



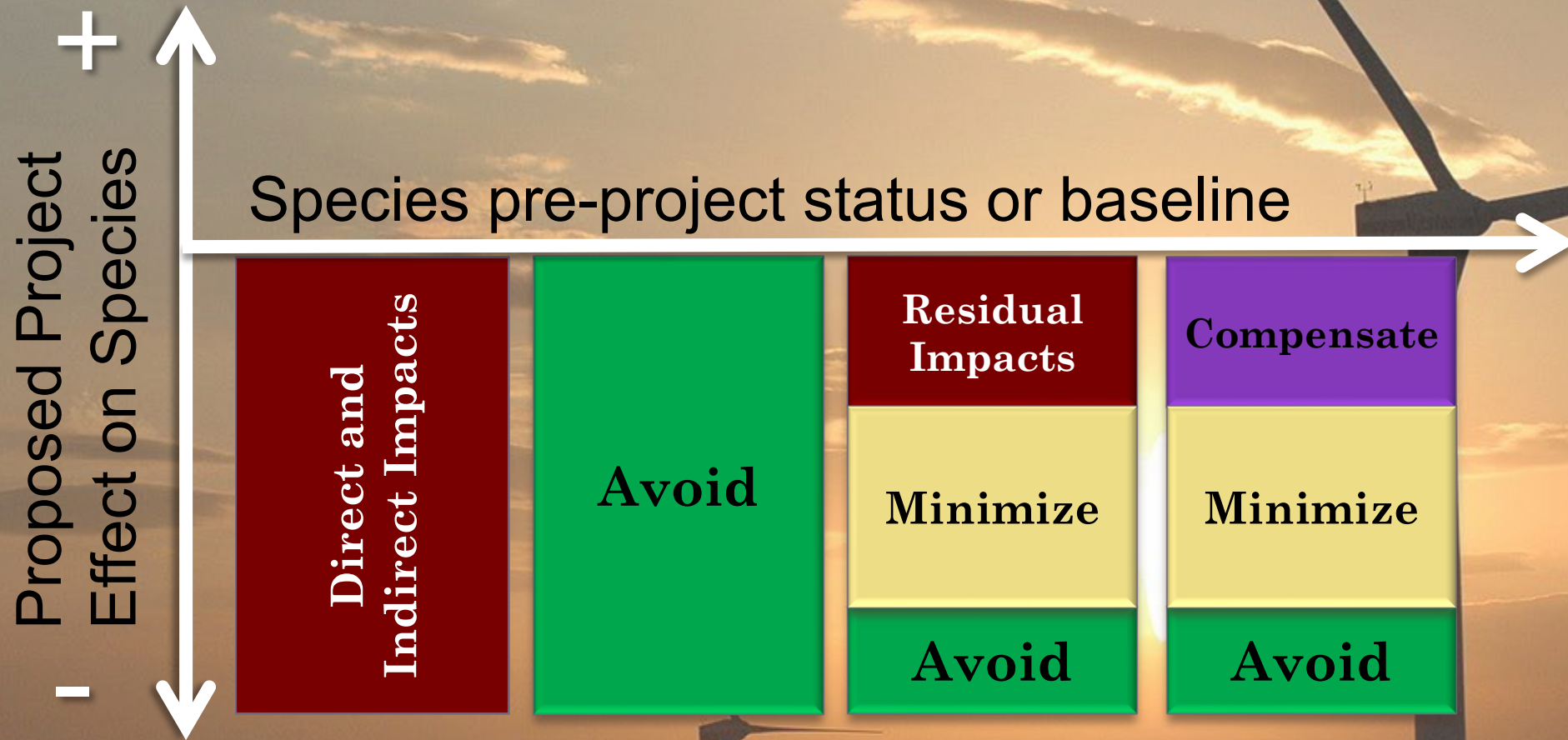
Compensatory Mitigation under the ESA

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Mitigation Sequence





USFWS Mitigation-Related Authorities *

- Endangered Species Act (ESA)
- Bald & Golden Eagle Protection Act (BGEPA/Eagle Act)
- Fish and Wildlife Coordination Act (FWCA)
- National Environmental Policy Act (NEPA)
- Clean Water Act (CWA)
- Oil Pollution Act & CERCLA (NRDA/NRDAR)
- Federal Land & Policy Management Act (FLPMA)
- Water Resources Development Act (WRDA)
- National Defense Authorization Act / Sikes Act
- Rivers and Harbors Act
- *Other* Federal and State Laws and Regulations

**not comprehensive*



ESA Section 9 – Prohibited Acts

“Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect - *or* to attempt to engage in any such conduct.





ESA Section 7 and Section 10

Incidental take of listed species can be authorized under ESA Sections 7(a)(2) and 10(a)(1)(B).

7

Federal Agencies
Consultation
Incidental Take Statement

10

Non-Federal Entities
Habitat Conservation Plan
Incidental Take Permit

Service can
recommend:

- mitigation to offset adverse impacts of incidental take actions under section 7(a)(2)

Service can
require:

- mitigation under section 7 jeopardy/adverse modification determination and under section 10

Section 7(a)(1)– develop conservation plans that include compensatory mitigation programs





Indiana bat

Section 7(a)(2) and Compensatory Mitigation



1. Incorporated into the Proposed Action (Conservation Measures) to mitigate unavoidable negative effects of the proposed action
2. As Conservation Recommendations to avoid, minimize, or mitigate adverse effects on listed species or critical habitat
3. As a Reasonable and Prudent Alternative (RPA) to avoid likelihood of jeopardizing continued existence of a listed species or destruction or adverse modification of critical habitat

Mandatory

Discretionary

Mandatory



Proposed ESA Implementing Reg. Changes

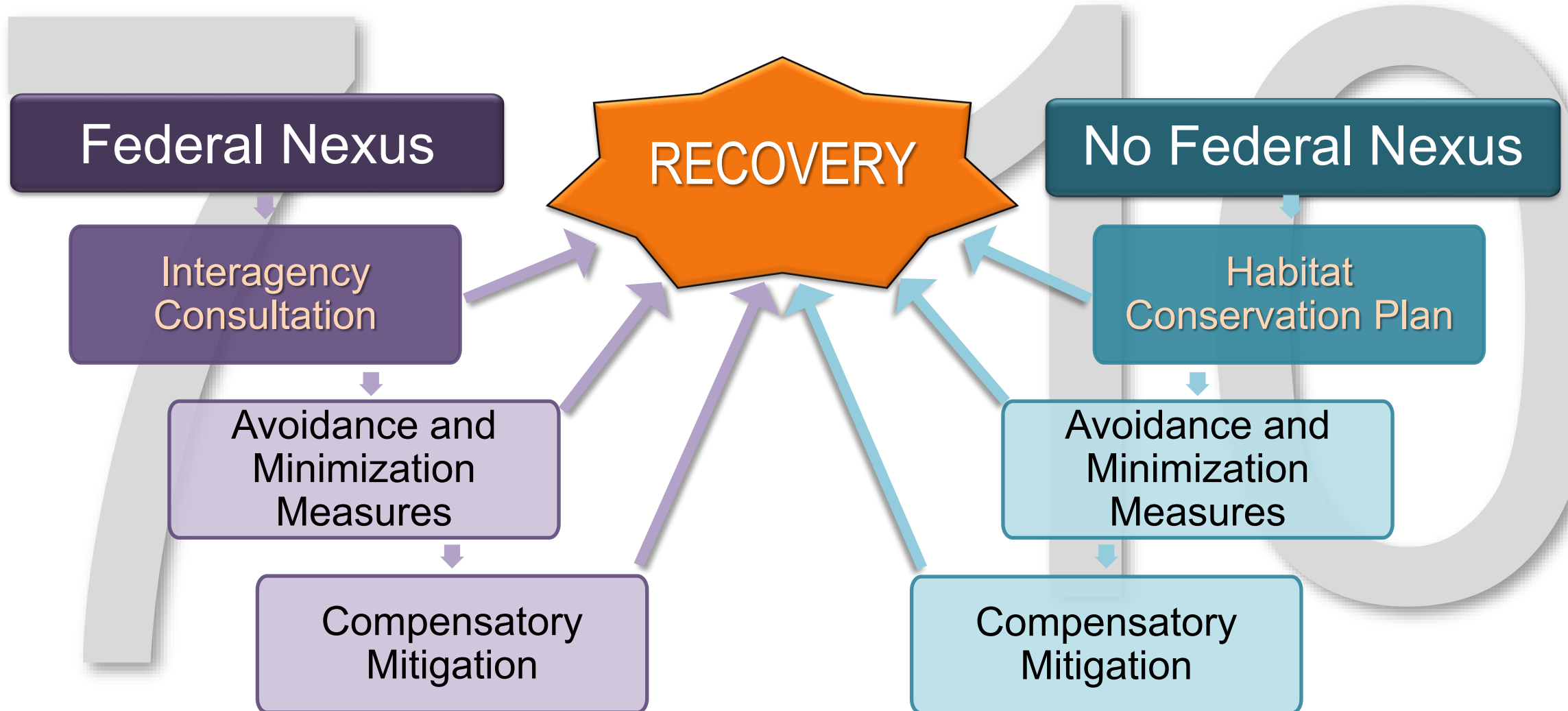
§402.14: Formal Consultation

- Reasonable and Prudent Measures (RPMs) may include offsets (mitigation)
- Offsets may occur within or outside of the action area
- As with any RPM, continue to be subject to the minor change rule

<https://www.govinfo.gov/content/pkg/FR-2023-06-22/pdf/2023-13054.pdf>

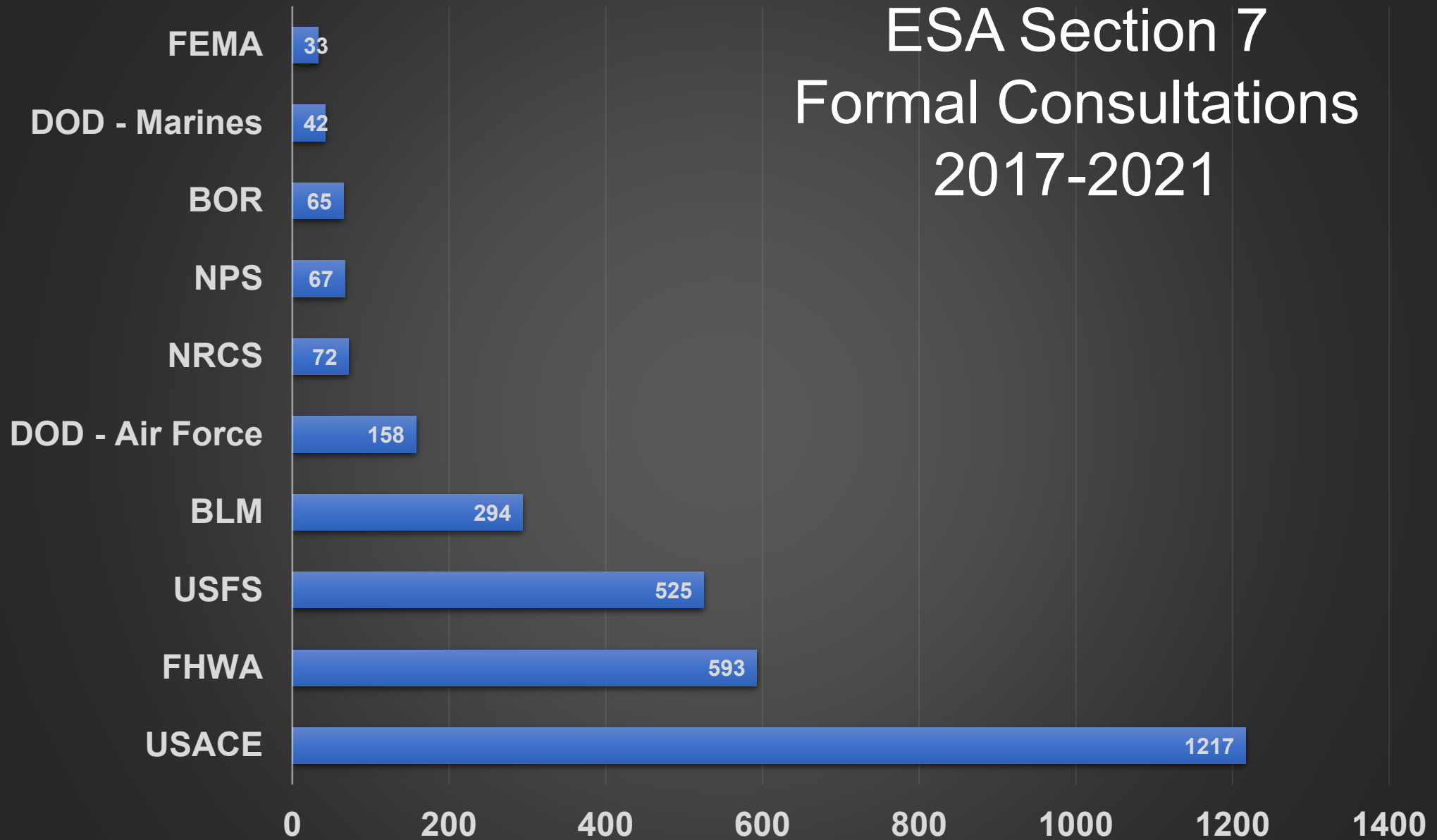


Incidental take of listed species can be authorized under ESA Sections 7(a)(2) and 10(a)(1)(B).





ESA Section 7 Formal Consultations 2017-2021





ESA Section 10 Habitat Conservation Plans (HCPs)

817

HCPs approved across the U.S.
(through 2021)

~100/yr last 5 yrs plus
amendments

Data sources: [ECOS.fws.gov](https://ecos.fws.gov) October 2020; 87 FR 39855 2022



Compensatory Mitigation Mechanisms

Single Party

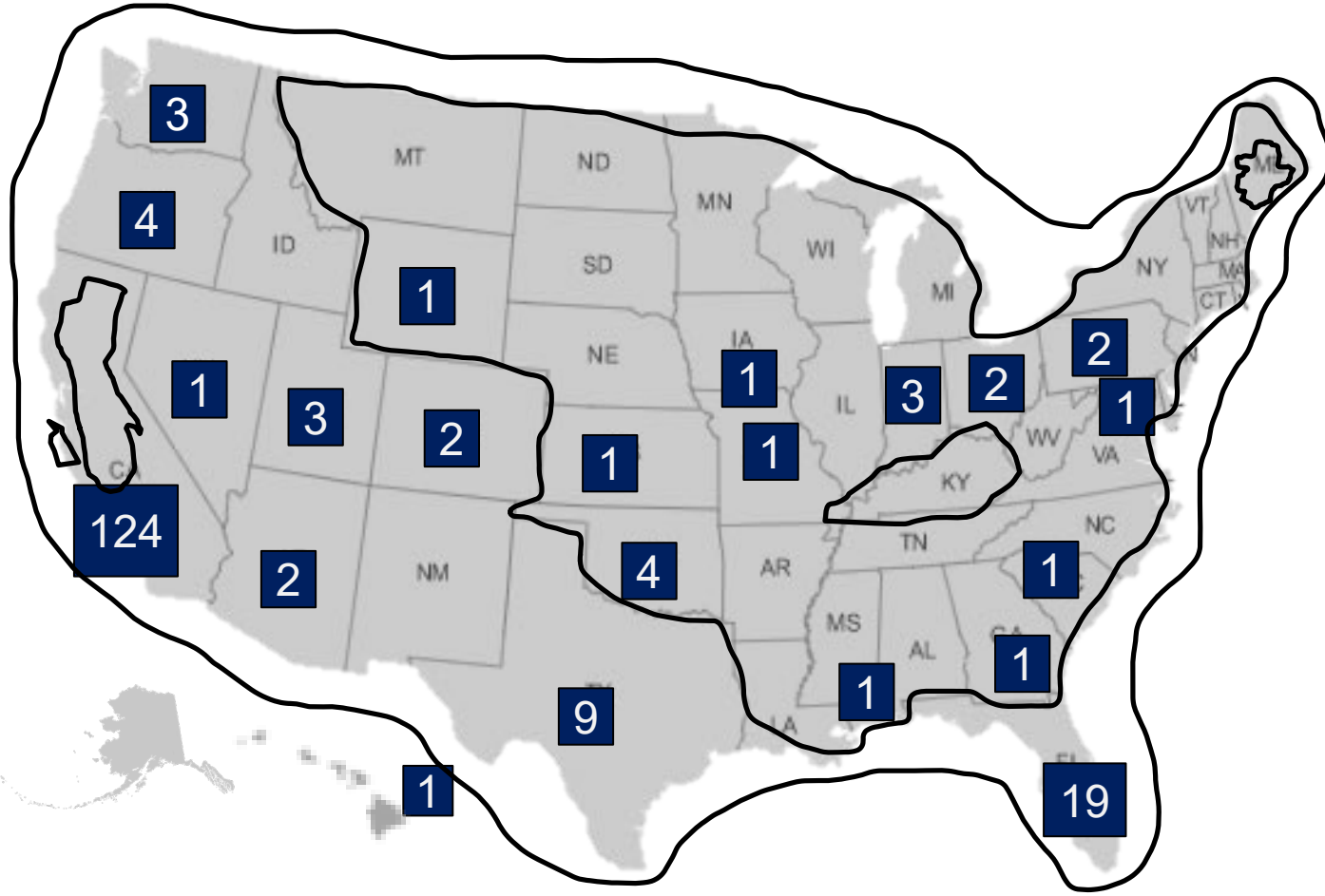
- Proponent Responsible Mitigation (PRM)

Third Party

- Conservation Bank
- In Lieu Fee (ILF)
- Habitat Credit Exchange
- Recovery Crediting System

Programmatic

- Programmatic ESA Consultation & MOU Approaches
- Pre-Listing Mitigation Programs



Conservation Banks & ILFs

187 Conservation Banks

6 ILF Programs

1,672 ESA-listed species (US)
~75 species in banks and ILFs (4%)
~268,400 acres protected

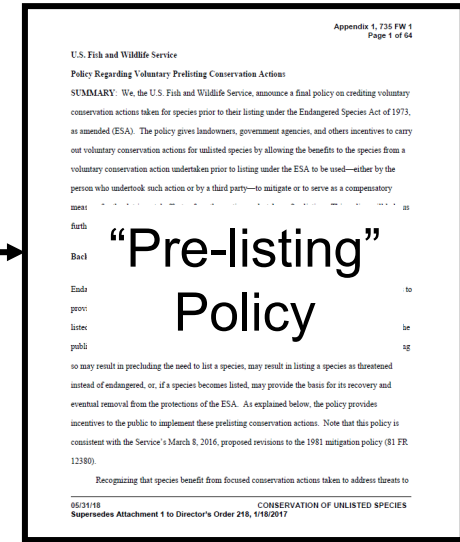
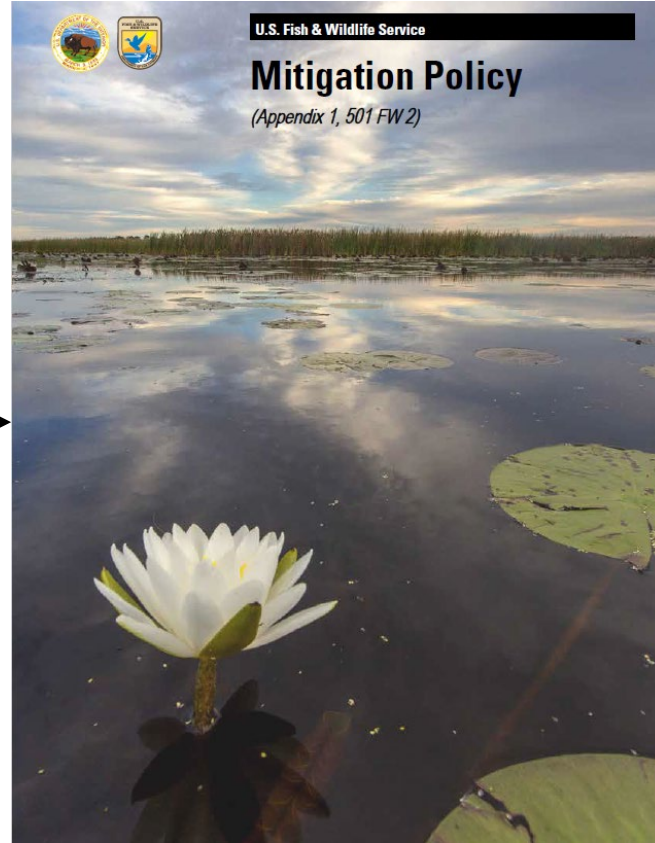
Data sources: RIBITS Sept. 2023; ECOS Sept. 2023

RIBITS: <https://ribits.ops.usace.army.mil/>



USFWS Mitigation Policies

**Coming Soon:
Proposed Mitigation Rule**



Future Policies and Guidance

<https://www.fws.gov/sites/default/files/policy/pdfs/FWS-Mitigation-Policy.pdf>

https://www.fws.gov/sites/default/files/policy/pdfs/FWS-ESA-Compensatory-Mitigation-Policy-amend_1.pdf

<https://www.fws.gov/sites/default/files/policy/pdfs/a1735fw1.pdf>



Greater sage-grouse

