

The Conservative Turn Against Compensatory Mitigation



Photos from USACE, Savannah District Office webpage

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“One of the first secretarial orders I signed was to end the practice of compensatory mitigation.”

“I call it un-American.”

Interior Secretary Ryan Zinke, June 27, 2017.

The Basic Concept...



Some statutes...

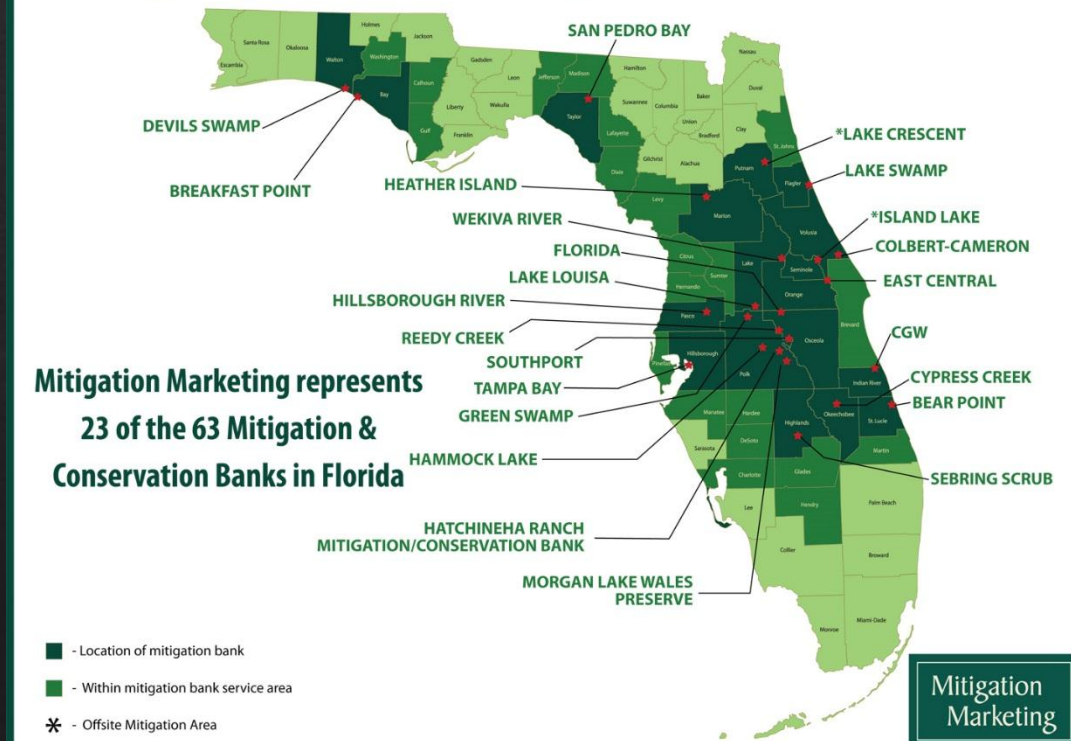
- ◆ Clean Water Act section 404
- ◆ Endangered Species Act
- ◆ National Environmental Policy Act
- ◆ Oil Pollution Act
- ◆ CERCLA
- ◆ Water Resource Development Acts
- ◆ Federal Power Act
- ◆ State NEPAs



Figure 2c. Geographic Trends in Mitigation Banking: The number of approved (active or sold-out) mitigation banks in each state in 2005.

Jessica Wilkinson & Jared Thompson, 2005
Status Report on Compensatory Mitigation in
the United States 3 (2006).

Providing Mitigation Solutions Throughout Florida



The Basic Concept...



“The vocabulary used to describe these mechanisms—banks, bankers, credits, debits, etc.—and the associated legal framework are elegant testimony to the underlying neoliberal vision.”

Valerie Boisvert, *Conservation Banking and the Economization of Nature: An Institutional Analysis*, 15 ECOSYSTEM SERVICES 134, 135 (2015)

“The knowledge system of science is being put into new articulatory relationships with the standards of capital, and scientific data are doing important new work in expanding the circuits of capital.”

Morgan M. Roberston, *The Nature that Capital Can See: Science, State, and Market in the Commodification of Ecosystem Service*, 24 ENV'T & PLANNING D: SOCIETY & SPACE 367, 371-72 (2006)

“It is about finding new arenas for markets to operate in and thus to expand the remit, and ultimately the circulation of capital.”

Bram Büscher et al., *Toward a Synthesized Critique of Neoliberal Biodiversity Conservation*, CAPITALISM NATURE SOCIALISM, June 2012, at 4, 8

#1 NATIONAL BESTSELLER

TRUMP

THE ART OF THE DEAL



**"Trump makes one believe for a moment in the
American dream again." —*The New York Times***

DONALD J. TRUMP with TONY SCHWARTZ

Agency Origins



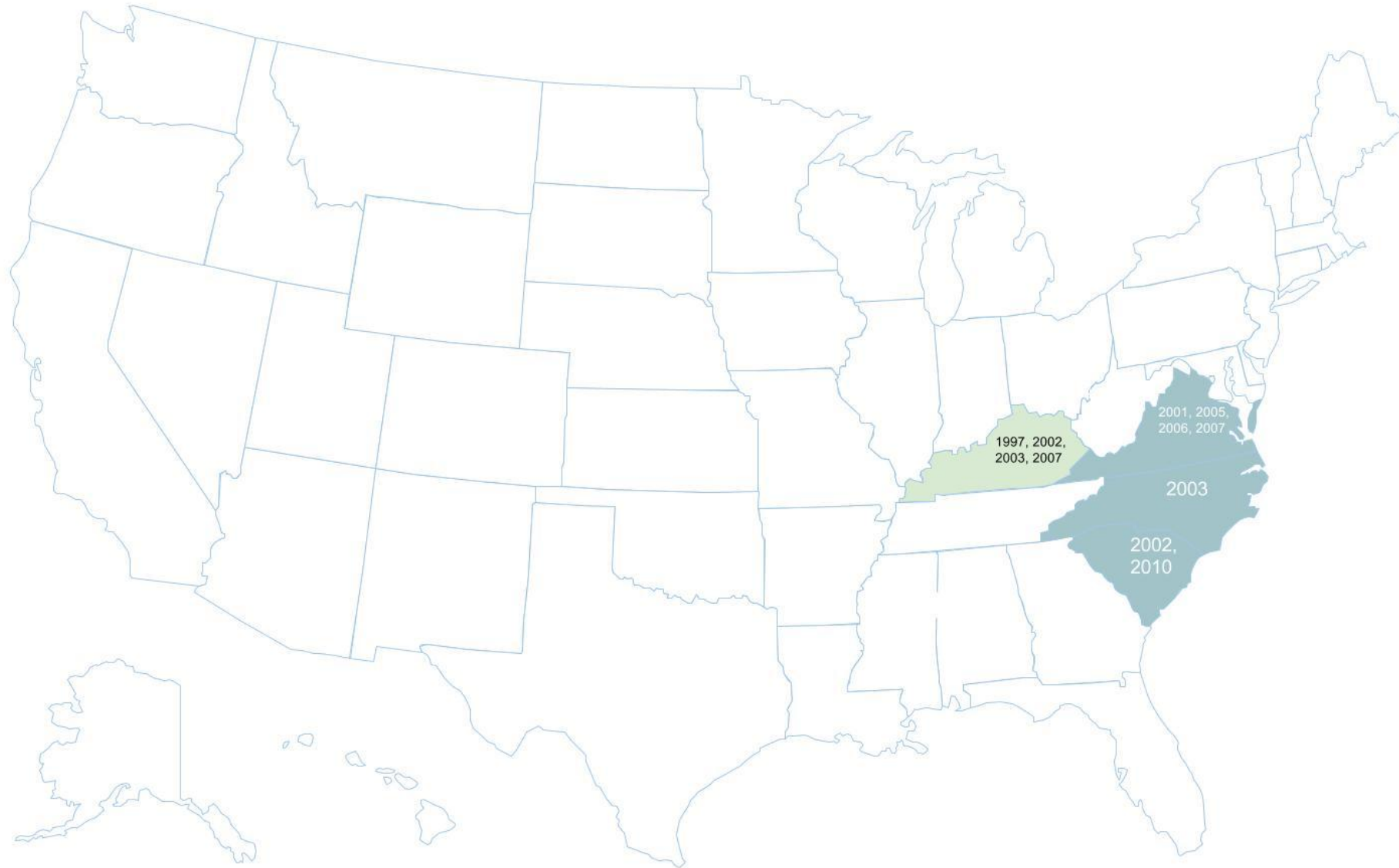
Expanding scope



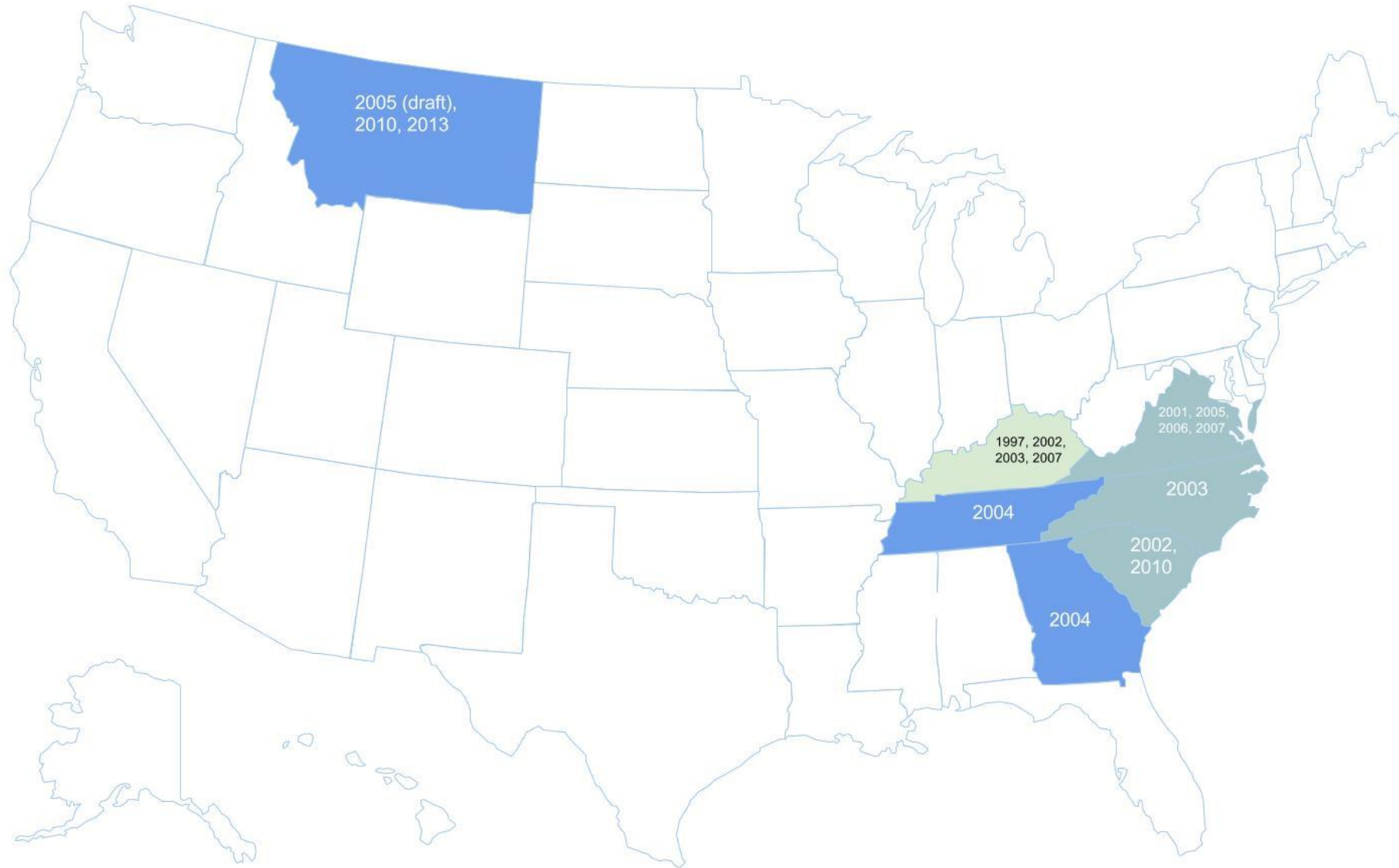
States with Stream Mitigation Guidance: 2000



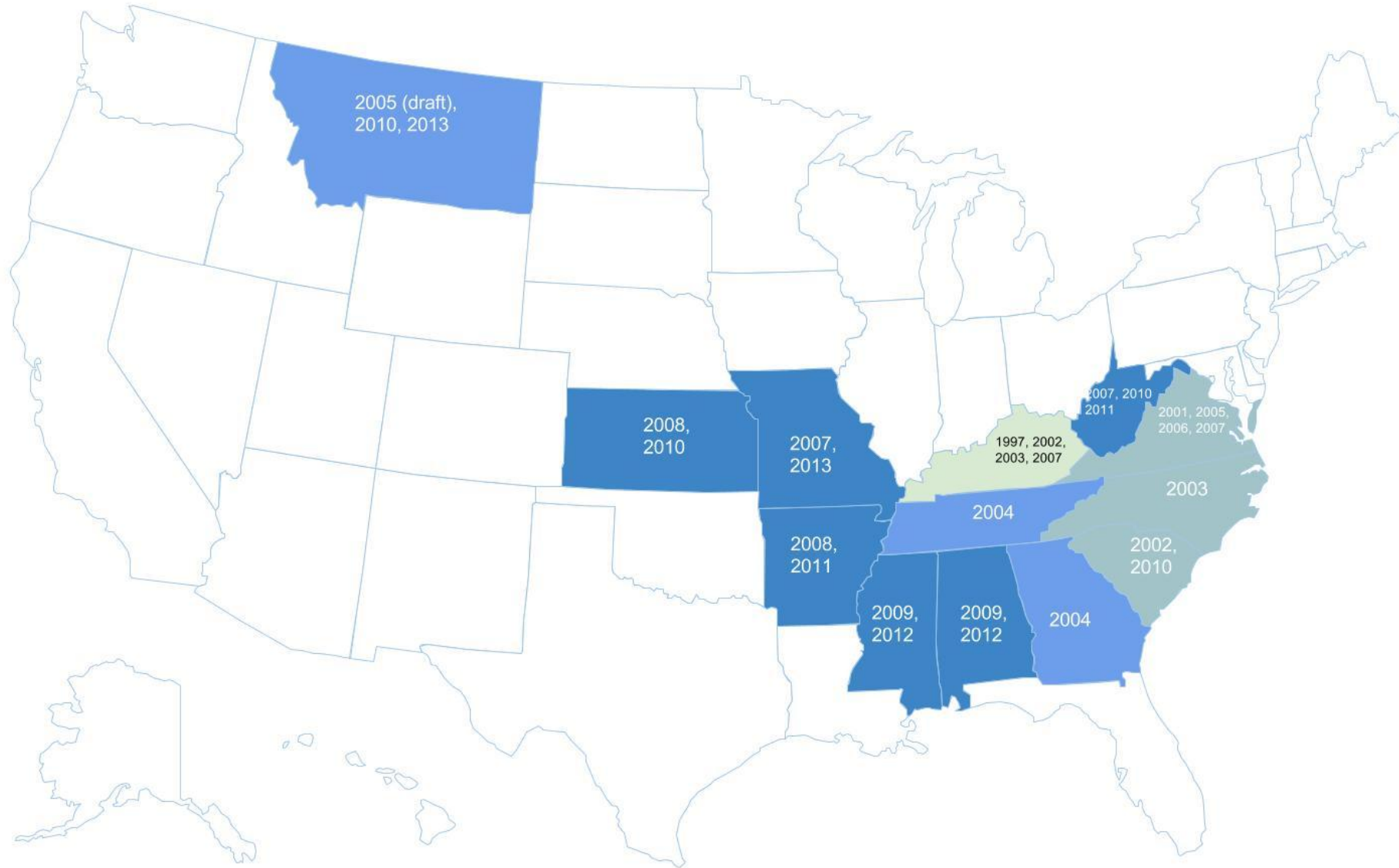
States with Stream Mitigation Guidance: 2003



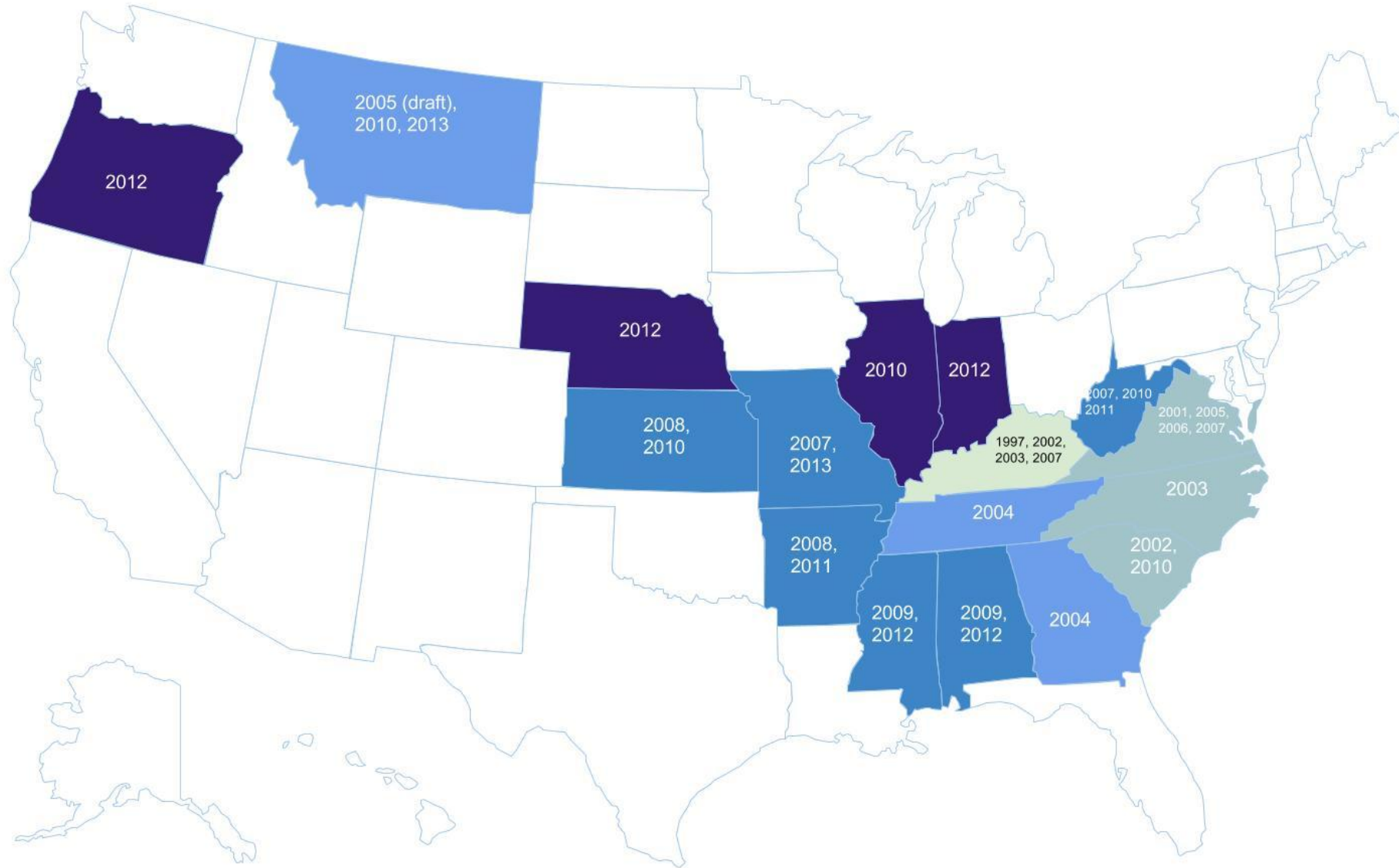
States with Stream Mitigation Guidance: 2006



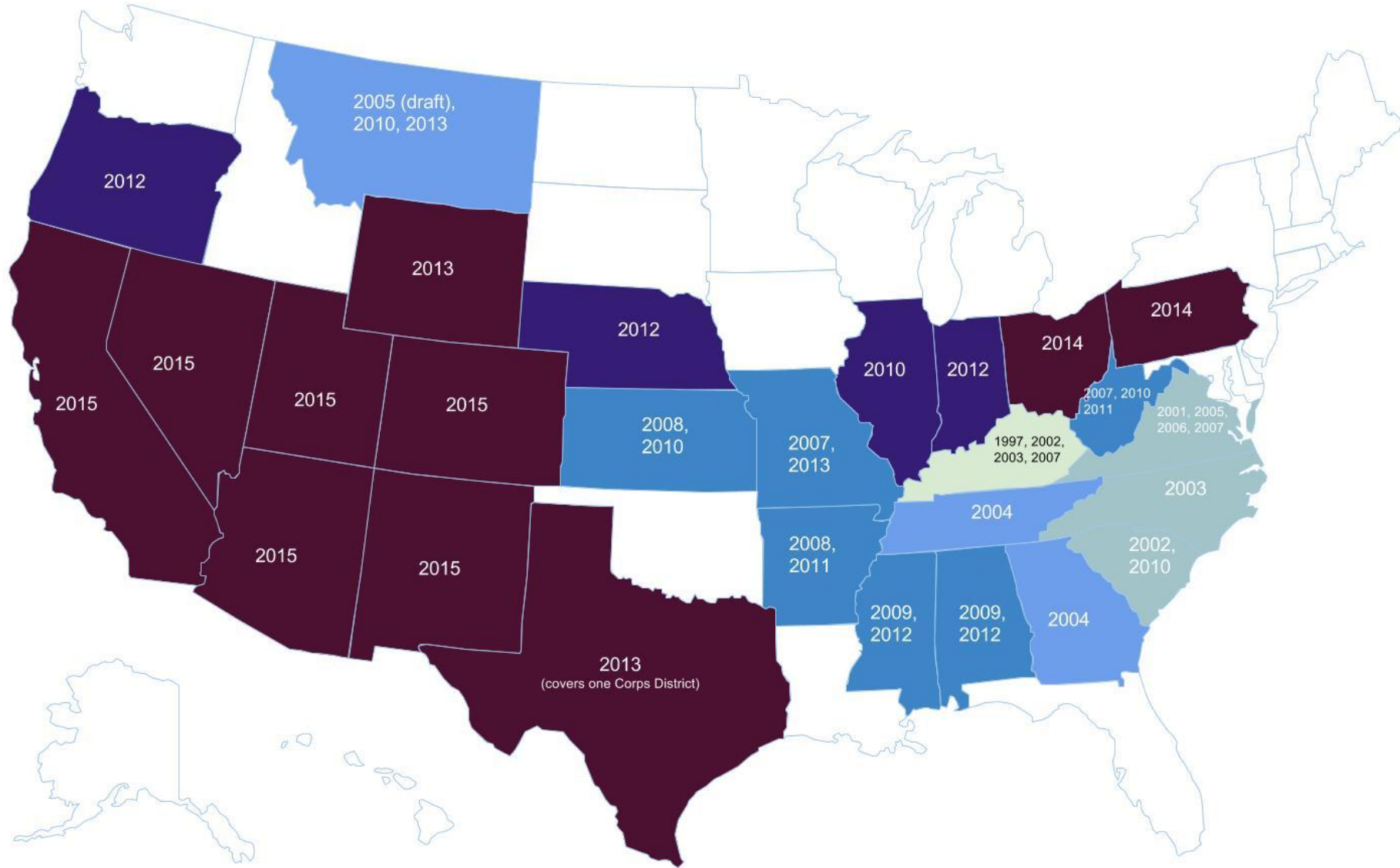
States with Stream Mitigation Guidance: 2009



States with Stream Mitigation Guidance: 2012



States with Stream Mitigation Guidance: 2015



Integration with planning



US Army Corps of Engineers

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Watershed Approach to Compensatory Mitigation Projects

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What is a watershed approach?
A watershed approach is an analytical process for making compensatory mitigation decisions that support sustainability or improvement of aquatic resources in a watershed (33 CFR 332.2). The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources through strategic selection of compensatory mitigation sites.

Must the siting of compensatory mitigation use the watershed approach?
A watershed approach must be used, to the extent appropriate and practicable, for siting compensatory mitigation projects for Department of the Army permits. The watershed approach applies to all mitigation banks, in-lieu fee programs, and permittee responsible compensatory mitigation.

Is a watershed approach only achieved through a watershed plan?
From the U.S. Army Corps of Engineers' (USACE) perspective, a watershed plan for the purpose of compensatory mitigation is a plan developed by any government or appropriate non-governmental organization for the purpose of aquatic resource restoration, establishment, enhancement, or preservation, in consultation with stakeholders. Not all self-identified watershed plans are suitable for compensatory mitigation site selection. To implement the watershed approach, USACE may use an appropriate watershed plan, if available. If there is no available watershed plan, there is no requirement to develop a watershed plan. Without a watershed plan, other landscape-level information may be used to appropriately select compensatory mitigation sites.

Photos ◀ 1 of 2 ▶



Wetland with contributing watershed (Photo by USACE)

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Nollan v. California Coastal Commission, 483 U.S. 825 (1987)



Dolan v. City of Tigard, 512 U.S. 374 (1994)

Koontz v. St. Johns River Water Mgmt. Dist, 135 S.Ct. 2586, 2591-92 (2013)



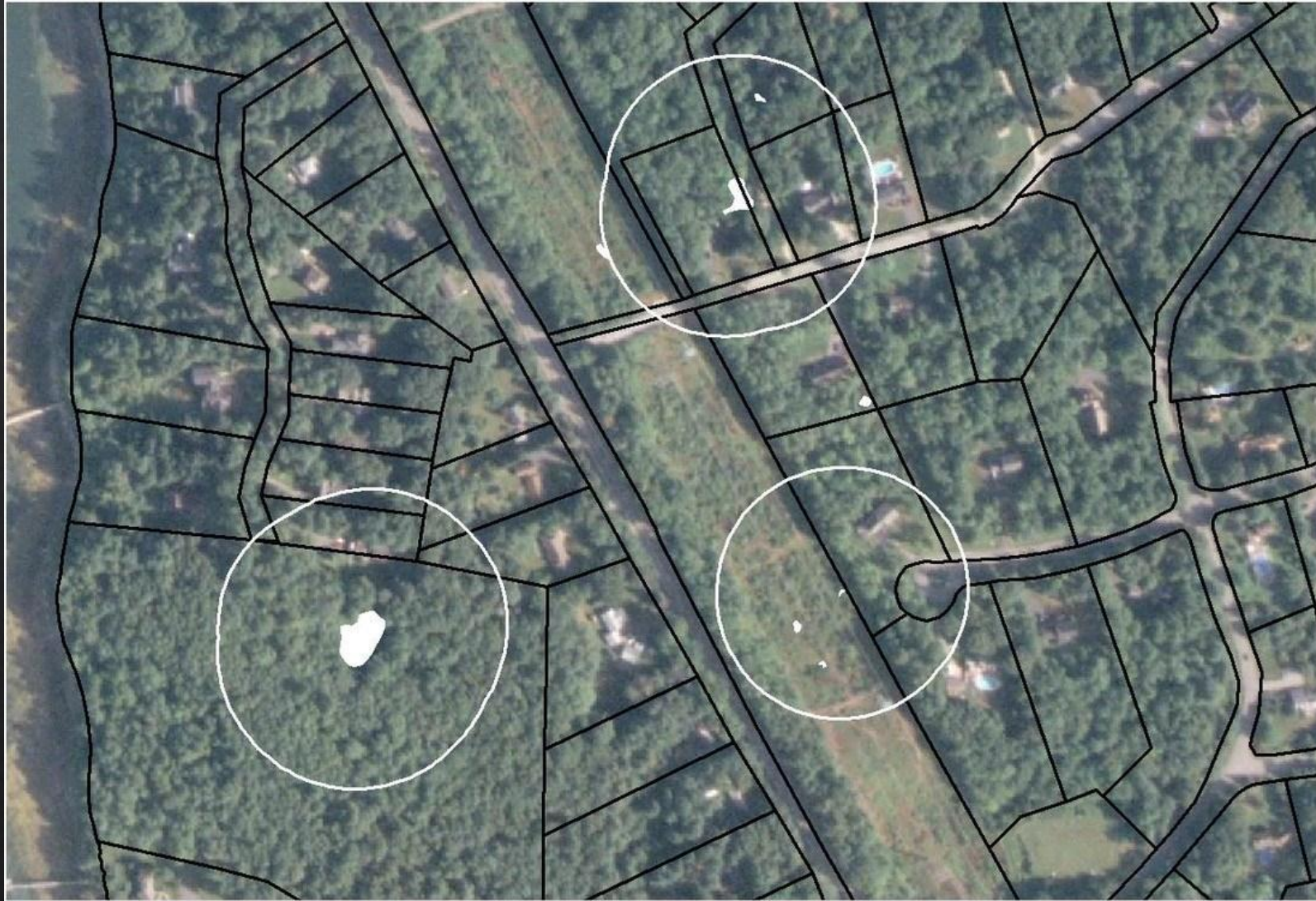
Shift in focus

Shift in focus

“The language of mitigation artfully reverses the previous understanding that the habitat belongs to the person who owns the land.”

Richard A. Epstein, *Babbitt v. Sweet Home Chapters of Oregon*, *The Law and Economics of Habitat Conservation*, 5 SUP. CT. ECON. REV. 1, 3 (1997).

Governmental incentives



Lessons?