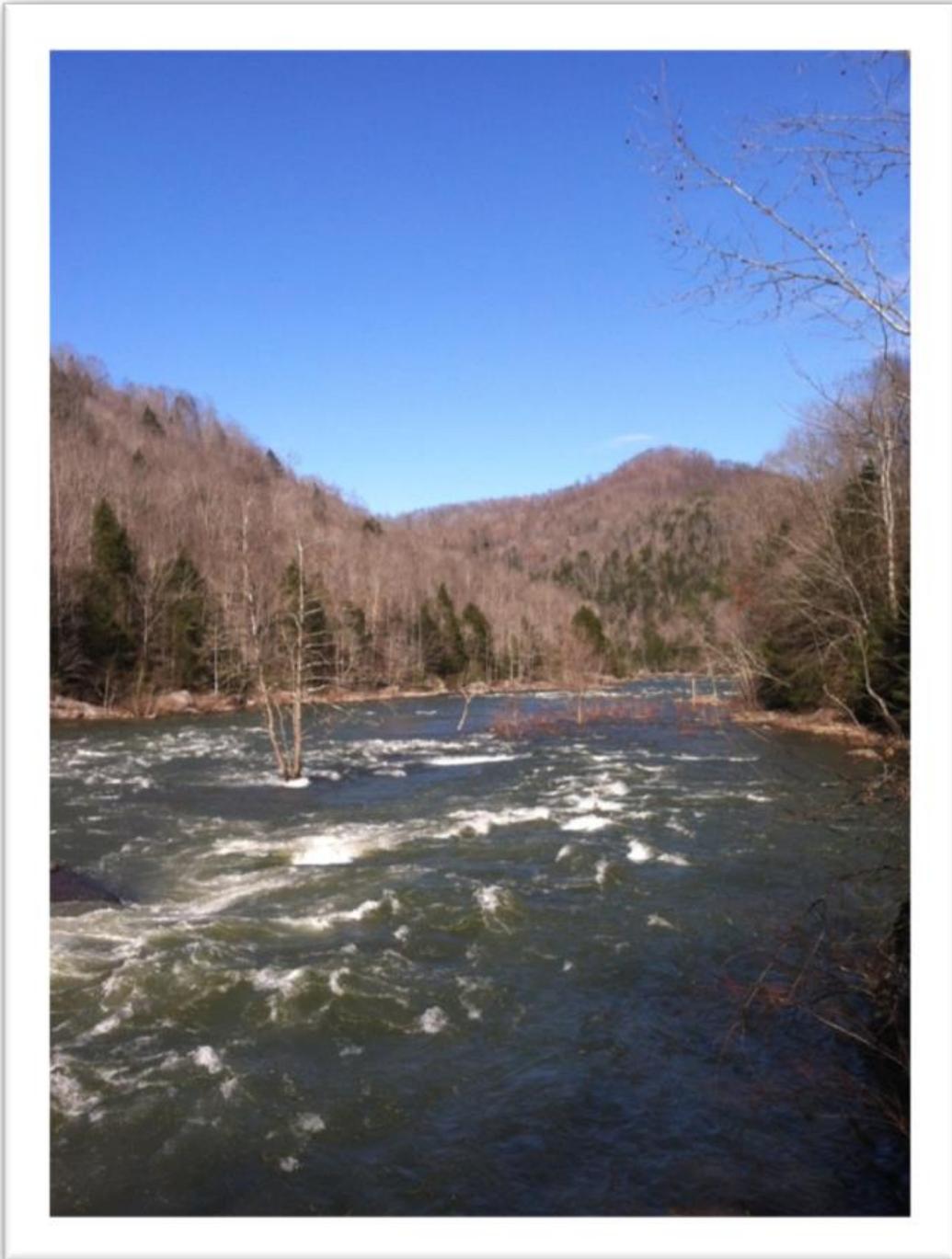




West Virginia **IN LIEU FEE** Stream and Wetland Mitigation Program

**INSTRUMENT**



# WV IN-LIEU FEE MITIGATION INSTRUMENT

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## I. INTRODUCTION

This West Virginia In-Lieu Fee Mitigation Program Instrument (“Instrument”) between the U.S. Army Corps of Engineers, Huntington and Pittsburgh Districts (“Corps”) and the West Virginia Department of Environmental Protection (“WVDEP”) details the establishment and processes for the West Virginia In-Lieu Fee Mitigation Program (the “Program”). This Instrument supersedes and replaces the Agreement Concerning In-Lieu Fees between the West Virginia Department of Environmental Protection and the U.S. Army Corps of Engineers dated January 25, 2006. On April 10, 2008, a “Compensatory Mitigation for Losses of Aquatic Resources; Final Rule” (the “Final Rule”) was published in the Federal Register, 33 CFR Parts 325 and 332. As a result of provisions in the Final Rule that relate to in-lieu fee arrangements, this Instrument is developed.

### A. PURPOSE AND GOALS

The purpose of the Program is to provide an additional mechanism for compensatory mitigation for impacts to aquatic resources authorized by the Clean Water Act (33 U.S.C. § 1251 *et seq.*) while maximizing the benefit to the aquatic environment and the public interest. The purpose of this Instrument is to establish guidelines, responsibilities and standards for the establishment, use, operation and maintenance of the Program in a way that brings the Program into compliance with revised regulations, as set forth in 33 CFR Part 332, governing compensatory mitigation for activities authorized by Department of Army (“DA”) permits. The Corps and the WVDEP agree to follow and comply with the procedures set forth in this Instrument. The parties intend to achieve no net loss of existing stream and wetland acreage and functions in West Virginia through effective restoration, enhancement, replacement and/or preservation of streams and wetlands at beneficial economies of scale to provide for a significant net gain of aquatic resource functions and values where possible, when aquatic resources are lost as the result of activities authorized in DA permits.

The Program may be used for compensatory mitigation for unavoidable impacts to waters of the United States that result from the discharges of dredged or fill material into waters of the United States in association with activities authorized under Section 404 and/or 401 of the Clean Water Act, and/or Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403). More specifically, the Program may be utilized to provide compensatory mitigation for impacts permitted by the Corps General, Regional and/or Individual Permits and in other cases if agreed upon by the Corps and the WVDEP.

It is the intent of the signatories that the standards of specific compensatory mitigation sites or projects authorized under the Program will be equivalent to the standards of mitigation banks. Where possible and appropriate, equivalent templates and policies will be used for the Program as are used for mitigation banks. This Instrument sets the framework under which the WVDEP-sponsored mitigation sites will be identified, funded, operated, maintained and managed.

## **B. ROLES AND RESPONSIBILITIES OF THE PARTIES**

The Corps is the party responsible for approval of in-lieu fee program instruments and oversight of compliance and mitigation activities associated with Section 404 of the Clean Water Act, and/or Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403). In addition, as Chair of the Interagency Review Team (“IRT”), the Corps is responsible for consulting with the IRT in accordance with 33 CFR §332.8. There are two Corps Districts covered by this Instrument – Huntington District and Pittsburgh District. Huntington is the lead District for this Program and is responsible for coordinating with the IRT and the Program sponsor on issues related to this Instrument and implementation of mitigation activities associated with this Instrument.

The WVDEP is the sponsor for the Program and is responsible for oversight, implementation, and fiscal management of the Program as defined in this instrument. The WVDEP has authority under this Instrument to enter into agreements with other state agencies, non-profit organizations, and for-profit organizations to implement the Program. All activities conducted by third parties under this instrument remain the responsibility of the WVDEP. The WVDEP also participates as a representative on the IRT.

## **C. EFFECTIVE DATE AND TERM, MODIFICATION AND AMENDMENT, AND TERMINATION OF THE INSTRUMENT**

This Instrument shall be effective upon the date that it is executed by both the Corps and the WVDEP (“Effective Date”). The parties acknowledge that the Instrument is valid for a period of five (5) years; however, it may be terminated by either party with written notice, given 90 days in advance. This Instrument may only be amended or modified with the written approval of all parties hereto.

Prior to termination, the WVDEP shall provide an accounting of funds and shall complete payments on existing contracts for projects approved by the Corps and IRT and expenses incurred on behalf of these projects. Upon termination, if Program funds should remain with the WVDEP, the Corps shall direct that the funds be transferred from the WVDEP to non-profit, governmental or quasi-governmental entities for application of the funds to stream and wetland restoration projects through the purchase of mitigation bank credits or the transfer of Program funds to another in-lieu fee (ILF) program. Any acceptance of payments and approval for Advance Credits by the Corps and/or the IRT shall be suspended. The WVDEP shall be responsible for compliance with this Instrument and any subsequent Mitigation Plans until each Mitigation Site is closed in accordance with the Program’s closure procedures or until all Credits are sold, whichever is later.

## **D. DISCLAIMER**

This Instrument does not guarantee the viability of the Program as a methodology to achieve mitigation. In addition, this Instrument cannot guarantee that any permittee will choose to make a payment to the Program or that the Corps or Interagency Review Team (“IRT”) will approve any payments or contributions to the Program. Each permit will be considered on a case-by-case basis

and each participating entity has discretion as to the mitigation it requires or will accept in association with any particular permit.

## II. DEFINITIONS

1. **ADVANCE CREDITS** – Any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan.
2. **AVAILABLE CREDITS** – Credits that have been approved for use by the Corps and have not been attributed to permits. Available credits may be Advance Credits or Released Credits.
3. **COMPENSATION** – Actions taken which have the effect of mitigating for, or substituting some form of, aquatic resource lost or significantly disturbed due to a permitted activity; generally aquatic resource preservation, restoration, enhancement, or creation.
4. **CREDIT** – A unit of measure representing the accrual or attainment of aquatic resource function, condition, or other performance measure at a mitigation site. It is also used to represent the mitigation liability of the Program.
5. **CREDIT REQUEST FORM** – Verification provided by the WVDEP to potential credit purchasers stating that credits are available and details the cost per credit.
6. **DEBIT** – A unit of measurement representing the reduction of available credits corresponding to the loss of aquatic resource functions at an impact or project site.
7. **FINANCIAL ASSURANCES** – A mechanism used to guarantee some aspect of mitigation site performance. Financial assurances may include a contingency account, performance bond, insurance, letter of credit, or other mechanism acceptable to the IRT. Financial assurances may be required for varying aspects associated with an in-lieu fee program including: a) a mechanism to guarantee the initial release of mitigation credits from a mitigation site; b) a mechanism to ensure that monitoring and maintenance of the mitigation site is completed; and/or c) a mechanism ensuring financing is available to address long-term management.
8. **FULL COST ACCOUNTING** – The process of collecting and presenting information (costs as well as advantages) for each mitigation project. It is a conventional method of cost accounting that traces direct costs and allocates indirect costs. It includes all appropriate expenses such as land acquisition, planning and design, construction, planting, legal expenses, monitoring, maintenance, remediation, adaptive management, long-term management, administration, and contingencies.
9. **FUNCTIONS** – The physical, chemical, and biological ecosystem processes of an aquatic resource without regard to its importance to society.
10. **HYDROLOGIC UNIT CODE** – Divisions of the watersheds of the United States. For the purposes of this Instrument, hydrologic unit code refers to those divisions as defined by the United States Geological Survey (“USGS”).
11. **IN-LIEU FEE PROGRAM ACCOUNT** – An account which contains any and all monies, including any interest associated with the sale or transfer of credits in accordance with this Instrument. Funds in this account can only be used to provide compensatory mitigation (including selection, acquisition, design, implementation, administration, and management of mitigation projects).
12. **IN-LIEU FEE MITIGATION PROGRAM (“PROGRAM”)** – The West Virginia In-Lieu Fee Mitigation Program as proposed in this Instrument (referred to herein as the “Program”).

13. INTERAGENCY REVIEW TEAM (“IRT”) – An interagency group of federal, state, tribal, and or local regulatory and resource agency representatives that participate in the development of this Instrument, and oversee the use of in-lieu fee funds for the establishment, use, and operation of a mitigation site. The IRT is chaired by a representative from the Corps Huntington District.
14. LEDGER – An accounting of mitigation credits and debits.
15. LONG-TERM MANAGEMENT AND MAINTENANCE PLAN – The plan that defines the goals and objectives of long-term stewardship of a mitigation site after success criteria monitoring has been completed. The long-term management and maintenance plan shall be binding on the long-term steward.
16. LONG-TERM STEWARD – The party (landowner, easement holder, or other party) responsible for long-term maintenance and management of the mitigation site.
17. MITIGATION – The process of sequentially avoiding impacts, minimizing impacts, and compensating for impacts to aquatic resources that could not be avoided or minimized.
18. MITIGATION PLAN – A detailed plan that identifies specifically how aquatic resources and associated upland buffers will be restored, created, enhanced, preserved, managed, and maintained on a mitigation site. Mitigation plans must contain the following twelve elements: objectives, site selection criteria, site protection instrument, baseline information, credit determination methodology, mitigation work plan, maintenance plan, ecological performance standards, monitoring requirements, long-term management plan, adaptive management plan, and financial assurances.
19. MITIGATION PERFORMANCE – The outcome of applying success criteria to a mitigation site in terms of identified goals and objectives.
20. MITIGATION PROJECT – The entire compensatory mitigation project, including all activities described in the mitigation plan and undertaken on the mitigation site to generate credits.
21. MITIGATION SITE(S) – A site or sites where aquatic resources are restored, created, enhanced, or preserved expressly for the purpose of providing compensatory mitigation for authorized impacts to similar resources.
22. PROGRAM INSTRUMENT – The legal document governing the establishment, operation, and use of an in-lieu fee program.
23. REAL ESTATE PROTECTION DOCUMENT – The document or instrument intended to protect, restrict, or preserve the land associated with a site and that will be recorded in local land records. The document may take the form of a deed, easement, declaration of restriction, or other similar legal document.
24. RELEASED CREDITS - Credits generated as the mitigation site begins to meet performance standards.
25. SUCCESS CRITERIA – The minimum standards required to meet the objectives for which the site was established.

### **III. REGULATORY AUTHORITIES**

The establishment, use, and operation of the Program are carried out in accordance with the following authorities:

#### **A. FEDERAL:**

1. Clean Water Act (33 USC §1251 et seq.);

2. Rivers and Harbors Act (33 USC §403);
3. Fish and Wildlife Coordination Act (16 USC §661 et seq.);
4. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-332);
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
6. Endangered Species Act (16 USC §1531 et seq.);
7. Magnuson Stevens Fishery Conservation and Management Act (16 USC §1801 et seq.);
8. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990);
9. Regulatory Guidance Letter No. 05-01. U.S. Army Corps of Engineers, February 14, 2005.
10. Regulatory Guidance Letter No. 08-03. U.S. Army Corps of Engineers, October 10, 2008.

## **B. STATE OF WEST VIRGINIA**

1. Chapter 22, Code of West Virginia

# **IV. PROGRAM OPERATION**

## **A. MITIGATION RESOURCES AND PROGRAM**

Resources available for the Program shall consist of funds paid by permittees or other parties as approved by the Corps to compensate for losses to aquatic resources in connection with issuance or verification of the Corps Section 404 Permits, or other cases as agreed upon by the Corps and the WVDEP. Funds shall be delivered to the WVDEP to be held in the In-Lieu Fee Program Account and used by the WVDEP to accomplish Mitigation Projects as described herein. Subject to the terms of this Instrument, the WVDEP hereby agrees to receive and expend said funds in the manner and with the limitations described herein.

## **B. INTERAGENCY REVIEW TEAM**

The Huntington Corps District Engineer ("District Engineer") will initiate the assembly of the IRT to review documentation for the establishment and management of the Program, define conditions under which in-lieu fees may be used, to review and approve projects for design and construction with in-lieu fee funds, and to perform annual reviews of ongoing and completed projects. Designated representatives of the District Engineer shall serve as the Chair of the IRT. All decisions, approvals, consents and other actions of the IRT are implemented by the Chair, and all references in this Instrument to a decision, approval, consent or other action by the IRT shall be deemed to refer to the Chair, unless the context clearly indicates otherwise. The Corps, representatives from the U.S. Environmental Protection Agency ("EPA"), the U.S. Fish and Wildlife Service ("FWS"), the WVDEP, the West Virginia Division of Natural Resources ("WVDNR") and other state, local and federal agencies, as appropriate, may participate in the IRT as consulting members. The Corps will retain final authority over the IRT composition, but shall not unreasonably exclude any government agency with an interest in IRT matters.

### C. GEOGRAPHIC SERVICE AREAS

The primary geographic service areas for the West Virginia In-Lieu Fee Mitigation Program are defined as each 8-digit U.S. Geological Survey (USGS) Hydrologic Unit Code (HUC) within the State of West Virginia. This includes a total of 32 separate 8-digit HUC service areas (see FIGURE 1). The WVDEP will provide compensatory mitigation for permitted impacts within the same 8-digit HUC in which the impacts occur, or, with approval from the District Engineer upon consultation with the IRT, within the secondary geographic service area. In general, the secondary geographic service areas are defined as each 6-digit HUC. These service areas were selected because the WVDEP, in consultation with the District Engineer during development of the previous In-Lieu Fee Agreement for the State of West Virginia, had reviewed and concluded that the scale is appropriate to ensure that the projects selected will be able to effectively compensate for adverse environmental impacts across the entire service area. Exceptions may be made for impacts to mainstem Ohio River, Kanawha River, Monongahela River or other large non-wadeable systems where the West Virginia Stream and Wetland Valuation Metric (WV SWVM) evaluation methodology is not applicable. Other Exceptions may be made as recommended by the IRT and approved by the Chair.

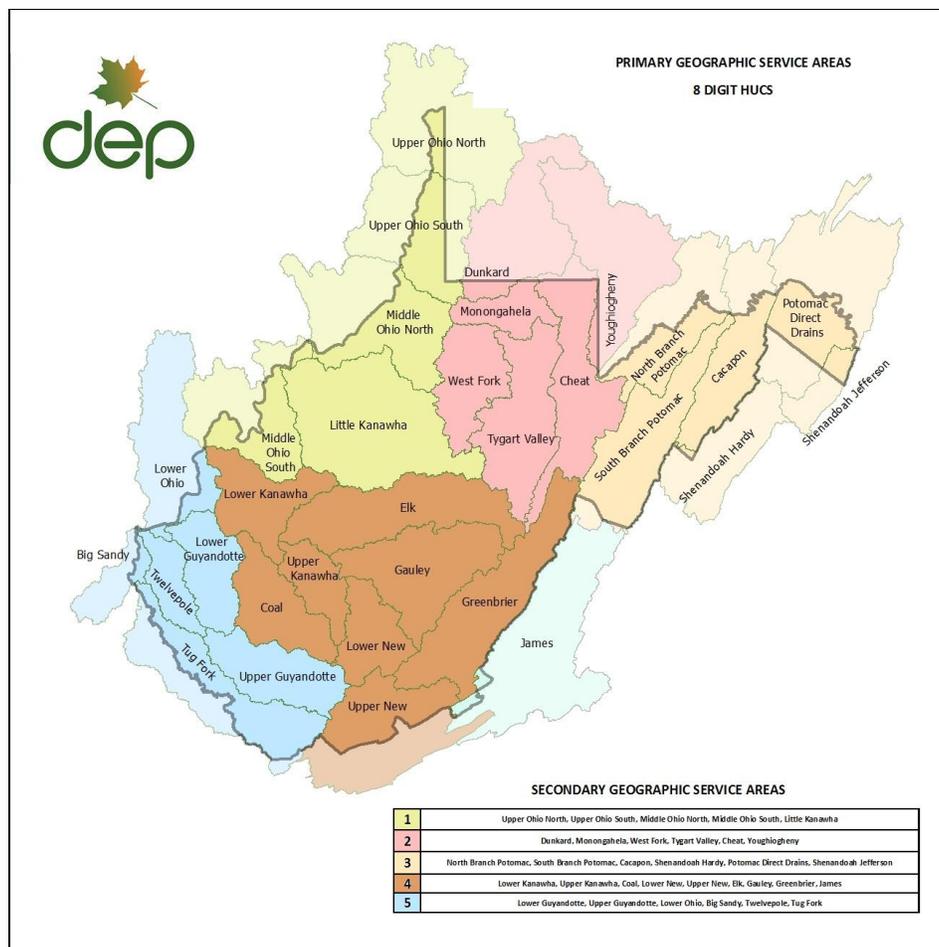


FIGURE 1

**WV In-Lieu Fee Mitigation Instrument**

Fund activities, including impacts, payments, credits and projects will be tracked and reported by 8-digit HUC Service Areas (see TABLE 1). Individual projects will be proposed for specific service areas in project-specific mitigation plans.

UPPER OHIO NORTH	05030101	<b>1</b>
UPPER OHIO SOUTH	05030106	
MIDDLE OHIO NORTH	05030201	
MIDDLE OHIO SOUTH	05030202	
LITTLE KANAWHA	05030203	
DUNKARD	05020005	<b>2</b>
MONANGAHELA	05020003	
WEST FORK	05020002	
TYGART VALLEY	05020001	
CHEAT	05020004	
YOUGHIOGHENY	05020006	
NORTH BRANCH POTOMAC	02070002	<b>3</b>
SOUTH BRANCH POTOMAC	02070001	
CACAPON	02070003	
SHENANDOAH HARDY	02070006	
POTOMAC DIRECT DRAINS	02070004	
SHENANDOAH JEFFERSON	02070007	
LOWER KANAWHA	05050008	<b>4</b>
UPPER KANAWHA	05050006	
COAL	05050009	
LOWER NEW	05050004	
UPPER NEW	05050002	
ELK	05050007	
GAULEY	05050005	
GREENBRIER	05050003	
JAMES	02080201	
LOWER GUYANDOTTE	05070102	<b>5</b>
UPPER GUYANDOTTE	05070101	
LOWER OHIO	05090101	
BIG SANDY	05070204	
TWELVEPOLE	05090102	
TUG FORK	05070201	

**TABLE 1**

#### D. IN-LIEU FEE PROGRAM ACCOUNT

Prior to the development of this instrument, the US Army Corps of Engineers, Huntington and Pittsburgh Districts, entered into an agreement with the West Virginia Department of Environmental Protection (January 25, 2006) to operate an In-Lieu Fee Mitigation Program within the State of West Virginia. That agreement established an In-Lieu Fee Program account held by the WVDEP to receive mitigation in-lieu fees from Department of the Army (DA) permittees. Those fees are held in an account by the WVDEP as restricted assets solely to identify, design, construct/undertake, monitor, and administer mitigation projects in West Virginia, upon approval by the IRT and the Corps. Interest accruing from in-lieu fee funds on deposit with the WVDEP becomes part of the administrative portion of the in-lieu account. In-lieu fee payments received once this Instrument is approved will be deposited into this existing account. All monies and fees collected prior to the Effective Date of this Instrument, and not allocated for expenditure for an approved Mitigation Site under the Prior Instrument, shall be managed in accordance with this Instrument beginning on the Effective Date of this Instrument.

When payment of fees into the In-lieu Fee Program is a result of the Department of the Army (DA) permitting process, the Corps will determine the level and number of mitigation credits required by the permittee. The amount paid into the fund is based on the number of credits required and the fees established under Section V. E. of this Instrument. If a DA permit is issued, the permittee will be provided instructions regarding participation in the in-lieu fee program sponsored by the WVDEP. The WVDEP will receive the in-lieu fee directly from the DA permittee as well as the proceeds from any forfeited mitigation plan performance bonds, which shall be furnished in the name of the WVDEP. These funds will be placed in the program account.

The WVDEP shall hold any funds collected pursuant to this Instrument in an interest bearing state account. The WVDEP shall account for the funds so held in accordance with generally accepted accounting principles, and the account shall be subject to audit by the Corps from time to time, as determined by the Corps. Interest and any other earnings produced by the Program, and proceeds from the sale of Mitigation Site lands, shall remain in the account. Funds paid into the In-lieu Fee Program account may only be used to identify and assess ecologically appropriate stream and wetland restoration and protection opportunities in West Virginia; to implement practical plans to protect, purchase, enhance, restore, and monitor selected sites; and to establish financial, technical, and legal mechanisms to ensure long-term success of the mitigation projects. This means the selection, design, acquisition (i.e., appraisals, surveys, title insurance, etc.), implementation, and management of in-lieu fee compensatory mitigation projects. This may include fees associated with securing a permit for conducting mitigation activities, activities related to the restoration, enhancement, creation, and/or preservation of aquatic resources, maintenance and monitoring of mitigation sites, and the purchase of credits from mitigation banks. Requests to expend funds for the Long-Term Maintenance and Management of a Mitigation Project must be accompanied by a description of needs, annual cost estimates for these needs and a discussion of inflationary adjustments and other contingencies, as appropriate. Use of fees is explicitly **prohibited** for research, education and outreach.

Funds received by the Program in excess of the amount needed for mitigation or restoration projects shall remain with the Program, and shall be disbursed in accordance with this Instrument for other Mitigation Projects or other uses approved by the IRT. The WVDEP shall be required to provide financial assurances by setting aside contingency funds from the Account sufficient to guarantee the success of each Mitigation Site undertaken in accordance with the Corps and the WVDEP regulations, including long-term management of each Mitigation Site.

The WVDEP may, as appropriate and with IRT approval 1) delay until sufficient fee monies are available in a watershed to implement a specific project; 2) divide a specific project into phases to allow funding in phases; or 3) seek to leverage monies with other appropriate sources of funds to expand and complement the scope of proposed projects.

If, within any 8-digit HUC, the cumulative amount of impacts, for which the Program was utilized in any given year, are less than 2,000 linear feet of stream or three acres of wetlands, or the WV SWVM model is not applicable, the WVDEP may submit a proposal to the IRT to satisfy the mitigation obligation liability through the use of Released Credits or Bank Credits from within the same Geographic Service Area, use of preservation, deferring the mitigation liability to the next year, or undertaking/utilizing other mitigation options as approved by the IRT.

The WVDEP shall receive an administrative fee amounting to a minimum of 10% and a maximum of 20% of the funds when the funds are deposited plus all interest accruing upon the deposited funds. Administrative fees in excess of 10% will only be charged as approved in advance by the Corps. The fee will come from the deposited funds, and is deemed to represent and reimburse reasonable overhead and related administrative costs of administering the Program to accomplish the Mitigation Projects described herein. Separate project accounting will be established to record revenues and expenditures for administrative costs. Such costs include, but may not be limited to the following: staff time for carrying out program responsibilities such as annual report preparation, initial site visits to investigate potential projects, development of a conceptual project plan for review by the IRT, development of general language for conservation easements, preliminary negotiations with landowners, program related meetings, and expenses for day to day management of the program. Administrative fees plus any interest do not require approval for expenditure.

All property used as compensation, shall be placed under long-term protection that shall run with the land and shall remain in place in the event of transfer of the land.

Any income generated from a conservation buyer transaction (when a site is purchased in fee simple for mitigation, the mitigation work is completed, a conservation easement is placed on the site, and the remaining fee interest is sold to a conservation buyer with the conservation easement intact) will be returned to the in-lieu fee program for additional restoration work within thirty (30) days after the transaction closing.

The WVDEP shall obligate funds for mitigation projects within three growing seasons of accepting funds and liability for the permitted impacts. If more than three years pass before the date of receipt of funds and the acquisition of a mitigation site, the Corps may direct that the funds be allocated to any project or proposal that it deems appropriate, and that mitigation liability to the Fund be reduced accordingly and transferred to the receiving party. If such project or proposal will be accomplished by another organization, the WVDEP will transfer an amount of funds, not to

exceed the original amount paid for the permitted impacts unless agreed to by the WVDEP, as directed by the Corps to that organization. The Corps in its discretion may allow extensions of the three-year time limit.

The IRT shall have oversight of the Account. Complete budgets for Mitigation Projects must be approved by the IRT. The WVDEP shall submit to the IRT an Annual Report by March 31 of each year. The Annual Report shall include detailed summaries of Account deposits and disbursements made for each Mitigation Project over the previous calendar year (January 1-December 31). Any increase in excess of ten percent (10%) from the total approved budget for a Mitigation Plan will require the IRT's approval before additional funds may be disbursed. Increases to Mitigation Plan budgets that are ten percent (10%) or less do not require approval by the IRT. The Corps may review Account records with 14 days of providing written notice to the WVDEP. When so requested by the IRT, the WVDEP shall provide all books, accounts, reports, files, and other records relating to the Account.

#### **E. PROGRAM ACCOUNTING PROCEDURES**

The WVDEP will accept in-lieu fees as restricted assets for the sole use of completing IRT approved stream and wetland restoration projects intended to meet the compensatory mitigation obligations of permittees participating in the program. The WVDEP shall adopt and update the system for tracking the production of mitigation credits, credit transactions, and financial transactions between the WVDEP and permittees that have been developed and approved by the IRT. Credit production (the generation of an amount of Credits based on Projects), Credit transactions (purchase by permittees and debit by the WVDEP of Credits), and financial transactions (the exchange of money in relation to Credits) shall be tracked both on a programmatic basis (i.e., the number of available credits for the entire program by service area) and separately for each individual Mitigation Project undertaken by the Program.

The sale, conveyance, or transfer of Credits includes all natural services, functions and values associated with the natural resources (*e.g.* wetlands, streams) from which Credits were derived. Credits may be used to compensate for environmental impacts under other programs (civil works, Superfund Program removal and remedial actions, supplemental environmental projects for state and federal enforcement actions, etc.), but Credits may not simultaneously serve as mitigation for more than one activity; *e.g.*, a Credit may be used to offset impacts under any Federal, State, or local program related to wetlands and streams, however that credit may only be counted against permitted impacts one time.

#### **F. PROVISION STATING LEGAL RESPONSIBILITY FOR PROVIDING COMPENSATORY MITIGATION**

The WVDEP assumes all legal responsibility for satisfying the mitigation requirements of the Corps/state permit for which fees have been accepted (i.e., the implementation, performance, and long-term management of the compensatory mitigation project(s) approved under this Instrument and subsequent mitigation plans). The transfer of liability is established by: 1) the approval of this in-lieu fee Instrument; 2) receipt by the District Engineer of a letter that is signed by the WVDEP In Lieu Fee Coordinator and dated; and 3) the transfer of fees from the permittee to the WVDEP In

Lieu Fee Program. The WVDEP liability shall be limited to those fees accepted into the ILF Program and in no circumstance shall exceed the total amount of those funds.

1. Applicants must first determine stream/wetland debt by using the **West Virginia Stream and Wetland Valuation Metric (SWVM)** which will calculate a total WVILF payment. (see Exhibit 1)
2. If the ILF debt is equal to or less than 500 stream credits the Corps Project Manager will complete a **WVILF Participant Information Sheet** (see Exhibit 2). This form must be attached to the 404 Permit and sent to the applicant and the WVDEP In-Lieu Fee coordinator.
3. If the ILF debt is greater than 500 stream credits, the applicant must first coordinate with the WVDEP by completing and forwarding the **WVILF Credit Request Form** to the WVDEP In-Lieu Fee Coordinator for approval (see Exhibit 3).
4. The applicant then forwards the approved **WVILF Credit Request Form** and the Corps Project Manager will complete a **WVILF Participant Information Sheet**. This form must be attached to the 404 Permit and sent to the applicant and the WVDEP In-Lieu Fee coordinator.
5. When a payment is provided by the applicant to the WVDEP for mitigation Credits, the WVDEP shall record the payment and the associated Credits on the Credit Ledger for that Service Area. The In Lieu Fee Coordinator will then issue a letter to the Corp verifying receipt of payment to the ILF Program (see Exhibit 4).

## G. DEFAULT AND CLOSURE PROVISIONS

### Default Provisions:

If the Corps determines that the WVDEP has failed to provide the required compensatory mitigation in a timely manner, the Corps and the IRT shall provide the WVDEP with written notice of such material default. Situations where material default could occur include:

- the WVDEP fails to meet performance based milestones or ecological performance standards as set forth in the project-specific mitigation plan
- the WVDEP fails to submit monitoring reports in a timely manner
- the WVDEP fails to establish and maintain an annual ledger report and individual ledgers for each project in accordance with the provisions in Section IV E (Program Accounting Procedures)
- the WVDEP fails to submit an annual financial assurances and long-term management funding report
- the WVDEP fails to report approved credit transactions
- the WVDEP fails to complete land acquisition and initial physical and biological improvements by the third full growing season after the first advance credit in that service area is secured by a permittee and/or
- the WVDEP otherwise does not comply with the terms of the Instrument

If the WVDEP fails to remedy such default within sixty (60) days after its receipt of such notice, or if such default cannot reasonably be cured within sixty (60) days, or if the WVDEP fails to commence

and diligently pursue remediation of such default during such thirty (30) day period, the IRT may, immediately upon written notice to the WVDEP, suspend the sale or transfer of any Credits until the appropriate deficiencies have been remedied to the reasonable satisfaction of the IRT. Upon notice of such suspension, the WVDEP agrees to immediately cease all sales or transfers of Credits until the IRT informs the WVDEP that the IRT has approved the WVDEP's resolution of deficiencies and that sales or transfers may be resumed. Should the WVDEP remain in default, the IRT may terminate all future Credit transactions from the project site in question, or initiate other measures including decreasing available credits, requiring adaptive management measures, utilizing financial assurances or contingency funds, terminating the Instrument, using the financial assurances or contingency funds to provide alternative compensation, directing the use of in-lieu fee program account funds to provide alternative mitigation (e.g., securing credits from another third party mitigation provider), or referring the non-compliance with the terms of the Instrument to the Department of Justice.

Any delay or failure of the WVDEP to comply with the terms of this Instrument shall not constitute a default if and to the extent that such delay or failure is primarily caused by any force majeure or other conditions beyond the WVDEP's reasonable control and significantly adversely affects its ability to perform its obligations hereunder, such as flood, drought, lightning, earthquake, fire, landslide, condemnation or other taking by any governmental body. The WVDEP shall give written notice to the District Engineer and IRT if the performance of any of its in-lieu fee projects is affected by any such event as soon as is reasonably practicable.

Funds remaining in the WV ILF Program accounts after these obligations are satisfied must continue to be used for the restoration, establishment, enhancement, and/or preservation of aquatic resources. The Corps shall direct the WV ILF Program to use these funds to secure credits from another source of third-party mitigation, such as another in-lieu fee program, mitigation bank, or another entity such as a governmental or non-profit natural resource management entity willing to undertake the compensation activities. The funds should be used, to the maximum extent practicable, to provide compensation for the amount and type of aquatic resource for which the fees were collected. The Corps, itself, cannot accept directly, retain, or draw upon those funds in the event of a default.

Either party to this Instrument may terminate the Instrument within 90 days written notification to the other party. In the event that the WV ILF Program operated by the WVDEP is terminated, the WVDEP is responsible for fulfilling any remaining project obligations including the successful completion of ongoing mitigation projects, relevant maintenance, monitoring, reporting, and long-term management requirements. The WVDEP shall remain responsible for fulfilling these obligations until such time as the long-term financing obligations have been met and the long-term ownership of all mitigation lands has been transferred to the party responsible for ownership and all long-term management of the project(s).

Closure Provisions:

Within ninety (90) days following the end of the monitoring period (minimum of 5 years) specified in the mitigation plan for each project site, or following a written request by the WVDEP upon satisfaction of the Success Criteria for a project site, as determined by the IRT, the IRT shall issue a written certification of satisfaction to the WVDEP and thereafter any remaining contingency

funds for that mitigation project shall be made available to the general balance of the Fund, or to the WVDEP for use in long-term management of the mitigation project site.

Prior to closure of a mitigation project site, the IRT may perform a final compliance inspection to evaluate whether all success criteria have been achieved. Upon the determination by the IRT that:

1. All applicable success criteria have been achieved;
2. All released Credits for that mitigation project site have been debited;
3. A Long-Term Management Plan is in place;
4. The IRT has received a GIS shapefile or similar exhibit depicting the location and extent of the mitigation project;
5. A long-term steward has been secured and provided with a management endowment
6. The mitigation project site has complied with the terms of this instrument and the mitigation plan.

Once the mitigation project site closes, and the period of Long-term Ownership and Preservation commences, the WVDEP responsibility and liability for the mitigation project ceases.

## **V. MITIGATION PROJECT ESTABLISHMENT AND OPERATION**

### **A. GENERAL MITIGATION SITE REVIEW PROCEDURES**

The primary emphasis of the Program is on aquatic resource restoration and protection. The use of this Program for compensatory mitigation shall occur only after the relevant permitted activity has complied with Corps regulations and policies regarding avoidance and minimization of impacts or as stated in Section I A, "Purpose and Goals" or otherwise herein. The WVDEP, pursuant to the terms of this Instrument, will act as a recipient of mitigation funds that are required of permittees and other parties as identified by the Corps.

1. To offset impacts to aquatic resources that resulted in payments into the Account, the WVDEP shall submit Mitigation Plans for funding approval in accordance with 33 CFR §332. Mitigation Plans will be based on the Compensation Planning Framework (See Appendix 1) and must include/address the 12 elements of mitigation plans at 33 CFR §332.4(c) (2)-(14). Each plan and associated funding requires approval by the IRT Chair, in consultation with the IRT members (33 CFR §332.8(g)); 33 CFR §332.8(i)).
2. The IRT shall meet on a regular basis with the WVDEP to review proposed Mitigation Plans and to discuss relevant issues with Program procedures. The IRT Chair, after seeking comments from the IRT members, shall approve or deny specific Mitigation Plans for restoration, creation, enhancement, buffering, preservation of aquatic resources and their adjacent uplands, or the purchase of credits from an approved mitigation bank. Such approval or denial will be based on

factors including site suitability, long-term sustainability, impacts to aquatic resources mitigated via the Program, the ratio of restoration to impacts of Program projects in particular watersheds, maximum return on expended funds, benefits to rare and endangered natural resources, and an acceptable Mitigation Plan.

3. Following general approval by the IRT of a proposed Mitigation Site, the WVDEP shall submit for approval a Conceptual Mitigation Plan. Conceptual Mitigation Plans shall include preliminary elements of the Mitigation Plan: Objectives, Site Selection, Site Protection Instrument, Baseline Information, Determination of Credits, and Mitigation Work Plan.

:

Mitigation Plans may request funding approval for costs associated with accomplishment of Mitigation Projects including, but not limited to, labor, land acquisition, appraisals, project design, project management, restoration, creation, monitoring, stewardship, legal, closing and materials necessary to accomplish mitigation, and monitoring. In the event the WVDEP determines that modifications must be made in a Mitigation Plan to ensure successful establishment of a Mitigation Project, the WVDEP shall submit a request for such modification to the IRT for approval.

Each Mitigation Plan shall be subject to the terms of 33 CFR §332. Each party to this Instrument may delegate authority to approve Mitigation Plans to an individual employed by such party who is qualified by education or experience to approve such plans. No party to this Instrument may delegate or assign its rights or obligations hereunder to another agency or entity without the prior written consent of the remaining parties.

## **B. REPORTING PROTOCOLS**

The WVDEP will report to the District Engineer and the IRT the following information:

- Monitoring reports, on a schedule and for a period as defined by project specific Mitigation Plan(s).
- Credit transaction notifications
- An annual program report summarizing activity from the program account (financial and credit accounting) as detailed below
- A Mitigation Project ledger for each Mitigation Project

### **1. Project Monitoring**

Monitoring will be completed on each compensatory mitigation project to determine if the project is meeting its performance standards, or if any additional measures are necessary to ensure the success of the mitigation project. Monitoring requirements for each in-lieu fee project will be described in the Mitigation Plan. Each Mitigation Plan will describe the scope of monitoring activities, the frequency of monitoring activities, the length of the monitoring period, a schedule for reporting to the District Engineer and the IRT, and the party responsible for submitting monitoring

reports. Monitoring activities will continue on each compensatory mitigation project until the Corps provides the WVDEP with a determination that the project has achieved its performance standards.

The WVDEP will coordinate project site visits with the IRT, as requested, to ensure the projects are meeting their stated success criteria. The IRT shall make every effort to complete the site inspections in a timely manner.

The Corps will provide monitoring reports to interested federal, tribal, state, and local resource agencies, and the public, upon request.

## 2. Credit Transaction Notification

Each time the WVDEP accepts fees from a permittee in exchange for advance or released mitigation credits from the WV In-Lieu Fee Mitigation Program, it will provide a letter to the District Engineer confirming that WVDEP has accepted the responsibility for providing the required compensatory mitigation. The letter will include the permit number and amount of payment (See Exhibit). Notification will be submitted within 10 days.

## 3. Annual Program Report

The WVDEP will prepare and submit an annual program report to the District Engineer and the IRT by March 31 of each year. The report will include five components:

1. A financial report for the WV In-Lieu Fee Program Fund describing the beginning balance, revenues collected for the year, expenditures for the year, any revenue returned to the Fund from conservation buyer transactions or through other means, interest earned, and an ending balance. The statement and all reports pertaining to the In-Lieu Fee Fund will be prepared according to generally accepted accounting procedures.
2. A list of all permits for which in-lieu fee program funds were accepted by service area, including the Corps permit number, the service area in which the authorized impacts are located, the amount of authorized impacts, the amount of required compensatory mitigation by resource type, the amount paid to the in-lieu fee program, and the date the funds were received from the permittee.
3. A description of in-lieu fee program expenditures/disbursements from the account (i.e., the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration) for the program and by service area.
4. A ledger (credit) report that details: the balance of advance credits and released credits at the end of the report period for the program and by service area, the permitted impacts for each resource type, all additions and subtractions of credits, and other changes in credit availability (e.g., additional credits released, credit sales suspended).
5. Any other reasonable information required by the District Engineer pertaining to the WV In-Lieu Fee Mitigation Program.

## 4. Mitigation Project Ledger

The WVDEP shall also maintain a separate ledger for each Mitigation Project. This ledger shall depict all Credit releases and Credit withdrawals by compensation resource type associated with

the Mitigation Project. This ledger shall be maintained on the Regulatory In lieu fee and Bank Information Tracking System ("RIBITS") a web-based mitigation tracking system, once available. The Corps shall be responsible for creating a record in RIBITS for each Mitigation Project and for providing the service and access to RIBITS for loading Mitigation Project data.

### **C. COMPENSATION PLANNING FRAMEWORK**

All mitigation projects provided by the WVDEP In-Lieu Fee Program under the terms of the instrument will comply with the Compensation Planning Framework presented in Appendix 1.

### **D. SPECIFICATION OF INITIAL ALLOCATION OF ADVANCE CREDITS**

"Advance Credits," as used in this Instrument, are Credits that are not associated with a compensatory Mitigation Project and that are available for sale prior to initiation of a Mitigation Project in accordance with an approved Mitigation Plan. The amount of Advance Credits for each Service Area is specified in Table 2. Advance Credits were determined using the methodology in Appendix 2. The sponsor may request to transfer available advance credits from one Primary Service Area to another, from within the same Secondary Service Area, subject to the approval of the IRT. Such transfer of advance credits shall not exceed 50 % of the initial advance credits allocated to the Service Area receiving the credits.

**Table 2. Stream and Wetland Advance Credits by Watershed**

Water Shed	Stream Miles	Streams Linear Feet	Streams Advance Credit Units	Wetland Acres
<b>Big Sandy/Lower Ohio</b>	20.00	105,600	31,680	29.70
<b>Cacapon/Shenandoah Hardy</b>	22.86	120,701	36,210	133.80
<b>Cheat/Youghiogheny</b>	38.57	203,650	61,095	56.20
<b>Coal</b>	30.36	160,301	48,090	28.30
<b>Elk</b>	45.72	241,402	72,420	10.00
<b>Gauley</b>	27.14	143,299	42,990	64.00
<b>Greenbrier</b>	18.57	98,050	29,415	279.80
<b>Little Kanawha</b>	218.22	1,152,202	345,660	15.60
<b>Lower Guyandotte</b>	69.64	367,699	110,310	10.00
<b>Lower Kanawha</b>	61.07	322,450	96,735	149.10
<b>Lower New</b>	9.64	50,899	15,270	10.00
<b>Middle Ohio North</b>	80.36	424,301	127,290	10.00
<b>Middle Ohio South</b>	66.07	348,850	104,655	48.20
<b>Monongahela/Dunkard</b>	19.64	103,699	31,110	11.00
<b>North Branch Potomac</b>	3.93	20,750	6,225	112.30
<b>Potomac Direct Drains/Shenandoah Jefferson</b>	16.43	86,750	26,025	76.20
<b>South Branch Potomac</b>	7.86	41,501	12,450	214.00
<b>Tug Fork</b>	12.50	66,000	19,800	10.00
<b>Twelvepole</b>	22.50	118,800	35,640	10.00
<b>Tygart Valley</b>	31.07	164,050	49,215	211.40
<b>Upper Guyandotte</b>	38.22	201,802	60,540	10.00
<b>Upper Kanawha</b>	10.72	56,602	16,980	10.00
<b>Upper New/James</b>	21.07	111,250	33,375	160.70
<b>Upper Ohio North /Upper Ohio South</b>	9.64	50,899	15,270	10.00
<b>West Fork</b>	22.14	116,899	35,070	32.10

Any debited Advance Credits must be fulfilled, or offset, by Released Credits associated with mitigation sites in a given service area before Released Credits are available for sale. Once the mitigation obligations associated with debited Advance Credits have been satisfied by Released Credits, that corresponding amount of Advance Credits is again available for use.

Because this Instrument modifies an existing in-lieu fee program, it is recognized that there may be Mitigation Projects that were approved or completed and funded by Program monies before the Effective Date of this Instrument that are not associated with a mitigation liability. Credits associated with that work may be released, if approved by the IRT, and may be available for sale, transfer or fulfillment of any Advance Credit Sales in the Service Area of the associated Mitigation Projects. These Credits may be released as milestones are achieved in the Credit Release schedule approved for each project. The Credit Release schedule is expected to follow that provided in the Mitigation Banking Instrument Template unless otherwise approved by the IRT. Released Credits may be sold once the mitigation obligation associated with Advance

Credits has been met. Released Credits generated by preservation will only be sold in conjunction with an equal number of Released Credits generated by restoration or creation unless otherwise approved by the IRT.

Land acquisition and the initial physical and biological improvements associated with a Mitigation Project must be completed by the third full growing season after the first Advance Credit in that Service Area is sold or debited, unless the IRT determines that more time is needed to plan and implement a Mitigation Project in that Service Area. If the IRT Chair, in consultation with the members, determines that there is a compensatory mitigation deficit in a specific Service Area by the third growing season after the first Advance Credit was secured, then the IRT may direct the disbursement of funds from the Account to provide alternative compensatory mitigation to fulfill those mitigation obligations. In that case, the mitigation liability to the Account shall be reduced accordingly and transferred to the receiving party. If such project or proposal will be accomplished by another organization, the WVDEP will transfer from the Account an amount of funds not to exceed the original amount paid for the impacts as directed by the IRT to that other organization.

In Service Areas where the WVDEP has met all mitigation obligations, any remaining monies that were paid into the Account because of impacts in those Service Areas may be used to establish additional mitigation sites, as approved by the IRT Chair, in consultation with the IRT members, in advance of a mitigation liability. Remaining monies may also be used in other watersheds where insufficient funds are available to accomplish suitable mitigation projects, or to expand the size and ecological value of projects.

#### **E. METHODOLOGY FOR DETERMINING PROJECT SPECIFIC CREDITS AND FEES**

The number of Credits allowed or assigned for each Mitigation Project shall be based on the compensation activity and must be included and approved in each Mitigation Plan. Stream and wetland Credits shall be determined using the West Virginia Stream and Wetland Valuation Metric (Exhibit 1), or another method approved by the IRT.

The price charged to permittees and others by the WVDEP for Credits is determined by the WVDEP. The cost per unit of Credit must take into account the expected costs associated with the restoration, establishment, enhancement and/or preservation of aquatic resources in a particular Service Area. Such costs must be based on full cost accounting according to 33 CFR §332.8(o)(5)(ii) and will reflect, as appropriate, expenses for land or property interest acquisition, Project planning and design, construction, plant materials, labor, legal fees, monitoring, remediation or adaptive management activities, long-term management, as well as costs associated with the administration of the Program. The cost per unit Credit shall also take into account contingency costs appropriate to the stage of Project planning, including uncertainties in construction and real estate expenses. In addition, the cost must also include the cost of providing financial assurances that are necessary to ensure successful completion of Projects, and may reflect other factors as deemed appropriate by the WVDEP and the Corps.

The prices charged to permittees or others by the WVDEP for Credits shall be reviewed by the WVDEP and the IRT on at least an annual basis. This review will take place within three months after the completion of the Annual Report.

## **F. PROTECTION OF MITIGATION SITES**

When monies from the Program are used for Mitigation Projects, the land associated with that Mitigation Site must be protected by a recorded document that preserves the land long-term with the protection "running with the land." Land protection documents must be approved by the Corps and must be recorded in the appropriate real property records depository for the locality where such project is located. In appropriate circumstances, and upon approval by the IRT, portions of land not used for mitigation may be exempted from, and conveyed separately free and clear of, such easement or restriction(s). No Credits may be sold, debited or released until the Corps has acknowledged that they have received proof that appropriate land protection documents are recorded. The WVDEP may engage in Mitigation Projects on land in which the State of West Virginia owns provided that appropriate protection mechanisms are approved by the IRT, in accordance with Section 332.7(a) of the Final Rule.

## **G. LONG-TERM MANAGEMENT**

The Long-Term Management and Maintenance Plan for each Mitigation Project shall contain specific objectives that address the long-term management requirements of the site. The WVDEP, or subsequently the Long-Term Steward, shall provide the IRT with 60 days advance notice before any actions are taken to modify the Long-Term Management and Maintenance Plan. The Long-Term Management and Maintenance Plan may only be amended or modified with the written approval of the IRT. The Long-Term Steward shall document that it is achieving each objective or standard by submitting status reports to the IRT on a schedule approved by the IRT.

A primary goal of the mitigation project is to create or restore a self-sustaining natural aquatic system that achieves the intended level of aquatic ecosystem functionality with minimal human intervention, including long-term site maintenance. Each project specific mitigation plan will contain provisions that address the long-term management and monitoring requirements for the site. At a minimum these provisions will include:

1. Annual monitoring to ensure the conditions of the conservation easement or other protection instruments are being met.
2. Annual monitoring of the condition of structural elements and facilities on the site such as signage, fencing, roads, in-stream structures, and trails.
3. Provisions to maintain and repair improvements as necessary to achieve the objectives of the mitigation project and comply with the provisions of the real estate instrument providing protection to the site.

## **H. PROVISIONS FOR TRANSFER OF LONG-TERM MANAGEMENT RESPONSIBILITIES**

The WVDEP may request approval from the Corps to transfer long-term management responsibilities to a land stewardship entity, such as a public land management agency or a non-governmental organization. Non-governmental entities must be qualified organizations pursuant to Treasury Regulation 1.170A-14(c) (1) and applicable state law. Transfer of long term stewardship responsibilities shall not occur until after performance standards have been achieved. Once long term management has been assigned to a land stewardship entity, as evidenced by the signature of the WVDEP and the Long-Term Steward on the Long-Term Management and Maintenance Plan and approval by the Corps, said party is thereby responsible for meeting any and all long-term management responsibilities outlined in the project-specific mitigation plan. Until such time as long-term management responsibilities are assigned to another party, the WVDEP will be considered responsible for long-term management of the mitigation project.

Should the Assignee cease to be a “qualified organization” pursuant to Treasury Regulation 1.170A-14(c)(1) or cease to be a permissible holder of the Conservation Easement under applicable state law, or fail to fulfill any of the obligations of the assignment, then the WVDEP may, but shall not be obligated to: inspect the Protected Property to determine compliance with the provisions of the Conservation Easement; obtain evidence for the purpose of seeking judicial enforcement of the Conservation Easement; enforce by proceedings at law or in equity the provisions of the Conservation Easement; seek expedited injunctive relief to enforce its rights with respect to this Assignment and the Protected Property; or terminate the property interest hereby granted to the Assignee, under a power of termination in the nature of a right of entry for condition broken.

The Long-Term Steward may modify the Long-Term Plan, subject to review and written approval by the Corps and the WVDEP. In the event that the long-term steward determines that remedial action to repair or replace structural elements and facilities on the project site is beyond the ability of the long-term management funds, or that the watershed or drainage basin containing the project site has become so infested with invasive species that effective control on the project site is either no longer practicable or unreasonably expensive, the long-term steward shall notify the Corps and the WVDEP, who will consider appropriate changes to the Long-Term Plan or other remedial measures. The Long-Term Steward shall report annually on the beginning and ending balances, including deposits and withdrawals from the account providing funds for long-term management for any Mitigation Projects.

## **I. FINANCIAL ARRANGEMENTS FOR LONG-TERM MANAGEMENT**

The Corps must be given the option of being a signatory to any contract or other arrangement assigning the rights and delegating the responsibilities to the steward. If long-term stewardship and reporting responsibilities are transferred to a public land management agency or another “qualified organization” (as defined in Section H above), the WVDEP shall also transfer the long-term management funds/account or otherwise arrange for disbursements from such funds/account to the land stewardship entity.

## **J. VALIDITY, AMENDMENT OR MODIFICATION, AND TERMINATION OF MITIGATION PROJECTS AND MITIGATION PLANS**

Any proposed modification to a Mitigation Plan, including but not limited to addition of lands to a site, establishment of additional sites, additions of different types of mitigation Credit resources (*e.g.* stream or wetland Credits) or alteration of success criteria shall require review and approval of the IRT Chair in consultation with the IRT members. Such modification shall require an amendment to the Mitigation Plan to comply with the Corps regulations at 33 FR 332.8(g).

Any Mitigation Plans approved under this Instrument may be considered null and void by the IRT Chair, in consultation with the IRT members, if the physical improvements identified in the Mitigation Plan have not been completed within five (5) years of the last date of signature or approval of the Mitigation Plan. The WVDEP may reinstate the process by submitting a new Mitigation Plan for a Mitigation Site.

## **K. FORCE MAJEURE**

Force Majeure shall mean an irreparable material and detrimental impact on the site over which the WVDEP or any entity controlled by the WVDEP could not have anticipated or controlled. The IRT has sole reasonable discretion to determine whether an event is a "Force Majeure" event as defined herein, and further defined in each Mitigation Plan, and the WVDEP shall bear the burden of demonstrating to the IRT's satisfaction that:

- (a) The Force Majeure event was caused by circumstances beyond the control or anticipation of the WVDEP and/or any entity controlled by the WVDEP, including its contractors and consultants;
- (b) Neither the WVDEP nor any entity controlled by the WVDEP, including its contractors and consultants, could have reasonably foreseen and prevented such an event;
- (c) Damage was caused by such circumstances; and
- (d) Damage is irreparable by any practicable and reasonable means as determined in the discretion of the IRT.

## **VI. Dispute Resolution**

Resolution of disputes between Federal IRT agencies and the Corps regarding the planning, approval and other aspects of Mitigation Projects approved under this Instrument shall be in accordance with the Corps regulations at 33 CFR §332.8(e). Resolution of disputes between the WVDEP and the Chair, or the IRT, related to satisfaction of Success Criteria will be resolved in the first instance by the IRT. If the WVDEP does not agree with the IRT, the WVDEP may request an independent review from government agencies or academia that are not part of the IRT. The IRT, in its discretion, may agree to such review, at the expense of the WVDEP. If such review is conducted, the IRT shall have sole discretion in evaluation of such review, conclusions or recommendations, and the IRT ultimately has sole discretion in determination of whether the success criteria are met.

## VII. Third Party Resale or Brokerage of Credits

The resale, brokering, or transfer of Credits to any entity for resale or re-transfer from one permittee to another permittee is not authorized without the express written approval of the IRT. Advance Credits may not be sold unless associated with a permit or enforcement case. The permit number shall be placed on every Credit bill of sale. For bills of sale associated with bulk sales where there is no associated permit number, the WVDEP shall include a special provision in the bill of sale stating that those Credits cannot be utilized to satisfy a Corps permit requirement unless the permittee provides a written "bank ledger allocation statement" to the Corps and the WVDEP. This bank ledger allocation statement shall state that the associated Credit(s) was part of a bulk sale to a specific party and has been allocated for use with a named project and a specific permit number.

At the WVDEP's sole discretion, and with the approval of the IRT, WVDEP may refund Credit purchases, minus the Administrative costs plus any accumulated interest, at the request of such purchaser, if the impacts for which the purchaser paid into the program have not occurred, and the WVDEP has not already obligated the funds. If the refund is made, the WVDEP will no longer be responsible for mitigating for the impacts not taken.

## **VIII. Other Provisions**

### **A. SPECIFIC LANGUAGE OF INSTRUMENT SHALL BE CONTROLLING**

To the extent that specific language in this Instrument changes, modifies or deletes terms and conditions contained in those documents that are incorporated into the Instrument by reference, the specific language within the Instrument and any associated Mitigation Plans is controlling.

### **B. NOTICE**

Any notice required or permitted hereunder shall be deemed to have been received when delivered by hand, transmitted electronically with verified receipt, after three days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or on the day received by Federal Express or similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party):

West Virginia Department of Environmental Protection,  
Director, Division of Water and Waste Management  
601 57<sup>th</sup> Street, SE  
Charleston, West Virginia 25304

U. S. Army Corps of Engineers  
Chief, Regulatory Division  
Huntington District Corps of Engineers  
502 Eighth Street  
Huntington, WV 25701-2070

U.S. Army Corps of Engineers  
Chief, Regulatory Division  
Pittsburgh District Corps of Engineers  
1000 Liberty Avenue  
Pittsburgh, PA 15222-4186

### **C. ENTIRE INSTRUMENT**

This Instrument constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.

### **D. INVALID PROVISIONS**

In the event any one or more of the provisions contained in this Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability

will not affect any other provisions hereof and this Instrument shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

#### **E. HEADINGS AND CAPTIONS**

Any paragraph heading or captions contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Instrument.

#### **F. COUNTERPARTS**

This Instrument may be executed by the parties in any combination, in one or more counterparts, all of which together shall constitute but one and the same instrument.

#### **G. BINDING**

This Instrument shall be immediately, automatically and irrevocably binding upon the parties and their heirs, successors, assigns and legal representatives upon execution.

#### **H. TRANSFER OF MITIGATION RESPONSIBILITY**

For projects in the service area of this Program that require Department of the Army authorization pursuant to Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899, Credits from this Program may be used to satisfy those compensatory mitigation requirements if the WVDEP and the permittee reach a mutually acceptable financial agreement, subject to the Corps written approval on a case-by-case basis. Notwithstanding anything in this Instrument, the Corps has sole discretion over how many and what type of Credits are required for permits issued and whether Credits from this Program are acceptable as mitigation.

#### **I. APPROVALS**

For purposes of this Instrument, any approval required hereunder must be in writing and expressly approve the action or other matter for which approval is sought. Written approval may be transmitted by letter, electronic mail or facsimile transmission.

#### **J. SEVERABILITY**

The provisions hereof shall be deemed individual and severable and the invalidity or partial invalidity or unenforceability of any one provision or any portion thereof shall not affect the validity or enforceability of any other provision thereof.

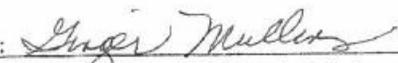
**WV In-Lieu Fee Mitigation Instrument**

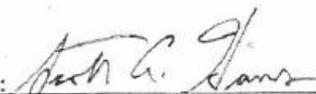
IN WITNESS WHEREOF, the parties hereto have executed this Instrument to continue the operation of West Virginia's In-Lieu Fee Programs operated by the West Virginia Department of Environmental Protection pursuant to 33 CFR Parts 325 and 332 as revised effective June 9, 2008:

**Sponsor: West Virginia Department of Environmental Protection**

By:  Date: 5/14/13  
Randy C. Huffman, Cabinet Secretary

**United States Army Corps of Engineers**

fa By:  Date: 6-3-13  
Steven McGugan, Colonel, U.S. Army, Huntington District Commander

By:  Chief, Regulatory Branch Date: 6-3-13  
Bernard R. Lindstrom, Colonel, U.S. Army, Pittsburgh District Commander

## Appendix 1

### **COMPENSATION PLANNING FRAMEWORK**

The West Virginia In-Lieu Fee Mitigation Program will utilize a watershed-based assessment process to identify and assess potential mitigation opportunities that maximize the ecological benefits of compensatory mitigation within the geographic service areas. By consolidating the mitigation requirements of multiple projects to implement large-scale watershed efforts, and focusing activities within priority watersheds, the program provides greater ecological benefits than would an isolated project with the same mitigation activities. The program will work to capitalize and expand on existing conservation investments and initiatives within the watersheds to maximize the ecological benefits for both aquatic and terrestrial systems.

Within this watershed level framework, the WVDEP will identify and assess potential mitigation sites for stream and wetland restoration, including landowner interest. For those sites with good potential, the WVDEP will then develop a project proposal, and present it to the Corps and IRT for review and approval. The WVDEP may also receive project proposals from other private, private non-profit or governmental entities. The WVDEP will evaluate these proposals for consistency with the program and, where appropriate, assist the proposing entity with submittals to the Corps and IRT for review.

The Compensatory Mitigation Rule identifies the following elements that are required to be addressed in the Compensation Planning Framework (§332.8(c) (2)):

1. The geographic service area(s), including a watershed-based rationale for the delineation of each service area;

The primary geographic service areas for the West Virginia In-Lieu Fee Mitigation Program are defined as each 8-digit U.S. Geological Survey (USGS) Hydrologic Unit Code (HUC) within the State of West Virginia. This includes a total of 32 separate 8-digit HUC service areas (see FIGURE 1). The WVDEP will provide compensatory mitigation for permitted impacts within the same 8-digit HUC in which the impacts occur, or, with approval from the District Engineer upon consultation with the IRT, within the secondary geographic service area. In general, the secondary geographic service areas are defined as each 6-digit HUC. These service areas were selected because the WVDEP, in consultation with the District Engineer during development of the previous In-Lieu Fee Agreement for the State of West Virginia, had reviewed and concluded that the scale is appropriate to ensure that the projects selected will be able to effectively compensate for adverse environmental impacts across the entire service area. Exceptions may be made for impacts to mainstem Ohio River, Kanawha River, Monongahela River or other large non-wadeable systems where the West Virginia Stream and Wetland Valuation Metric (WV SWVM) evaluation methodology is not applicable. Other exceptions may be made as recommended by the IRT and approved by the Chair.

2. A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats.

Threats to West Virginia's waters include, but are not limited to:

- a. Facilities discharging to water
- b. existing mines and abandoned mine lands
- c. sewage discharges
- d. oil and gas facilities
- e. dams
- f. roads and railroads
- g. agricultural activities
- h. urban and suburban development
- i. logging
- j. invasive plants and animals

The program will identify specific restoration needs and opportunities within each watershed/project area. Field work and additional data collection will be conducted to identify specific sites with restoration or protection potential including land ownership patterns, mineral ownership, adjacent land uses, position of the sites within the watershed, restoration feasibility and probability of success, the potential contribution of the project to increasing or improving watershed values (condition, function, diversity, wetland extent, etc.), and the probability of long-term success of the restoration project.

3. An analysis of historic aquatic resource loss in the service area(s);

Streams: The leading source of impairment to West Virginia's waterways is sedimentation/siltation. This impairment generally results from physical habitat conditions and alterations, such as channelization, loss of riparian habitat, stream bank modifications/destabilization, clear cutting for development, dredging, and habitat modification.

Wetlands: Most of the wetland loss in West Virginia has been due to draining or converting to other land uses. West Virginia is estimated to have 102,000 acres of wetlands, which is less than 1 percent of the state's land area. This amount is 24% less than the 134,000 acres present in the late 1700s.

4. An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;

The 2010 Integrated Water Quality Monitoring and Assessment Report will be used to determine the current aquatic resource conditions. This report was stratified to ensure adequate coverage across all watersheds and allows the state to characterize overall water quality conditions at the watershed (8-digit HUC) level in addition to providing state wide estimates of condition. The target population for this report was small to medium sized (1st-4th order) Wadeable streams. Ninety-eight percent of West Virginia's stream miles are of this size class and approximately 70 % of these are Wadeable. This level of effort allows for estimations of conditions across the state with a high

degree of confidence. Six sites were sampled in each of the 25 watersheds each year, resulting in 30 samples per watershed at the end of the five-year design.

The data collected at these sites can be subjected to statistical analysis to provide an overall characterization of a watershed. This analysis can then be used to predict the probability of a condition occurring within a watershed. The major objective of this effort is to collect sufficient data for Total Maximum Daily Load modelers to develop stream restoration plans. Each site is subjected to a one-time evaluation of riparian and instream habitat, basic water quality parameters, and benthic macroinvertebrate communities.

Sites are selected to meet a variety of informational needs in the following areas:

1. Impaired streams
2. Reference (minimally impacted) streams
3. Spatial trends (multiple sites on streams exceeding 15 miles in length)
4. Areas of concern as identified by the public and stakeholders
5. Previously unassessed streams

**Mine drainage:** Mine drainage streams may be impaired by low pH and/or elevated concentrations of metals, including iron, aluminum, and manganese. Other dissolved ions such as sulfate may also be present in concentrations above ambient levels. A sulfate concentration greater than 50 mg/L was used to identify probabilistic sites influenced by mine drainage. Following this guideline, approximately 20.1% of the stream miles statewide are influenced by mine drainage. Observed on an ecoregion basis (See FIGURE 2), mine drainage influences a greater proportion of stream miles in the coal rich Central Appalachians (Ecoregion 69) than in the Ridge and Valley (Ecoregion 67) or Western Allegheny Plateau (Ecoregion 70). About 30.3% of the stream miles in the Central Appalachians are influenced by mine drainage. Contrastingly, about 4.3% and 17.7% of stream miles are influenced by mine drainage in the Ridge and Valley and Western Allegheny Plateau, respectively.

**Bacterial contamination:** Many West Virginia waters contain elevated levels of fecal coliform bacteria. Contributors to the problem include leaking or overflowing sewage collection systems, illegal homeowner sewage discharges by straight pipes or failing septic systems, and runoff from urban or residential areas and agricultural lands. Based on probabilistic data, about 15.5% of stream miles in the state have fecal coliform bacteria levels that exceed the criterion of 400 colonies/100mL. In general, watersheds in the more developed regions of the state had a greater proportion of stream miles exceeding the criterion. The proportion of stream miles violating the criterion was highest in the Western Allegheny Plateau Ecoregion (23.4% of stream miles) and somewhat lower in the Central Appalachians (8.9% of stream miles) and the Ridge and Valley Ecoregions (13.0% of stream miles) (see FIGURE 2).

**Acidity:** The aquatic life communities in the headwater sections of many West Virginia waters continue to be impacted by low pH acidic water quality. The impairment is most prevalent in watersheds with soils of low buffering capacity and most often caused by acid precipitation and less often (but more severely) by acid mine drainage. An evaluation of probabilistic data indicates that approximately 8.2% of the stream miles in the state have pH values below 6.0. Most of the stream miles identified as impacted by acidic waters are in the Central Appalachians Ecoregion,

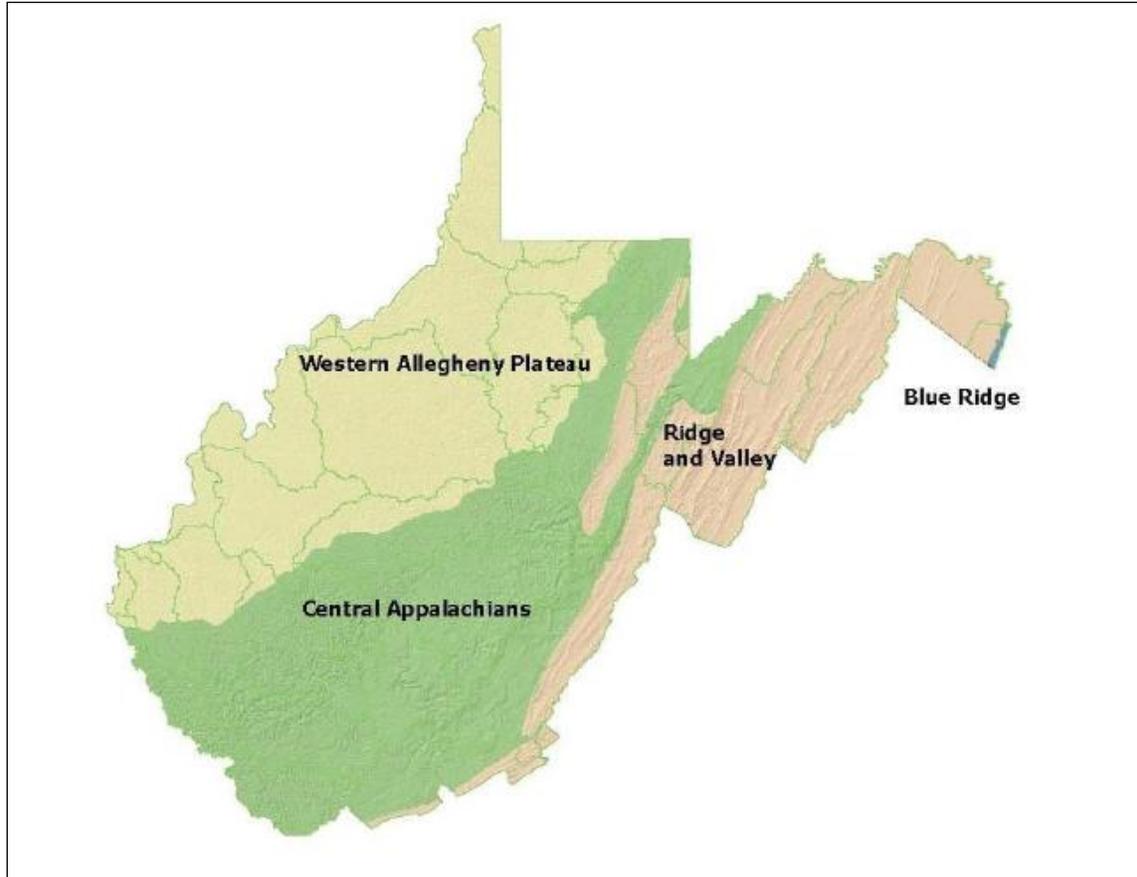
representing 17.0% of the stream miles within this area. Specifically, the forested hills and mountains section of this ecoregion are largely susceptible to acid deposition impacts due to infertile soils and resistant sandstones of the Pottsville group. The Ridge and Valley Ecoregion is less susceptible to the impacts of acid deposition with geologic materials such as limestone and shale providing more buffering capacity to neutralize acid precipitation. Nonetheless, probabilistic data indicates that approximately 6.2% of the stream miles in this ecoregion are impacted by acidic conditions. There is almost no stream miles with impacts attributed to acidic conditions in the Western Allegheny Plateau ecoregion. Again, this ecoregion has well buffered soils that limit the impacts of acid precipitation and acid mine drainage.

**Habitat quality:** During the course of probabilistic sampling, DEP personnel collected data on many features of both riparian and instream habitat known to be important to the biological communities of streams. Habitat parameters from the EPA's Rapid Bioassessment Protocol (RBP) were measured. These include measures of the amount of sediment and embeddedness in the stream channel as well as measures of the vegetation along the bank and riparian zone in the stream corridor. Specifically, ten characteristics are scored (0-20) based on their quality and then combined to assess the overall physical habitat condition of the site. The overall scores (Total RBP Habitat) were categorized as good, fair, or poor. Based on probabilistic data, about 18.2% of stream miles have good habitat quality (total RBP score of 160 or greater), 67.5% of stream miles have fair habitat quality (110–159), and 14.3% of stream miles have poor habitat quality (< 110). While these categorical thresholds are somewhat arbitrary, they do provide a good comparison of one area to another.

The Ridge and Valley and Central Appalachians Ecoregions are similar with respect to overall habitat quality. Over 24% of stream miles in each of these ecoregions are of good quality and less than 7% are poor with respect to overall habitat quality. In comparison, habitat quality scores are lower in the Western Allegheny Plateau. The presence of more widespread development and factors such as higher rates of soil erosion in this ecoregion are potential causes for only 2% of its stream miles being rated as good in overall habitat quality. Additionally, the proportion of stream miles with poor habitat quality (28.1%) is substantially higher in this ecoregion. It is important to consider that the greatest proportion (over 97%) of stream miles in the state, are in the fair or lower habitat categories. This indicates that most of the state's stream miles have at least some degree of habitat perturbation degradation.

**Biological impairment:** The DEP uses benthic macroinvertebrates to assess the biological condition of streams in the state. These organisms provide reliable information on water and habitat quality in streams. They are extremely diverse and exhibit a wide range of tolerances to pollutants. Further, they serve as an excellent tool for measuring overall ecological health, especially when summarized into a single index of biological integrity. In West Virginia, the health of benthic macroinvertebrate communities are rated using a multimetric index developed for use in wadeable streams. The West Virginia Stream Condition Index (WVSCI) is composed of six metrics (each measuring a different aspect of the community) that were selected to maximize discrimination between streams with known impairments and reference streams. Based on the WVSCI impairment threshold of 60.6 (0–100 scale) WVSCI, about 29.27% of wadeable stream miles in the state are in poor condition (i.e. impaired), while 58.99% of stream miles are not impaired and 11.74% are inconclusive. More than 43% (43.09%) of the wadeable stream miles in the Western

Allegheny Plateau were impaired. In contrast, the Ridge and Valley and Central Appalachians ecoregions had substantially lower percentages (14.15% and 23.70%, respectively) of wadeable stream miles rated as impaired biologically. Poorer habitat conditions in the Western Allegheny Plateau, especially those related to sedimentation, are likely to be at least partially responsible for the higher proportion of stream miles rated as impaired biologically.



**FIGURE 2**

5. A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide;

The primary goal of the West Virginia In-Lieu Fee Program is to provide compensatory mitigation for wetland and stream impacts authorized by the Corps pursuant to Section 404 of the Clean Water Act and to meet the “No Net Loss” objective for compensatory mitigation through effective restoration, enhancement, replacement and/or preservation of streams and wetlands. Within this programmatic framework, there are several general aquatic resource goals and objectives that apply to all service areas including:

1. Utilizing mitigation to address multiple functions and services, such as improvement of fish & wildlife habitat, support for rare species, water quality improvement, and recreation or education values.

2. Utilizing mitigation to accomplish high priority conservation objectives or ecological benefits by:
  - a. Adding to, or providing connectivity between, existing conservation lands.
  - b. Restoring habitat on an existing publicly owned conservation lands.
  - c. Contributing to a high priority strategy of the State Wildlife Action Plan, or other state or regional conservation initiatives.
  - d. Protecting and restoring habitat for populations of rare or protected species, or areas of identified high biodiversity.
  - e. Benefitting the protection or restoration of unique aquatic resources (e.g. native trout streams).
  - f. Improving water quality and habitat conditions in an impaired water body.
3. Working at larger scales to accomplish the protection/restoration of streams coupled with riparian corridors and adjacent forests from headwater streams down; and/or wetlands coupled with the adjacent floodplain and watershed.
4. Permanently protecting mitigation sites through fee simple acquisition or less than fee options that contain suitable conditions for protection, access, construction, and long term management and monitoring.
5. Ensuring that land uses adjacent to the site offer the greatest probability for success of a mitigation site, and the likelihood of future disturbances from incompatible uses is low.
6. Ensuring high project feasibility and probability of success, including the long-term sustainability of the mitigation site.

More specific, site based goals and objectives for aquatic resources in each service area will be determined during completion of each mitigation plan.

6. A prioritization strategy for selecting and implementing compensatory mitigation activities;
  1. **Proximity of the proposed mitigation site to impact site:**
  2. **Likelihood of success:**

Funded projects must demonstrate a high likelihood of success through a sound stream and wetland restoration, creation and/or enhancement concept. The water source for the site should be reliable. Threats from invasive species or vandalism should be low or manageable. The project will be evaluated for its ability to result in successful and sustainable net gain of stream and wetland acreage and/or function, with limited maintenance. Restoration

projects will receive priority due to the higher lift in function that can be achieved, and the higher success rate of these types of projects.

3. **Multiple objectives:**

The project will be evaluated for its ability to address multiple functions and services such as improvement of fish and wildlife habitat, support for rare species, flood attenuation, water quality improvement, and recreation or education values. The project should target native plant community diversity and natural processes. Greater functional gains will be given more preference.

4. **Supports regional conservation initiatives and is compatible with the surrounding landscape:**

Projects should be located where they pose minimal conflicts with adjacent land uses and where they meet regional conservation priorities, address limiting factors identified in watershed assessments, provide habitat corridors, and/or add to the effectiveness of nearby protected natural areas.

5. **Long-term management:**

Suitable projects must have a plan for long-term management and stewardship. Long-term stewardship could be provided by state/local government, a non-profit conservation organization, or other suitable constituency.

6. **Capacity of the applicant and the project team:**

The applicant must demonstrate that they have sufficient capacity and expertise to manage the project. The project team must have the necessary expertise and capacity to carry out pre-implementation planning, restoration construction, follow-up monitoring and remediation of project problems.

7. An explanation of how any preservation objectives identified in element (5) and addressed in the prioritization strategy in element (6) satisfy the criteria for use of preservation in section 332.3(h);

The Compensatory Mitigation Rule establishes that preservation may be used when the following five criteria are met:

1. The resources to be preserved provide important physical, chemical, or biological functions for the watershed.
2. The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the

ecological sustainability of the watershed, the District Engineer must use appropriate quantitative assessment tools, where available.

3. Preservation is determined by the District Engineer to be appropriate and practicable.
  4. The resources are under threat of destruction or adverse modifications.
  5. The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).
8. A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities;

The WVDEP works closely with other state and federal agencies, non-governmental organizations, academic institutions watershed associations, individuals and others to develop plans and set priorities. We are also working with private landowners, trust agencies, local governments, and public land agencies to meet the objectives of the Instrument. Individual projects will be implemented on private and public lands. The WVDEP will participate in public outreach activities to educate the public regarding the mitigation program and to seek local involvement in identifying mitigation projects.

9. A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;

The WVDEP will secure the appropriate real estate interests in any property used to satisfy compensatory mitigation requirements through fee simple and fee acquisitions and/or conservation easements held by the WVDNR, TNC/CVI, the West Virginia Public Lands Corporation, or another approved third party easement holder. The WVDEP will ensure that adequate endowment funds are provided to the fee or easement holder for permanent protection of the site. Conservation easements may need to include language specifying access for construction, maintenance, and monitoring; access by agency representatives for review; and 3rd party enforcement rights for the Corps if required.

10. A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in element 5 of this section, including a process for revising the planning framework as necessary.

The WVDEP will provide annual reports to the IRT which will include the progress of each mitigation project. A major component and high priority of each project is monitoring which will document ecological performance. A great deal of monitoring work is also being done by state agencies and academic institutions in West Virginia. The WVDEP strategically uses and tracks this type of data to develop and implement watershed plans. Further, the IRT meets on a quarterly basis. In practice,

program progress and evaluation is undertaken in each of these meetings. Corrective measures and or refocused actions often result from the IRT meetings. Comprehensively, the results of all information learned will be used to determine the need for adaptive management strategies for the projects and/or program.

## Appendix 2 Advance Credit Methodology

### Streams

First, all potential stream restoration sites within each HUC 8 watershed were identified using the WVDEP's Generalized Random Water Quality Survey data; which collects data from 750 randomly selected sites statewide over a five-year period. The survey period used for this evaluation was data from 2002 – 2006. At each site, Rapid Bioassessment Protocols (RBP) were utilized to evaluate and score stream conditions; and to classify the streams into one of four condition categories (poor, marginal, sub-optimal, or optimal).

1. Using a sub-set of the RBP parameters utilized to rank high gradient streams (embeddedness, sediment deposition, bank stability, and vegetative protection), all sampling points with two or more of these parameters in the marginal category were identified and selected for additional evaluation. As a conservative measure to ensure the probability that restoration was needed and would be effective, sites with less than two RBP scores in the marginal category were not used; and sites in the optimal, sub-optimal, and poor categories were not used. The optimal and sub-optimal categories were not used because they were considered in good condition and may not require restoration. The poor category was not used because the probability of success is reduced in highly degraded streams. This process is not meant to exclude any stream from future work. It is simply a mechanism to conservatively estimate the extent of streams available for restoration work.
2. All sites identified with more than two RBP scores in the marginal category were then filtered using a spatial feasibility analysis based on data collected from the Compensation Planning Framework. Any site affected by acid mine drainage or occurring within a catchment with greater than 10% impervious surface was excluded from further evaluation.
3. The percent of sampling sites within each HUC 8 watershed meeting the above criteria was then multiplied by the total stream miles within that watershed to determine the length of stream miles potentially available for restoration.
4. As an additional measure to determine a realistic estimate of advance credits available for each watershed, a second screening tool that estimates the probability of successfully implementing a project within a watershed was applied (locating a willing landowner, securing adequate real estate protection, compatible adjacent land use, etc.). This estimate is based on the historical to projected success rate of the program within each watershed (number of potential sites evaluated that lead to implementation divided by the total number of potential sites evaluated). At this time the probability was set at 25%, but this estimate may be periodically adjusted with approval from the IRT to reflect current program success rates.
5. The analysis results in an estimate of stream miles available for restoration within each watershed. In Exhibit 1, this figure was converted to linear feet and the number of credits available (0.3 credits per linear foot-estimated average ecologic lift). This represents the Advance Credits for streams in each watershed.

## Wetlands

1. The analysis of potential wetland restoration sites within each watershed was based on a spatial analysis of the presence of hydric soils. Within each watershed, the total acreage of hydric soils present based on the U.S. Geological Survey SURRGO soil survey were mapped. All locations that overlapped with National Wetland Inventory mapped wetlands were excluded because these were considered existing wetlands and potentially not suitable for restoration. Polygons covering less than 5 acres were also excluded.
2. All sites remaining were then filtered with a spatial feasibility analysis. Any areas of hydric soils, including a 100 meter buffer around the area, with greater than 10% imperviousness were excluded from further analysis.
3. Locations that met the above criteria were then compared with land use maps. All areas of hydric soils where greater than 50% of the area was covered by agriculture, pasture, or mine disturbance was considered a potentially restorable wetland.
4. As an additional measure to determine a realistic estimate of advance credits available for each watershed, a second screening tool that estimates the probability of successfully implementing a project within a watershed was applied (locating a willing landowner, securing adequate real estate protection, compatible adjacent land use, etc.). This estimate is based on the historical success rate of the program within each watershed (number of potential sites evaluated that lead to implementation divided by the total number of potential sites evaluated). At this time the probability was set at 5%, but this estimate may be periodically adjusted with approval from the IRT to reflect current program success rates.
5. The analysis results in an estimate of wetland acres available for restoration within each watershed. The analysis resulted in several watersheds with low estimates wetland acres available. A minimum of 10 acres was set for these watersheds. This represents the Advance Credits for wetlands in each watershed.



### West Virginia Stream and Wetland Valuation Metric

(Wetland Valuation Metric - Worksheet 1 of 2)

USACE FILE NO./Project Name:		LRH-2005-001-W / Cinnamon Wetland Fill		COORDINATES: Lat. 897555 Lon. 45689	
STREAM/SITE ID AND SITE DESCRIPTION: (% stream slope, watershed size (acreage), unaltered or impairments)				UT Coal River, RPW Int-3 3.89% Streambed Slope, 80 acre Watershed, Mature Tree Stratum	
WETLAND IMPACT ACREAGE:	0.5	FORM OF MITIGATION:	Permittee Responsible-On-site	Mitigation Acreage: (N/A if Mit. Bank or ILF)	13
DATE:	16-Nov-09	WEATHER CONDITIONS:	Sunny/Dry	PRECIPITATION PAST 48 HRS:	0.02
PART I - Wetland Indicators					
Wetland ID:	Existing Classification	Impacts	Mitigation Classification		
W1	Emergent	0.3	Emergent		
W2	Emergent	0.3	Emergent		
W3	Emergent	0.3	Emergent		
W4	Emergent	0.3	Emergent		
W5	Emergent	0.3	Emergent		
W6	Emergent	0.3	Emergent		
W7	Emergent	0.3	Emergent		
W8	Emergent	0.3	Emergent		
W9	Emergent	0.3	Emergent		
W10	Emergent	0.3	Emergent		
W11	Emergent	0.3	Emergent		
W12	Emergent	0.3	Forested		
Total Impact		3.6			
PART II - Unit Score					
Wetland Classification			Replacement Unit(e)		
Total Emergent			6.6		
Total Scrub-Shrub			0		
Total Forested			0.6		
Total Open Water			0		
PART III - Advanced Mitigation					
Sustainable Determination Made on Advanced Mitigation (Y or N)				n	
Estimated ILF Costs					
				\$432,000.00	

### West Virginia Stream and Wetland Valuation Metric

(Wetland Valuation Metric - Worksheet 2 of 2)

PART IV - Factors (See instruction page for default values for MITIGATION BANKING and ILF.)					
Temporal Loss-Construction			Long-term Protection		
<i>Note: Reflects duration of aquatic functional loss between the time of an impact (debit) and completion of compensatory mitigation (credit).</i>			% Add. Mitigation and Monitoring		
Years	2		Long-Term Protection (Years)		
Sub-Total	0.06		0 + 5/10 Year Monitoring		
Temporal Loss-Maturity			Sub-Total		
<i>Note: Period between completion of compensatory mitigation measures and the time required for maturity, as it relates to function (i.e. maturity of tree stratum to provide organic matter and detritus within riparian stream or wetland buffer corridor).</i>			101		
% Add. Mitigation	Temporal Loss-Maturity (Years)		0		
0%	0		Sub-Total		
Sub-Total			0		
PART V - Final Unit Score					
Wetland Classification	Replacement Index (Debit)	Form of Mitigation	Final Unit Score to Offset (Credit)	Applicant Input Mitigation (Acres)	Balance
Emergent	6.6	Enhancement	6.996	13	0.396
Scrub-Shrub	0		0		0
Forested	0.6		0.636	6	0.036
Open Water	0		0		0
<b>Net-Total</b>	<b>7.2</b>		<b>7.632</b>	<b>19</b>	

## EXHIBIT 2

## West Virginia In-Lieu Fee Program ~ Participant Information Sheet

<b>Corps ID No.</b>		
<b>WQC No.</b>		
<b>Project Name</b>		
<b>Applicant</b>	<b>Name</b>	
	<b>Address</b>	
	<b>Phone Number</b>	
<b>Project Information</b>	<b>County</b>	
	<b>City</b>	
	<b>Latitude</b>	
	<b>Longitude</b>	
	<b>8 Digit HUC</b>	
	Perennial Stream Impact (linear feet/functional units)	
	Perennial Stream ILF (\$)	
	Intermittent Stream Impact (linear feet/functional units)	
	Intermittent Stream ILF (\$)	
	Ephemeral Stream Impact (linear feet/functional units)	
	Ephemeral Stream ILF (\$)	
	Wetland Type Impacted/Acreage (i.e. Forested .1-ac., Scrub-shrub .2-ac. and Emergent .3-ac.)	
Wetland ILF (\$)		

Submit table (email or hard copy) to:

Attn.: In-Lieu Fee Program Coordinator  
 West Virginia Department of Environmental Protection  
 601 57<sup>th</sup> Street, SE  
 Charleston, West Virginia 25304  
[Glenn.D.McLernon@wv.gov](mailto:Glenn.D.McLernon@wv.gov)

## EXHIBIT 3

**West Virginia In-Lieu Fee Credit Request Form**  
(For Projects Exceeding 500 Stream Credits)

Project Name: _____	WQC No. (if known): _____ USACE File No. (If Known): _____
Applicant Name: _____ Address: _____ _____	Consultant Name: _____ Address: _____ _____
Phone Number: _____ E-mail: _____	Phone Number: _____ E-mail: _____
Requested Stream Credits (Using WV SWVM): _____	
Requested Wetland Credits (Using WV SWVM): _____	
Total Payment: \$ _____	
Project Location: HUC 8 _____	Lat/Long (in decimal) _____

Please forward completed form to: Mr. Glenn McLernon  
West Virginia DEP  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304  
[Glenn.D.McLernon@wv.gov](mailto:Glenn.D.McLernon@wv.gov)

Applicant Signature: \_\_\_\_\_ Date: \_\_\_\_\_

-----DO NOT WRITE BELOW THIS LINE - WEST VIRGINIA DEP USE ONLY-----

The requested level of advance credits are available within the service area: Yes \_\_\_ No \_\_\_

Comments:  
\_\_\_\_\_  
\_\_\_\_\_

West Virginia In Lieu Fee Sponsor Signature: \_\_\_\_\_ Date: \_\_\_\_\_

\*Please include this form in your Department of the Army 404 Permit Application. Please note that an indication of credit availability by the In-Lieu Fee Sponsor does not guarantee approval of a Final Compensatory Mitigation Plan (CMP) by the U.S. Army Corps of Engineers or WVDEP, which is reviewed with a complete application. If an ILF payment is acceptable to USACE and WVDEP, a credit reservation letter from the ILF sponsor must be obtained and provided within the Final CMP to confirm credit availability prior to CMP and permit approval.

## EXHIBIT 4

date

Mr. Mark A. Taylor  
U.S. Army Corps of Engineers  
Huntington District  
Huntington, West Virginia  
502 Eighth Street 25701-2070

Re: Applicant name, Project name, USACOE  
Permit number: Stream name, Corps  
District, County, West Virginia.

Dear Mr. Taylor:

The West Virginia department of Environmental Protection-Division of Water and Waste Management (WVDEP-DWWM) received payment in the amount of **\$0000000** to meet the mitigation requirements for the above referenced project. The payment has been deposited in the WVDEP-DWWM In-Lieu Fee Program fund and will be held for later use in accordance with the ILF Instrument (date) between the U.S. Army Corps of Engineers and the WVDEP.

Should you need any additional assistance or information you may contact me at your convenience.

Sincerely,

Glenn D. McLernon  
In Lieu Fee Coordinator

cc: Applicants mailing address  
Huntington or Pittsburgh District Corps of Engineers—Contact person