

# Mitigation Requirements & Regulatory Updates

U.S. Army Corps of Engineers  
Seattle District  
15 June 2016



# Agenda

## Objectives

- To summarize wetland and non-wetland compensatory mitigation requirements
- To summarize other mitigation initiatives
- Provide brief Regulatory Program updates

## Presentation Outline

- Part 1: Mitigation Special Public Notice
  - ▶ Questions & Answers
  - ▶ Break
- Part 2: Other Mitigation Initiatives
- Part 3: Regulatory Program Updates
  - ▶ Questions & Answers
- Part 4: Meet & Greet Corps Regulators



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# Introductions

- Muffy Walker, Branch Chief
- Kristina (Tina) Tong, Section Chief
- Gail Terzi, Mitigation Program Manager
- Suzanne Anderson, Mitigation Team
- Susan Buis, Compliance Team



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Part 1:  
Mitigation Special Public Notice



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# Special Public Notice on Mitigation Requirements

On May 19, 2016, the Corps released a Special Public Notice:

- To provide an overview of Seattle District's mitigation program.
- The Corps is not changing its mitigation processes or regulations
- It consolidates mitigation information from various regulations and documents into a single, concise resource



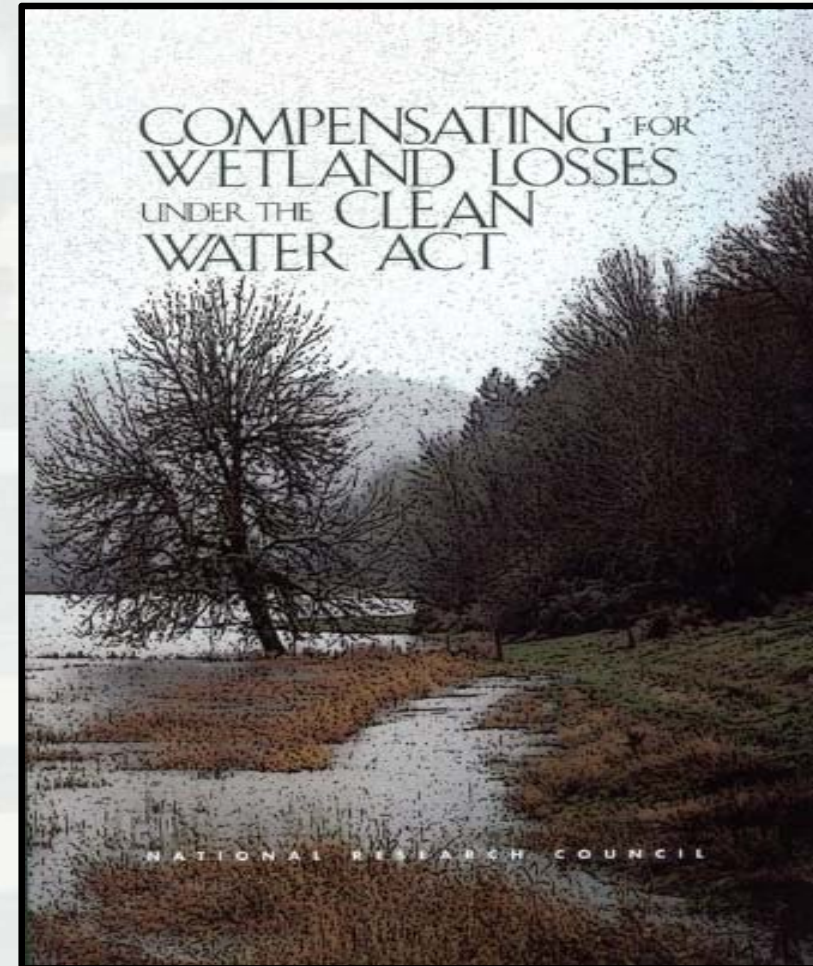
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# 2001 National Research Council Wetland Study<sup>1</sup>

The study of wetland mitigation for Section 404 activities determined:

- Goal of no net loss of wetlands was not met
- Compensatory mitigation performance and compliance must be improved
- Compensatory mitigation must use a watershed approach

A concurrent study performed by the Washington State Department of Ecology<sup>2</sup> had similar findings.



<sup>1</sup> *Compensating for Wetland Losses under the Clean Water Act*, National Academy of Sciences, 2001

<sup>2</sup> Washington State Wetland Mitigation Evaluation Study – Phases 1 and 2 (1999, 2002)



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# Compensatory Mitigation for Losses of Aquatic Resources<sup>1</sup> (Federal Rule)

Published on April 10, 2008, the purpose of the Federal Rule was:

- To establish standards and criteria for all types of compensatory mitigation
- Address unsuccessful compensatory mitigation trends
- Greater predictability and consistency
- Increase focus on accountability



<sup>1</sup> 33 CFR 325 and 332



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# Watershed Approach to Site Selection<sup>1</sup>

An analytical process for making compensatory mitigation decisions that:

- Support the sustainability and improvement of aquatic resources in a watershed
- Consider how site selection and mitigation type will meet watershed needs at a landscape perspective.
- Identifies, rare, unique, or limited resource in a watershed



<sup>1</sup> Selecting Wetland Mitigation Sites Using a Watershed Approach (Ecology Publication #09-06-032), December 2009



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# Mitigation Sequencing<sup>1</sup>

Mitigation Sequencing must occur for all projects proposing impacts to waters of the U.S.:

- I. Avoid impacts to waters of the U.S.
- II. Minimize permanent and temporary impacts
- III. Compensate for unavoidable impacts



<sup>1</sup> (33 CFR 332.3(b)2)



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# Compensatory Mitigation Preference Hierarchy<sup>1</sup>

The Federal Rule established a preference hierarchy of available compensatory mitigation options:

- I. Mitigation Banks
- II. In-Lieu Fee (ILF) Programs
- III. Permittee-Responsible using a Watershed Approach
- IV. Permittee-Responsible onsite and in-kind
- V. Permittee-Responsible offsite or out-of-kind



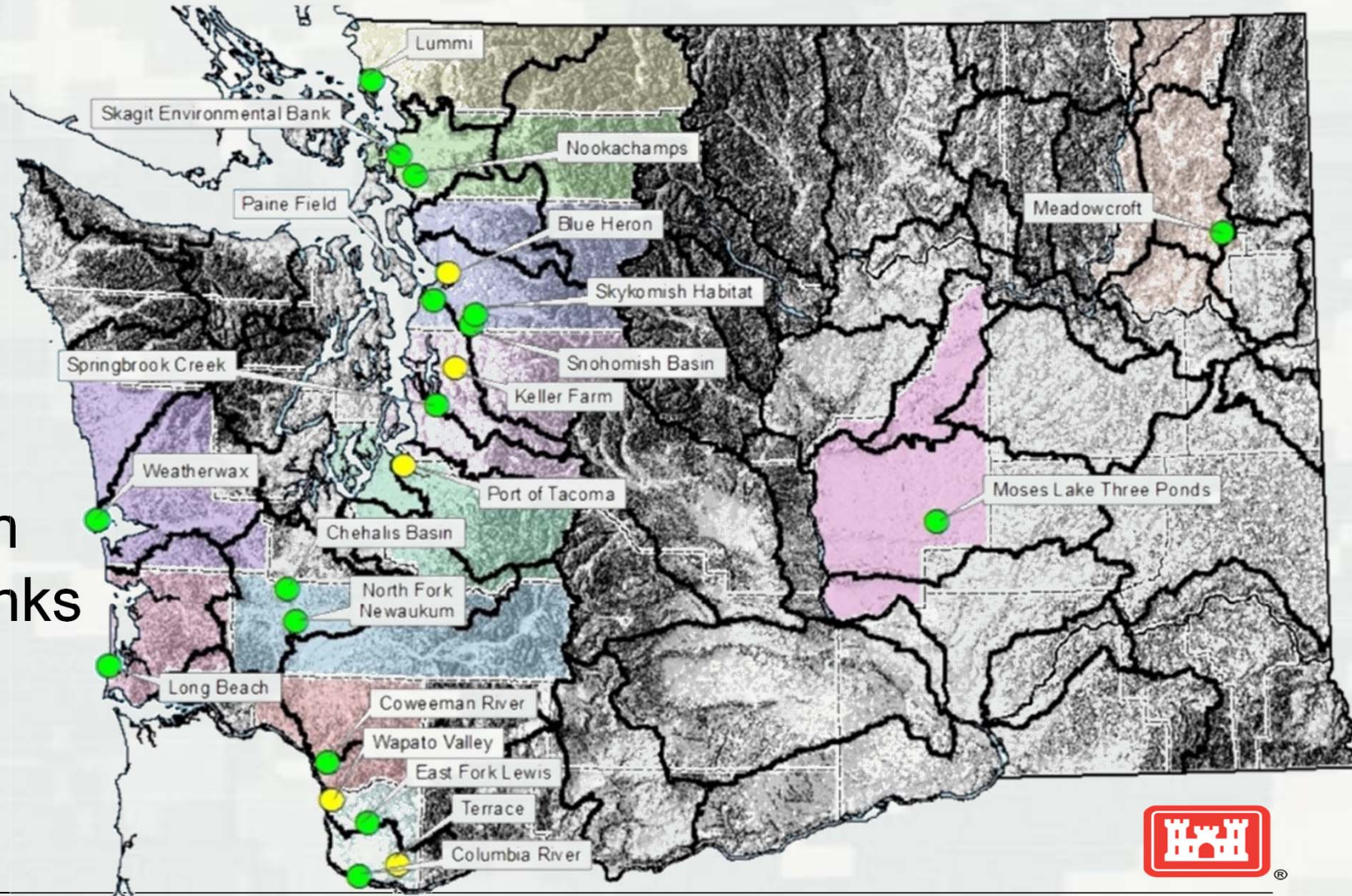
<sup>1</sup> 33 CFR 332.3(b)



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- Approved Banks
- Banks under Review

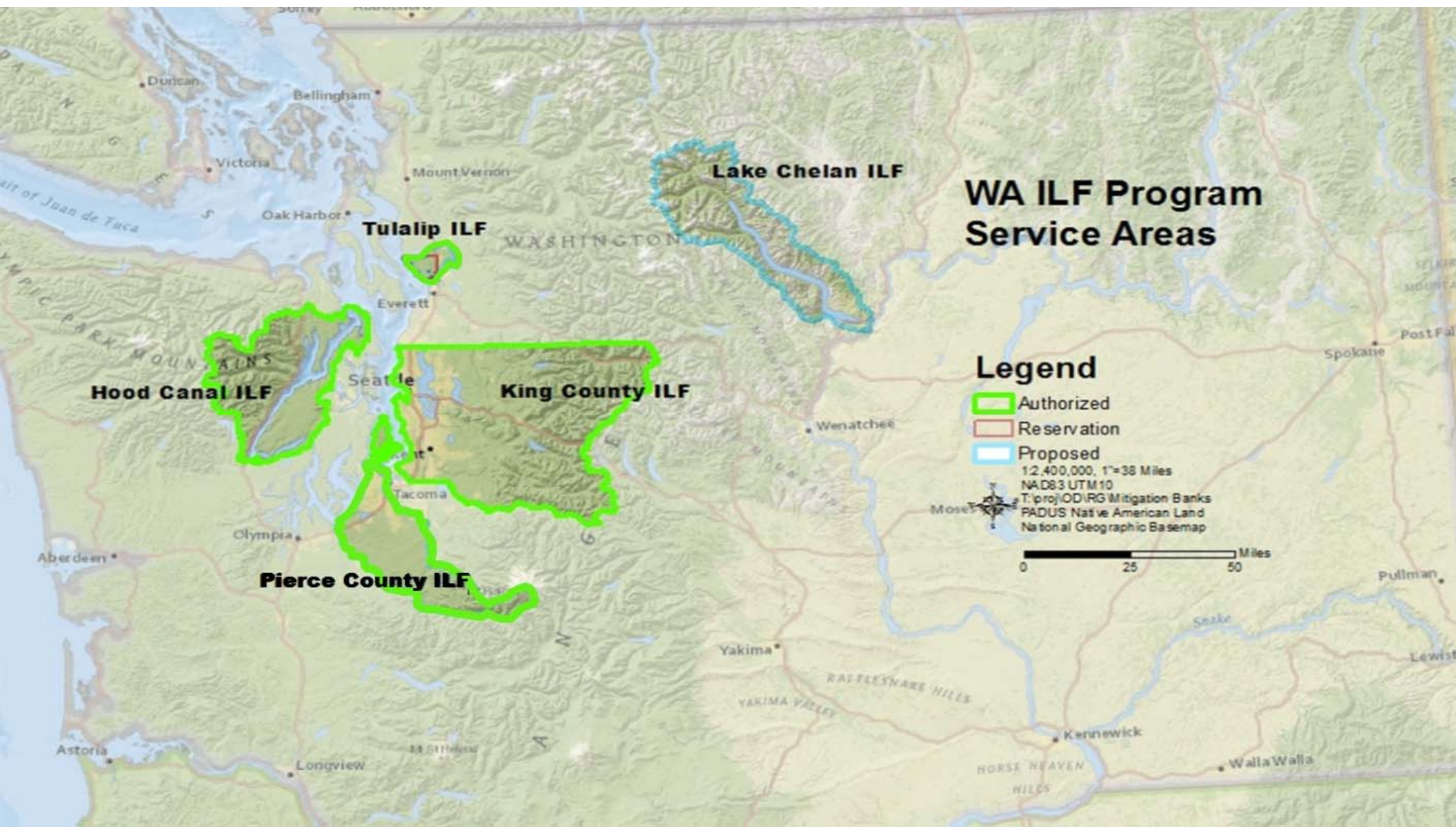


# Washington Mitigation Banks



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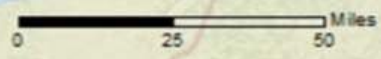




# WA ILF Program Service Areas

## Legend

- Authorized
  - Reservation
  - Proposed
- 1:2,400,000, 1"=38 Miles  
NAD83 UTM 10  
Topographic Data: Mitigation Banks  
PADUS Native American Land  
National Geographic Basemap



# Benefits of Mitigation Banks & ILF Programs to the Public

- Reduced permitting time
- Transfer of responsibility from applicant to Bank or ILF Program
- Reduced risk and uncertainty of mitigation success
- Potential cost reduction
- Fairly simple and predictable to use
- Allows full use of applicant's property



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# Benefits of Mitigation Banks & ILF Programs to the Environment

- Reduced temporal loss<sup>1</sup> of functions and services
- More contiguous acreage
- Targeted site selection that results in ecological lift beyond the boundaries of the mitigation site
- Incorporates important upland habitat, increasing diversity and function



<sup>1</sup> Does not apply to every ILF Program. Check with your local ILF Program sponsor to verify if temporal loss has been reduced.



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# Permittee-Responsible Compensatory Mitigation

Permittee-Responsible mitigation plans must sufficiently demonstrate<sup>1</sup> that it:

- Meets all requirements of the Federal Rule<sup>2</sup>
- Complies with mitigation sequencing
- Will restore an outstanding resource based on rigorous scientific and technical analysis
- Uses a watershed approach for site selection



<sup>1</sup> Preamble of the Federal Rule  
<sup>2</sup> 33 CFR 332.4(c)(2) – (14)



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# Permittee-Responsible Compensatory Mitigation

Permittee-Responsible compensatory mitigation sites must:

- Be self-sustainable
- Have low risk of failure and high likelihood of success
- Fully compensate for all aquatic resource functions and services impacted by the proposed project<sup>1</sup>



<sup>1</sup> Includes all direct, indirect, temporary, & temporal impacts





# Cost as a Consideration for Compensatory Mitigation

Cost is one of several factors evaluated under the Federal Rule's mitigation preference.

If cost is used as a factor to override the preference hierarchy:

- It cannot be the only reason to not use a Mitigation Bank or ILF Program
- A detailed and comprehensive cost analysis must be submitted for evaluation



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# Cost as a Consideration for Compensatory Mitigation

The comprehensive cost analysis must include:

- Land Costs
- Construction Costs
- Implementation
- Financial Assurances
- Site Protection Costs
- Contingencies

Contracting and consulting fees (10 years):

- Design
- Maintenance
- Monitoring
- Reporting

Long-term Management Plan (in perpetuity):

- Development
- Management
- Monitoring
- Reporting



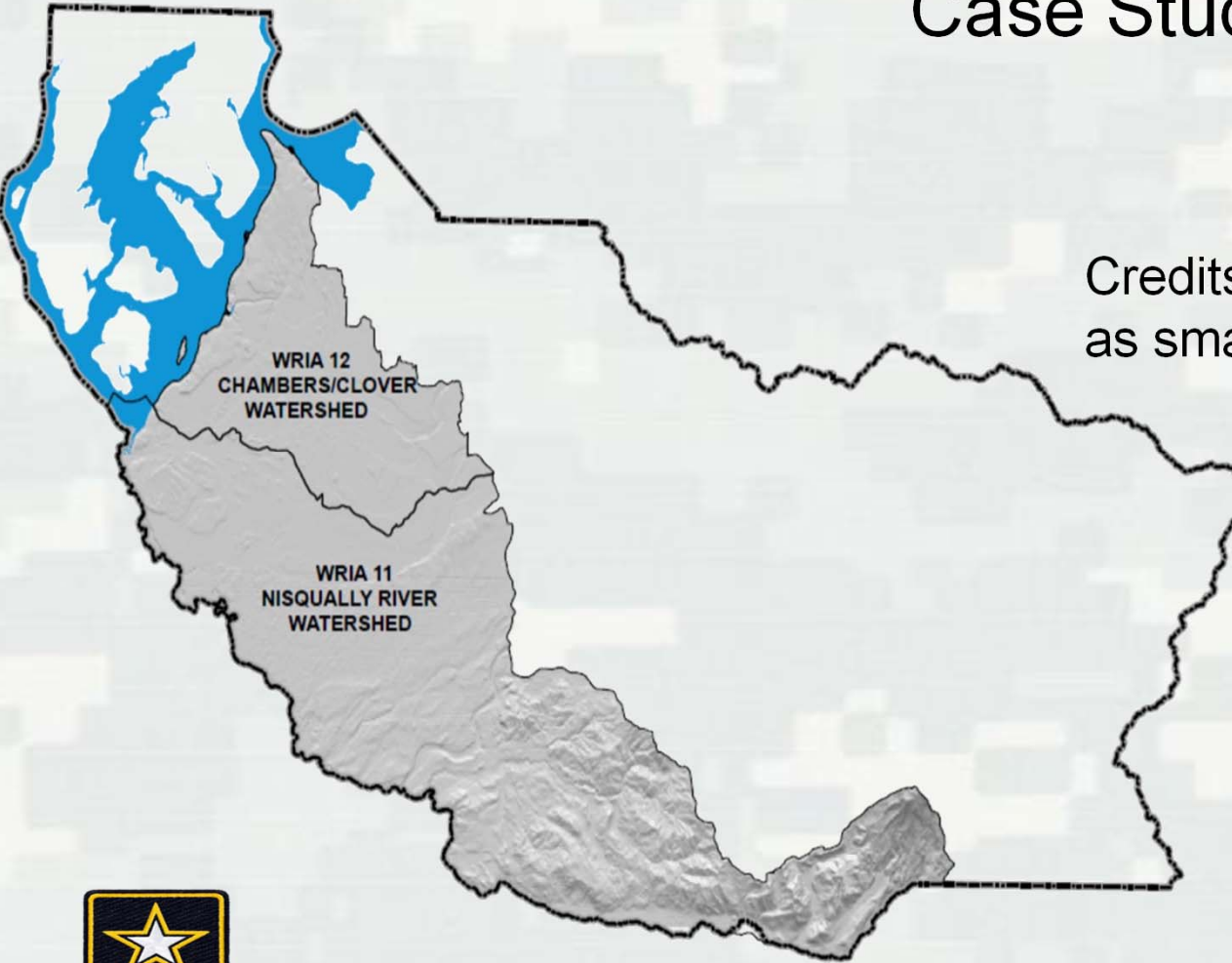
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# Case Study using Pierce County ILF Program

Credits may be purchased in increments  
as small as 1/100<sup>th</sup> of a credit.

Cost per acre-credit<sup>1</sup>:

- \$30k in WRIA 11
- \$40k in WRIA 12



<sup>1</sup>. Cost estimates as of 8 June 2016



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# Case Study using Pierce County ILF Program

## Permittee-Responsible Mitigation

\$10k	Identify mitigation site
\$10k	Develop mitigation plan
\$10k	Develop construction plans
\$50k	ROW acquisition
\$30k	Construct mitigation site
+ \$30k	Monitor & maintain mitigation site
<hr/>	
<b>\$140k</b>	<b>Total estimated cost for onsite mitigation</b>



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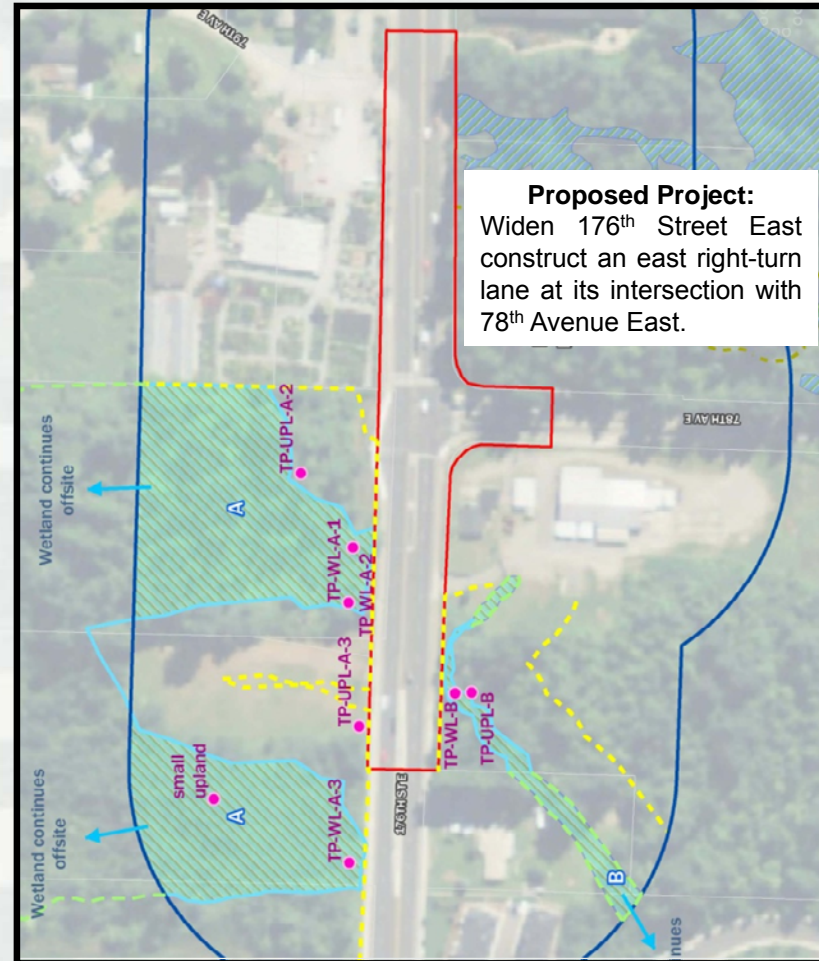
# Case Study using Pierce County ILF Program

Wetland Fill: 700 square feet

Mitigation Required: 0.6 acre-credits

Onsite Mitigation: \$140,000

Pierce County ILF credits: \$ 24,000



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# Permittee-Responsible Compensatory Mitigation Plans

To meet all requirements of the Federal Rule, applicants may use:

- *Joint Agency Guidance: Wetland Mitigation in Washington State, Part 1 – Agency Policies & Guidance<sup>1</sup> and Part 2 – Developing Mitigation Plans<sup>2</sup>*
- *Checklist of Key Elements of the Federal Rule and the Joint Agency Guidance<sup>3</sup>*



<sup>1</sup> Version 1, March 2006, Department of Ecology Publication #06-06-011a

<sup>2</sup> Version 1, March 2006, Department of Ecology Publication #06-06-011b

<sup>3</sup> [www.nws.usace.army.mil](http://www.nws.usace.army.mil)



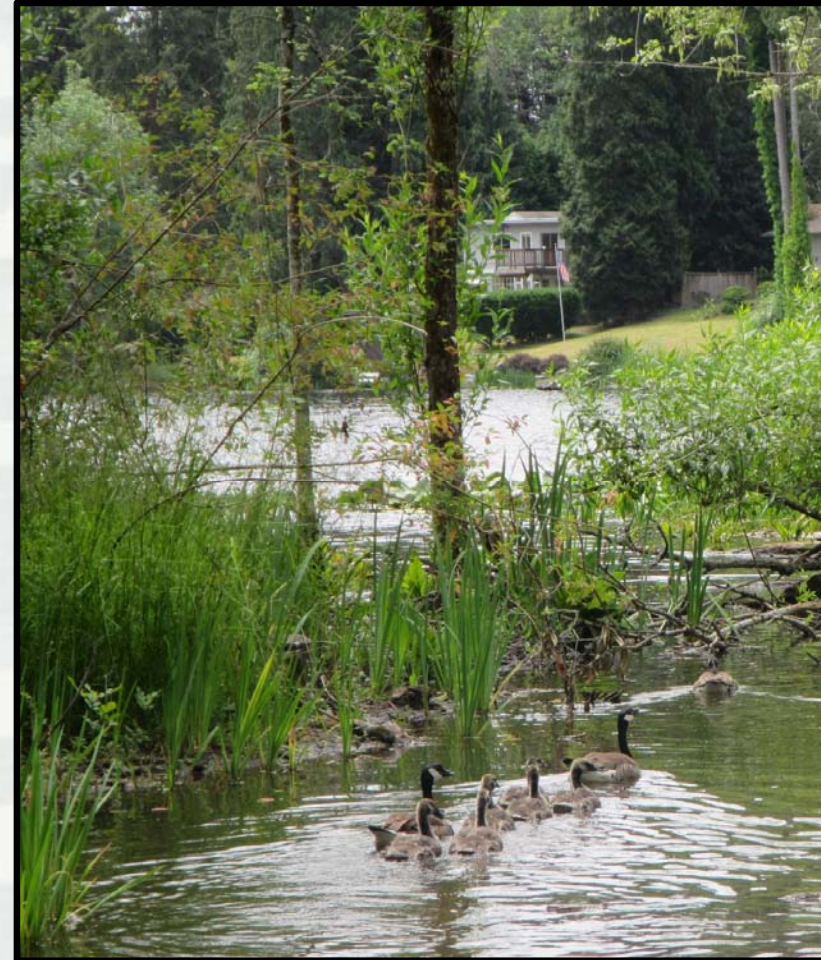
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# Permittee-Responsible Compensatory Mitigation Plans

Requirements that are often omitted:

- Watershed approach for site selection
- Site protection instrument
- Sufficient baseline information (e.g., hydrology)
- Functioning buffers of adequate width
- Measurable & enforceable performance standards
- Adaptive management plan
- Financial assurances
- Long-term management plan



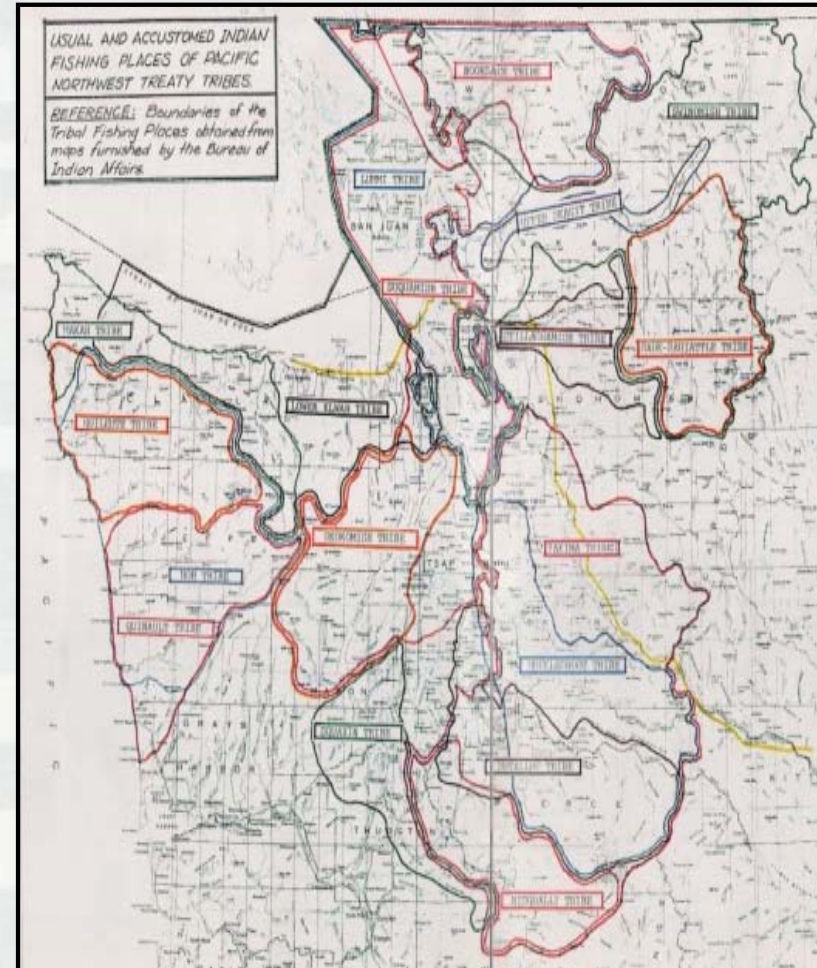
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# Tribal Considerations for Compensatory Mitigation

In the mid-1850s, the U.S. entered into treaties with numerous Native American tribes in Washington.

Tribal coordination on Federal actions (i.e., a Corps permit) is required by federal law because of the following Tribal Treaty Rights and cultural resource concerns:

- Usual and accustomed fishing areas
- Hunting and gathering areas
- Traditional cultural properties



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# Conclusion

- The Federal Rule applies to all Department of the Army permit applications
- The Corps is not changing its mitigation processes or regulations
- The underlying rationale for the preference hierarchy is ecologically founded
- Monitoring data indicates that all Mitigation Banks in Washington State are on trajectory towards achieving full ecological success and sustainability



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Questions?



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Part 2:  
Other Mitigation Initiatives



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# Future Mitigation Banking in Washington State

- Multi-resource banks
- Banks with multiple service areas
- Development and fine-tuning of credit/debit currencies
  - ▶ Streams; upland resources; terrestrial species; marine
  - ▶ Training for regulatory agency staff, consultants, and applicants
- Marine mitigation and Banks



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# Multi-Resource Mitigation Banks & ILF Program Sites

- Coweeman River Mitigation Bank
- Port of Tacoma Umbrella Bank
- Blue Heron Slough
- Wapato Valley Wetland & Conservation Bank
- Fish overlay for 3 existing wetland banks:
  - ▶ Skykomish, Skagit, Snohomish



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# Marine Mitigation

Studies, such as the 2014 Corps' Cumulative Effect Analysis<sup>1</sup>, demonstrate the need for marine mitigation:

- Significant loss of estuaries
- Significant increases in impervious surfaces
- Landscape fragmentation
- Degradation of water & sediment quality
- Effects on endangered species



<sup>1</sup>. Cumulative Effects Analysis Eastern Shore of Central Puget Sound Washington, Final February 7, 2014.  
U.S. Army Corps of Engineers, Seattle District

## Cumulative Effects Analysis Eastern Shore of Central Puget Sound Washington



**Final**  
February 7, 2014



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# Marine Mitigation

The following programs include the potential to compensate for marine impacts:

- Hood Canal Coordinating Council ILF
- King County ILF
- Pacific County Demonstration Bank

Potential future programs include:

- Port of Tacoma Umbrella Bank
- Blue Heron Slough
- Port of Seattle
- Pierce County ILF expansion



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Questions?



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Part 3:  
Regulatory Program Updates



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# Joint Agency Guidance on Compensatory Mitigation

Joint undertaking between agencies

- Tribal coordination
- Special Public Notice requesting comments

Anticipated to begin writing updated guidance  
Fall 2016

- Policy Updates
- Banking & ILF Programs
- Revised tools
- Advanced Mitigation



1: Version 1, March 2006, Department of Ecology Publication #06-06-011a  
2: Version 1, March 2006, Department of Ecology Publication #06-06-011b



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# Compliance Process for Permittee Responsible Mitigation

1. Site protection mechanism
2. Certificate of compliance
3. As-built report
4. Monitoring reports (5 – 10 years)
5. Site inspections
6. Contingency plans
7. Implementation of the Long Term Management Plan



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# Nationwide Permits (NWP)

The 2012 NWPs will expire on March 18, 2017

The 2017 NWPs are in development:

- Proposed National Conditions were published in the Federal Register on June 1, 2016; comments due to HQ no later than August 1, 2016
- Proposed Regional Conditions will be announced soon with a Special Public Notice to solicit comments



## FEDERAL REGISTER

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Part III

Department of Defense

Department of the Army, Corps of Engineers  
33 CFR Chapter II  
Proposal To Reissue and Modify Nationwide Permits; Proposed Rule



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Meet & Greet Corps Regulators



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