



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 West Virginia In-Lieu Fee Mitigation Program Instrument dated June 3, 2013. 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.

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 provide guidelines, responsibilities and standards for the operation and maintenance of the Program in a way that ensures the Program is in compliance with 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 compensatory mitigation sites or projects authorized under the Program will meet the required mitigation standards identified in the Final Rule. The Program will comply with regulatory standards and utilize recommended templates from the Corps. 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.

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. CONCEPTUAL MITIGATION PLAN – A plan utilized for the preliminary project review and approval by the Corps and IRT, which shall include the following elements of a Mitigation Plan; Objectives, Site Selection, Site Protection Instrument, Baseline Information, Determination of Credits, and Mitigation Work Plan.
5. 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.
6. CREDIT REQUEST FORM – Verification provided by the WVDEP to potential credit purchasers stating that credits are available and details the cost per credit.
7. 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.
8. 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.
9. 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.
10. FUNCTIONS – The physical, chemical, and biological ecosystem processes of an aquatic resource without regard to its importance to society.
11. 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”).
12. 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).
13. 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”).
14. 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.
15. LEDGER – An accounting of mitigation credits and debits.
16. 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.
17. LONG-TERM STEWARD – The party (landowner, easement holder, or other party) responsible for long-term maintenance and management of the mitigation site.

18. MITIGATION – The process of sequentially avoiding impacts, minimizing impacts, and compensating for impacts to aquatic resources that could not be avoided or minimized.
19. 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.
20. MITIGATION PERFORMANCE – The outcome of applying success criteria to a mitigation site in terms of identified goals and objectives.
21. MITIGATION PROJECT – The entire compensatory mitigation project, including all activities described in the mitigation plan and undertaken on the mitigation site to generate credits.
22. 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.
23. PROGRAM INSTRUMENT – The legal document governing the establishment, operation, and use of an in-lieu fee program.
24. 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.
25. RELEASED CREDITS - Credits generated as the mitigation site begins to meet performance standards.
26. 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. National Historic Preservation Act, Section 106;
10. Regulatory Guidance Letters which are applicable to this Instrument and program operations

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.

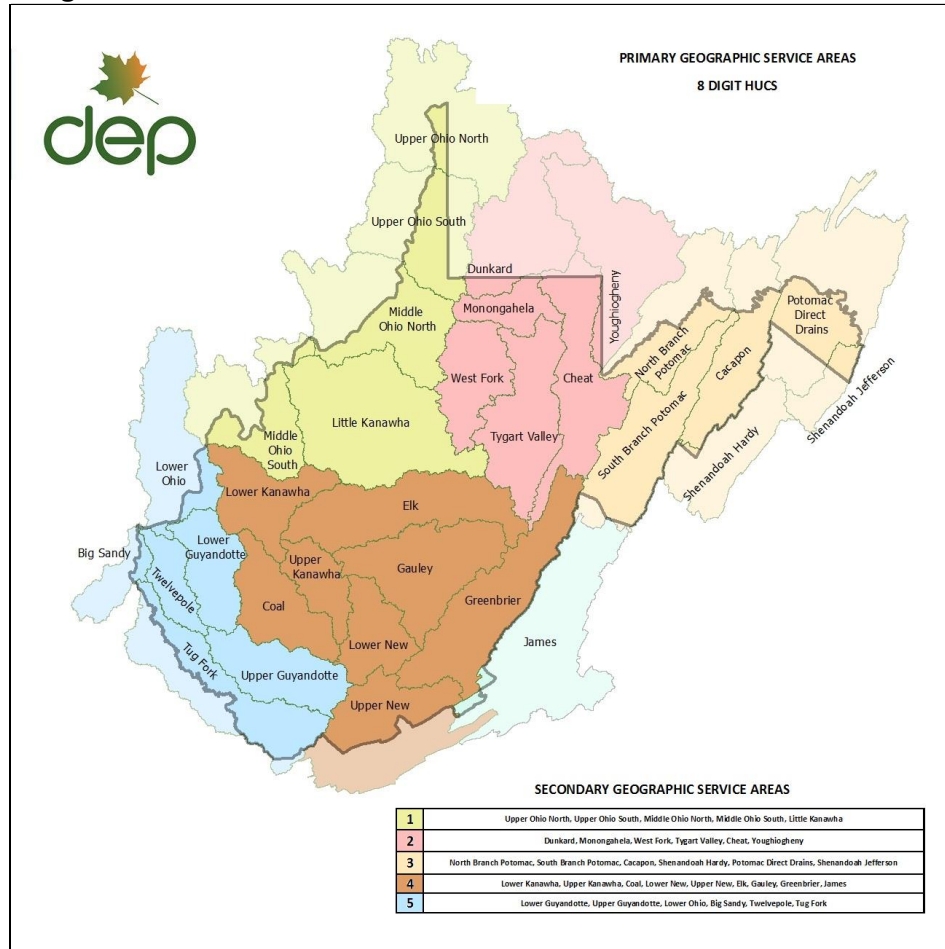
B. INTERAGENCY REVIEW TEAM

The IRT aids in; the review of documentation for the management of the Program, defining the conditions under which in-lieu fees may be used, reviewing and approving projects for design and construction with in-lieu fee funds, and performing annual reviews of ongoing and completed projects. A designated representative of the Huntington Corps District Engineer ("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. The secondary service areas used by the West Virginia In Lieu Fee (WVILF) program were established to comply with 332.8(c)(2)(i). The secondary service areas were delineated based on major river basins. The secondary service areas break the state into 5 watersheds, which include the Upper Ohio, Monongahela, Potomac, Kanawha, and Lower Ohio. The current secondary service areas outlined in this document assure that any credit sold by the WVILF program will be mitigated for in the same major river basin. 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: Program Service Areas



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.

Table 1: Program Service Areas

PRIMARY GEOGRAPHIC SERVICE AREAS	8 DIGIT HUC	SECONDARY GEOGRAPHIC SERVICE AREAS
UPPER OHIO NORTH UPPER OHIO SOUTH MIDDLE OHIO NORTH MIDDLE OHIO SOUTH LITTLE KANAWHA	05030101 05030106 05030201 05030202 05030203	1
DUNKARD MONANGAHELA WEST FORK TYGART VALLEY CHEAT YOUGHIOGHENY	05020005 05020003 05020002 05020001 05020004 05020006	2
NORTH BRANCH POTOMAC SOUTH BRANCH POTOMAC CACAPON SHENANDOAH HARDY POTOMAC DIRECT DRAINS SHENANDOAH JEFFERSON	02070002 02070001 02070003 02070006 02070004 02070007	3
LOWER KANAWHA UPPER KANAWHA COAL LOWER NEW UPPER NEW ELK GAULEY GREENBRIER JAMES	05050008 05050006 05050009 05050004 05050002 05050007 05050005 05050003 02080201	4
LOWER GUYANDOTTE UPPER GUYANDOTTE LOWER OHIO BIG SANDY TWELVEPOLE TUG FORK	05070102 05070101 05090101 05070204 05090102 05070201	5

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 (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. Any funds taken into the account which are not a result of Section 404 required mitigation will be tracked separately and not commingled with funds received as a direct result of Section 404 required mitigation. Interest accruing from in-lieu fee funds resulting from Section 404 required mitigation on deposit with the WVDEP becomes part of the administrative portion of the in-lieu account. Subsequent In-lieu fee payments received after the signing of the approved Instrument, on June 3, 2013, have been deposited into the Account. All monies and fees collected prior to June 3, 2013, and not allocated for expenditure for an approved Mitigation Site under the prior agreement, were managed in accordance with the Instrument beginning on the Effective Date of the Instrument. All in lieu fee payments will continue to be deposited into the Account and managed in accordance with the revised Instrument upon the Effective Date of signing.

When payment of fees into the In-lieu Fee Program is a result of a regulatory permitting process, the regulatory body issuing the permit requiring mitigation of impacts 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 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 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 restricted state Account(s). 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 and IRT from time to time, when financial practices and programmatic operations cannot be clarified, instances of severe non-compliance or for program elements that cannot be reasonably explained, and the cost of which will be a project expense of the program. Notwithstanding the foregoing, the program shall undertake a financial audit once each five years by an independent auditor, the cost of which shall be an administrative expense of the program. The parties shall endeavor to cause such independent audit to occur prior to the expiration of the instrument. 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. Funds received in excess of the amount needed for mitigation can be utilized, with the IRT's approval, outside of the secondary service area in which the funds were received to offset unforeseen shortfalls in another service area or to fund additional restoration projects. The funds are considered to be in excess when the WVDEP and IRT both agree with a high level of confidence that the projects will meet the performance standards outlined in the approved mitigation plan. The WVDEP can ask for concurrence from the IRT that a project will meet the stated performance standards and that funds in excess be allowed to be utilized in another secondary service area no earlier than three (3) growing seasons after construction of the project is complete. Once the project has been monitored for three growing seasons monies still allocated to that project over the total cost of the project (both actual costs accrued to date and proposed cost through closeout) will be considered excess money and be made available statewide for utilization. At closeout, any excess funds will automatically become available for utilization in other secondary service areas where shortfalls may occur or for additional stream and/or wetland restoration activities. A detailed ledger of excess funds approved by the IRT and the projects they are associated with will be included with the annual report submitted to the IRT for review no later than March 31. The WVDEP provides 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. Funds set aside for contingencies which are not utilized will become eligible to be utilized in any service area with shortfalls or for additional stream and/or wetland restoration activities.

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.

For any given transfer of advance credits to a Corps permittee, the Program shall complete land acquisition and initial physical and biological improvements at mitigation sites designed to produce an equivalent number of credits by the third full growing season after said transfer of advance credits. The Program intends to utilize May 1st to November 1st as the standard growing season for West Virginia. If a payment is received during a given growing season, then the Program has three full growing seasons to complete the aforementioned land acquisition and improvements not including the partial season during which payment was received. If the Program fails to meet these deadlines, the Corps must either make a determination that more time is needed to plan and implement a mitigation project or, if doing so would not be in the public interest, direct the Program to disburse funds from the Program Account to provide alternative compensatory mitigation to fulfill those compensation obligations. 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 may suspend the sale of additional advance credits if the Program is not performing in compliance with this Instrument.

The IRT shall have oversight of the Account. 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 within 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 most currently approved version of the **West Virginia Stream and Wetland Valuation Metric (SWVM)** which will calculate a total WVILF payment. (see Exhibit 1)
2. The applicant must coordinate with the WVDEP by completing and forwarding the **WVILF Credit Request Form** to the WVDEP In-Lieu Fee Program Coordinator for approval (see Exhibit 3).
3. The Corps Project Manager must provide appropriate information to the permittee to complete a **WVILF Participant Information Sheet** (see Exhibit 2) upon \$404 permit issuance. The permittee will be directed to the Program website for all forms and payment procedure options.
4. When a payment is provided by the permittee along with the aforementioned documents 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

Program 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 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 any given sale of advance credits in a given service area 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 source of long-term financing.
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.

H. FINANCIAL ASSURANCES

The WV ILF Program is funded through the sale of credits to Corps permittees. Program credit costs were established and based on the actual and forecasted costs to implement mitigation projects based on current Corps requirements including financial assurances. Funds collected from the sale of stream and wetland credits are deposited and maintained in restricted accounts. These funds are

invested with the West Virginia Investment Management Board which manages and invests the State's money including its defined benefits pension plans. Once a sale of advance credits takes place the WV ILF Program will set aside 10% of the total transaction for administrative costs. The remaining funds (90% of the total) is split between project funds (80%) and reserve funds (20%). The project funds are used for design, implementation, monitoring and standard maintenance. The reserve funds are used for long term management and contingencies. Once a long-term steward is identified for a project, a long-term financing source will be provided based on the estimated annual monitoring requirements and standard annual rate of return for the investment chosen by the long-term steward. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site. Any leftover monies not used will remain in the contingency fund compounding for future projects.

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. 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.
2. A Conceptual Mitigation Plan will be utilized to provide information for the review of a proposed in-lieu fee project for funding approval. Each project and associated funding require approval by the IRT Chair, in consultation with the IRT members (33 CFR §332.8(g)); 33 CFR §332.8(i)).
3. A Mitigation Plan will be developed 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).
4. Mitigation Plans may include 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 substantial 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 4). 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. A detailed ledger of excess funds approved by the IRT and the projects with which they are associated as defined in Section IV.D of this Instrument.
6. 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. 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

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

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" or must be incorporated into a management plan of state or

federally owned lands where the management plans align with the goals of the mitigation sites. Land protection documents and/or state or federal land management plans will be included into the site-specific Mitigation Plan and approved by the Corps and recorded (if applicable) 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 executed and/or recorded. The WVDEP may engage in Mitigation Projects on federally owned land within the State of West Virginia or 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. Examples of typically used real estate easements and WMA management plan addendums can be found in appendix 3 of this document.

G. LONG-TERM MANAGEMENT

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

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. Each project specific LTMP will contain provisions that address the long-term management and monitoring requirements for the site. The Long-Term Steward will be provided a long-term funding source in an amount sufficient to monitor and enforce the site protection instrument restrictions. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site. A Long-Term Stewardship calculator will be utilized to determine the amount of money necessary to enforce the site protection instrument and for the long-term monitoring of the Mitigation Project. An example of a stewardship calculator can be found in Appendix 3. These monies along with a LTMP will typically be transferred to the Long-Term Steward after the approval of the first year of monitoring report however, the long-term monitoring of the Mitigation Project does not begin until after the active monitoring phase is closed out by the Corps (typically 5-10 years after construction as-built submittal). The Long-Term Steward will provide monitoring reports to the appropriate U.S. Army Corps of Engineers District every other year for the first 10 years after project closeout and every five years after that in perpetuity or until the Corps decides to suspend or amend the reporting requirements. At a minimum, these monitoring reports will include:

1. Brief discussion and photographs of site conditions and if the restrictions of the site protection instruments are being met.

2. Observations of visible structural elements and facilities on the site such as signage, fencing, roads, in-stream or wetland structures, and trails.
3. Recommendations of any remedial actions that may be necessary to achieve the objectives of the mitigation project and comply with the provisions of site protection instrument.

The long-term management and monitoring requirements are set up as minimum requirements and can be assessed for each individual project site and adjusted based on the needs of that site. An Example of a Long-Term Stewardship Agreement can be found in Appendix 3 of this document.

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 and the project is closed out. 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 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. Any subsequent transfer of responsibilities under the long-term management plan to a different land manager shall be requested by the Long-term Steward in writing to the Corps and require written approval by the Corps.

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. 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, 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 to the Corps.

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 reinitiate 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 Corps. 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 57th 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: *Austin Caperton* Date: 12/15/2020
Austin Caperton, Cabinet Secretary

United States Army Corps of Engineers

For By: _____ Chief, Regulatory Division Date: 15 Jan 2021
Jason A. Evers, Colonel, U.S. Army, Huntington District Commander

For By: *Scott A. Hans* Chief, Regulatory Division Date: 01/07/2021
Andrew J. Short, 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 (as outlined in section 6), 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 using the criteria outlined in section 6 of this document 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. According to the 2014 West Virginia Integrated Water Quality Monitoring and Assessment Report, approximately 44% of streams in West Virginia are classified as impaired. The most common impairments include: fecal/bacterial (8069 miles), iron (7583 miles), bio-impairment (6096 miles), pH (1376 miles), aluminum (1102 miles), PCB's (478 miles), selenium (438 miles) and Dioxin (352miles).

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 most recent Integrated Water Quality Monitoring and Assessment Report will be used to determine the current aquatic resource conditions. The data below can be found in the 2014 Integrated Water Quality Monitoring and Assessment Report. 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 data collected from across the state 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. 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: Streams receiving mine drainage 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 background levels. A sulfate concentration greater than 50 mg/L was used to identify probabilistic sites influenced by mine drainage. Following this guideline, approximately 16.7 % 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 27.3% of the stream miles in the Central Appalachians are influenced by mine drainage. Contrastingly, about 2.5% and 11.9% 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 13.6% 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. Among Ecoregions, the proportion of stream miles violating the criterion was highest in the Western Allegheny Plateau Ecoregion (21.3% of stream miles) and somewhat lower in the Central Appalachians (9.0% of stream miles) and the Ridge and Valley Ecoregions (8.3% 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 12.0% 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 24.0% 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 7.8% 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, WVDEP 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 35.9% of stream miles in each of these ecoregions are of good quality and only 3.3% are poor with respect to overall habitat quality. The Central Appalachians Ecoregions ranked second in the state for the proportion of stream miles rated as good for overall habitat quality with a value of 24.6%. 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 81.8%) 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 WVDEP 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 and have been used as indicators all over the world for nearly 100 years. 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.

Based on the probabilistic data utilized in the 2014 West Virginia Integrated Water Quality Monitoring and Assessment Report and a comparison to low-end reference condition (5th percentile of all appropriate season and ecoregion reference sample GLIMPSS scores), 59.4 percent of wadeable stream miles are comparable to reference condition statewide with the remaining 40.6 percent scoring less than this threshold. Breaking this down by ecoregion, the Ridge and Valley ecoregion has the highest percentage of streams with healthy aquatic ecosystems, with 80.3 percent scoring above the 5th percentile threshold. The Western Allegheny Plateau ecoregion is estimated to have 62 percent of stream miles comparable to reference, which is a greater percentage than estimated in the past (42.5) when based on WVSCI. The percent of stream miles in the Central Appalachians

scoring above the GLIMPSS threshold is estimated to be 47.8 percent which is lower than previous estimates (65.3) based on WVSCI.

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.

The Sponsor will also use targeting tools available to identify and prioritize key properties based on ecological and functional values to increase the likelihood of success of mitigation 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, the West Virginia Land Stewardship Corporation, or another

approved third party easement holder. The WVDEP will ensure that adequate long term management 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.

Appendix 3 Document Templates and Examples

1. In-Lieu Fee Conservation Easement

****THIS DOCUMENT SERVES AS A TEMPLATE ONLY. ALL BLANKS AND SPECIFIC REFERENCES MUST BE ALTERED TO REFLECT THE SPECIFIC INTENT OF THE PARTIES INVOLVED****

CONSERVATION EASEMENTS

DEED OF CONSERVATION EASEMENT

This **DEED OF CONSERVATION EASEMENT** (“Conservation Easement”) made this ____ day of _____, 2018 by _____, having an address of _____ (“Grantor”), in favor of the **STATE OF WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION (“WVDEP”)**, having an address of 601 57th Street SE, West Virginia 25304 (“Grantee”), and each of the following third-party beneficiaries (collectively “Beneficiaries” and each individually a “Beneficiary”) who have a third-party right of enforcement hereunder: the **UNITED STATES**, by and through the **UNITED STATES DEPARTMENT OF THE ARMY CORPS OF ENGINEERS PITTSBURGH DISTRICT (“Corps”)**. The designation of Grantor, Grantee and Beneficiary as used herein shall include said parties, their heirs, successors and assigns.

1) **GRANT.** The Grantor, for good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, and in consideration of the facts recited above and incorporated by reference, and of the mutual covenants, terms, conditions and restrictions contained herein, hereby voluntarily, unconditionally and irrevocably grant, bargain, and convey a Conservation Easement on the Real Estate, forever and all in perpetuity over the Easement Area to the Grantee, together with the right to preserve and protect the Conservation Values thereof in the nature and character as follows:

2) **DEFINITIONS.** As used in this Conservation Easement:

A. **Aquaculture** - The propagation, rearing, enhancement, and harvest of aquatic organisms in controlled or selected environments for commercial or research purposes, conducted in marine, estuarine, brackish or fresh water, including manmade ponds or impoundments.

B. **Mitigation Plan** - A plan approved by Grantor and Grantee that will contain the following twelve elements in accordance with 33 CFR 332.4 (c):

- (1) Stream restoration and management goals and objectives,
- (2) Site selection criteria,

- (3) Site protection instrument,
- (4) Baseline information,
- (5) Credit determination methodology,
- (6) Mitigation work plan,
- (7) Maintenance plan,
- (8) Ecological performance standards,
- (9) Monitoring requirements,
- (10) Long-term management plan,
- (11) Adaptive management plan, and
- (12) Financial assurances.

C. Existing Improvements and Constructed Features - Those existing structures, facilities, septic fields, water wells, springs, header dams, utilities, Roads (defined below), Trails (defined below), and other man-made additions to the natural environment located on the Easement Area as of the date of this Conservation Easement and described and depicted in the Project Proposal.

D. Forested Areas - Those forested or wooded areas of the Easement Area as shown on Exhibit B and as described and depicted in the Project Proposal and any alterations in the area thereof, as agreed to in writing by Grantor and Grantee.

E. Improvements - Improvements consist of any building, structure, or man-made addition to the Easement Area, including but not limited to Residences, out-buildings, sheds, barns, tree-houses, house and office trailers, tennis and other recreation courts, and swimming pools placed, built, or constructed on the Easement Area after the date of this Conservation Easement. For the purposes of this definition, Improvements do not include Roads and Trails (defined below), fences, or movable items not affixed to real estate that have a de minimis impact on ground area.

F. Invasive Plants and Animals – Plants, animals, pests, and pathogens included on the most current lists maintained by the University of Georgia Center for Invasive Species and Ecosystem Health. If the State of West Virginia commences publication of similar lists of Invasive Plants and Animals, then the parties agree that such lists shall be binding for purposes of this Conservation Easement in lieu of the University of Georgia lists or any federal lists. If the University of Georgia ceases to publish such lists, then a similar list promulgated by the federal government, of which the Grantee shall notify the Grantor, shall be the list that shall be binding on the Grantor for purposes of this Conservation Easement.

G. Roads - Those access roads, driveways, or improved paths used to provide access to and within the Easement Area by motorized and non-motorized means. The locations of existing Roads are shown on Exhibit B and described and depicted graphically in the Project Proposal.

H. Trails - Those trails and paths used to provide access to and within the Easement Area by non-motorized means only. The locations of existing Trails are shown on Exhibit B.

3) LEGAL DESCRIPTION OF PROPERTY. Grantor is the sole fee simple owner of certain tracts of real estate containing in the aggregate approximately 84.69 acres located in Philippi, Barbour County, West Virginia (“Real Estate”). The Real Estate comprises 332.18 acres as designated by the Barbour County Assessor. Grantor agrees that the Grantor would make the portion of the Real Estate hereinafter referred to as the “Easement Area” and as set forth in a metes-and bounds description of the boundaries of the easement conveyed herein Exhibit A”, attached hereto and a plat of the Easement Area, subject to the conservation-based covenants described in this Conservation Easement.

4) CONSIDERATION.

█ The Easement Area is a significant natural area that qualifies as a “. . . relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,” as that phrase is used in P.L. 96-541, 26 USC 170(h)(4)(A)(ii) of the Internal Revenue Code (references to the Internal Revenue Code in this Conservation Easement shall be to the United States Internal Revenue Code of 1986, as amended, or the corresponding provisions of any subsequent Federal tax laws, and the applicable regulations and ruling issued thereunder) (the “IRC”). Specifically, the Easement Area:

- i. Protects and facilitates restoration of substantial segments of UNT #1 of Teter Creek of the Tygart Valley River and several unnamed tributaries thereof, covering approximately 5,510 feet, 5,608 and 1,310 feet of perennial, intermittent and ephemeral channel respectively; and approximately 3.8 acres of wetland;
- ii. Protects and facilitates restoration of the surface water resources in two easement areas within these segments of the Tygart Valley River, thereby enabling critical groundwater protection and recharge as well as maintaining terrestrial and subterranean aquatic habitat in headwater streams supporting native fish species (the preceding subparts (i) and (ii) referred to collectively as the “Conservation Values”).

█ The characteristics and current state of the Easement Area is described in a document entitled “Conceptual Mitigation Plan – UNT #1 of Teter Creek In - Lieu Fee Mitigation Area” (the “Project Proposal”). The Project Proposal, incorporated by reference, includes reports, maps, photographs, and other documentation that the parties agree provide an accurate representation of the Real Estate at the time of this Conservation Easement and which is intended to serve as an objective information baseline for monitoring compliance with the terms of this Conservation Easement. The Project Proposal will be used by the Grantor and Grantee to assure that any future changes in the use of the Easement Area will be consistent with the terms of this Conservation Easement. However, the Project Proposal is not intended to preclude the use of other evidence to establish the present condition of the Easement Area if there is a controversy over its use.

██████████ Grantor and Grantee have the common purpose of conserving the conservation values (the “Conservation Values”) of the Easement Area in perpetuity, and the State of West Virginia has authorized the creation of Conservation Easements pursuant to Section 20-12-1 et seq. of the Code of West Virginia (the “West Virginia Conservation Easement Act”) and Grantor and Grantee wish to avail themselves of the provisions of that law, as well as the provisions of the IRC, Section 170(h) concerning qualified conservation contributions, and Section 2031(c) allowing an election for special treatment of qualifying conservation easements for estate tax purposes, as such sections may apply.

5) PURPOSES.

- A. The purposes of this Conservation Easement are as follows: to ensure that the Easement Area will be, following performance of the measures set forth in the Mitigation Plan, retained forever predominantly in its natural condition; to protect water quality and aquatic habitat within the UNT #1 of Teter Creek of Tygart Valley River; to prevent any use of the Easement Area that will conflict with the Conservation Values of the Easement Area described above, while allowing for traditional uses on the Easement Area that are compatible with and not destructive of the Conservation Values of the Easement Area, such as hunting, fishing, and other recreation.
- B. Grantor will not perform, nor knowingly allow others to perform, any act on or affecting the Easement Area that is inconsistent with the purposes of this Conservation Easement. Nothing in this Conservation Easement shall require Grantor to take any action to restore the condition of the Easement Area after any act of God or other event over which Grantor had no control, except in those cases when an act of God destroys an Existing Improvement or Constructed Feature or an Improvement and that destruction produces continuing deleterious impacts to the Conservation Values of the Easement Area. In such case, the Grantor shall notify the long-term Conservation Easement holder of the act of God and planned steps to resolve destruction of Existing Improvement or Constructed Feature to remedy the situation and remove deleterious impacts through appropriate corrective action. Grantor understands that nothing in this Conservation Easement relieves Grantor of any obligation or restriction on the use of the Easement Area imposed by law.

6) GRANTEE’S DUTIES.

██████████ The Grantee affirms that this Conservation Easement represents a unique and valuable asset to the quality of life in West Virginia and that by the acceptance of this Conservation Easement that it will act in good faith to uphold the Conservation Easement and not seek to benefit from its conversion or elimination; Grantee agrees by accepting this grant to honor the intention of Grantor stated herein and to preserve and protect in perpetuity the Conservation Values of the Real Estate for the benefit of this generation and future generations of West Virginians.

██████ Grantee and its successors and assigns shall: 1) perform, at a minimum on a yearly basis, compliance monitoring inspections of the Conservation Area, and 2) prepare reports on the results of the compliance inspections, and provide these reports to the Beneficiaries on an annual basis.

7) EASEMENT AREA TERMS, CONDITIONS, AND USES

- A. Any activity on or use of the Easement Area inconsistent or in conflict with the purposes of this Conservation Easement is prohibited. Unless otherwise restricted or prohibited by this Conservation Easement, any activity on or use of the Easement Area consistent with the purposes of this Conservation Easement is permitted. Without limiting the generality of the foregoing, the following is a listing of activities and uses which are expressly prohibited or which are expressly allowed. Grantor and Grantee have determined that the allowed activities do not impair the Conservation Values of the Easement Area. Additional retained rights of Grantor are set forth in Paragraph 12 below, and additional rights of the Grantee are set forth in Paragraph 13.
- B. The following requirements apply to all activities and uses of the Easement Area, unless an exception is specifically provided:
- i. Boundary Line Adjustments. Adjustments to boundaries in common between sections of the Parcels 22, 23, 24, 31 on Tax Map 8, all described in Will Book 44 page 442 within the Easement Area and adjoining parcels of land are permitted, provided that any portion of the Easement Area so conveyed shall remain subject to the terms of this Conservation Easement, and further provided that Grantee is notified in writing prior to the completion of any such boundary line adjustment and at least one of the following conditions is met:
 - a. The entire adjacent parcel is subject to another existing, recorded conservation easement held by Grantee; or
 - b. The proposed boundary line adjustment is reviewed and approved in advance by the Grantee.
 - ii. Improvements. No Improvements, structures or fills, including, but not limited to, any building, tennis or other recreational court, landing strip, mobile home, swimming pool, fence or sign (other than those required by Grantee for appropriate management), asphalt or concrete pavement, billboard or other advertising display, antenna, utility pole, tower, conduit, line, sodium vapor light, water well or septic facility, or any other temporary or permanent structure or facility may be constructed, maintained, or permitted on the Easement Area, except as provided herein:
 - iii. Roads and Utilities. Construction of new roads or utilities on the Easement Area is prohibited unless constructed: (A) as part of the approved Mitigation Plan, or

(B) to realign the access Road into and within the Real Estate if the current access Road, at or near its point of Intersection with the public road (as described and detailed in the Project Proposal), is damaged beyond repair as a result of natural events or act of God. Current access/county roads shall not be increased in length or width, however routine maintenance and motorized vehicles are permitted within prescribed right-of-way. Roads constructed as part of an approved restoration and management activity in the Mitigation Plan shall be considered temporary, and shall be restored upon completion of the restoration and management activity.

- a. Trails. Grantor shall have the right to construct Trails on the Easement Area of reasonable extent to provide non-motorized access to the Easement Area and to accommodate recreational activities. Trails shall be no more than four (4) feet in width and shall be either unimproved paths or shall be constructed of permeable materials. Trails may be permitted provided their extent is limited and they cause no harm to the health of the Easement Area. If a trail is proposed to pass through the Easement Area, Grantor should ensure:
 - (i) That the trail passes through the Easement Area in a manner that limits the linear extent of its intersection with the Easement Area;
 - (ii) The Trail crosses the stream itself at as close to a ninety-degree (90°) angle as possible; and
 - (iii) The management of erosion and sedimentation issues during and after the Trail construction.
- b. Utilities. Unless utilities are placed on or over the Easement Area under eminent domain proceedings or the threat thereof, Grantor may not consent to the construction or placement of utilities on the Easement Area that serve entities or users located off the Easement Area without the prior written consent of the Grantee. Such consent shall only be granted if their construction or placement would not deleteriously impact the Conservation Values of the Easement Area or would produce a smaller impact than if those utilities were located on an adjoining or nearby real property.
- c. Existing Improvements and Constructed Features. Grantor shall have the right to maintain, remodel, and repair Existing Improvements and Constructed Features on the Easement Area (as described and detailed in the project's proposed Mitigation Plan), and in the event of their destruction, to reconstruct any such Existing Improvement or Constructed Feature with another of similar size, function, capacity,

location and material, unless Grantor and Grantee agree that changes in the size, capacity, location, or material would improve the performance of the Existing Improvement or Constructed Feature and benefit the stated conservation objectives of this Conservation Easement (e.g. improve access by fish and other aquatic organisms, reduce sedimentation or erosion, or remove a barrier to stream flow). Water impoundments existing as of the date of this Conservation Easement will not be maintained and will be allowed to return to a natural condition, unless Grantor chooses to restore the natural water course.

- d. **Spring and Water Resources.** Grantor shall retain all rights to the spring (as identified in the Project Proposal) for non-commercial use, farming and ranching outside of the Easement Area, including, but not limited to, the rights to all water produced by the spring and the right to transport the water by conduit or pipeline across the Easement Area to areas owned by the Grantor outside of the Easement Area. Grantor shall also retain the right to remodel or repair the existing water storage tank (spring box), replace the existing tank with a new tank not exceeding 1,500 gallons in size, and to install any pumping equipment necessary to effectively transport the water by conduit or pipeline. Other water resources on the property shall remain intact and not be disturbed in accordance with federal regulations. However, if water resources on the property negatively impact Existing Improvements or Constructed Features, coordination with the Corps district is required prior to altering any waters of the United States.
- C. **Recreational Uses.** Grantor shall have the right to engage in and permit others to engage in non-commercial recreational uses of the Easement Area, including, without limitation, hunting, fishing, hiking, biking and equestrian activities that require no surface alteration or other development of the land. Motorized vehicles are prohibited on all Trails and off-road terrain in the Easement Area. Furthermore, Grantor shall not be allowed to conduct recreational activities that impair the Conservation Values of the Easement Area, especially with regards to erosion and sedimentation issues associated with overuse or misuse of the Easement Area's landscape. De minimis commercial recreational uses of the Easement Area are permitted, such as the granting of hunting and fishing licenses, provided that the activities are consistent with the terms of this Conservation Easement and do not harm the Conservation Values protected by this Conservation Easement. Commercial recreational activities that constitute more than a de minimis use of the Easement Area are prohibited.
- D. **Commercial Use and Development.** Unless otherwise provided for herein, any commercial or industrial use of, or activity on, the Easement Area is prohibited.

- E. Invasive Plants and Animals. In no event shall Grantor introduce Invasive Plants or Animals to the Easement Area or wetlands or stream segments occurring on the Easement Area. However, such introduction may be approved in writing by the Grantee to address a defined land management concern, such as short-term erosion mitigation using annual grasses. Notwithstanding the foregoing, Grantor shall have the right, but not the obligation, to remove Invasive Plants and Animals, including diseased trees, shrubs, or plants.
- F. Firebreaks. Grantor shall have the right to cut firebreaks, subject to the prior approval of the Grantee, except that such approval shall not be required in case of emergency firebreaks.
- G. Excavation. Except as necessary to accommodate the activities expressly permitted under this Conservation Easement, there shall be no ditching, draining, diking, filling, excavating, dredging, or removal of topsoil, sand, gravel, rock, minerals or other materials. In addition, except as otherwise permitted under this Conservation Easement, there shall be no building of Roads, change in the topography of the Easement Area, or disturbance of the soil in any manner.
- H. Water Management. Unless otherwise provided, there shall be no alteration, pollution, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies on the Easement Area; and no activities shall be conducted on the Easement Area that would be detrimental to water purity or that could alter the natural water level or flow in or over the Easement Area, including impoundments and ponds. Grantor shall retain all rights to the Spring, and will be permitted to use, for non-commercial purposes, including farming and ranching outside of the Easement Area.
- I. Mineral Extraction. There shall be no exploration, development, production, extraction, or transportation of oil, gas or other mineral substances (whether such other mineral substances be part of the mineral estate or part of the surface estate) on, from, or across the Easement Area (“Mineral Activities”) except in accordance with this section; provided, however, that this section does not apply to water, which is addressed elsewhere in this Conservation Easement.
- i. No Surface Mining. Mineral Activities shall not be conducted by any surface mining methods including, without limitation, the removal of gravel, sand, limestone, or sandstone. Surface mining is strictly prohibited.
 - ii. No Surface Use. Grantor has the right and retains its interests in all oil, gas and all other mineral substances (whether such other mineral substances be part of the mineral estate or part of the surface estate) in and under the Easement Area; provided, however, it is understood and agreed by Grantor and Grantee that, in conducting any Mineral Activities on the Real Estate, Grantor shall not use or

occupy any portion of the surface estate of the Easement Area and shall not place any facilities, fixtures, equipment, building, structures, pipelines, rights of way or personal property of any kind or nature whatsoever on the surface of the Easement Area or in the subsurface within the depth interval of 1000 feet below the surface of the Easement Area (unless a shallower depth interval is approved by Grantee) or on or in any portion thereof. Grantor agrees that any and all Mineral Activities shall be strictly on a “no-drill” basis, except for directional or horizontal drilling below said subsurface interval from a surface location outside the boundary of the Easement Area, and, accordingly, Grantor hereby waives any rights whatsoever to the use of the surface and said subsurface interval of the Easement Area in connection with any Mineral Activities on the Easement Area. To the extent Grantor elects to explore for or otherwise extract or exploit any oil, gas or other minerals in or under the Easement Area from a surface location off the Easement Area, Grantor shall use their best efforts to minimize any damage or other negative impact on the aquatic resources on, or aquifers underlying, the Real Estate by such activity.

- J. Stream Bank and Shoreline Stabilization. There shall be no hardening of stream banks or shorelines, including but not limited to installation of riprap or bulkheads. If such features exist as of the date of this Conservation Easement and are detailed in the Project Proposal as such, Grantor shall have the right to maintain or repair these features, but may not enlarge them. This restriction does not prohibit the use or installation of Stream Bank or Shoreline Stabilization features conducted as part of an approved restoration activity in the Mitigation Plan utilizing the principles and commonly accepted practices of natural stream channel design in order to reduce sediment or pollutant inputs to the waterway and establish conditions conducive to the protection and enhancement of aquatic and wetland plant and animal communities in the affected stream.
- K. Signage. No signs or billboards or other advertising displays are allowed on the Easement Area, except that signs whose placement, number and design do not significantly diminish the scenic character of the Easement Area may be displayed to state the name and address of the Easement Area and the names of persons living on the Easement Area, to advertise or regulate permitted on-site activities, to advertise the Easement Area for sale or rent, and to post sign(s) defining the Easement Area to control unauthorized entry or use.
- L. No Biocides. There shall be no use of biocides, including, but not limited to, pesticides, fungicides, rodenticides, and herbicides. Notwithstanding the foregoing, Grantor shall have the right to use biocides as approved by Grantee to control Invasive Plants and Animals detrimental to the Conservation Values of the Easement Area.
- M. No Storage or Dumping. There shall be no storage or dumping of trash, garbage, or other unsightly or offensive material, hazardous substances, or toxic waste on the Easement Area. There shall be no placement of new storage tanks in, on, or under the Easement Area. Furthermore, there shall be no changing of the topography of the Easement Area

through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the Easement Area that could cause erosion or siltation. Should Grantor place soil or other substance or material on the Real Estate, Grantor shall implement best management practices to minimize erosion or sedimentation on the Easement Area. Notwithstanding the above restriction, temporary soil piles associated with construction activities expressly permitted under this Conservation Easement are permitted. Nothing in this paragraph shall prevent generally accepted wildlife management practices, such as the creation of brush piles.

- N. Animal Control. Except with respect to household vermin and other small animals that cannot be practically controlled by selective methods, Grantor shall remove problem animals on the Easement Area using methods selective and specific to individual animals, rather than broadcast, nonselective methods.
- O. Ecological Restoration Activities. Grantor and Grantee have determined that aquatic and forest conservation activities, including, without limitation, those described in Exhibit B, are consistent with the purposes of this Conservation Easement and Grantor shall permit the Grantee and the WVDEP and its employees, agents, contractors, and assigns to engage in restoration activities pertaining to, without limitation, streams, wetlands, stream banks, riparian areas, forests, and invasive plant infestations. Restoration activities may include, without limitation, the use of all equipment necessary (in the Grantee's discretion) to successfully complete any grading, excavation, bank shaping or sloping, channel alteration, placing of in-stream structures within the channel, vegetation removal and vegetation establishment, monitoring the success of restoration activities, and maintenance of the restoration activities. Access by motorized vehicles to the Easement Area as a component of restoration activities is permitted. Prior to commencement of any restoration activities, Grantee shall have the plans and specifications for such restoration approved by, and shall obtain all permits necessary for engaging in such activities from, all local, state and federal authorities with jurisdiction over such activities.
- P. Removal of Vegetation. There shall be no removal, destruction, or cutting of trees, shrubs, or plants on the Easement Area, except as part of an ecological restoration activities described in Exhibit B. Nothing in this paragraph shall prohibit the Grantor's right to cut and remove diseased trees, shrubs, or plants; or to remove or trim vegetation falling outside of the Easement Area, or causing damage or blockage to Existing Improvements and Constructed Features, fences, and restored streams and wetlands on the Easement Area; or to remove invasive plants pursuant to Paragraph 3.1(e) (Invasive Plants and Animals).
- Q. Fertilizers. There shall be no use of fertilizers on the Easement Area, except as part of an approved ecological restoration activity.

- 8) **AGRICULTURE.** No agricultural activities are permitted on the Easement Area, including, without limitation, crop production, grazing, livestock or poultry production, viticulture, horticulture, silviculture, nurseries, and orchards.
- 9) **AQUACULTURE.** In no event shall Grantor practice Aquaculture on the Easement Area. Grantor shall not introduce non-native aquatic organisms into any water body unless approved by Grantee. Notwithstanding the above, Grantor and Grantee shall have the right to restock native brook trout or other native aquatic organisms as part of an ecological management and restoration activity.
- 10) **DENSITY.** Neither the Easement Area nor any portion of it shall be included as part of the gross area of other real property not subject to this Conservation Easement for the purposes of determining density, lot coverage, or open space requirements under otherwise applicable laws, regulations or ordinances controlling land use and building density. No development rights that have been encumbered or extinguished by this Conservation Easement shall be transferred to any other lands pursuant to a transferable development rights scheme, cluster development arrangement or otherwise; provided, however, that with prior written permission of the Grantee, this paragraph shall not preclude such transfer of development rights resulting from the destruction or demolition of any existing residential building on the Easement Area.
- 11) **ECOLOGICAL RESTORATION AND MANAGEMENT.** Grantor and Grantee shall have the right, but not the obligation, to conduct ecological restoration and management activities on the Easement Area, provided that such ecological restoration and management conforms to the Mitigation Plan and is conducted under the supervision or approval of the Grantee. Timber harvesting may be conducted to achieve specific ecological restoration and management objectives defined in the Mitigation Plan; however, commercial forestry activities conducted solely for the purpose of harvesting or extracting wood products or generating income are not permitted on the Easement Area. The use of all income generated from harvesting on the Easement Area shall be described in the Mitigation Plan, and shall be utilized to conduct restoration and management activities on the Easement Area. The Grantee reserves the right to waive, in writing, the required Mitigation Plan, or portions thereof, if the WVDEP and the Grantee determine that the proposed management activity, such as harvest of firewood by Grantor, does not warrant development of a complete plan. The Grantee shall respectively assume all liability and obligations for restoration and management activities undertaken by its own actions on the Easement Area.
- A. **Activities.** Ecological restoration and management includes, but is not limited to, the following:
- i. Planting and reforestation on the Easement Area;
 - ii. Control of pests, pathogens, and non-native, and Invasive Plants and Animals, using biocides or otherwise;

- iii. Timber harvests to accomplish specific ecological management and restoration objectives;
- iv. Prescribed burning activities;
- v. Use of fertilizers or other soil ameliorations as necessary to improve soil conditions and tree growth;
- vi. Survey, monitoring, management, and reintroduction of historically present native fish and wildlife species; or
- vii. Instream aquatic habitat improvements and streambank restoration.

B. Objectives. All ecological management activities undertaken on the Easement Area, including the provisions of the written Mitigation Plan, shall be guided by the following objectives:

- i. Promote the recruitment and retention of a forest canopy of native tree species and species composition that is likely to occur on the site under natural biological and physiological processes.
- ii. Promote the recruitment and persistence of an intact, native herbaceous and woody understory that is characteristic of the given stream community type in terms of its composition and abundance.
- iii. Maintain soil productivity and prevent erosion.
- iv. Enhance and protect water quality.
- v. Protect springs, seeps, karst features, and cave resources from disturbance.
- vi. Maintain biological diversity, native plant, fish, and animal species, and the ecological processes that support them.
- vii. Prevent or control the infestation of non-native, invasive species, including pests and pathogens, animals, fish, insects, and plants that threaten the health of the forest, caves, wetlands, and aquatic habitats.

C. Mitigation Plan Approval. As a condition to conducting ecological restoration and management activities, Grantor and Grantee shall develop and approve a Mitigation Plan that complies with the terms of the Conservation Easement. Prior to the development of such plan by either Grantor or Grantee or a qualified consultant, the Grantor and Grantee shall meet to share information relevant to the planning process. Upon completion of the Mitigation Plan, the parties shall have (30) days to complete their review and communicate their approval of the Mitigation Plan, and such approvals shall not be unreasonably withheld. Ecological restoration and management activities are prohibited unless conducted in accordance with a valid Mitigation Plan.

D. Mitigation Plan Changes. The Mitigation Plan shall remain valid for ten (10) years from the date of approval by Grantor and Grantee. The Mitigation Plan may be renewed at the end of the 10-year period, with each renewal of the Mitigation Plan covering a period to be specified at the time of such renewal. Interim updates to the Mitigation Plan are permitted to address a specific forest or stream management concern. Each renewal and update of the Mitigation Plan shall be subject to approval under the provisions; however, the parties shall have only thirty (30) days to complete their review and communicate their approval of each renewal and update of the Mitigation Plan. In the event that Grantor does not communicate within thirty (30) days its approval of any such renewal or update of the Mitigation Plan, Grantor shall be deemed to have waived its opportunity to review and approve the renewal or update at issue, and Grantor's consent to the renewal or update of the Mitigation Plan shall be implied. In the event of the need for a material deviation from a Mitigation Plan which has been approved by the parties, such deviation shall be subject to the review and approval procedures applicable to renewals and updates of the Mitigation Plan. Material deviations from an existing Mitigation Plan include the relocation of a stream crossing or existing right-of-way utilized to carry out the Mitigation Plan, and any material change in the methods used for stream restoration pursuant to the Mitigation Plan.

12) GRANTOR RIGHTS. Grantor retains the following additional rights:

- A. Existing Uses. The right to undertake or continue any activity or use of the Easement Area not prohibited by this Conservation Easement. Prior to making any change in use of the Easement Area, Grantor shall notify Grantee in writing to allow Grantee a reasonable opportunity to determine whether such change would violate the terms of this Conservation Easement.
- B. Transfer. The right to sell, give, mortgage, lease, or otherwise convey the Easement Area subject to the terms of this Conservation Easement.

13) GRANTEE'S RIGHTS. To accomplish the purpose of this Conservation Easement, the following rights are granted to Grantee or its authorized representatives, successors and assigns, and each Beneficiary by this Conservation Easement:

- A. Right to Enforce. The right to preserve and protect the Conservation Values of the Easement Area and enforce the terms of this Conservation Easement.
- B. Right of Entry. The right of Grantee's contractors and associated natural resource management professionals and each Beneficiary and its successors and assigns to enter the Easement Area after prior notice to Grantor, for the purposes of:
 - i. Inspecting the Easement Area to determine if Grantor is complying with the covenants and purposes of this Conservation Easement;

- ii. Conducting ecological restoration activities, including all planning and design, construction, planting and establishment of native vegetation, and monitoring, maintenance and corrective actions associated with the activity;
 - iii. Monitoring and research as described below;
 - iv. Management of Invasive Plants and Animals; and
 - v. Enforcing the terms of this Conservation Easement.
- C. Grantee shall have the right, upon prior notice to Grantor, and without unreasonably interfering with Grantor's use and quiet enjoyment of the Real Estate as restricted by this Conservation Easement, to enter upon the Real Estate at reasonable times and in a reasonable manner in order to monitor Grantor's compliance with the terms of this Conservation Easement. Inspection and monitoring of the Easement Area shall typically be conducted annually unless circumstances occur that threaten, as determined by Grantee in its sole discretion, to substantially diminish or impair the Conservation Values of the Easement Area. The frequency of access for other purposes listed above shall be described in the plans developed for those purposes, except that the Grantee's staff, contractors, and associated natural resource professionals, and other parties, shall have the right to enter the Easement Area after prior notice to Grantor, without further description or limitation of frequency, for the duration of any restoration project conducted. Such right of entry shall include the right to cross other lands of Grantor for access to the Easement Area. Prior notice is not required if Grantee is entering upon the Easement Area because of an ongoing or imminent violation that could, in the sole discretion of Grantee, substantially diminish or impair the Conservation Values of the Easement Area. Such right of entry shall include the permanent right to cross other lands of Grantor for access to the Easement Area.
- D. Right of Entry for Other Parties during Restoration Activities. The right of the Beneficiaries' staff, agents and representatives, and members of the West Virginia Interagency Review Team acting in the capacity as administrators of the West Virginia In-Lieu Fee Mitigation Program; and the staff, agents, and representatives of granting agencies or partners participating in or funding restoration activities, to enter the Easement Area after prior notice to Grantor, for the duration of any restoration project conducted, for the purposes of reviewing, monitoring, or inspecting the restoration project. Such right of entry shall include the right to cross other lands of Grantor for access to the Easement Area. For other ecological restoration and management activities conducted, the terms and duration of access shall be specified in the Mitigation Plan.
- E. Monitoring. In addition to monitoring activities required, Grantee shall have the right, but not the obligation, to monitor the plant, fish, and wildlife populations, plant communities and natural habitats on the Easement Area. Grantor shall cooperate with Grantee in establishing, at no expense to Grantor, a written Monitoring Plan to direct the monitoring of and research on plant and wildlife populations, plant communities and natural habitats on the Easement Area. Grantor agrees that all monitoring activity, natural resource

inventory and assessment work or other natural resource research, conducted by Grantor or others, shall be reported to Grantee. The terms and duration of access for any monitoring and research activities conducted pursuant to this paragraph shall be specified in the Monitoring Plan.

- F. **Mitigation Credits.** All mitigation credits, if any, derived from stream and/or wetland protection and stream and or wetland restoration activities approved and funded by the West Virginia DEP In-Lieu Fee Mitigation Program are to be allocated to, owned by, and maintained by the In-Lieu Fee Program. Any mitigation credits resulting from activities not funded by, allocated to, or owned by the In-Lieu Fee program shall be retained by Grantor unless otherwise specified in a separate agreement between Grantor and WVDEP.
- G. **Discretionary Consent.** The Grantee's consent for activities otherwise prohibited or requiring Grantee's consent under Paragraph C above may be given under the following conditions and circumstances. If, owing to unforeseen or changed circumstances, any of the prohibited activities listed in Paragraph C are deemed desirable by both the Grantor and Grantee, the Grantee may, in its sole discretion, give permission for such activities, subject to the limitations herein. Such requests for permission, and permission for activities requiring the Grantee's consent, shall be in writing and shall describe the proposed activity in sufficient detail to allow the Grantee to judge the consistency of the proposed activity with the purpose of this Conservation Easement. The Grantee may give its permission only if it determines, in its sole discretion, that such activities (i) do not violate the purpose of this Conservation Easement and (ii) either enhance or do not impair any significant conservation interests associated with the Easement Area. Notwithstanding the foregoing, the Grantee and Grantor have no right or power to agree to any activities that would result in the termination of this Conservation Easement.

14) **RESPONSIBILITIES OF GRANTOR AND GRANTEE.** Other than as specified herein, this Conservation Easement is not intended to impose any legal or other responsibility on Grantor, or in any way to affect any existing obligation of Grantor as owners of the Easement Area. Among other things, this shall apply to:

- A. **Taxes.** Grantor shall be solely responsible for payment of all taxes and assessments levied against the Easement Area.
- B. **Upkeep and Maintenance.** Grantor shall be solely responsible for the upkeep and maintenance of the Easement Area, to the extent it may be required by law. The Grantee shall have no obligation for the upkeep or maintenance of the Easement Area, unless otherwise specified in a separate management agreement. The requirements of this paragraph do not apply to any grading, replanting of trees or other vegetation, bank stabilization, in-stream structures, or other components of a wetland and stream restoration project conducted as part of an In-Lieu Fee Mitigation Project. Maintenance and upkeep of any component of an In-Lieu Fee Mitigation Project, during the life of the project (until final closeout is granted by the regulatory agencies), shall be the responsibility of the WVDEP. Responsibility for upkeep and maintenance of any future

restoration project conducted on the Easement Area, whether as part of a mitigation project or another project type, shall be specified in an agreement between Grantor, Grantee, WVDEP and project provider, if the project provider is an entity other than the WVDEP.

15) ACCESS. No right of access by the general public to any portion of the Easement Area is conveyed by this Conservation Easement. However, the public has the right to view the Easement Area from adjacent publicly accessible areas such as public roads and waterways.

16) ENFORCEMENT.

- A. If the Grantee becomes aware of a violation of the terms of this Conservation Easement by Grantor, or permitted or authorized by Grantor, the Grantee shall give notice to Grantor of such violation and request corrective action sufficient to abate such violation and restore the Easement Area to its previous condition at the time of this grant. Grantor agrees that the Project Proposal, shall be deemed to provide objective information concerning the Easement Area's condition at the time of this grant. Failure by Grantor to abate the violation and take such other corrective action as may be requested by the Grantee within thirty (30) days after receipt of such notice shall entitle the Grantee to bring an action at law or equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement; to require the restoration of the Easement Area to its previous condition; to enjoin the non-compliance by ex parte temporary or permanent injunction in a court of competent jurisdiction; or to recover any damages arising from the noncompliance. Such damages, when recovered, may be applied by the Grantee, in its sole discretion, to corrective action on the Easement Area.
- B. Grantor agrees that Grantee's remedies at law for any violation of this Conservation Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of this Conservation Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity. If the court determines that the Grantor have failed to comply with this Conservation Easement, Grantor shall reimburse the Grantee for any reasonable costs of enforcement, including costs of restoration, court costs and reasonable attorneys' fees, in addition to any other payments ordered by such court. The WVDEP shall have the right to enforce the terms and conditions of this Conservation Easement as the Grantee.
- C. Emergency Enforcement. If the Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Easement Area, the Grantee may pursue its remedies under this paragraph without prior notice to Grantor or without waiting for the period for cure to expire.

- D. Failure to Act or Delay. The Grantee does not waive or forfeit the right to take action as may be necessary to ensure compliance with this Conservation Easement by any prior failure to act and Grantor hereby waives any defenses of waiver, estoppel or laches with respect to any failure to act or delay by the Grantee, its successors or assigns, in acting to enforce any restriction or exercise any rights under this Conservation Easement.
- E. Violations Due to Causes Beyond Grantor's Control. Nothing herein shall be construed to entitle the Grantee to institute any enforcement proceedings against Grantor for any changes to the Easement Area due to causes beyond the Grantor's control, such as changes caused by fire, flood, storm, earthquake or the unauthorized wrongful acts of third persons. In the event of violations of this Conservation Easement caused by the unauthorized wrongful acts of third persons, Grantor agrees, upon request by the Grantee, to assign its right of action to the Grantee, to join in any suit, or to appoint the Grantee its attorney-in-fact for the purposes of pursuing enforcement action, all at the election of the Grantee.
- F. If at any time Grantee is unable or fails to enforce this Conservation Easement, or if the Grantee ceases to be a qualified grantee, and if within a reasonable period of time after the occurrence of one of these events, the Grantor may assume the Grantee's rights to enforce hereunder; and further, if the Grantee fails to make an assignment pursuant to this Conservation Easement, then the Grantee's interest shall become vested in another qualified grantee in accordance with an appropriate proceeding in a court of competent jurisdiction.
- G. Standing. By virtue of Grantee's acquisition of rights under this Conservation Easement, it shall be entitled, at its option, to standing before appropriate courts of law to pursue remedies or other matters which are necessary or incidental to the protection of the Easement Area which is subject to this Conservation Easement.
- H. The Grantor and the Grantee agree that third-party rights of enforcement shall be held by the Corps (to include any successor agencies) and may be exercised through the appropriate enforcement agencies of the U.S., and that these rights are in addition to, and do no limit, the rights of enforcement under any permit or certifications issues by the Corps to the Grantor in regards to the protected property.

17) ASSIGNMENT.

- A. Transfer of Easement. The parties recognize and agree that the benefits of this Conservation Easement are in gross and assignable. The Grantee shall have the right to transfer or assign this Conservation Easement to an organization that, at the time of transfer, is a "qualified organization" under Section 170(h) of the U.S. Internal Revenue Code, and the organization expressly agrees to assume the responsibility imposed on the Grantee by this Conservation Easement. If the Grantee ever ceases to exist or no longer qualifies under Sec. 170(h) or applicable state law, a court with jurisdiction shall transfer this easement to another qualified organization having similar purposes that agrees to assume the responsibility. The Grantee shall obtain the consent of Grantor or appointed

steward prior to any assignment or encumbrance of its interests in the Easement. Prior to any transfer, a 60 day notification to the Corps is required.

- B. Transfer of Easement Area. Any time the Easement Area, or any portion thereof or any interest therein, is transferred by Grantor to any third party, Grantor shall notify the Grantee in writing at least thirty (30) days prior to the transfer of the Easement Area, or portion thereof or interest therein, and the document of conveyance shall expressly refer to this Conservation Easement. Grantor further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue in perpetuity the conservation purposes described in this Conservation Easement.
- C. Grantor and any Transferee or assignee shall submit to the Grantee, upon written request by the Grantee, or to the Corps upon written request by the Corps, written documentation verifying that the activity and use limitations remain in place and are being complied with.

18) AMENDMENT. This Conservation Easement may be amended only with the written consent of Grantor and Grantee and the Corps as beneficiary. Any such amendment shall be consistent with the purposes of this Conservation Easement, shall not affect its perpetual duration, and shall comply with Section 170(h) of the Internal Revenue Code, or any regulations promulgated in accordance with that section. Any such amendment shall also be consistent with Section 20-12-1 et seq. of the West Virginia Conservation Easement Act or any regulations promulgated pursuant to that law. Grantor and Grantee have no right or power to agree to any amendment that would affect the enforceability of this Conservation Easement. Any such amendment shall be recorded in the official records of the county in which the Real Estate is located, and Grantee shall promptly provide a conformed copy of the recorded amendment to the Grantor and the Beneficiaries.

19) TERMINATION.

█ This Conservation Easement may be terminated only by written consent of the Grantor, Grantee and the Corps as Beneficiary. This Conservation Easement may be terminated only by a written instrument duly executed by the Grantee and Grantor. Within thirty (30) days of signature by all requisite parties on any termination, the Grantor shall file such instrument for recording with the appropriate Recorder's office and shall provide a true copy of the recorded instrument to the Grantee and the Corps as Beneficiary.

█ Grantor hereby agrees that at the time of the conveyance of this Conservation Easement to the Grantee, this Conservation Easement gives rise to a real property right, immediately vested in the Grantee, with a fair market value of the Conservation Easement as of the date of the conveyance that is at least equal to the proportionate value that this Conservation Easement at the time of the conveyance bears to the fair

- market value of the Easement Area as a whole at that time. That proportionate value of the Grantee's real property rights shall remain constant. When a change in conditions takes place which makes impossible or impractical any continued protection of the Easement Area for conservation purposes, and the restrictions contained herein are extinguished by judicial proceeding, the Grantee, upon a subsequent sale, exchange or involuntary conversion of the Easement Area, shall be entitled to a portion of the proceeds at least equal to that proportionate value of the Conservation Easement, minus any amount attributable to new improvements allowed under this Conservation Easement made as of the date of the sale, exchange or conversion, which amount shall be reserved to Grantor. The Grantee shall use its share of the proceeds in a manner consistent with the conservation purposes set forth herein or for the protection of a "relatively natural habitat of fish, wildlife, or plants or similar ecosystem," as that phrase is used in and defined under PL. 96-541, 26 U.S.C. § 170(h)(4)(A)(ii), as amended and in regulations promulgated thereunder.
- 20) **EMINENT DOMAIN.** Whenever all or part of the Easement Area is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate the restrictions imposed by this Conservation Easement, Grantor and the Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking and all incidental or direct damages resulting from the taking, which proceeds shall be divided in accordance with the proportionate value of the Grantee's and Grantor' interests, and Grantee's proceeds shall be used as specified above. All expenses incurred by Grantor and Grantee in such action shall be paid out of the recovered proceeds.
- 21) **CHOICE OF LAW.** This Conservation Easement shall be interpreted under the laws of West Virginia, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation purposes. Despite any general rule of construction to the contrary, this Conservation Easement shall be liberally construed to affect the purposes of this Conservation Easement and the purposes, instruments and regulations of the In-Lieu Fee Program. If any provision is found to be ambiguous, an interpretation consistent with the purposes of this Conservation Easement that would render this provision valid shall be favored over any interpretation that would render it invalid. No failure on the part of the Grantee or a Beneficiary to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right to the Grantee or a Beneficiary to enforce the same in the event of a subsequent breach or default. The recitals at the beginning of this document are incorporated by reference and made part of this Conservation Easement. The captions in this document are inserted solely for convenience of reference and shall have no effect upon construction or interpretation.
- 22) **RISK AND LIABILITY.** Each party agrees to assume all risk and liability for all loss, injury, damage, judgments, costs, expenses and fees that may result or arise out of the activities of the respective party on the Easement Area that causes injury to a person(s) or damage to property.

23) MARKETABLE TITLE. Grantor covenants and represents that the Grantor are the sole owners and are seized of the Easement Area in fee simple and have good right and marketable title to grant and convey this Conservation Easement; that the portions of the Real Estate within the Easement Area are free and clear of any and all encumbrances, including but not limited to, any deeds of trust or mortgages not subordinated to this Conservation Easement. Grantor further warrants that Grantee shall have the use of all benefits derived from and arising out of this Conservation Easement, and that Grantor will warrant and defend title to the Real Estate against the claims of all entities.

24) NOTICES. Any notices required by this Conservation Easement shall be in writing and shall be personally delivered or sent by first class mail, to Grantor and Grantee, respectively, at the following addresses, unless a party has been notified by the other of a change of address.

To Grantor: Mr. John Doe
246 Highland Road
Philippi, WV 26416

To Grantee: WV In-Lieu Fee Coordinator
WVDEP Division of Water and Waste Management
601 57th Street, S.E.
Charleston, WV 25304

To Corps: U.S. Army Corps of Engineers, Huntington District
Energy Resource Branch
502 Eighth Street
Huntington, WV 25701-2070

U.S. Army Corps of Engineers, Pittsburgh District
Regulatory Branch, William S. Moorehead Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222-4186

25) ENVIRONMENTAL CONDITION. Grantor covenant and represent that no hazardous substance or toxic waste exists nor has been generated, treated, stored, used, disposed of, or deposited in or on the Easement Area, and that there are not now any underground storage tanks located on the Easement Area. If, at any time, there occurs, or has occurred, a release in, on, or about the Easement Area of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water or soil, or in any way harmful or threatening to human health or the environment, Grantor agree to take all steps necessary to assure its containment and remediation, including any cleanup that may be required, unless the release was caused by Grantee, in which case Grantee shall be

responsible therefor. Nothing in this Conservation Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability to Grantee to exercise physical or managerial control over the day-to-day operations of the Easement Area, or any of Grantor's activities on the Easement Area, or otherwise to become an operator with respect to the Easement Area within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), and any corresponding state statute.

- 26) ENTIRE AGREEMENT. This Conservation Easement sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Easement. If any provision of this Conservation Easement is found to be invalid, the remaining provisions shall not be altered thereby. If a court of competent jurisdiction voids or invalidates the application of any provision of this Conservation Easement to a person or circumstance, such action shall not affect the application of the provision to any other person or circumstances.
- 27) PARTIES. Every provision of this Conservation Easement that applies to the Grantor, Grantee and each Beneficiary shall also apply to their respective heirs, executors, administrators, personal representatives, agents, assigns, and all other successors as their interests may appear.
- 28) RECORDING. This Conservation Easement shall be perpetual, and is an easement in gross, runs with the land and is enforceable by Grantee against Grantor, Grantor's personal representatives, heirs, successors and assigns, lessees, agents and licensees. In order to ensure the perpetual enforceability of the Conservation Easement, the Grantee or a Beneficiary is authorized to re-record this instrument or any other appropriate notice or instrument.
- 29) MERGER. The parties agree that the terms of this Easement shall survive any merger of the fee and easement interests in the Easement Area.
- 30) LIENS. No provisions of this Conservation Easement should be construed as impairing the ability of Grantor to use this Easement Area as collateral for subsequent borrowing, provided that any mortgage or lien arising from such a borrowing shall be subordinate to this Conservation Easement.
- 31) ACCEPTANCE. As attested by the signature of the authorized representative of the West Virginia Land Stewardship Corporation affixed hereto, the Grantee hereby accepts without reservation the rights and responsibilities conveyed by this Conservation Easement. This Conservation Easement is to be effective the date recorded in the Office of the County Clerk of Barbour County, West Virginia. Grantee makes no express or implied warranties regarding whether any tax benefits will be available to Grantor from donation of this easement.

TO HAVE AND TO HOLD, this Grant of Conservation Easement unto the Grantee, its successors and assigns, forever.

The total consideration paid for said easement is \$X.

IN WITNESS WHEREOF, the Grantor and Grantee, intending to legally bind themselves, have set their hands and seals on the date first written above.

GRANTOR / LANDOWNER:

Name (Print) _____

Signature _____ Date _____

STATE OF WEST VIRGINIA
COUNTY OF _____

I, _____, Notary Public for said County and State, certify that
_____ personally came before me this _____ day of _____
_____, 2019 and acknowledged that he / she is the authorized landowner of the
Parcel referenced above, and that by authority duly given, the foregoing instrument was signed by
him / her as owner.

Notary Public, State of West Virginia

Printed Name: _____

Notary Commission #: _____

My Commission Expires: _____

(SEAL)

GRANTEE:

Name (Print) _____

Signature _____ Date _____

STATE OF WEST VIRGINIA
COUNTY OF _____

I, _____, Notary Public for said County and State, certify that
_____ personally came before me this _____ day of _____
_____, 2019 and acknowledged that he / she is the authorized landowner of the
Parcel referenced above, and that by authority duly given, the foregoing instrument was signed by
him / her as owner.

Notary Public, State of West Virginia

Printed Name: _____

Notary Commission #: _____

My Commission Expires: _____

(SEAL)

2. West Virginia Stream and Wetland Valuation Metric

(WV SWVM Sole Preservation- Working Draft September 2011)

West Virginia Stream and Wetland Valuation Metric v2.1

(September 2017)

The SWVM is composed of six tabs including the following: Instructions, Stream Parts I-II, Stream Parts III-VI, Multiple Site Unit Comparison, Wetland Parts I-III and Wetland Parts IV-V. The SWVM has been designed to indicate where data entry is required. All cells or fields highlighted in red shall be populated by the applicant, consultant or practitioner. Below are descriptions of the information or data being requested:

Stream Valuation Metric:

Stream Parts I-II

Cell B1 [USACE File No./Project Name] -Enter USACE File Number as well as the overall project name. Mining-related projects should also include the SMCRA Permit No in this field.

Cell L1 [Impact Site Lat.] – Enter latitude coordinate in NAD 83 Decimal Degrees

Cell N1 [Impact Site Long.] – Enter longitude coordinate in NAD 83 Decimal Degrees

Cell R1 [Weather] – Enter the weather conditions on the date the assessment was performed. Ex. Cloudy, 40 degrees.

Cell X1 [Date] – Enter date of the assessment being performed

Cell B2 [Stream Classification] – Enter the classification of stream being assessed. Choices are provided from the drop-down list (i.e. ephemeral, intermittent or perennial)

Cell L2 [Impact Stream/Site ID and Site Description] – Enter the stream name, stream segment identifier (which may correlate to a drawing), % streambed slope, watershed acreage and riparian condition (i.e. mature tree stratum)

Cell W2 [Mitigation Stream Class/ Site ID Description] - Enter stream classification for stream that mitigation will be performed on and stream segment identifier (which may correlate to a drawing), % streambed slope, watershed acreage and riparian condition (i.e. mature tree stratum)

Cell B3 [Stream Impact Length] – Enter the length of the impact (in linear feet)

*Note: when using this metric to only assess mitigation (i.e. preservation) no impact length should be entered and no data is necessary in Column No. 1-Impact Existing Condition (Debit)

Cell F3 [Form of Mitigation] – Enter the form of mitigation. Choices are provided from the drop-down list

Cell L3 [Mitigation Site Lat.] – Enter the mitigation site latitude coordinate in NAD 83 Decimal Degrees

Cell N3 [Mitigation Site Long.] – Enter the mitigation longitude coordinate in NAD 83 Decimal Degrees

Cell R3 [Precipitation Past 48 Hrs] – Enter the past 48 hrs precipitation for the impact site being assessed

Cell X3 [Mitigation Length] – Enter the linear feet of the compensatory mitigation proposed

COLUMN No. 1 – Impact Existing Condition (Debit) – This column establishes the baseline conditions of the proposed impact site. All projects proposing an impact (debit) to waters of the U.S. shall enter data in this column, as follows:

(WV SWVM Sole Preservation- Working Draft September 2011)

Part I – Physical, Chemical and Biological Indicators

Cells B9 – B11 [HGM] – Input Hydrology, Biogeochemical Cycling and Habitat Functional Capacity Index (FCI) scores generated by completing the HGM assessment, when applicable. HGM data forms should accompany the submittal of SWVM assessments. An average is taken between the three HGM FCI scores. This is then averaged with the overall SWVM score to indicate a final index score.

Cell B5 - Select Impact Stream Classification

Cell D7 - Input Percent Stream Channel Slope for Impact Stream

Cells D15 – D25 [Physical Indicator] - Indicate the physical condition of the stream by applying the USEPA RBP. The Physical descriptor for streams relies upon the data collected for the USEPA RBP Stream Data Sheet. This part of the metric allows the user to choose the High Gradient or Low Gradient Stream Data Sheet, as applicable. This portion of the Part I is required for all stream classifications. When completing impact and mitigation site assessments on high-gradient Ephemeral streams, practitioners should insert “0”s in fields 1, 3, 5 and 7 of the USEPA RBPs.

Cells D31, D34 and D37 [Chemical Indicator] - Indicate the chemical condition or water quality of the stream by inputting the data, which is based upon key parameters historically utilized by the WVDEP. This portion of Part I shall be completed for waadeable perennial, intermittent and ephemeral stream classifications (where applicable). Ephemeral stream water quality data shall be obtained during (or a short period after) a precipitation event within the reach being assessed or immediately downstream. When the immediate downstream method is necessary this shall be noted in Cell L2 or at the bottom of the assessment sheet. In the event data for these fields are not provided, good water quality will be assumed.

Cell D42 [Biological Indicator] - Indicate the biological condition of the stream by inputting the data based upon the West Virginia Stream Condition Index (WVSCI) of the WVDEP Save Our Stream Protocol. It is recommended this portion of Part I be completed for perennial and intermittent stream classifications. In the event this data cannot be obtained (i.e. ephemeral stream), the metric will generate an index score based upon the Physical and Chemical Indicators.

COLUMN No. 2 – Mitigation Existing Condition (Credit) - All projects proposing compensatory mitigation (credit) to waters of the U.S. shall enter data in Column No. 2. This column is utilized to establish the baseline conditions for the mitigation site. In cases where an impact and mitigation will occur at the exact same site (i.e. sediment pond construction and restoration), this column should reflect baseline mitigation conditions as “0”[1].

Cell G5 - Select Mitigation Stream Classification

Cell I7 - Input Percent Stream Channel Slope for Mitigation Stream

Part I – Physical, Chemical and Biological Indicators

*Reference Part I above.

COLUMN No. 3 – Mitigation Projected at Five Years Post Completion (Credit) - All projects proposing compensatory mitigation (credit) to waters of the U.S. shall enter data in Column No. 3. This column is utilized to establish the projected condition of the site after five years of completion. Generally, there should not be a dramatic or substantial increase in functional unit scores between year 5 and 10 projected assessments (i.e. the duration of total stream buffer revegetation will typically be the last element to reach maturity for optimal functional input). The five year post-completion benchmark is also utilized to clearly identify performance standards and success criteria, which will be incorporated into Department of the Army Permits as special conditions (when it is determined five years of monitoring is appropriate by USACE).

For example purposes, a sediment pond restoration site (mitigation site) which formerly required total elimination of the riparian vegetative buffer and received a full re-vegetation application of native tree, shrub and grass stratum species would be expected to score within the following USEPA RBP individual parameter ranges (High Gradient Data Sheet) after five years of restoration.

(WV SWVM Sole Preservation- Working Draft September 2011)

USEPA RBP									
Epifaunal Substrate	Embeddedness	Velocity Depth Regime	Sediment Deposition	Channel Flow Status	Channel Alteration	Frequency of Riffles	Bank Stability (LB&RB)	Vegetative Protection (LB&RB)	Riparian Vegetative Zone (LB&RB)
8-12	8-12	6-10	8-13	0-20	11-15	11-18	12-16	8-12	0-20

Part I – Physical, Chemical and Biological Indicators

*Reference Part I above.

COLUMN No. 4 – Mitigation Projected at Ten Years Post Completion (Credit) - All projects proposing compensatory mitigation (credit) to waters of the U.S. shall enter data in Column No. 4. This column is utilized to establish the projected condition of the site after ten years of completion. The ten year post-completion benchmark is also utilized to clearly identify performance standards and success criteria, which will be incorporated into Department of the Army Permits as special conditions. The ten year post-completion benchmark is also utilized to clearly identify performance standards and success criteria, which will be incorporated into Department of the Army Permits as special conditions (when it is determined ten years of monitoring is appropriate by USACE).

Part I – Physical, Chemical and Biological Indicators

*Reference Part I above.

COLUMN No. 5 – Mitigation Projected Upon Maturity (Credit)

All projects proposing compensatory mitigation (credit) to waters of the U.S. shall enter data in Column No. 5. This column is utilized to establish the projected condition of the site at maturity. The full restoration of a riparian buffer zone may require 40 or more years of sustained growth to contribute detritus and large woody debris, and provide light and temperature regulation.

Part I – Physical, Chemical and Biological Indicators

*Reference Part I above.

PART II – Index and Unit Score - No data entry is required in Part II, the Index Score is multiplied by the linear feet of impact (debit) to generate a raw Unit Score.

Stream Parts III-VI

Part III- Impact Factors

Cell C8 [Temporal Loss-Construction] - Enter the number of years reflecting the duration of aquatic functional loss between the time of impact (debit) and completion of compensatory mitigation (credit). For example, if Permittee-Responsible On-site mitigation is proposed and it will be five (5) years before the mitigation will be completed then enter a "5".

DEFAULT VALUES: The default value for ILF is 4 years and Mitigation Banking (provided Mitigation Bank credits have been approved and are available) is 0 years.

Cell C19 [Temporal Loss-Maturity] - Enter the number of years representing the period between completion of compensatory mitigation measures and the time required for maturity, as it relates to function (i.e. the full restoration of a riparian buffer zone may require 40 or more years of sustained growth to contribute detritus and large woody debris and provide light and temperature regulation).

Cell H7 [Long-term Protection] - Enter the number of years representing the period of protection proposed for the mitigation site. Long-term protection is obtained via conservation easements or deed restrictions to ensure sustainable gains in values. Perpetual protection should be entered as "101" or "Perpetual".

DEFAULT VALUES: The default value for Mitigation Banking and/or ILF is "Perpetual" since these projects are required by the IRT to obtain perpetual protection.

(WV SWVM Sole Preservation- Working Draft September 2011)

Part IV- Comparison of Unit Scores and Projected Balance - No data entry is required. This part depicts the "Final Unit Score (debit)" in comparison with the Mitigation Existing Condition (credit), Mitigation Projected Upon Completion (credit) and the Mitigation Projected at Maturity (credit). The balance of the "Mitigation Projected at Maturity" shall be equal to or greater than the "Final Unit Score (debit)" to adequately offset the proposed impacts and be compliant with the national policy of "no net loss".

Part IV- Index to Unit Score Conversion - No data entry is required. This section displays the final index score, which is utilized to generate a final debit unit score. For your convenience, this section also indicates the LIF amount that would be required to offset the final debit units.

*Note: All forms of compensatory mitigation now focus upon offsetting the final (debit) units rather than the linear feet except where the SWVM is not applicable (i.e. non-wadeable stream impacts).

Part V – Comparison of Unit Scores and Projected Balance - No data entry is required. This part depicts the "Final Unit Score (debit)" in comparison with the Mitigation Existing Condition-Baseline (credit), Mitigation Projected at Five Years (credit), Mitigation Projected at Ten Years (credit), and Mitigation Projected at Maturity (credit). Functional lift is defined as the balance between the "Mitigation Existing Condition-Baseline" and "Mitigation Projected at Maturity". The balance of the "Mitigation Projected at Maturity" shall be equal to or greater than the "Final Unit Score (debit)" to adequately offset the proposed impacts and be compliant with the national policy of "no net loss".

*Note: The yellow highlighted cells (Cells A43, C43 and D43) may be cut and copied to the next tab "Multiple Site Unit Comparison" for compiling data on multiple streams or stream segments. For submittal purposes, the Multiple Site Unit Comparison should be accompanied by individual Stream Valuation Metric spreadsheets for each stream or stream segment.

Part VI - Mitigation Considerations

Extent of Stream Restoration

Cells D32-D34 – Reference the IRT defined levels of Restoration and place an "x" in the appropriate Stream Restoration Level.

Extended Upland Buffer Zone

Cells F34-F37 – Insert the width of the buffer zone up to 150 feet from each stream channel side.

Cells H34-H35 and H37-H38 – Select from pull down box the class of buffer preservation and/or revegetation being performed.

Multiple Site Unit Comparison

When assessing multiple reaches or streams Cell Nos. A43-C43 should be copied and pasted into this table, which keeps a running tally of the debits and credits. When pasting choose "Paste Special" and then select "values and number format".

Wetland Valuation Metric:

Wetland Parts I-III

Cell B1 [USACE File No./Project Name] -Enter USACE File Number as well as the overall project name. Mining-related projects should also include the SMCRA Permit No in this field.

Cell L1 [Lat.] – Enter latitude coordinate in NAD 83 Decimal Degrees

Cell N1 [Long.] – Enter longitude coordinate in NAD 83 Decimal Degrees

Cell G2 [Stream/Site ID and Site Description] – Enter the wetland name, wetland identifier (which may correlate to a drawing), watershed acreage and riparian condition (i.e. mature tree stratum)

Cell B3 [Wetland Impact Acreage] – Enter the acreage of the impact

Cell F3 [Form of Mitigation] – Enter the form of mitigation. Choices are provided from the drop-down list

(WV SWVM Sole Preservation- Working Draft September 2011)

Cell M3 [Mitigation Acreage] - Enter the acreage of the compensatory mitigation proposed

Cell B4 [Date] - Enter date of the assessment being performed

Cell G3 [Weather Conditions] - Enter the weather conditions from the site during the assessment

Cell M4 [Precipitation Past 48 Hrs] - Enter the past 48 hrs precipitation for the site being assessed

Part I- Wetland Indicators

Cells A7 - A18 [Wetland ID] - Enter the wetland identification for each wetland impact (which may correspond to a drawing)

Cells B7 - B18 [Existing Classification] - Enter the wetland classification being assessed. Choices are provided from the drop-down list.

Cells D7 - D18 [Impacts] - Enter the amount of impacts (in acres) for each wetland.

Cells F7 -F18 [Mitigation Classification] - Enter the wetland classification being mitigated. Choices are provided from the drop-down list.

Part II- Unit Scores - No data entry is required. This part indicates the total Unit Scores or Replacement Units for each individual classification of wetlands.

Part III- Advanced Mitigation - Enter a "Yes" or "No" to indicate compensatory mitigation has been completed and determined sustainable in advance of any proposed impacts.

DEFAULT VALUES: Approved forms of advanced mitigation determined to be sustainable may be provided to offset impacts on a 1:1 ratio, within the same wetland classification.

Estimated In-Lieu Fee Costs - A comparison of the In-Lieu Fee costs associated with the proposed impacts is provided for reference purposes.

Wetland Parts IV-V

Part IV- Factors

Cell C6 [Temporal Loss-Construction] - Enter the number of years reflecting the duration of aquatic functional loss between the time of impact (debit) and completion of compensatory mitigation (credit). For example, if Permittee-Responsible On-site mitigation is proposed and it will be five (5) years before the mitigation will be completed then enter a "5".

DEFAULT VALUES: The default value for ILF is 4 years and Mitigation Banking (providing Mitigation Bank credits have been approved and are available) is 0 years.

Cell C17 [Temporal Loss-Maturity] - Enter the number of years representing the period between completion of compensatory mitigation measures and the time required for maturity, as it relates to function.

Cell H5 [Long-term Protection] - Enter the number of years representing the period of protection proposed for the mitigation site. Long-term protection is obtained via conservation easements or deed restrictions to ensure sustainable gains in values. Perpetual protection should be entered as "101" or "Perpetual".

DEFAULT VALUES: The default value for Mitigation Banking and/or ILF is "Perpetual" since these projects are required to obtain perpetual protection.

Extended Upland Buffer Zone

Cells F16 - Insert the average width of the buffer zone up to 150 feet from wetland boundary.

Cells H16-H17 - Select from pull down box the class of buffer preservation and/or revegetation being performed.

(WV SWVM Sole Preservation- Working Draft September 2011)

Part V- Final Unit Score - This part is utilized as a reference for obtaining the Replacement Index (debit), Final Unit Score to Offset (credit) and the balance. The Final Unit Score has been adjusted to compensate for the factors input in Part IV and is the final figure necessary to be entirely offset by mitigation (credit).

Cell D25 [Form of Mitigation] - Enter the form of mitigation from the drop-down list.

Cells H25 - H28 [Applicant Input Mitigation (acres)] - Enter the acreage for each classification of wetland mitigation being proposed. The balance should be equal to or greater than the "Final Unit Score to Offset (credit)" to provide an adequate level of compensatory mitigation for offsetting the proposed impacts and be compliant with the national policy of "no net loss".

West Virginia Stream and Wetland Valuation Metric (WVSM)
Version 2.1, September 2017

USACE FILE NO./ Project Name: (2.7, Sept 2015)		IMPACT COORDINATES: (in Decimal Degrees)		Lat	Lon	WEATHER:	Sunny	DATE:	8/15/2015
IMPACT STREAM/SITE ID AND SITE DESCRIPTION: (in checked size (none), a sublot or easement)					MITIGATION STREAM CLASS, SITE ID AND SITE DESCRIPTION: (in checked size (none), a sublot or easement)				
STREAM IMPACT LENGTH:		FORM OF MITIGATION:		RESTORATION (Levels I-III)	MIT COORDINATES: (in Decimal Degrees)	Lat	Lon	PRECIPITATION PAST 48 HRS:	Mitigation Length:
Column No. 1- Impact Existing Condition (Debit)		Column No. 2- Mitigation Existing Condition - Baseline (Credit)		Column No. 3- Mitigation Projected at Five Years Post Completion (Credit)		Column No. 4- Mitigation Projected at Ten Years Post Completion (Credit)		Column No. 5- Mitigation Projected at Maturity (Credit)	
Stream Classification:		Stream Classification:		Stream Classification:		Stream Classification:		Stream Classification:	
Percent Stream Channel Slope		Percent Stream Channel Slope		Percent Stream Channel Slope		Percent Stream Channel Slope		Percent Stream Channel Slope	
HGM Score (attach data forms)		HGM Score (attach data forms)		HGM Score (attach data forms)		HGM Score (attach data forms)		HGM Score (attach data forms)	
Average		Average		Average		Average		Average	
Hydrology		Hydrology		Hydrology		Hydrology		Hydrology	
Biogeochemical Cycling		Biogeochemical Cycling		Biogeochemical Cycling		Biogeochemical Cycling		Biogeochemical Cycling	
Habitat		Habitat		Habitat		Habitat		Habitat	
PART I - Physical, Chemical and Biological Indicators		PART I - Physical, Chemical and Biological Indicators		PART I - Physical, Chemical and Biological Indicators		PART I - Physical, Chemical and Biological Indicators		PART I - Physical, Chemical and Biological Indicators	
PHYSICAL INDICATOR (Applies to all stream classifications)		PHYSICAL INDICATOR (Applies to all stream classifications)		PHYSICAL INDICATOR (Applies to all stream classifications)		PHYSICAL INDICATOR (Applies to all stream classifications)		PHYSICAL INDICATOR (Applies to all stream classifications)	
USPA/IRIP (High Gradient Data Sheet)		USPA/IRIP (Low Gradient Data Sheet)		USPA/IRIP (High Gradient Data Sheet)		USPA/IRIP (High Gradient Data Sheet)		USPA/IRIP (High Gradient Data Sheet)	
1. Epifaunal Substrate/Awakenable Cover		1. Epifaunal Substrate/Awakenable Cover		1. Epifaunal Substrate/Awakenable Cover		1. Epifaunal Substrate/Awakenable Cover		1. Epifaunal Substrate/Awakenable Cover	
2. Embeddedness		2. Embeddedness		2. Embeddedness		2. Embeddedness		2. Embeddedness	
3. Velocity/Depth Regime		3. Velocity/Depth Regime		3. Velocity/Depth Regime		3. Velocity/Depth Regime		3. Velocity/Depth Regime	
4. Sediment Deposition		4. Sediment Deposition		4. Sediment Deposition		4. Sediment Deposition		4. Sediment Deposition	
5. Channel Flow Status		5. Channel Flow Status		5. Channel Flow Status		5. Channel Flow Status		5. Channel Flow Status	
6. Channel Alteration		6. Channel Alteration		6. Channel Alteration		6. Channel Alteration		6. Channel Alteration	
7. Frequency of Barbed (or bands)		7. Frequency of Barbed (or bands)		7. Frequency of Barbed (or bands)		7. Frequency of Barbed (or bands)		7. Frequency of Barbed (or bands)	
8. Bank Stability (L & R)		8. Bank Stability (L & R)		8. Bank Stability (L & R)		8. Bank Stability (L & R)		8. Bank Stability (L & R)	
9. Vegetative Protection (L & R)		9. Vegetative Protection (L & R)		9. Vegetative Protection (L & R)		9. Vegetative Protection (L & R)		9. Vegetative Protection (L & R)	
10. Riparian Vegetative Zone Width (L & R)		10. Riparian Vegetative Zone Width (L & R)		10. Riparian Vegetative Zone Width (L & R)		10. Riparian Vegetative Zone Width (L & R)		10. Riparian Vegetative Zone Width (L & R)	
Local IRIP Score		Local IRIP Score		Local IRIP Score		Local IRIP Score		Local IRIP Score	
Sub-Total		Sub-Total		Sub-Total		Sub-Total		Sub-Total	
CHEMICAL INDICATOR (Applies to intermittent and perennial streams)		CHEMICAL INDICATOR (Applies to intermittent and perennial streams)		CHEMICAL INDICATOR (Applies to intermittent and perennial streams)		CHEMICAL INDICATOR (Applies to intermittent and perennial streams)		CHEMICAL INDICATOR (Applies to intermittent and perennial streams)	
WQDEP Water Quality Indicators (General)		WQDEP Water Quality Indicators (General)		WQDEP Water Quality Indicators (General)		WQDEP Water Quality Indicators (General)		WQDEP Water Quality Indicators (General)	
Specific Conductivity		Specific Conductivity		Specific Conductivity		Specific Conductivity		Specific Conductivity	
pH		pH		pH		pH		pH	
DO		DO		DO		DO		DO	
Sub-Total		Sub-Total		Sub-Total		Sub-Total		Sub-Total	
BIOLOGICAL INDICATOR (Applies to intermittent and perennial streams)		BIOLOGICAL INDICATOR (Applies to intermittent and perennial streams)		BIOLOGICAL INDICATOR (Applies to intermittent and perennial streams)		BIOLOGICAL INDICATOR (Applies to intermittent and perennial streams)		BIOLOGICAL INDICATOR (Applies to intermittent and perennial streams)	
WV Stream Condition Index (WVSCI)		WV Stream Condition Index (WVSCI)		WV Stream Condition Index (WVSCI)		WV Stream Condition Index (WVSCI)		WV Stream Condition Index (WVSCI)	
Sub-Total		Sub-Total		Sub-Total		Sub-Total		Sub-Total	
PART II - Index and Unit Score		PART II - Index and Unit Score		PART II - Index and Unit Score		PART II - Index and Unit Score		PART II - Index and Unit Score	
Index		Index		Index		Index		Index	
Linear Feet		Linear Feet		Linear Feet		Linear Feet		Linear Feet	
Unit Score		Unit Score		Unit Score		Unit Score		Unit Score	
0.450		0		0		0		0.90633333	

West Virginia Stream and Wetland Valuation Metric (WVVM)
Version 2.1, September 2011

PART III - Impact Factors (See instruction page to insert default values for MITIGATION BANKING and ILF)			
Temporal Loss-Construction		Long-term Protection	
<small>*Note: Reflects variation of equals functional flow between two forms of an impact (create and completion of compensatory mitigation) (credit)</small>			
Years		% Add. Mitigation and Monitoring Period	Long-Term Protection (Years)
Sub-Total	0		
Temporal Loss Maturity		90% - 20 Year Monitoring	
<small>*Note: Period between completion of compensatory mitigation measures and the time required for maturity, as it relates to creation (i.e. maturity of tree, stream) to project impacts (create and completion of compensatory mitigation or wetland/buffer creation)</small>			
% Add. Mitigation	Temporal Loss Maturity (Years)	Sub-Total	0.225
Sub-Total	0		

PART IV - Index to Unit Score Conversion			
Final Index Score (Debit)	Linear Feet	Unit Score (Debit)	ILF Costs (Offsetting Debit Units)
0.675	0	0	\$0.00

PART V - Comparison of Unit Scores and Projected Balance						
Final Unit Score (Debit) (No Net Loss Value)	0	Mitigation Existing Condition - Baseline (Credit)	Mitigation Projected at Five Years Post Completion (Credit)	Mitigation Projected at Ten Years Post Completion (Credit)	Mitigation Projected At Maturity (Credit)	
FINAL PROJECTED NET BALANCE			0	0	0	0

Part VI - Mitigation Considerations (incentives)						
Extent of Stream Restoration			Extended Upland Buffer Zone			
<small>*Note: Reference the instructions to insert the correct restoration level and (where) for your project. *Note: Place an "X" in the appropriate category (only select one).</small>			<small>*Note: Reference instructions at handout for the definitions of the buffer zone mitigation extent and types (debit). *Note: Enter the value for each debit into cell (debit) and (right) bank. *Note: Select the appropriate mitigation type.</small>			
<input checked="" type="checkbox"/> Restoration Level 1			Buffer Width		Left Bank	
<input type="checkbox"/> Restoration Level 2			0.50	\$1,750	Preservation and Re-vegetation	
<input type="checkbox"/> Restoration Level 3					Preservation and Re-vegetation	
			Buffer Width		Right Bank	
			0.50	\$1,750	Preservation and Re-vegetation	
					Preservation and Re-vegetation	
Compensatory Mitigation Plan incorporates HUC 12 based watershed approach? (Yes or No) <small>*Note: HUC 12 based watershed approach incorporates stream channel restoration practices</small>			Average Buffer Width/Feet	0		
Site	Impact Unit Yield (Debit)	Mitigation Unit Yield (Credit)	Straight Preservation Ratio (v2.1, Sept 2010)			
	0	0.675/0.1	Final Mitigation Unit Yield			
			0.675/0			

3. West Virginia In-Lieu Fee Participant Information Sheet

West Virginia In-Lieu Fee Program ~ Participant Information Sheet

Corps ID No.													
WQC No.													
Project Name													
Applicant	Name												
	Address												
	Phone Number												
Project Information	County												
	City												
	Latitude												
	Longitude												
	8 Digit HUC												
	Perennial Stream Impact¹	_____ Linear Feet _____ Impact Unit Yield											
	Perennial Stream ILF (\$)												
	Intermittent Stream Impact¹	_____ Linear Feet _____ Impact Unit Yield											
	Intermittent Stream ILF (\$)												
	Ephemeral Stream Impact¹	_____ Linear Feet _____ Impact Unit Yield											
	Ephemeral Stream ILF (\$)												
	Wetland Impact²	<table border="0"> <tr> <td>PEM</td> <td>_____ Acres</td> <td>_____ Debits</td> </tr> <tr> <td>PSS</td> <td>_____ Acres</td> <td>_____ Debits</td> </tr> <tr> <td>PFO</td> <td>_____ Acres</td> <td>_____ Debits</td> </tr> <tr> <td>Total</td> <td></td> <td>_____ Debits</td> </tr> </table>	PEM	_____ Acres	_____ Debits	PSS	_____ Acres	_____ Debits	PFO	_____ Acres	_____ Debits	Total	
PEM	_____ Acres	_____ Debits											
PSS	_____ Acres	_____ Debits											
PFO	_____ Acres	_____ Debits											
Total		_____ Debits											
Wetland ILF (\$)													

¹ List both linear feet and impact unit yield (debit) from SWVM. Impact unit yield should be rounded to hundredth (0.01).

² List both acres and adjusted final unit score to offset (debit) from SWVM. Debits should be rounded to nearest thousandth (0.001).

Submit table (email or hard copy) to:

Mr. Dallas Scott Settle
 In-Lieu Fee Program
 West Virginia Department of Environmental Protection
 601 57th Street, SE
 Charleston, West Virginia 25304
Dallas.S.Settle@wv.gov

4. West Virginia In-Lieu Fee Credit Request Form

West Virginia In-Lieu Fee Credit Request Form

Project Name: _____ WQC No. (If known): _____
USACE File No. (If Known): _____

Applicant Name: _____ Consultant Name: _____
Address: _____ Address: _____
Phone Number: _____ Phone Number: _____
E-mail: _____ E-mail: _____

Requested Stream Credits (Using WV SWVM): _____
Requested Wetland Credits (Using WV SWVM): _____
Total Payment: \$ _____

Project Location: HUC 8 _____
Latitude/Longitude (in decimal degree) _____

Please forward this form to: In-Lieu Fee Program Coordinator
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304

Applicant Signature: _____ Date: _____

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

The requested amount of advance credits is 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.*

5. Payment Notification Letter to USACE

Date

U.S. Army Corps of Engineers
Huntington District
Energy Resource Branch
502 Eighth Street
Huntington, WV 25701-2070

Re: Permittee Name, Project Name
USACE Permit number:
HUC 8:
Corps District:
County, West Virginia

Chief Regulatory Division:

The West Virginia Department of Environmental Protection-Division of Water and Waste Management (WVDEP-DWWM) received payment in the amount of **\$000,000.00** to meet the mitigation requirements for the above referenced project: **wetland mitigation = 00 credits** and **stream mitigation = 00 credits**. 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 between the U.S. Army Corps of Engineers and the WVDEP.

Should you need any additional assistance or information please contact me at (304) 926-0499 ext. 1829 or

Sincerely,

In Lieu Fee Program Coordinator

cc:
Permittee's mailing address
Huntington or Pittsburgh District Corps of Engineers—Project Manager

6. WMA Management Plan Addendum

****THIS DOCUMENT SERVES AS A TEMPLATE ONLY. ALL BLANKS AND SPECIFIC REFERENCES MUST BE ALTERED TO REFLECT THE SPECIFIC INTENT OF THE PARTIES INVOLVED****

Addendum to Green Bottom WMA Land Management Plan

A. Purpose

The purpose of this Addendum is to document measures that have been or will be employed to protect the Green Bottom Wildlife Management Area In Lieu Fee (ILF) Stream and Wetland Mitigation Project and its associated wetland buffers. The Addendum will outline specific protection measures agreed to by the WV Division of Natural Resources (DNR), WV Department of Environmental Protection (DEP), and the US Army Corps of Engineers (USACE) that will serve to uphold the ecological integrity of the project area in perpetuity.

B. Background

The Green Bottom WMA ILF Mitigation project will take place within the Green Bottom WMA. The property is owned by the WVDNR. The project will be administered by the WVDEP and overseen by the USACE. The proposed ILF project will create wetland mitigation credit units to offset impacts associated with previously permitted activities within the designated service areas. The project will entail creating and restoring wetlands and planting and preserving buffers around them. For the purpose of this agreement, the Project Area will be defined as the wetlands and a 25' buffer extending outwards from each edge of the aforementioned wetland.

C. Agreements

1. Use of the Project area

The public may engage in all recreational uses of the project area, including but not limited to hiking, touring, swimming, camping, biking, hunting, and fishing that require no development of the land and are consistent with conservation values.

2. Activities for Educational Purposes or to Foster Tourism

Activities or businesses undertaken for educational purposes or to foster tourism may be conducted on the project area to foster rural economic uses while protecting the rural character of the project area. Such activities must be compatible with and supportive of the rural character of the project area.

3. Transfer of Development Rights

The Project Area and any portion thereof shall not be included as part of the gross area of other Property not subject to this Addendum for the purposes of determining density, lot coverage, or open spaces requirements under otherwise applicable laws, regulations or ordinances controlling land use and building density. No development rights shall be transferred to any other lands pursuant to a transferable development rights scheme or cluster development arrangement or otherwise; provided, however, that with prior written permission of Grantees.

4. Subdivision

It is the intention of Grantors to protect the open space values of the project area. Accordingly, subdivision of the project area is prohibited.

5. Removal of Natural Resources

Ditching, draining, diking, filling, excavating, removal of topsoil or sand, gravel or rock on the project area is prohibited, except when such activities in accordance with a conservation plan, and are restored within a reasonable time. The exploration, development, mining or extraction of minerals, oil, gas or any other hydrocarbon substance from the project area is prohibited.

6. Management of Woodland Resources

Removal, destruction and cutting or harvesting of trees, shrubs, and other woodland resources is prohibited except:

- To the extent necessary for application of sound disease or insect control practices and removal of non-native invasive species;
- To control or prevent fire, damage to improvements, and the endangerment of life;
- To remove an impediment that is blocking access to the property through existing roads and trails.

7. Prescribed Burning

Prescribed burning at the project area is prohibited, except for sound disease or non-native invasive species control practices.

8. Mowing

Mowing of the project area is prohibited, except for non-native invasive species control practices.

9. Other Construction

Except as specifically permitted above, there shall be no constructing or placing of any buildings; manufactured homes; swimming pools or other recreational facilities; commercial lighting or any other temporary or permanent structure or facility within the Project Area.

11. Waste

Dumping or storage of trash, garbage, hazardous substances, abandoned vehicles or machines or other material in the Project Area is prohibited.

12. Streams, Wetland and Water Bodies

There shall be no pollution, alteration, depletion of surface water, natural water courses, lakes, ponds, marshes, wetlands, springs, subsurface water or any other water bodies, nor shall there be activities conducted on the Project Area which would be detrimental to water purity or which could alter natural water level and/or flow in or over the project area.

13. Effective Date

This Addendum will become effective with the approval of the final mitigation plan by the USACE and shall remain in effect in perpetuity.

14. Termination and Amendments

This Addendum is intended to remain in full force and effect in perpetuity. Any modification or termination of this Addendum must be agreed to by all parties.

7. Long Term Stewardship Calculator

LONG-TERM STEWARDSHIP COSTS CALCULATOR

NOTE: Enter values in blue-shaded cells.
Click on individual Tasks and Descriptions for additional guidance.

Project Name:	Acres:	State (or state equivalent):	Country:	Prepared by:	Date:
Lakin State Farm	100	WV	USA	Scott Settle	09/27/16

Unit Cost Estimates:			
	Quantity	Units	Cost
Regular staff hourly rate (inc benefits)		hour	\$ 75.00
Short-term staff hourly rate (inc benefits)		hour	\$ 100.00
<i>Click + to the left to expand additional hourly rates (see Instructions below).</i>			
Travel Costs:			
Mileage OR cost (round-trip)	500	miles	\$ -
Mileage rate	0.58	\$/mile	
Vehicle Travel Cost:			\$ 290.00
Overnight lodging cost (per night)	\$ 150.00	\$/night	
Per diem (meals)	\$ 56.00	\$/day	

Additional Rates:	
Capitalization rate	3.00%
% of annual costs covered by fund (50% or 100%)	100%
Contingency (10-20%)	15%
Administrative (recommended min 10%)	20%

Site Protection Monitoring and Easement Stewardship Costs

NOTE: Enter values in blue-shaded cells. Click on individual Tasks and Descriptions for additional guidance.

Stewardship Tasks	Description	Regular Staff (hours)	Short-term Staff (hours)	Quantity	Unit	Unit Cost	Extended Cost	Recurrence Interval (years)	Annual Cost	Subtotal	Notes (explain assumptions used in cost estimate; indicate corresponding LTMP task)	Responsible Party
Monitoring the site protection mechanism										\$ 2,217.50		
Preparation for site visit	Staff time	1	1		hours		\$ 175.00	1	\$ 175.00			
Travel expenses occurring annually	Number of trips annually			1	# trips							
	Overnight stays for annual site visit(s)			0	# nights	\$ 290.00	\$ 290.00	1	\$ 290.00			
	Allowance for meals (# of days) for annual site visit(s)			0	# days							
Travel expenses (non-annual trips)	Number of trips				# trips							
	Overnight stays for site visit(s)				# nights	\$ -	\$ -	3	\$ -			
	Allowance for meals (# of days) for site visit(s)				# days							
Site visit	Visual assessment, notes, photos. Include travel time and time on-site.		10		hours		\$ 1,000.00	1	\$ 1,000.00		Annual site inspection	
Prepare and submit report, maintain records	Report preparation & submittal, agency coordination, maintenance of records	5	10		hours		\$ 1,375.00	2	\$ 687.50		Report prep/review and documentation of problem areas	
	Expenses (e.g. printing, copying, mailing)			1	ea	\$ 30.00	\$ 30.00	2	\$ 15.00			
Supplies	Add description (e.g. iPad/tablet, camera, GPS, aerial or satellite imagery, UAV (drone))			1	ea	\$ 50.00	\$ 50.00	1	\$ 50.00			
Maintaining landowner/neighbor relationships										\$ 225.00		
Staff time	Communicating with landowner/neighbors, reviewing reserved rights, etc.	2			hours		\$ 150.00	1	\$ 150.00		land owner relations on non-state owned properties	
Communications/outreach	Staff time	1			hours		\$ 75.00	1	\$ 75.00			
	Expenses (e.g. newsletter/brochure printing, postage, supplies for events, etc.)				ea		\$ -	1	\$ -			
Enforcement to correct violations										\$ -		
Option A: Legal defense fund contribution	Lump sum (based on LTA Legal Defense Reserves calculator). Entire lump sum is carried over to Summary tab.			1	ea	\$ 3,954.00	\$ 3,954.00	N/A	N/A			
Option B: Legal defense costs	Staff time				hours		\$ -	8	\$ -			
	Travel expenses (Number of trips)				# trips							
	Travel expenses (Overnight stays for site visit(s))				# nights	\$ -	\$ -	8	\$ -			
	Travel expenses (Meals (# of days) for site visit(s))				# days							
Legal Defense Insurance	Legal fees			20	hours		\$ -	8.5	\$ -			
	Annual insurance premium, prorated for an individual property				ea		\$ -	1	\$ -			
ANNUAL COST SUBTOTAL:										\$ 2,442.50		

Land Management and Maintenance Costs *NOTE: Enter values in blue-shaded cells. Click on individual Tasks and Descriptions for additional guidance.*

Management and Maintenance Tasks	Description	Regular Staff (hours)	Short-term Staff (hours)	Quantity	Unit	Unit Cost	Extended Cost	Recurrence Interval (years)	Annual Cost	Subtotal	Notes (explain assumptions used in cost estimate; indicate corresponding LTMP task)	Responsible Party
Infrastructure Maintenance and Replacement										\$ 1,984.00		
Travel expenses recurring annually	Number of trips annually			0	# trips							
	Overnight stays for annual site visit(s)				# nights			1	\$ -			
	Allowance for meals (# of days) for annual site visit(s)				# days							
Travel expenses (non-annual trips)	Number of trips			1	# trips							
	Overnight stays for site visit(s)			4	# nights	\$ 1,170.00	\$ 1,170.00	5	\$ 234.00			
	Allowance for meals (# of days) for site visit(s)			5	# days							
Site visit	Inspect boundaries, signs, other infrastructure. Include prep time, travel time and time on-site.				hours		\$ -	1	\$ -			
Remove trash and rectify trespass, vandalism	Trash removal and addressing trespass, vandalism				hours		\$ -	1	\$ -			
Replace fence	Materials or Contract Amount			1000	linear ft	\$ 8.50	\$ 8,500.00	5	\$ 1,700.00		Based on high end of average cost of electric fence using a fence calculator	
	Labor or Staff Oversight				hours		\$ -		\$ -			
Replace signs	Material (add description)			10	ea	\$ 25.00	\$ 250.00	5	\$ 50.00			
	Labor (may be included in annual site visit)				hours		\$ -		\$ -			
Other (select from drop-down)	Materials or Contract Amount				ea	\$ -	\$ -	1	\$ -			
	Labor or Staff Oversight				hours		\$ -		\$ -			
Equipment daily use rate	Vehicle (add description)				day	\$ -	\$ -	1	\$ -			
	Other (select from drop-down list)				day	\$ -	\$ -	1	\$ -			
Equipment replacement	Vehicle (add description)				ea	\$ -	\$ -	1	\$ -			
	Other (select from drop-down list)				ea	\$ -	\$ -	1	\$ -			
Ecological Management										\$ 1,482.53		
Travel expenses	Number of trips annually				# trips							
	Overnight stays for annual site visit(s)				# nights			1	\$ -			
	Allowance for meals (# of days) for annual site visit(s)				# days							
Travel expenses (non-annual trips)	Number of trips			1	# trips							
	Overnight stays for site visit(s)			1	# nights	\$ 496.00	\$ 496.00	5	\$ 99.20			
	Allowance for meals (# of days) for site visit(s)			1	# days							
Update management plan	Review and update management plan	10			hours		\$ 750.00	5	\$ 150.00		For WMA's	
Ecological monitoring	Monitoring T&E species, inventories, reporting				hours		\$ -	1	\$ -			
	Supplies				ea	\$ -	\$ -		\$ -			
Invasive species control (plants)	Materials or Contract Amount			1	ea	\$ 500.00	\$ 500.00	5	\$ 100.00			
	Labor or Staff Oversight		20		hours		\$ 2,000.00		\$ 400.00			
Nuisance wildlife control	Materials or Contract Amount				ea	\$ -	\$ -	1	\$ -			
	Labor or Staff Oversight				hours		\$ -		\$ -			
Prescribed fire	Cost of burn (burn plan, implementation of burn, follow-up monitoring)				ea	\$ -	\$ -	1	\$ -			
	Staff oversight of contract				hours		\$ -		\$ -			
	Annual training and recertification costs				ea	\$ -	\$ -	1	\$ -			
Vegetation management	Materials or Contract Amount				ea	\$ -	\$ -	3	\$ -			
	Labor or Staff Oversight		10		hours		\$ 1,000.00		\$ 333.33		Vegetation plots and counts	
Supplies	Small equipment & supplies				ea	\$ -	\$ -	1	\$ -			
Other (add description)	Materials or Contract Amount			1	ea	\$ 1,000.00	\$ 1,000.00	5	\$ 200.00		Replace water pump, trough etc... based on solar kit for well	
	Labor or Staff Oversight		10		hours		\$ 1,000.00		\$ 200.00			

SUMMARY OF LONG-TERM COSTS AND PRINCIPAL NEEDED

Project Name:	Acres:	State (or state equivalent):	Country:	Prepared by:	Date:
Lakin State Farm	100	WV	USA	Scott Settle	9/27/2016

Site Protection Monitoring and Easement Stewardship

Annual Cost Subtotal (see Tab 2 for details)		\$ 2,442.50
Contingency (10-20%)	15%	\$ 366.38
Administrative (min 10%)	20%	\$ 561.78
Annual Cost Total (includes Option B Legal Defense Costs):		\$ 3,370.65
Capitalization Rate:	3.00%	
Option A: Legal defense fund contribution		\$ 3,954.00
Total Fund Principal Needed for Site Protection Monitoring and Easement Stewardship:		\$ 116,309.00

Land Management and Maintenance

Annual Cost Subtotal (see Tab 3 for details)		\$ 3,466.53
Contingency (10-20%)	15%	\$ 519.98
Administrative (min 10%)	20%	\$ 797.30
Annual Cost Total:		\$ 4,783.82
Capitalization Rate:	3.00%	
Total Fund Principal Needed for Land Management and Maintenance:		\$ 159,460.53
Overall Total Fund Principal Needed:		\$ 275,769.53

8. Example Long-Term Steward Agreement

****THIS DOCUMENT SERVES AS A TEMPLATE ONLY. ALL BLANKS AND SPECIFIC REFERENCES MUST BE ALTERED TO REFLECT THE SPECIFIC INTENT OF THE PARTIES INVOLVED****

MASTER LONG-TERM STEWARDSHIP AGREEMENT

This Master Long Term Stewardship Agreement (this "Stewardship Agreement") is entered among the **West Virginia Department of Environmental Protection**, an agency of the State of West Virginia (the "DEP"), **U.S. Army Corps of Engineers, Huntington and Pittsburgh Districts** (collectively the "USACE", with the Huntington District of USACE designated the lead District for this MOA) and the _____, (together, the "Parties," and individually, a "Party"), as of the date of the signature of the last Party to sign (such date, the "Effective Date").

1. PURPOSES

- a. The purposes of this Stewardship Agreement and the Master Long-Term Stewardship Account Memorandum of Agreement ("MOA") are to preserve compensatory mitigation projects for unavoidable impacts to waters of the United States and state waters, including wetlands, streams and associated buffers, through permits that are required for such impacts by the USACE (Section 404 of the Clean Water Act, under Section 10 of the Rivers and Harbors Act, and by the State of West Virginia under Section 401 of the Clean Water Act) under the DEP In-Lieu Fee Program ("ILF"), and to designate _____ to act as endowment holder and long-term steward. _____, acting as endowment holder and long-term steward, will oversee monies in the ILF Stewardship Account to provide for long-term management and maintenance of each designated ILF Site, easement stewardship and defense, and long-term endowment management as described in the "ILF Site Documents," as hereinafter defined.
- b. The purpose of this Stewardship Agreement and the MOA is to ensure that the ILF Sites are managed, monitored, and maintained in perpetuity. This Stewardship Agreement establishes objectives, priorities and tasks to monitor, manage, maintain and report on the waters of the U.S. and state waters, covered species and covered habitat contained on the ILF Sites.
- c. The Parties shall work together to implement this Stewardship Agreement, managing and monitoring the ILF Sites in perpetuity to preserve habitat and conservation values in accordance with the ILF Program, the conservation easement, and this Stewardship Agreement. Long-term management tasks shall be funded as set out in the MOA, and the Parties shall establish and modify tasks and activities as needed so that the ILF Sites may be managed and monitored in perpetuity.

2. Performance of Land Stewardship Activities

_____ agrees to perform the stewardship activities on the ILF Sites, upon the terms and conditions set forth below, and using the revenue generated from funds provided by the DEP from the DEP ILF Fund. A "Set of ILF Site Documents" for an ILF Site consists of:

- a. Conservation Easement (if applicable)
- b. Stewardship Agreement - Attachment "1," Long-Term Management Plan - ILF Site Scope of Work
- c. Stewardship Agreement - Attachment "2," Summary of Long-Term Costs and Endowment Principal Needed
- d. Request for Funds – Attachment "3", Document for depositing Endowment Principal Needed into a certain Sub Account (as defined below) that includes information the DEP determines is necessary, such as: 1) Project name; 2) Project location; 3) Land owner and designated manager for the applicable ILF Site.

3. Funding and Task Prioritization

The Long-Term Management Plan- ILF Site Scope of Work summarizes the tasks and anticipated costs of long-term stewardship for the ILF Site. These costs include estimates of time and funding needed to conduct the basic site monitoring visits and other task activities and to generate reports. Due to unforeseen circumstances, prioritization of tasks (including tasks resulting from new requirements) may be necessary if insufficient funding is available to accomplish all tasks and maintain perpetual stewardship. The Parties shall discuss task priorities and funding availability to determine which tasks will be implemented with the goal of maintaining perpetual stewardship for the ILF Sites. In general, tasks are prioritized in this order: 1) those required by a local, state, or federal agency; 2) tasks necessary to maintain or remediate habitat quality; and 3) tasks that monitor resources, particularly if past monitoring has not shown downward trends. Equipment and materials necessary to implement priority tasks will also be considered priorities. Final determination of task priorities in any given year of insufficient funding will be determined by agreement of the Parties and memorialized in writing.

4. Payment for Land Stewardship

In consideration of the land stewardship activities and tasks being performed by _____, _____ shall be entitled to a disbursement from the ILF Stewardship Account in the form of an annual, advance payment (each such payment, an "Endowment Payment"), which _____ shall use to pay the costs of the land stewardship activities and tasks to be performed by _____ throughout the forthcoming calendar year. _____ will prepare a Request for an Endowment Payment in the form of a written statement detailing the tasks, activities and fund amounts needed for each ILF Site, which expenses shall total the amount requested, in accordance with generally accepted accounting principles. The Request for an Endowment Payment shall be provided to the USACE and DEP at least 30 days prior to the draw of funds from the ILF Stewardship Account and include: a) a description of needs, b) annual cost estimates for these needs and a discussion of inflationary adjustments and other contingencies, as appropriate.

5. Review and Reporting Requirements

_____ shall submit an Annual Funding Report to the USACE and DEP for each calendar year this Stewardship Agreement is in effect. Each Annual Funding Report shall be submitted

by _____ between January 1 and January 31, or at least thirty (30) days prior to the effective date of extinguishment of the Stewardship Agreement. In accordance with generally accepted accounting principles, the Annual Funding Report shall (i) describe in reasonable detail by Site the long-term stewardship tasks and activities performed by _____ during the immediately preceding calendar year, or upon extinguishment, the current calendar year (collectively the "Reporting Period"); (ii) detail by Site all expenses incurred by or on behalf of _____ for long-term stewardship performed during the Reporting Period; (iii) describe by Site any discrepancy between the long-term stewardship activities expected to be performed during the Reporting Period and those activities actually performed; and (iv) describe by Site any discrepancy between the costs as determined by _____ Cost-Calculator and the costs of activities actually performed during the Reporting Period.

6. Modification

Upon 60 days advance notice to the DEP, _____ may modify the Long-Term Management Plan – ILF Site Scope of Work, subject to review and written approval by the Parties. In the event _____ determines that the remedial action needed to repair or replace structural elements and facilities on the ILF Site is beyond the ability of the long-term management funds in the respective ILF Stewardship Sub-Account, or that the watershed or drainage basin containing the ILF Site has become so infested with invasive species that effective control on the ILF Site is either no longer practicable or unreasonably expensive, _____ shall notify the USACE who will consider appropriate changes to the Long-Term Management Plan – ILF Site Scope of Work or other remedial measures. In considering this situation, the Parties shall concur in good faith to determine whether a force majeure event, such as flood, drought, earthquake, fire, landslide, condemnation or taking, has occurred that the Parties could not have anticipated or controlled. _____ has no obligation to perform any long-term management tasks (aside from annual monitoring and easement enforcement) at an ILF Site that cannot be funded from its respective ILF Stewardship Sub-Account.

7. Termination

If _____ fails to implement the tasks described in this Stewardship Agreement and is notified of such failure in writing by the USACE, _____ shall have 90 days to cure such failure. If failure is not cured within 90 days, _____ may request a meeting with the USACE to resolve the failure. Such meeting shall occur within 30 days or a longer period if approved by the USACE. Based on the outcome of the meeting, or if no meeting is requested, the USACE may designate a replacement long-term steward in writing by amendment of this Stewardship Agreement. If _____ fails to designate a replacement long-term steward, then such public or private land or resource management organization acceptable to and as directed by the USACE may enter onto the ILF Site to fulfill the purposes of this Stewardship Agreement.

8. Extinguishment Clause and Transfer

Upon triggering the Extinguishment Clause under the MOA, this Stewardship Agreement shall terminate, as to all the Parties, concurrently with termination of the MOA. _____ shall cease work immediately under the Stewardship Agreement and transfer all records pertaining to the ILF Sites and any remaining funds to the control of the entity designated by the USACE for permanent recordkeeping purposes.

9. Access to Records

The DEP and the USACE, or any of their authorized representatives, shall, upon three (3) days prior notice, have access to any books, documents, papers and records of _____ that are directly pertinent to this Stewardship Agreement for purposes of making audits, examinations, excerpts or transcription. _____ shall keep all books, documents, papers, or records for at least five (5) years after their preparation and shall maintain permanent copies of all ILF Site Documents.

10. Contact Information/Communications

All approvals, notices, reports and other communications required or permitted under this Stewardship Agreement shall be in writing and delivered by first-class mail, overnight mail or email at the addresses below. Each Party agrees to notify the others promptly after any change in named representative, address, telephone, or other contact information.

The individuals named below shall be the Representatives of the USACE, the DEP and _____ for purposes of this Stewardship Agreement. Contact information is as follows:

DEP:

Name:

Title:

West Virginia Department of Environmental Protection

Phone:

Email:

DEP Alternate:

Name:

Title:

West Virginia Department of Environmental Protection

Phone:

Email:

_____:

Name:

Title:

West Virginia Land Stewardship Corporation

Phone:

Email:

_____ Alternate:

Name:

Title:

West Virginia Land Stewardship Corporation

Phone:

Email:

USACE:

Name:

Title:

U.S. Army Corps of Engineers

Phone:

Email:

USACE Alternate:

Name:

Title:

U.S. Army Corps of Engineers

Phone:

Email:

11. Miscellaneous Provisions

- a. _____ may not assign this Stewardship Agreement, in whole or in part, to any individual or other legal entity without the prior written approval of the DEP, which the DEP may withhold. The DEP may assign its rights to a successor agency or USACE without the consent of _____ provided that the such agency is legally obligated to assume or otherwise assumes the DEP's obligations hereunder.
- b. If any provision of this Stewardship Agreement is held to be unlawful or invalid by any court of law with duly established jurisdiction over this Stewardship Agreement, the Parties intend that the remainder of this Stewardship Agreement shall remain in full force and effect notwithstanding the severance of the unlawful or invalid provision(s).
- c. Each of the Parties is acting in its independent capacity in entering into and carrying out this Stewardship Agreement and not as an agent, employee or representative of the other Party. The Parties will cooperate in good faith to achieve the objectives of this Stewardship Agreement and to avoid disputes. The Parties will use good faith efforts to resolve disputes at the lowest organizational level and, if a dispute cannot be so resolved, the Parties will then elevate the dispute to the appropriate officials within their respective organizations.
- d. Nothing contained in this Stewardship Agreement is intended to unlawfully delegate the DEP's duties or to limit the authority of the DEP to fulfill its statutory or regulatory responsibilities.
- e. This Stewardship Agreement shall not be the basis of any claims, rights, causes of action, challenges, or appeals by any person not a Party to this Stewardship Agreement. Nothing in this Stewardship Agreement shall be construed to create privity of contract between the DEP and any third parties.

WV In-Lieu Fee Mitigation Instrument

- f. This Stewardship Agreement shall be governed by and interpreted in accordance with the laws of the State of West Virginia, disregarding principles of conflicts of law. Venue for any action arising out of this Stewardship Agreement shall be in Kanawha County, WV.
- g. Any waiver by either Party of any term or provision of this Stewardship Agreement must be given in writing. No waiver shall be construed as a waiver of any other provision of this Stewardship Agreement, nor shall such waiver be construed as a waiver of such provision respecting any other event or circumstance.
- h. The headings used in this Stewardship Agreement are for convenience only and shall not determine or limit the interpretation, construction or meaning of this Stewardship Agreement.
- i. This Stewardship Agreement represents the entire agreement of the Parties with respect to the subject matter hereof and may not be amended, except in writing signed by each Party hereto. Each Party to this Stewardship Agreement warrants to the other that its respective signatory has full right and authority to enter into and consummate this Stewardship Agreement and the transactions contemplated hereby.
- j. Resolution of disputes between the Parties regarding the planning, approval and other aspects of ILF Sites shall be in accordance with the USACE regulations at 33 CFR 332.8(e). Resolution of disputes between the Parties related to long-term stewardship management will be resolved in the first instance by the Huntington District Interagency Review Team ("IRT"). If _____ does not agree with the IRT, _____ may request an independent review and recommendations from government agencies or academia that are not part of the IRT. The Parties agree to negotiate in good faith to resolve the dispute based upon the results of the independent review and recommendations.

IN WITNESS WHEREOF, the Parties have caused this Stewardship Agreement to be executed by their respective authorized representatives, intending to be bound legally.

**State of West Virginia, Department
of Environmental Protection**

 Signature
 Name: _____
 Title: _____
 Date: _____

 Signature
 Name: _____
 Title: _____
 Date: _____

**U.S. Army Corps of Engineers
Huntington District**

Signature

Name: _____

Title: _____

Date: _____

Attachment "1" – Long-Term Management Plan - ILF Site Scope of Work**A. Property Description****1. Setting and Location**

The ILF Site is located at _____ [*include address and county*], WV, designated Assessor's Parcel No. _____. The ILF Site is shown on the general vicinity map (Figure 1) and the ILF Site property map (Figure 2). The general vicinity map shows the ILF Site location in relation to cities, towns, or major roads, and other distinguishable landmarks. The ILF Site property map shows the ILF Site property boundaries on a topographic map.

2. History and Land Use

[*Describe past and present land use including grazing practices, logging, mineral extraction*].

The land in the general area of the ILF Site is currently _____ [*Describe adjacent land and local area land uses*].

3. Cultural Resources – (if applicable under historical resources preservation laws)**4. Aquatic Resources and Topography**

[*Describe aquatic resources and topography of the ILF Site. Indicate whether aquatic resources are driven by surface flows (i.e., fluvial systems) or groundwater flows from offsite sources. Describe precipitation onto and off of the site.*]

5. Soils

[*Describe soils on the ILF Site.*]

6. Existing Easements

[*Include descriptions/locations of existing easements, their nature (conservation easement, buried pipeline, overhead power, ingress/egress, etc), authorized users (if known), access procedures, etc. Depict easements, rights of way, ingress, and egress routes on an attached map.*]

7. Adjacent Land Uses

[*Detail the baseline adjacent land uses. These land uses may change over time; however, the description of the baseline conditions will give the manager some idea of the conditions present when the management plan was first developed and bring to light areas that may be of management concern or items that may compromise biological integrity over time.*]

B. Description of Restoration Activities**1. Survey of ILF Site**

[*General description of geographic location and features, topography, soils, vegetation (assessment of native vs. exotic species), species present and potentially present, habitat requirements of each species and a quality assessment of all types. In addition, provide an*

inventory list, if available, of aquatic resources on the property.

2. Summary of ILF Site Development Plan

[Describe all created and/or enhanced waters and the condition of those aquatic resources. Provide final map showing the areas.]

3. Endangered and Threatened Species

[Describe all endangered and threatened species that occur or may occur on the ILF Site. If applicable, provide map showing their location.]

4. Rare Species and Species of Special Concern

[Describe all rare species and species of special concern that occur or may occur on the ILF Site. If applicable, provide map showing their location.]

C. Long-Term Stewardship Plan

The overall goal of long-term management is to foster the long-term viability of the ILF Site's aquatic resources and associated upland areas. Routine monitoring and minor maintenance tasks are intended to assure the viability of the ILF Site in perpetuity.

1. Aquatic Resources

The approach to the long-term management of the ILF Site's aquatic resources is to conduct annual site examinations and monitoring of selected characteristics to determine stability and ongoing trends of the preserved, restored, and enhanced waters, including wetlands. Annual monitoring will assess the ILF Site's condition, degree of erosion, degree of invasion of exotic or deleterious (e.g., thatch producing) species, water quality, fire hazard, and/or other aspects that may warrant management actions. While it is not anticipated that major management actions will be needed, an objective of this Stewardship Agreement is to conduct monitoring to identify any issues that arise and use adaptive management to determine what actions might be appropriate. Those chosen to accomplish monitoring responsibilities will have the knowledge, training, and experience to accomplish monitoring responsibilities.

Adaptive management means an approach to natural resource management that incorporates changes to management practices, including corrective actions as determined to be appropriate by the USACE and _____. Adaptive management includes those activities necessary to address the effects of climate change, fire, flood, or other natural events, force majeure, etc. Before considering any adaptive management changes to the Stewardship Agreement, the USACE and _____ will consider whether such actions will help ensure the continued viability of ILF Site's aquatic resources.

[The list that follows is not meant to be exhaustive and some sites may have more elements to consider and some may have fewer.]

2. Tasks

_____ for the ILF Site shall implement the following:

Task 1.1 Waters of the U.S., Including Wetlands

Objective: Monitor, conserve and maintain the ILF Site's waters of the U.S., including wetlands. Limit any impacts to waters of the U.S. from vehicular travel or other adverse

impacts.

Task 1.1.1: Conduct at least one annual walk-through survey to qualitatively monitor the general condition of these habitats. Note, evaluate, and map general topographic conditions, hydrology, general vegetation cover and composition, invasive species, erosion, streambed stability, large woody debris, and head cuts during a site examination in the spring. Notes shall include observations of species encountered, water quality, general extent of wetlands, and any occurrences of erosion and invasive vegetation.

Task 1.1.2: Establish reference sites for photographs and prepare a site map showing the reference sites for the ILF Site file. Alternatively, utilize photographic reference sites, if any, developed during interim ILF monitoring period. Take reference photographs of the overall wetland mosaic at least every five years from the beginning of the long-term management period, with selected reference photos taken on the ground annually.

Task 1.2 Covered Species (if applicable)

Objective: Monitor, conserve and maintain the ILF Site's covered species.

Task: As part of the annual site walk-through, note the status and any changes to the covered species. Identify, prioritize, and implement any necessary tasks as funding is available.

Task 1.3 Non-native Invasive Species

[Note: Species-specific objectives and tasks will need to be developed in consultation with the appropriate agencies.] Invasive species threaten the diversity or abundance of native species through competition for resources, predation, parasitism, interbreeding with native populations, transmitting diseases, or causing physical or chemical changes to the invaded habitat.

Objective: Monitor and maintain control over non-native invasive species (including but not limited to noxious weeds) that diminish the conservation values being protected at the ILF Site. Attached to this report is information on the species that were identified on the site during the monitoring period and on management of those species.

Task 1.3.1: Mapping of non-native invasive species cover or presence shall occur during the ILF Site monitoring period to establish a baseline. Mapping shall be accomplished through use of available technologies, such as GIS and aerial photography.

Task 1.3.2: Each year's annual walk-through survey (or a supplemental survey) will include a qualitative assessment (e.g., a visual estimate of cover) of potential or observed noxious weeds or other non-native species invasions, primarily in or around the aquatic resources. Additional actions to control invasive species will be evaluated and prioritized.

Task 1.4 Vegetation Management

Objective: Adaptively manage vegetation based on site conditions and data acquired through monitoring to maintain functional values.

Task 1.4.1: Review and explore potential vegetation management regimes as proposals and/or opportunities and funding arise. If determined to potentially maintain site quality,

develop site-specific practices, amend this Stewardship Agreement with the USACE's approval to reflect those practices, and implement actions as funding allows.

Task 1.4.2: Implement vegetation management techniques, if determined beneficial and as funding allows, to maintain vegetation height and composition similar to baseline conditions or as determined likely to maintain seasonal wetland function [or *threatened/endangered plant species habitat*].

Security, Safety, and Public Access

Task 2.1 Trash and trespass

Objective: Monitor sources of trash and trespass in areas where there is no anticipated public access.

Objective: Collect and remove trash, repair vandalized structures, and rectify trespass impacts.

Task 2.1.1: During each site visit, record occurrences of trash and/or trespass. Record type, location, and management mitigation recommendations to avoid, minimize, or rectify a trash and/or trespass impact.

Task 2.1.2: At least once yearly collect and remove as much trash as possible and repair and rectify vandalism and trespass impacts.

Task 2.2 Fire Hazard Reduction

Objective: Maintain the site as required for fire control while limiting impacts to biological values.

Task 2.2.1: Mow or graze to reduce vegetation in areas required by USACE for fire control.

Infrastructure and Facilities

[Fence and gate maintenance and repair frequency will be dependent on trespass and access control issues, as well as whether grazing is utilized as a vegetation management technique and to what extent.]

Task 3.1 Fences and Gates

Objective: Monitor condition of fences and gates.

Objective: Maintain fences and gates to prevent casual trespass, allow necessary access, and *[if applicable: facilitate grazing regime and management.]*

Task 3.1.1: During each site visit, record condition of fences and gates. Record location, type, and recommendations to implement fence and/or gate repair or replacement, if applicable.

Task 3.1.2: Maintain fences and gates as necessary by replacing posts, wire, and/or gates. Replace fences and/or gates, as necessary, and as funding allows.

Reporting and Administration

Task 4.1 Annual Report

Objective: Provide annual report on all management tasks conducted and general site conditions to USACE and any other appropriate parties.

Task 4.1.1: Prepare annual report and any other additional documentation. Include a summary. Complete and circulate to the USACE and other parties by August 15 of each year.

Task 4.1.2: Make recommendations about (1) any habitat enhancement measures deemed to be warranted, (2) any problems that need near-, short-, and long-term attention (e.g., invasive vegetation removal, fence repair, erosion control), and (3) any changes in the monitoring or management program that appear to be warranted based on monitoring results to date.