

# Florida Chamber's 29<sup>th</sup> Annual Environmental Permitting Summer School 2015



## Practical Considerations in Environmental Mitigation And Mitigation Banking

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# Mitigation and Mitigation Banking

## Course Overview

- Mitigation Banking - 101
  - Preference
  - Availability
  - No banks? Other options
  
- Mitigation Bank Development
  - Feasibility assessment
  - Market demand and competition
  - Pro forma/risk
  
- Regulatory Processes – Federal Update
  - New Prospectus & MBI Templates
  - Current Issues & Guidance
  
- Regulatory Processes – State Update
  - Upcoming Rule Changes
  - Current Issues and Guidance
  
- Discussion/Case Studies (as *time permits*)



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# Mitigation Banking 101

- Preference
- Availability
- No banks? Other options

# Mitigation & Mitigation Banks - Preference

## *Regulatory Preference – Mitigation Banks*

Federal – April 2008 Compensatory Mitigation for Losses of Aquatic Resources; Final Rule

➤ **33 CFR Parts 325 and 332**

- Officially states preference for use of mitigation banks
- If not using bank, need justification

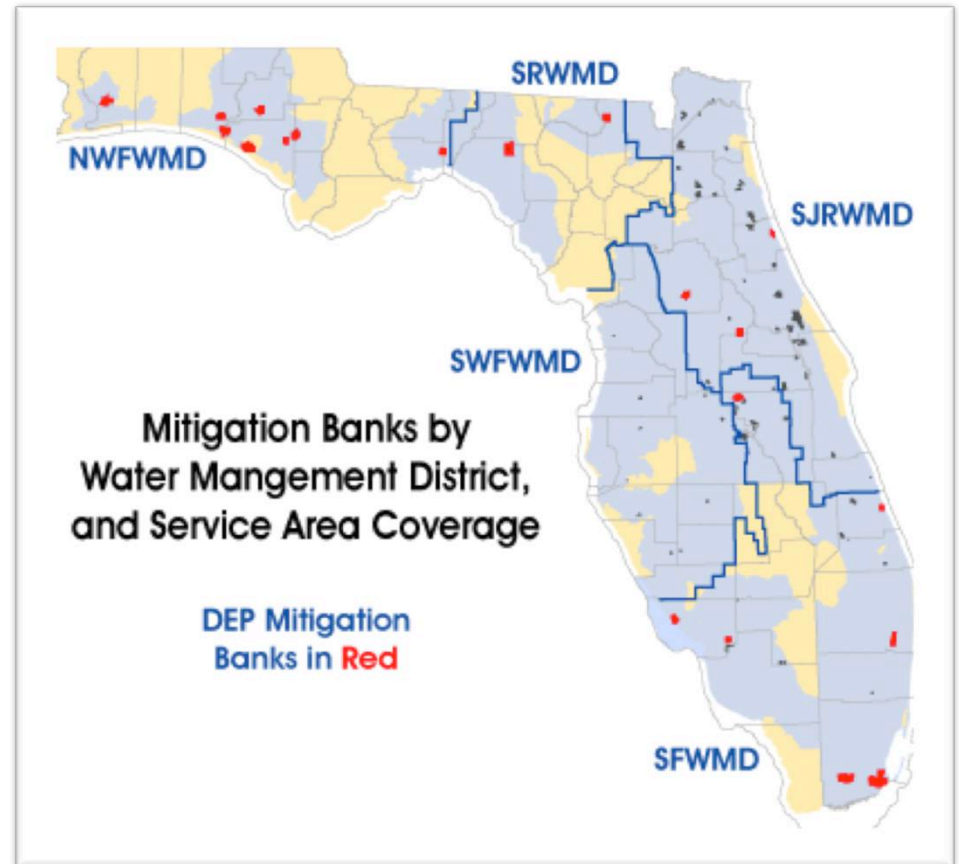
DEP and WMD Applicant's Handbook

➤ **FAC 62. 342.300**

- WMDs – previously preference for on-site
- Most agencies now focused on mitigation banks as first choice for consistency with the USACE

# Mitigation Banks - Availability

- Over 80 permitted banks (state, federal)
- Mitigation Service Area - MSA
- Appropriate type
- Web sites:
  - Federal – RIBITS
  - State – DEP and WMDs
- Agency contacts; specialized companies; FAMB



# Mitigation Options

*If no Mitigation Bank available or you want to use another option:*

- There may be no Mitigation Banks available or appropriate (type) – flexibility
  - Federal RGL – justification
  - Cumulative Impact Study – state requirement (e.g. SWFWMD Applicant's Handbook 10.2.8) – impacts outside drainage basin
  - TBEP Freshwater Wetlands Master Plan – herbaceous vs forested wetlands in Tampa Bay Basin
- On-site or other permittee responsible mitigation may be more cost effective or beneficial to applicant or required by local government
  - USACE now requiring site protection and financial assurance comparable to mitigation banks – may be dependent on mitigation acreage
- In lieu fee programs

# Mitigation Options - Criteria

## *Criteria for Mitigation*

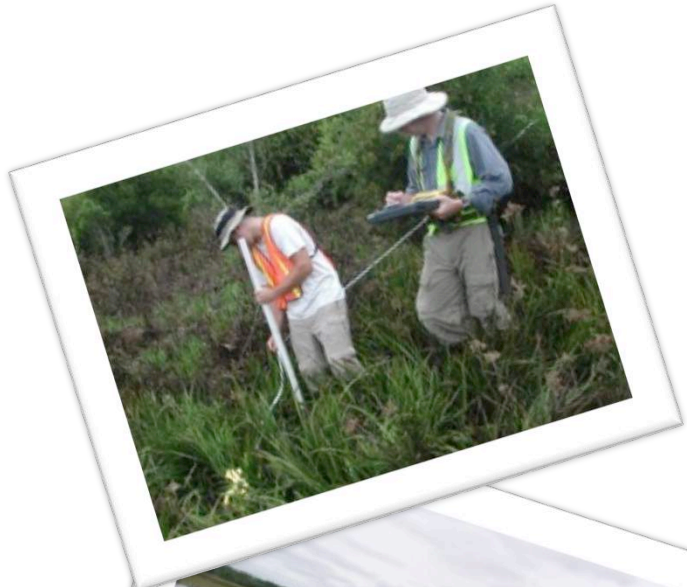
- Within same watershed - unless cumulative impact assessment completed
- Similar habitat/functions; in-kind preferred
- UMAM scores for mitigation – equal or exceed UMAM functional loss (or alternative assessment method)
- Special provisions for linear projects (State)
- Uplands mitigation and wetlands preservation generally not acceptable for USACE; except for buffers

- Other federal criteria include: Woodstork Core Foraging Area
- Other state criteria include: Class II Waters



# Mitigation Elements

- *Federal Rule has 12 Elements for Determining Mitigation*
- *Same Elements are Part of the Mitigation Process for the State*



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







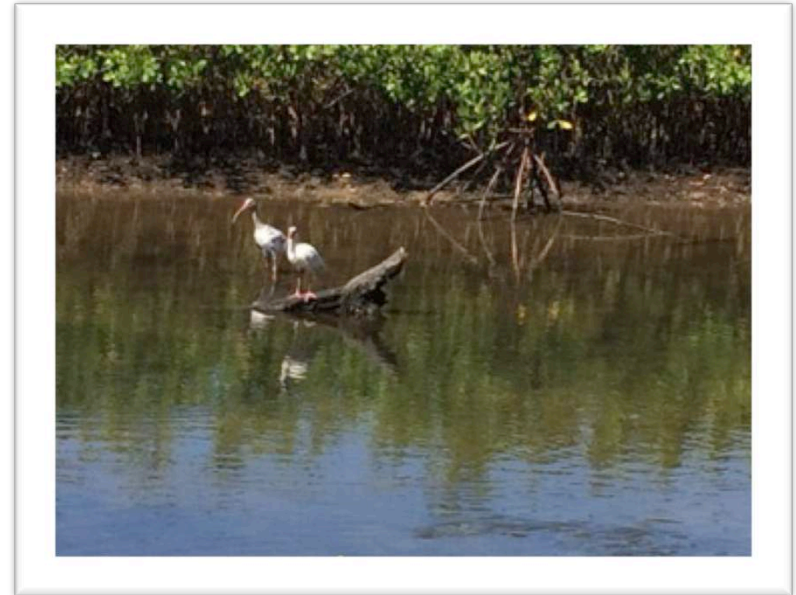
# Mitigation Bank Development

- Feasibility assessment
- Market demand and competition
- Pro forma/risk

# Mitigation Bank Development

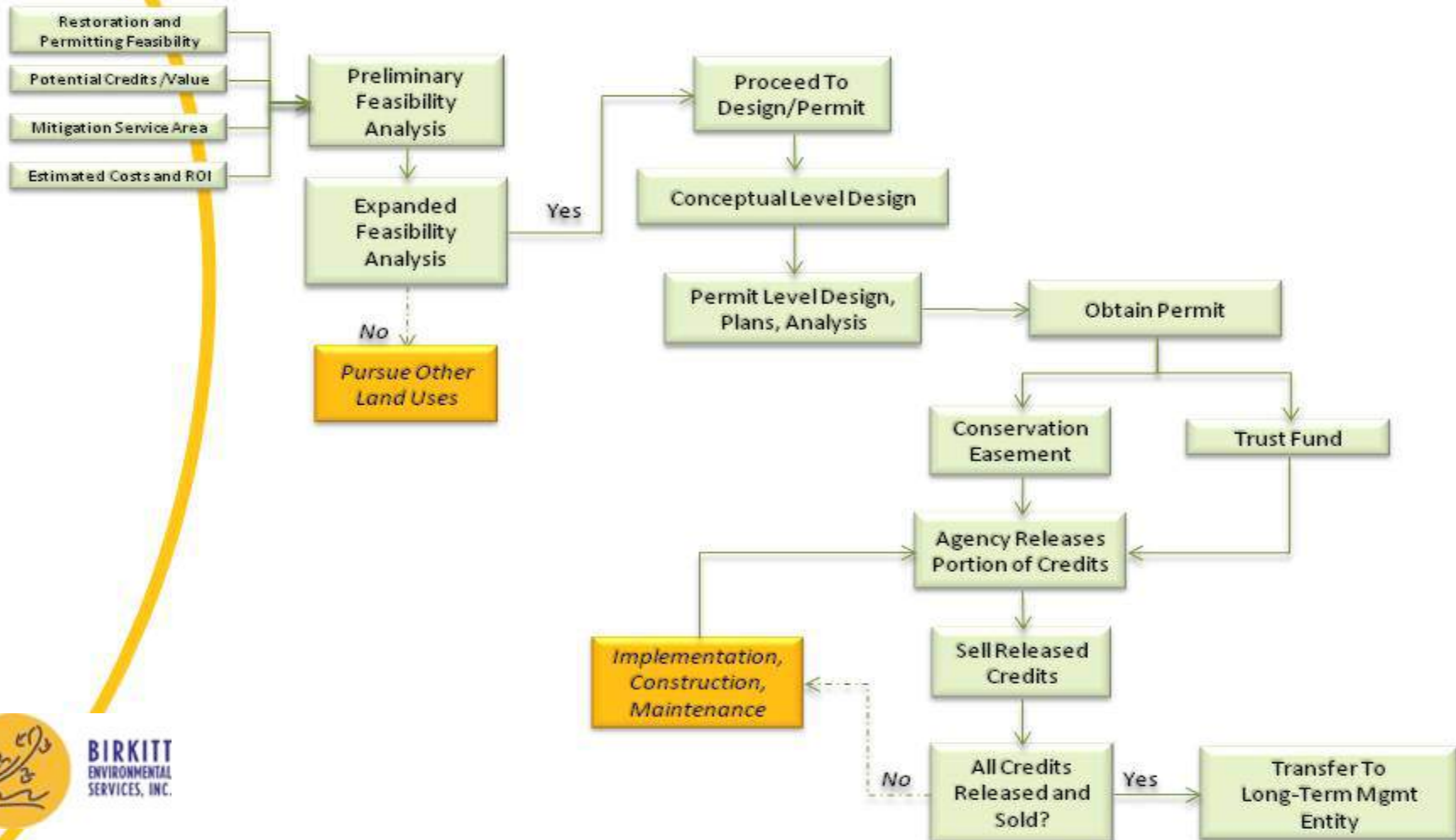
## *Choosing a site or evaluating existing land holdings - Business investment opportunity*

- Location, Location, Location!
- Potential MSA
- Market demand/competition/MSA
- Size
- Ecological lift opportunity
- Cost considerations
- Regional significance – ecological, regional goals, other



# Mitigation Bank Development

## Mitigation Banking Process



# Mitigation Bank – Feasibility Analysis

- Technical Feasibility – likelihood of achieving ecological lift and potential number of credits
- Regulatory Feasibility – likelihood of obtaining permits in reasonable time frame
- Legal Feasibility (Ownership and Encumbrances)
- Financial Feasibility – preliminary pro forma
  - Market Demand/Competition
  - Cost of enhancement activities, maintenance and monitoring
  - Permitting/compliance costs
  - Potential MSA
  - Potential credit value
  - Other hidden costs or other considerations (e.g. SSL)

# Mitigation Bank – Feasibility Analysis



## *Technical Feasibility*

- Does site provide important ecological functions?
  - Restorable hydrology
  - Connectivity to other preservation or significant lands
  - Habitat for T/E species
  - Improvements to water quality
  - Compatibility with adjacent lands
- Number and type of potential credits?
- Mitigation Service Area

# Mitigation Bank – Feasibility Analysis

## *Regulatory Feasibility*

- Is the IRT likely to conclude site “has potential?”
- Will state and federal agencies require a lot of convincing? Or are benefits obvious?



# Mitigation Bank – Feasibility Analysis

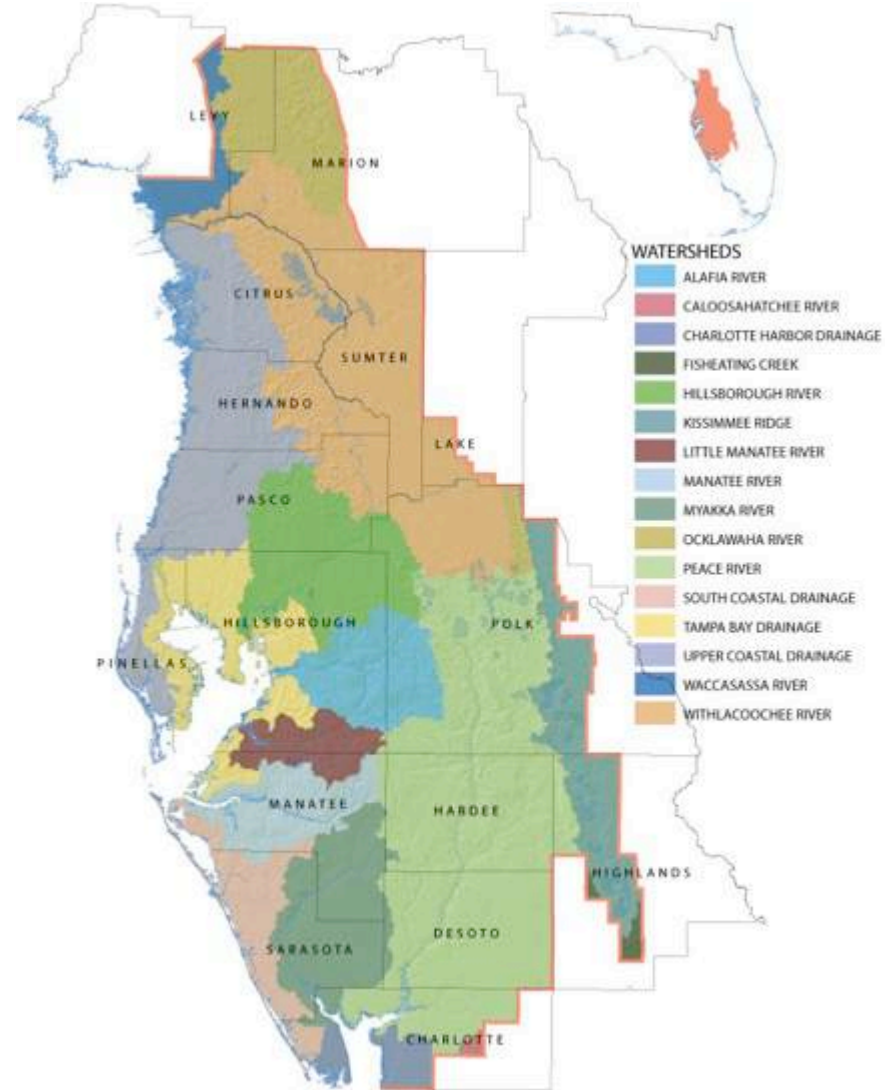
## *Legal Feasibility*

- Adequate Ownership (Fee Simple)
- Encumbrances must not adversely affect ecological viability
  - Mineral Interests
  - Rights of Way and Access Easements
  - Contractual Rights (hunt leases, timber leases)
- Title Insurance (Existing Policy & New Commitment)
  - Identifies encumbrances
- Survey – identifies extent of ownership and location of encumbrances
- Resolve (clear title, design around, adjust credit scoring, etc.)

# Mitigation Bank – Feasibility Analysis

## *Financial Feasibility*

- Understand the Market and Competition within Target Basin
  - CIP, FDOT, and other public projects
  - Projected population growth; economic conditions
  - Other banks? MSA, credits remaining; type of credits; adsorption history





# Mitigation Bank – Feasibility Analysis

## *Financial Feasibility – Pro forma*

- Pro forma based on realistic costs and credit absorption
  - Realistic Revenue Projections (amount and timing)
  - Realistic Costs Estimate (amount and timing)
    - Land
    - Permitting/Design/Legal
    - Construction
    - Monitoring/Maintenance
    - Financial Assurances
    - Sales Costs

# Mitigation Bank – Feasibility Analysis

## *Financial Feasibility – Pro forma*

### ➤ Other considerations

- Sources of financing – equity? debt?
- Partnership with landowner
- Partnership with Consultant/Contractor
- Sales (in-house or outside)
- Residual Value of Bank at Closure
- Other revenue sources
  - Species mitigation
  - Hunting (if part of plan)
  - Timber harvesting (if part of plan)



# Mitigation Bank – Feasibility Analysis

<u>Assumptions</u>					
Credit Price	\$100,000		Acres	1200	
Number Credits	200		Land Cost	\$5,000/ac	
Absorption	25/yr.		Permitting	3 years	
Sales Cost	6%		Closure	7 years	
<u>Revenue</u>					
	2014	2015	2016	2017-2024	Total
Timber Harvesting			\$600,000		
Credit Sales	0	0	0	\$2,500,000	\$20,000,000
Cost of Sales				\$150,000	\$1,200,000
Net Revenue			\$600,000	\$2,350,000	\$19,400,000
<u>Expenses</u>					
Land	\$6,000,000				\$6,000,000
Permitting/Design	\$200,000	\$100,000	\$100,000		\$400,000
Construction			\$300,000	\$300,000	\$600,000
Short Term F.A.			\$660,000		\$660,000
Long Term F.A.			\$600,000		\$600,000
Maint./Monitoring			\$55,000	\$55,000	\$445,000
Total Expense	\$6,200,000	\$100,000	\$1,715,000	\$355,000	\$8,705,000
Cumulative (Rev.-Expense)	-\$6,200,000	-\$100,000	-\$1,115,000	\$1,995,000	\$10,695,000

# Mitigation Bank Development Risks

*Sounds good; but,  
what about the risks?*

- Regulatory – delays, issues, future rule changes
- Hidden costs – legal, easement filings
- Construction unknowns
- Meeting Success Criteria –  
when and if?
- Market needs and timing;  
competition; credit value
- Financial assurance
- Long Term Management



# Mitigation Bank – Feasibility Analysis

Mitigation Bank Simplified IRR				
		Years		
		8	12	20
Credit Price	\$150,000.00	26%	20%	11.00%
	\$100,000.00	16%	12%	4%
	\$50,000.00	3%	2%	-4%

# Permitting Process

## DIFFERENCES BETWEEN STATE AND FEDERAL PROCESS

### USACE 33 CFR 332.8

- Prospectus – Letter of Potential
- Mitigation Banking Instrument (MBI)
  - Design Details
  - Success Criteria
  - MSA Justification
  - Credit Ledger
  - Financial Assurance
- IRT Review (including state agencies)

### DEP/WMD 62-342 FAC

- ERP application (same considerations as MBI)
- State commenting agencies

# Mitigation Bank - After Permitting

- Conservation easement
  - Appraisal
  - Recording
  - Requirements
- Financial Assurance - Changes
  - Construction/Implementation
  - Long term financial assurance funding
  - Perpetual Management and Maintenance
  - 100% funding with 1<sup>st</sup> credit release or partial funding
  - Other options?
- Meet success criteria – Obtain credit releases from agencies
- Selling credits - Ledger updates
  - Process
  - Responsibilities



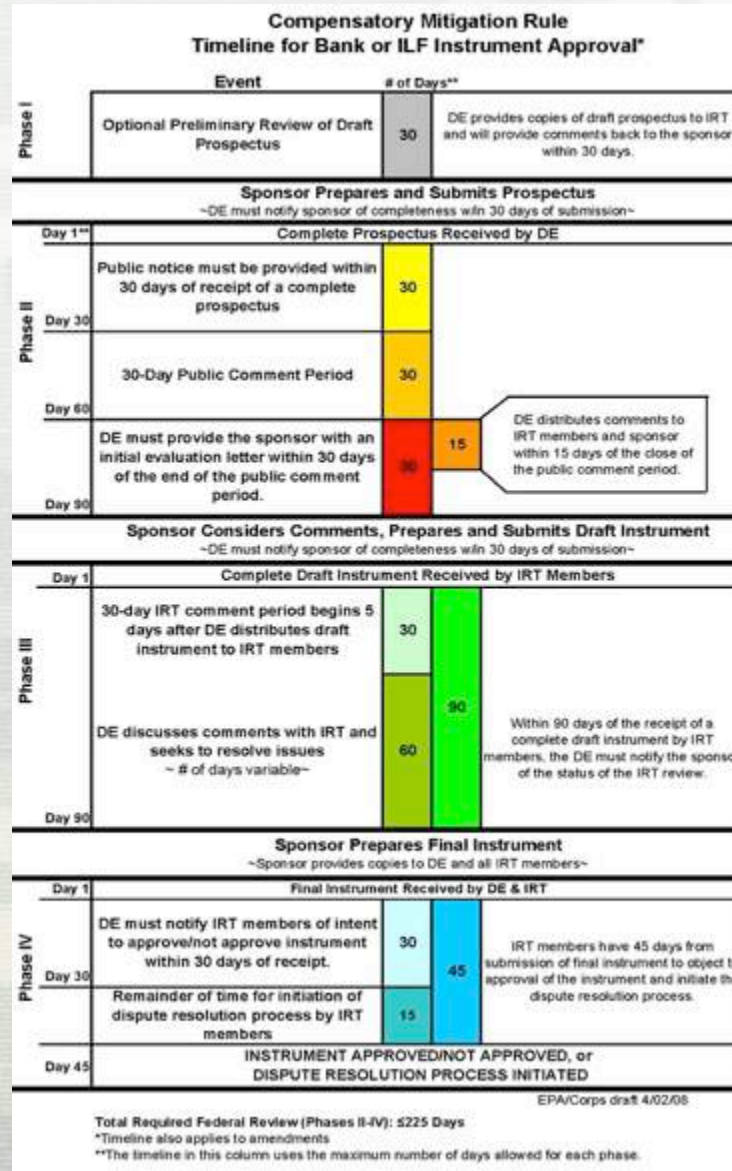
# Regulatory Updates

## ➤ Federal Updates





# Federal Review Process



# Prospectus

Federal review begins with complete prospectus

➤ Required information:

- Objectives
- Establishment and operation
- Service area
- General need and technical feasibility
- Ownership & long-term management
- Sponsor qualifications
- Ecological suitability



# Mitigation Banking Instrument

- Developed after submission of prospectus and finding of potential
- Instrument based on prospectus and describes in detail the physical and legal characteristics of the proposed mitigation bank and how it will be established and operated
- Draft instrument must be determined complete before review by IRT begins



# Mitigation Banking Instrument

## Draft instrument must include:

- Mitigation plan (12 components)
- Credit release schedule
- Service area
- Accounting procedures
- Default and closure provisions
- Reporting protocols
- Provision stating legal responsibility for mitigation lies with sponsor once permittee secures credits



# Post Issuance Activities

## *Initial Credit Release*

- Conservation easement
- Financial assurances (Implementation/Long-term)

## *Monitoring Reports*

## *Credit Release Requests*

- Based on criteria established in approved MBI

## *Credit Sales*

- Associated with COE permits
- RIBITS
- Letter/form accepting responsibility

## *Modifications*



# Corps Bank Team Focus

- Organizational changes
- Review timelines and process
- Communication – internal and external
- Continued education
- Predictability and reliability





# Regulatory Updates

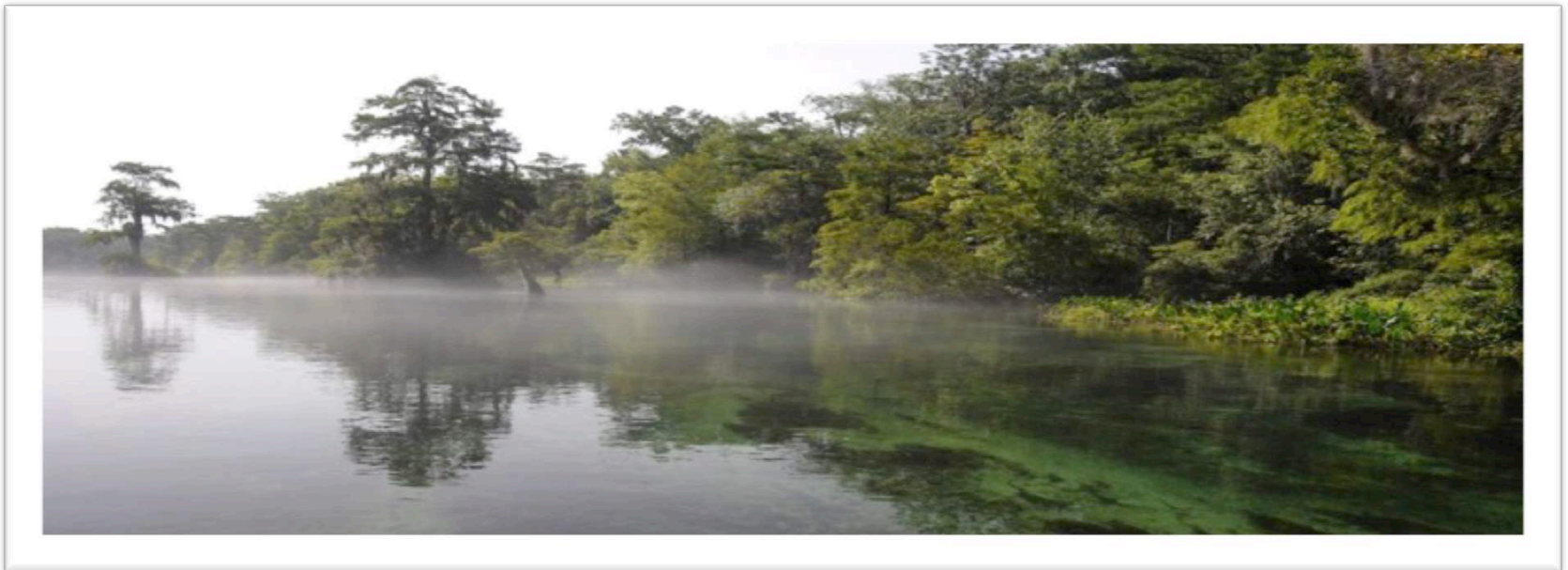
- State Regulatory Changes

# Mitigation and Mitigation Banking

## What's new with DEP?

### *State Regulatory and Policy Updates:*

- UMAM rule development (still ongoing)
- Mitigation Bank insurance/escrow option (ongoing)
- SWERP Phase II (still ongoing)





# UMAM Rule Development

DEP is in active rule development and has established seven workgroups to help develop revised field worksheets.

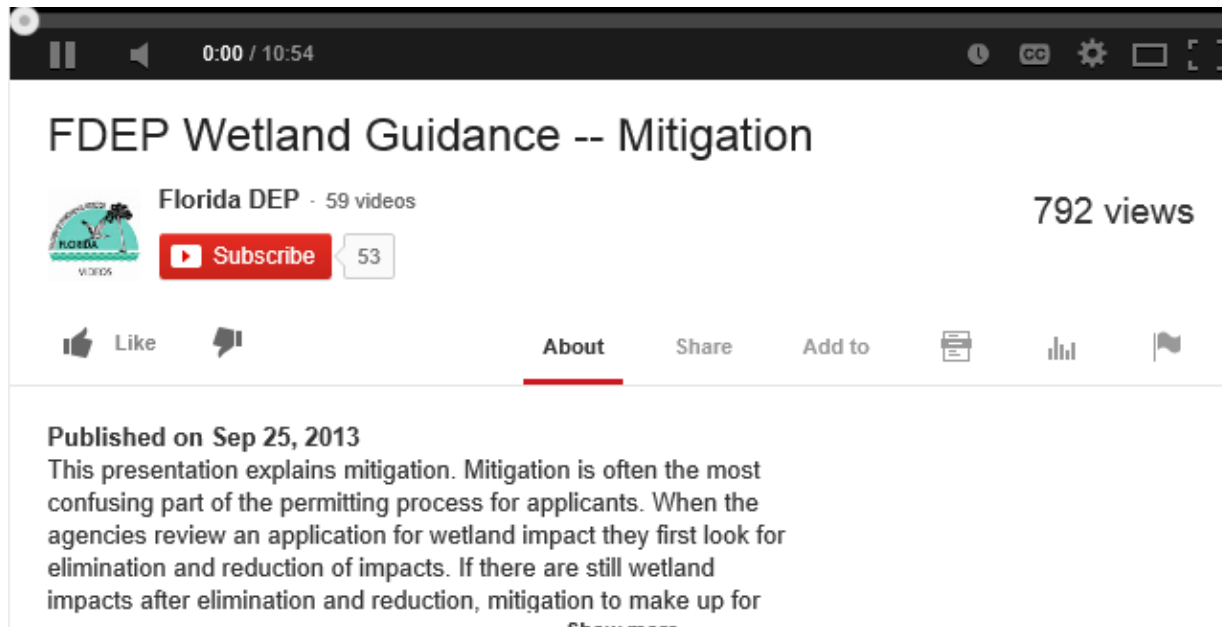


<http://www.dep.state.fl.us/water/wetlands/mitigation/umam/index.htm>

Field testing has been occurring as well as further edits to the worksheets.

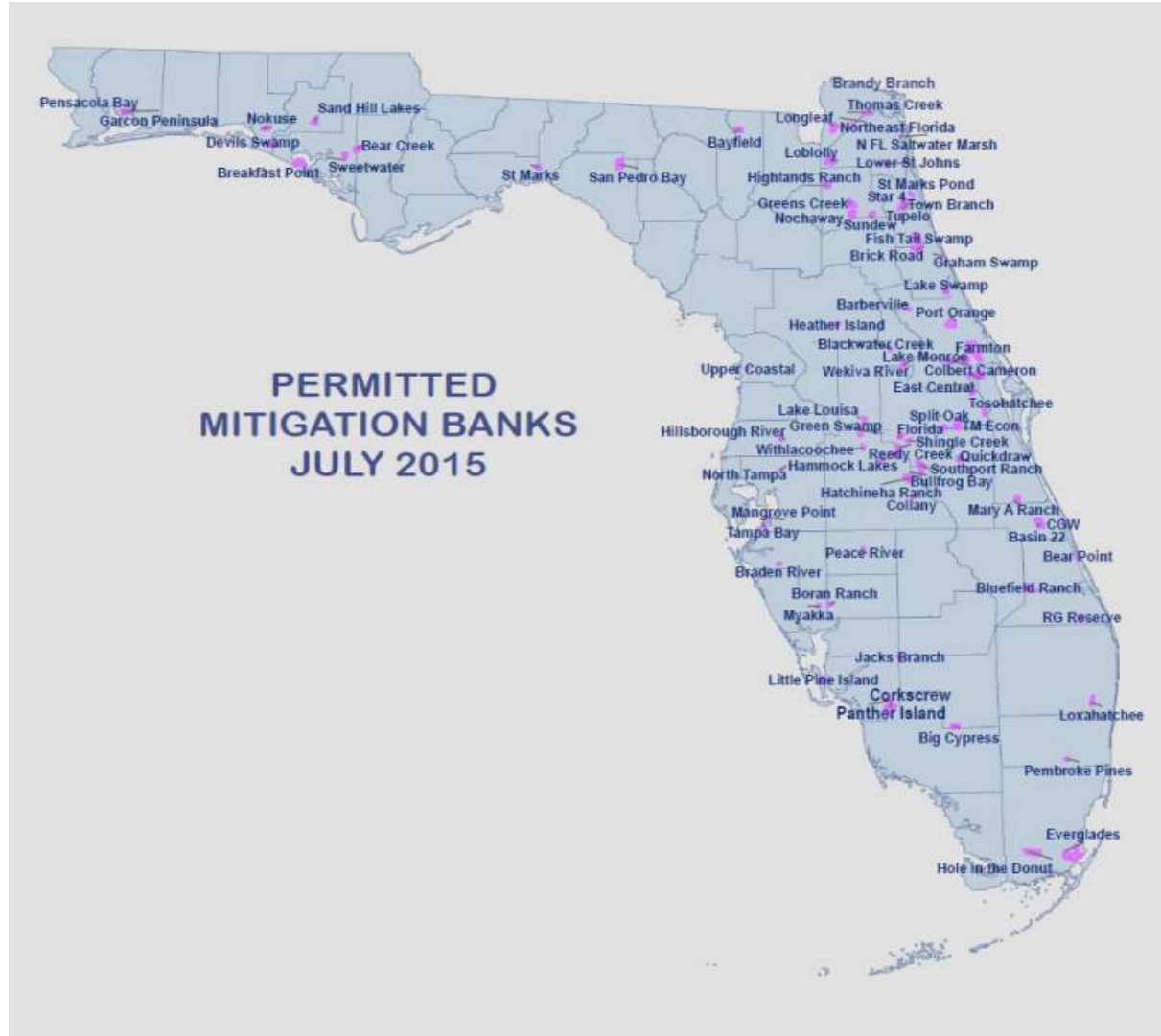
# Reference Materials

- You Tube videos
- Comments regarding rulemaking
- Delineation manual, etc.



The image shows a screenshot of a YouTube video player. At the top, there is a black control bar with a play/pause button, a volume icon, a progress bar showing 0:00 / 10:54, and icons for closed captions, settings, and full screen. Below the control bar, the video title "FDEP Wetland Guidance -- Mitigation" is displayed. Underneath the title, the channel name "Florida DEP" is shown with a profile picture of a globe and the text "59 videos". To the right of the channel name, it says "792 views". Below the channel name is a red "Subscribe" button and a white box containing the number "53". Underneath the subscribe button are icons for "Like" and "Dislike". Below these icons is a navigation bar with the following options: "About" (which is underlined in red), "Share", "Add to", a printer icon, a bar chart icon, and a flag icon. Below the navigation bar, the video description is visible, starting with "Published on Sep 25, 2013" and followed by a paragraph of text: "This presentation explains mitigation. Mitigation is often the most confusing part of the permitting process for applicants. When the agencies review an application for wetland impact they first look for elimination and reduction of impacts. If there are still wetland impacts after elimination and reduction, mitigation to make up for". At the end of the text, there is a "Show more" link.

# Permitting Mitigation Banks

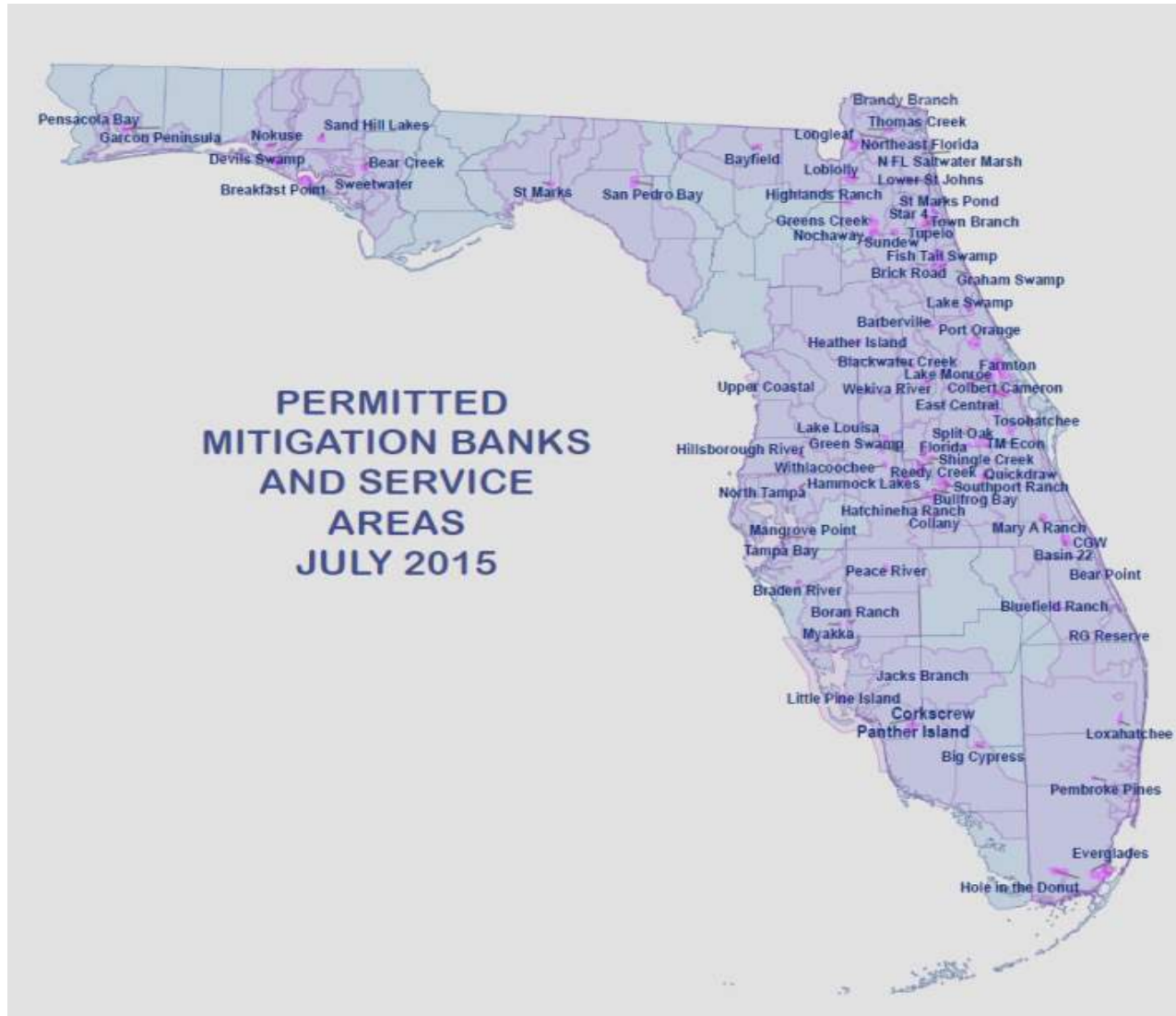


82 State Permitted  
Mitigation Banks

60 Permitted by WMDs

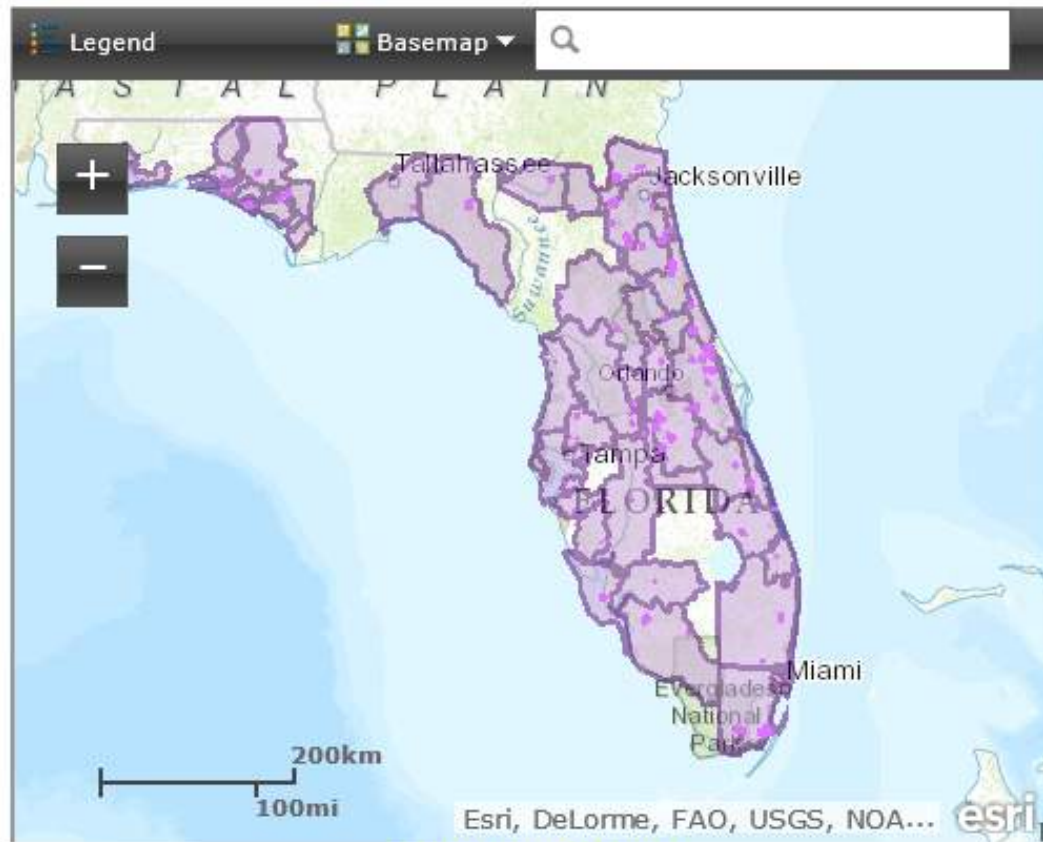
22 Permitted by DEP

# Mitigation Bank Service Areas



# Mitigation Banking Website

[http://www.dep.state.fl.us/water/wetlands/mitigation/mitigation\\_banking.htm](http://www.dep.state.fl.us/water/wetlands/mitigation/mitigation_banking.htm)

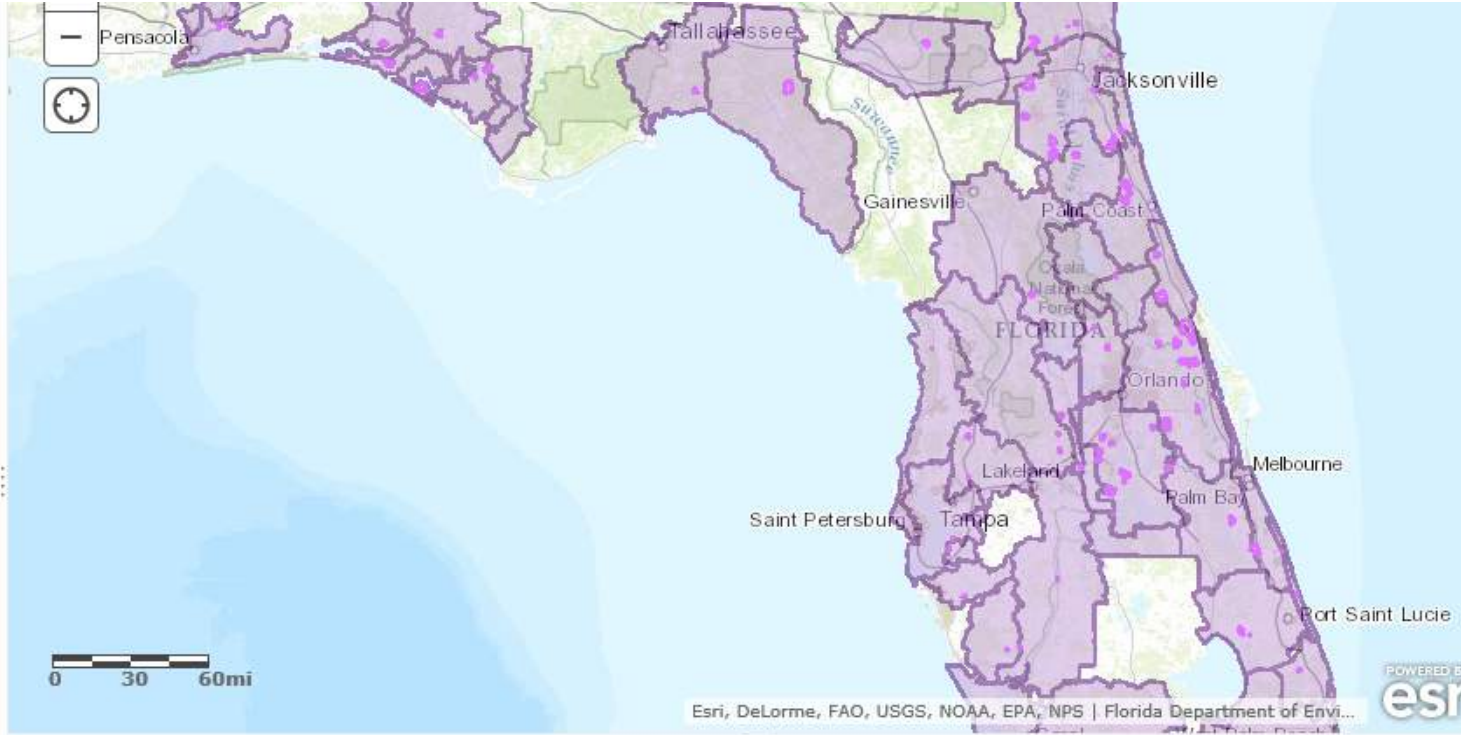


[View larger map](#)

[Video Quick Start Guide](#)

# Mitigation and Mitigation Banking New Website

- Wetlands Mitigation Bank Data Sharing
- Mitigation Banks
- Mitigation Bank Service Areas
- Topographic



Dropdown box to filter by agency, bank, or location

Open and filter table

**Wetlands Mitigation Bank Data Sharing - Mitigation Banks (82 features, 0 selected)** Table Options ▾

SITE/FILE ID	BANK NAME	PROJECT DESCRIPTION	CREDIT TYPES	PERMITTEE	COUNTY	COUNTY	Filter
227351	Sand Hill Lakes	The site is in the St Andrews Bay Basin in rural lands adjacent to pine plantation. The site was sand	Potential credit type(s) offered: 'Herbaceous', 'Flatwoods' and 'Mixed Hardwoods'. These credit	Northwest Florida Water Management District	WASHINGTON		<ul style="list-style-type: none"> <li>Show Selected Records</li> <li>Center on Selection</li> <li>Clear Selection</li> <li>Show/Hide Columns</li> </ul>

# Mitigation and Mitigation Banking New Website

Filtered to show only banks permitted by SJRWMD

SITE/FILE ID	BANK NAME	PROJECT DESCRIPTION	CREDIT TYPES	PERMITTEE	COUNTY	COUNTY	AGENCY	ISSUE DATE
92314	Blackwater Creek	The site is southwest of Lake Norris and east of Blackwater Creek, in Lake County. The ecological	Habitats present on the site include bottomland swamps, mixed wetland hardwoods, freshwater	Blackwater Creek Wetlands Mitigation LLC	LAKE		SJRWMD	3/12/2014

# Insurance and/or Escrow option

- Department has initiated rule development to allow the use of an insurance policy for construction financial assurance
- A revised notice of Rule Development will add the ability to set up an escrow account with the Department of Financial Services as an additional option
- We are currently seeking input from mitigation bankers and the insurance industry regarding this rulemaking
- Currently a variance is required if you want to use an insurance policy



# Future Rulemaking

- Larger Mitigation Bank rulemaking cleanup
- “Coastal Basin” rulemaking
- Additional cleanup of Statewide ERP rules?

# Trends

- Has there been an increased interest in coastal banks?

- Salt Marsh
- Mangroves
- Seagrass



- The Department is currently reviewing two possible banks that involve some of these communities

# Consistency/Improvements

- Continued coordination between DEP/WMDs and ACOE
- Develop a “State Template” for Mitigation Bank applications modeled after Federal MBI template
- Develop more state templates regarding Hunting Plans, Monitoring Plans, Long Term Management Plans, Fire Management, etc.
- What can we do to speed up the reviews and improve consistent feedback from the state?

# Contact Information

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*Thank you!*

