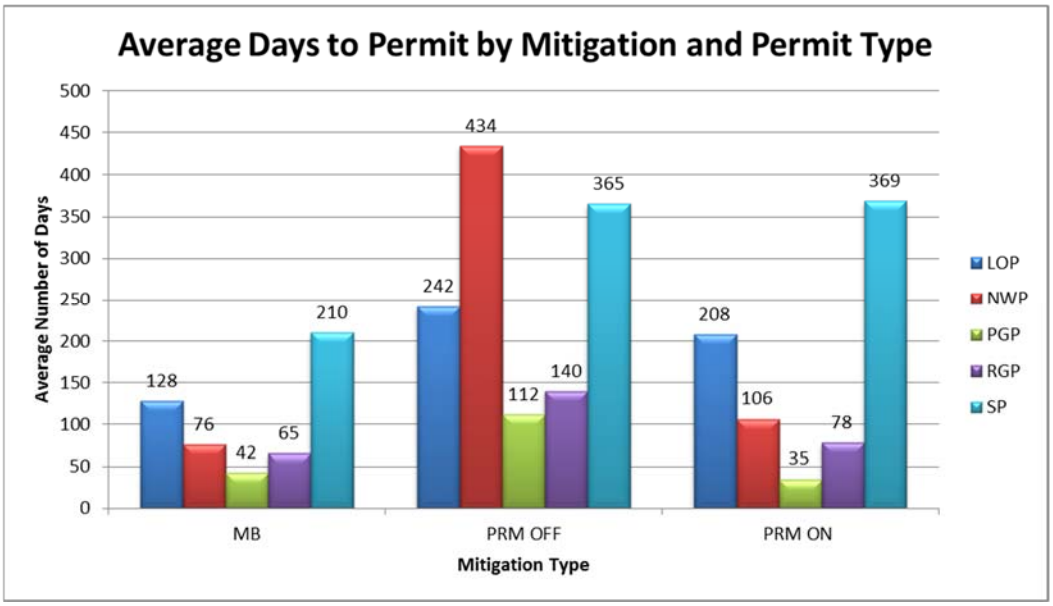
The following suggestions for improving implementation of the 2008 Rule are endorsed by NEBA and intended to apply regardless of which regulatory authority is requiring mitigation or what form of mitigation is being applied.

Efficiency

A thorough examination of the 2001 National Research Council (NRC) report[1] shows that incentive-based wetland mitigation banking performed better than both permittee-responsible mitigation and in-lieu fee banking. The reasons are obvious: wetland banks not only performed their function in advance of impacts, they also had the added security of financial assurance mechanisms attached to ensure that project sponsors were motivated to see the projects succeed.

All compensatory mitigation, whether on private or public lands, should enable efficiency and reduce risk for government and industry. The 2008 rule prioritizes bank mitigation credits to offset the unavoidable impacts of development and industry in part for those reasons.

Clean Water Act permit processing data from 2011– 2014 was analyzed and showed that when projects use mitigation bank credits, they are approved twice as fast as projects that do not. Conversely, projects proposing after-the-fact compensatory mitigation pose uncertainty and often face permitting delays not experienced by projects that use quality, advance mitigation as an offset.



***Graph showing the average number of days to permit for different mitigation types MB = Mitigation bank; PRM OFF = Offsite Permittee-Responsible Mitigation; PRM ON = Onsite Permittee Responsible Mitigation) and by permit types (LOP = Letter of Permission; NWP = Nationwide* Permit; PGP = Programmatic General Permit; RGP = Regional General Permit; SP = Standard Permit).**

	Environmental Banks	In Lieu Fee Organizations	Permittee Responsible Mitigation	Land Donations
Pay ordinary income tax rates	✓	✓	✓	✓
No temporal loss to environment	✓	✓	✓	✓
No taxpayer subsidies	✓	✓	✓	✓
Permanent Site Protection	✓	✓	✓	✓
No legal liability for developer	✓	✓	✓	✓
Permit time is cut in half at least	✓	✓	✓	✓
Reduced gov't oversight costs	✓	✓	✓	✓
Meets all 2008 Rule requirements	✓	✓	✓	✓
Environment does not suffer failures	✓	✓	✓	✓

Graph showing why environmental mitigation banks are typically environmentally and economically superior

Programmatic Consistency

Project proponents responsible for environmental impacts are usually in highly competitive markets forcing them to seek the least expensive mitigation alternative. Only when regulators insist upon meaningful and uniform mitigation standards can consistent quality and pricing across different mitigation options be achieved. Equivalency eliminates demand for substandard, less expansive offset options. When compensatory mitigation is less negotiable, permitting is streamlined.

Regulators issuing permits should be held to a high standard of accountability for following the requirements of the 2008 Rule. The success of the entire industry depends on this. Banks that have been bypassed for inferior projects that do not meet the standards established in the Rule should have a clear path to obtain justification for that decision.

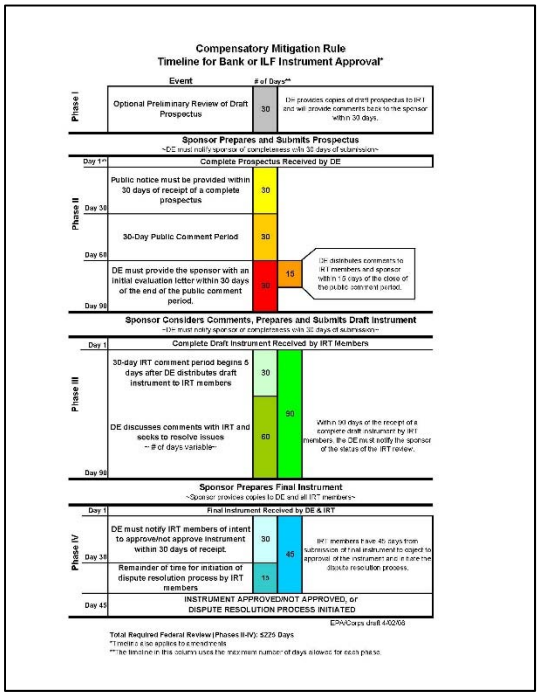
Mitigation projects not required to maintain a long-term trust fund have a distinct, lower cost advantage over better guaranteed advance mitigation.

When permissible, once again, the cheaper, less guaranteed mitigation option is more attractive.

Regulators must insist upon meaningful and uniform standards for all forms of mitigation and implement the mitigation program consistently

Mitigation providers with little or no financial risk, however, have little or no incentive to guarantee the successful completion of their project, or to avoid project failure.

While some agencies and project sponsors have traditionally chosen to address compensatory mitigation failure risk by requiring additional mitigation instead of financial assurances, this approach has failed.



Timeline

It is broadly recognized that processing of Mitigation Banking Instruments by USACE can take several years and in many cases may be inconsistent from project-to-project. To compound this, the RIBITS tracking system for mitigation bank projects doesn't provide transparency for processing timelines or create a 'compliance' mechanism to insure the permit is processed per the 2008 Mitigation Rule.

This situation has caused some in industry to preference Permittee-Responsible Mitigation (PRM), the lowest form of mitigation in the hierarchy within the Rule. PRM, though similarly used to offset environmental impacts under Section 404 of the Clean Water Act is typically processed faster and consistent with Individual Permits (the most extensive, highly scrutinized permits at USACE.) Streamlining and speeding the processing of Mitigation Banking Instruments, consistent with the intention of the rule and its timeline (Attachment 3), will help to position lower cost credits in places where infrastructure and energy development most demand.

Recommendations:
Mitigation, Conservation, Nutrient and other Environmental Banking solutions allow industry to develop and prosper while insuring that unavoidable impacts from development are offset. While environmental banking solutions reduce risk, costs, and uncertainty for government they also provide certainty and clear transfer of liability for those impacting natural resources like water or species.

Strict Application of the Timeline is Necessary to Assure Mitigation Project Success

NEBA understands that what industry most needs is clarity and certainty. Unfortunately, the often extended and uncertain Mitigation Banking Instrument (MBI) timelines are causing and will cause further uncertainty to the banking industry and likely drive up the costs of mitigation credits to market as a result. And, that situation is likely to result in less private conservation/mitigation investment, higher project development costs, delays in providing offsets, and fewer economic benefits for industry.

Examples: The Seattle District informs potential bankers that it will likely take two years to merely review the initial prospectus for completeness before giving permission to move ahead with a Banking Instrument. The timeline requirement included with the Rule allows for a 30-day review period of the initial prospectus.

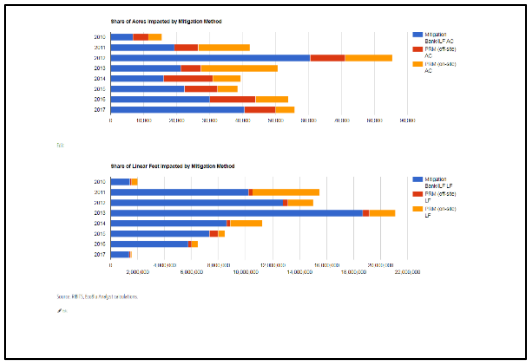
Historically, it takes many years after that to get a Banking Instrument approved. In Galveston and Wilmington, NEBA members recently saw 3-year PROSPECTUS processes, where rounds of required additional information and requests for additional work consumed more than twice the time specified for the ENTIRE MBI process.

In the Chicago District, one NEBA member reports that the agencies continue to pay little attention to the timeline even a decade after the Rule was finalized.

NEBA believes these long processing times negatively impact bank development in states and districts across the United States. Further, many important national and international businesses which are our customers are denied credits to effectively offset their impacts.

NEBA recommends, consistent with the Rule and the Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure which calls for a more transparent, timely, and coordinated process for environmental review and permitting for energy, transportation, and other infrastructure projects, the following:

1. Strict Application of the Timeline to improve timeliness of processing Mitigation Banking Instruments (MBI's)
2. Transparent Reporting of the MBI Process with RIBITS and/or ORM2 to improve transparency
3. Use of Common Project Management Tools (i.e.; agreed-to Gantt timeline with known project milestones/deadlines) to enable better coordination
4. Improved leadership by USACE Project Managers within the Inter-Agency Review (IRT) Process in application of their position as LEAD to the IRT
5. Use of Templates and Standard Operating Procedures for MBI's and other documents required by the process to improve transparency, timeliness and coordination.



Hierarchy

In the Federal Compensatory Mitigation for Losses of Aquatic Resources; Final Rule 2008 (Rule) some 113 pages, including the preamble, give weighty consideration to development and implementation of a mitigation hierarchy.

The hierarchy as written is a well-reasoned, important part of insuring 'No Net Loss'

The Authors drew from scientific studies as well as other governmental studies in developing the hierarchy. The Authors considered not only the environmental benefits, but also the potential for efficiencies and streamlining in the permitting and compliance processes performed by various federal resource agencies. Use of credits from mitigation banks was considered the first option in this mitigation hierarchy.

The preamble to the rule is very clear on this point. Page 19605 of the rule states "In this final rule, we have established a preference for mitigation bank credits, since mitigation banks must have an approved mitigation plan and other assurances in place before credits can be provided to permittees --."

NEBA believes that the application of the hierarchy to satisfy compensatory mitigation requirements under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act is appropriate and is fully supportive thereof.

The hierarchy included in the Rule should be consistently enforced. The Rule requires **"rigorous scientific and technical analysis"** to justify bypassing an approved bank in cases where an outstanding resource will be restored.

In Lieu Fee projects are listed as #2 in the hierarchy for a host of reasons. The Rule states, "**Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is generally preferable to permittee-responsible mitigation**." In Lieu Fee options are tax advantaged due to their non-profit status and are subsidized by taxpayers. Taxpayers should not be required to bear this burden if an approved bank is available. We understand mitigation proposals originate from project applicants seeking permits and the Corps can only evaluate what is proposed by those applicants. However, the use of the Hierarchy was so important to the Corps that in one of the few post rule communications a permit decision template was created and provided for use in all Corps Districts to assure, amongst other things, application of the hierarchy in the permitting process. A copy of the permit

decision template is attached for your consideration, and we request that this template be incorporated into the permitting process.

In conclusion the hierarchy as written in the Rule is a well-reasoned, important part of insuring the "No Net loss" policy, and NEBA supports the use of the hierarchy in determining how compensatory mitigation will be provided in all permit decisions. We request that it be followed as envisioned and established in the rule. We also fully support the completion of the permit decision template to document the use of the hierarchy and justify any deviations.

Site Protections

While common sense would dictate that the mitigation (offset) should have a life span at least equal to that of the impact, making that match can be problematic, particularly for permanent impacts.

Permanent mitigation projects require ongoing maintenance and monitoring to be durable. These activities need to be funded by a long-term trust account. A significant portion of the cost of mitigation and conservation banks is funding the bank's long-term trust.

When compensatory mitigation projects are created on public lands it is important that they demonstrate outcomes that are clearly above and beyond those outcomes from any public programs already planned or completed. Tools used to protect mitigation sites including deed covenants, title conveyance, and conservation easements are all available to private owners. However, when development occurs on public land, leased land, and land where the developer only owns subsurface rights, the protection tools mentioned may be less available.

Mitigation and conservation banks are usually required to establish an ownership interest in the mitigation site to protect it. When competing mitigation projects are not required to do so, those projects once again are more attractive because they cost significantly less to produce credits. In many cases, taxpayers may be required to bear the burden of long-term management, which allows for lower costs to purchasers of these credits. These projects should include financial assurances and long-term management provisions equivalent to banks to avoid transferring these costs to taxpayers.

Agencies tasked with public land management are required to make sustainable and positive long-term land steward decisions.

Mitigation should demonstrate additionality and include ecological restoration activities

Normal land management practices should include traditional sustainable use activities and outcomes.

Projects that exceed normal management actions should have significant capital investment that restores some features of the resource to levels sustainable by nature. While structural repairs to hydrology qualify as "additional", exotic plant removal fails to meet the additionality test as exotic plant removal programs are already common on public lands.

Scientific

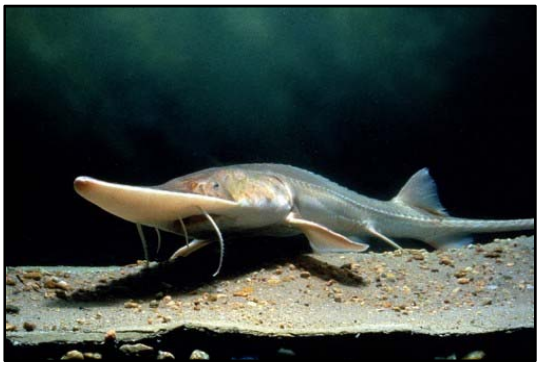
Mitigation projects should be designed, assessed, and managed with a thorough scientific foundation. This process starts with collection of baseline data and analysis to establish site conditions. Only then can an adaptive management, restoration, and financial assurance plan be created. This method allows probable unknowns to be identified, accounted for, and shown transparently to any interested parties.

Compensatory mitigation should be based on scientific data with success monitoring and transparent reporting

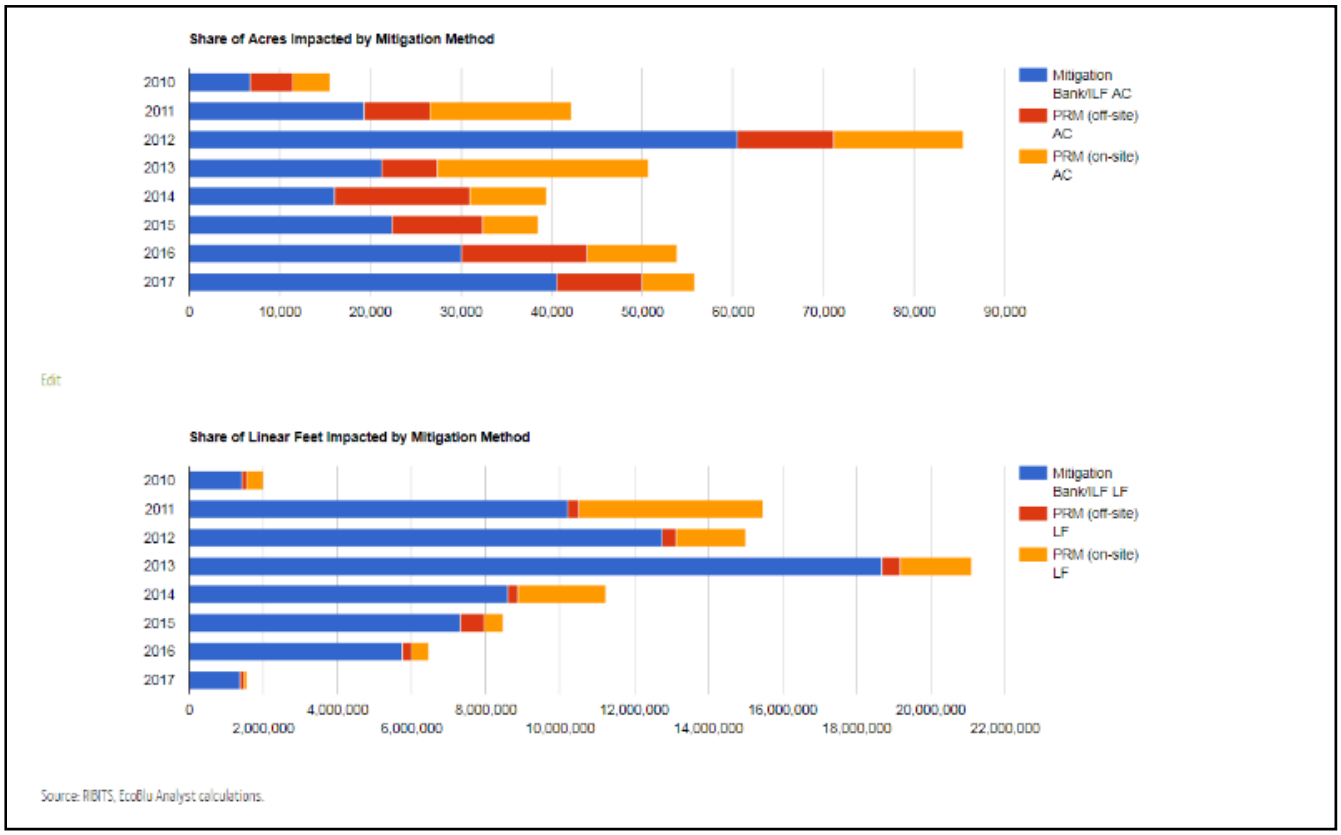
Any lack of transparency leaves room for suspicion that the science behind the project is in doubt or was compromised. This suspicion can lead to project delays including litigation.

Advance

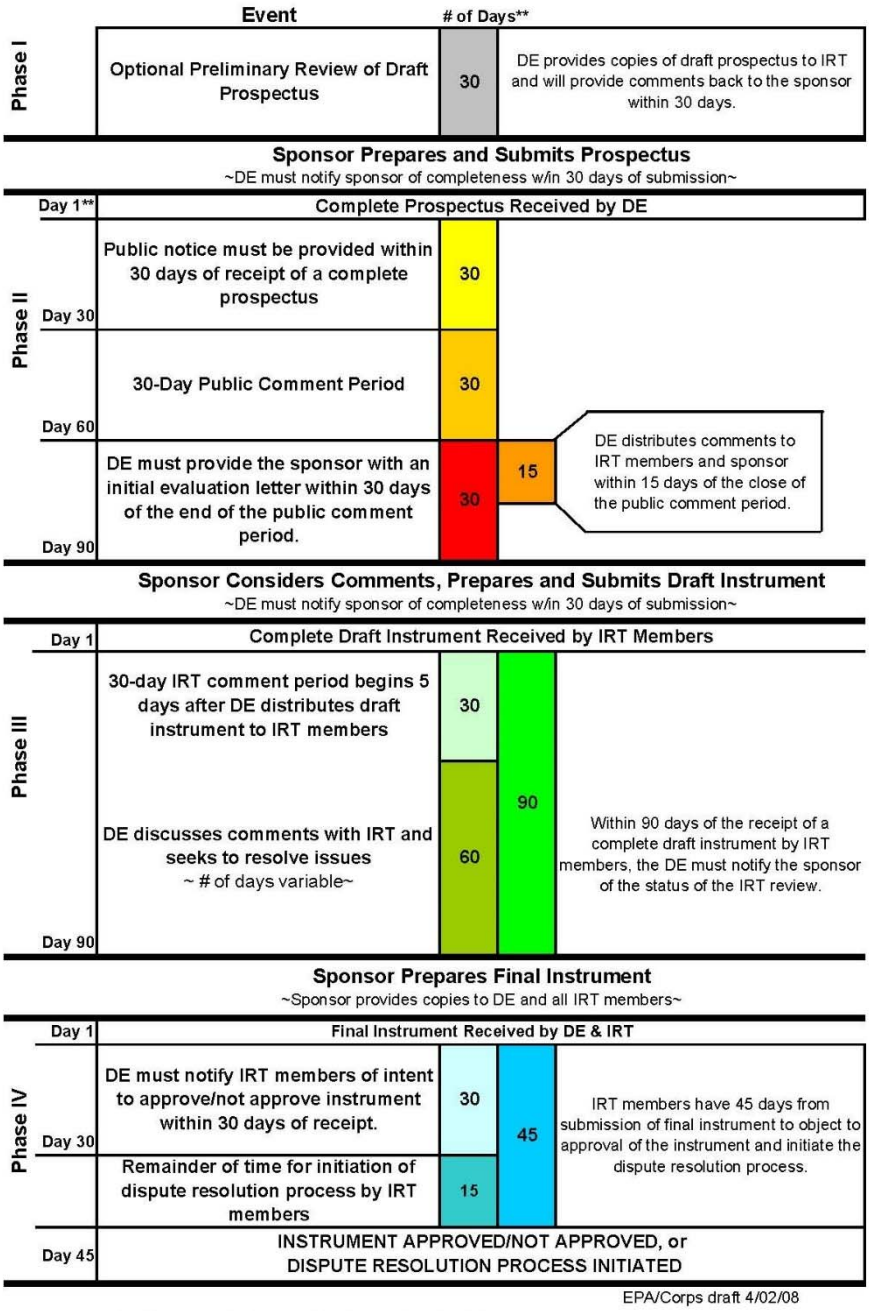
Advance mitigation projects are best suited to demonstrate the scientific foundation of ecological improvement from baseline to present-day conditions. Advance mitigation project sponsors usually have both the time and financial resources to document positive environmental outcomes as the release of their mitigation credits are predicated on demonstrating the improvement of the resource.



Advance mitigation will have already employed adaptive management to demonstrate environmental outcomes and successes. This is just another reason why advance mitigation, with strict financial assurances and associated incentives to complete the project, is the best choice to ensure effective ecological offsets.


Share of Acres Impacted by Mitigation Method
2010
2011
2012
2013
2014
2015
2016
2017
0
10,000
20,000
30,000
40,000
50,000
60,000
70,000
80,000
90,000
Mitigation Bank/ILF AC
PRM (off-site) AC
PRM (on-site) AC
Edit
Share of Linear Feet Impacted by Mitigation Method
2010
2011
2012
2013
2014
2015
2016
2017
0
2,000,000
4,000,000
6,000,000
8,000,000
10,000,000
12,000,000
14,000,000
16,000,000
18,000,000
20,000,000
22,000,000
Mitigation Bank/ILF LF
PRM (off-site) LF
PRM (on-site) LF
Source: RIBITS, EcoBlu Analyst calculations.

Compensatory Mitigation Rule
Timeline for Bank or ILF Instrument Approval*



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.

Publication Credits:

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Ben Guillon is the CEO of Conservation Investment Management, an investment advisor focused on private investments in conservation. Guillon is a co-owner and manager of several mitigation banks in Colorado as well as a innovative conservation bank in Wyoming for the Greater Sage Grouse. Guillon also advises sophisticated investors and foundations on their investments in environmental projects across the U.S. and abroad. Guillon also serves as a board member of the Wildlife Friendly Enterprise Network, an international standard setting non-profit organization.

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