AGREEMENT

CONCERNING IN LIEU MITIGATION FEES BETWEEN

KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES

AND

U. S. ARMY CORPS OF ENGINEERS

I. PURPOSE

This is an agreement between the Kentucky Department of Fish and Wildlife Resources (KDFWR) and the Great Lakes and Ohio River Division of the U.S. Army Corps of Engineers, as implemented by the Huntington, Louisville, and Nashville Districts (Corps). This agreement recognizes that the Stream and Wetland Mitigation Trust Fund (Fund) within the KDFWR may receive mitigation in lieu fees from Department of the Army permittees. KDFWR employs monies from the Fund to identify and assess ecologically appropriate stream and wetland restoration opportunities in Kentucky; 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.

II. US ARMY CORPS OF ENGINEERS

A. The Clean Water Act (33 USC 1251 et seq.) provides for the administration of Section 404 of that Act by the Secretary of the Army. Under Section 404, the placement of dredged or fill material within a water of the United States requires appropriate authorization through Department of the Army (DA) permits issued by the U .S. Army Corps of Engineers. Section 10 of the Rivers and Harbors Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable water of the United States unless authorized by a DA permit.

B. DA permit applicants, after demonstrating that project impacts cannot be avoided, further minimized, nor mitigated on site, may achieve mitigation through payment of in-lieu-fee monies to groups who will use these funds to protect, restore, and enhance waters of the United States as well as uplands important to water quality maintenance or improvement.

C. Establishment of Mitigation Review Team (MRT): The Corps in cooperation with other federal and state resource agencies will establish a MRT to approve proposed projects and to perform a yearly review of ongoing and completed projects. The MRT will be directly involved in approval of restoration projects by a simple majority vote. These votes will occur at scheduled meetings of the MRT. The Corps will chair the MRT and other members may include the Kentucky Division of Water, KDFWR, the U.S. Fish and Wildlife Service, and the U.S. Environmental Protection Agency. The MRT may develop guidelines or an agreement to further define the conditions under which the Fund monies may be used in accordance with the Federal

Guidance on the Use of In Lieu Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

III. KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES

KDFWR is the designated state agency responsible for the protection, conservation and enhancement of the Commonwealth of Kentucky fish and wildlife resources. KDFWR desires to develop, restore, and enhance aquatic resources in Kentucky for the benefit of its citizens. KDFWR is authorized to receive, hold, and account for assets it holds with the Fund. The Fund was established by the Kentucky General Assembly pursuant to KRS 150.255 (SB 147) and became effective July 14, 2000. This law stipulates that monies may be paid to the State Treasury for the purposes of restoring, creating, enhancing or preserving the Commonwealth's streams and wetlands. The Fund may also receive state appropriations, gifts, grants, federal funds, revolving funds, and other funds from both public and private sources. The Fund is to be administered by the KDFWR.

IV. IN-LIEU-FEE PROGRAM OPERATION

A. Payment of Fees to KDFWR: Where the Corps has determined that avoidance, minimization, or on-site mitigation of stream or wetland impacts is not possible, the DA permit applicant may be offered the opportunity for off-site or in-lieu-fee mitigation or a combination thereof. Where in-lieu-fee mitigation is chosen, the Corps will determine the in-lieu-fee based on stream and wetland impacts and the comments received as part of the established DA permit evaluation process. If a DA permit is issued, the permittee will be informed of how and when to pay the in-lieu-fee to the Fund. The KDFWR will receive the in-lieu-fee directly from the DA permittee.

B. Employment of Fees by KDFWR: KDFWR will employ monies from the Fund, as appropriate and with prior MRT written approval, to identify and assess stream and wetland restoration opportunities in Kentucky and to implement practical plans to protect, purchase, enhance, restore, and monitor selected sites. The MRT will work with KDFWR to prioritize and select the most appropriate stream and wetland restoration projects.

C. The KDFWR may, as appropriate and with MRT approval: 1) wait until sufficient monies are available in the Fund to implement a specific project; 2) divide a specific project into phases to allow funding in phases; or 3) seek to leverage monies from the Fund with other appropriate sources of funds to expand and complement the scope of proposed projects.

D. The KDFWR will develop a Restoration Plan for each identified and MRT-approved restoration project. This plan will provide information on the restoration site location, baseline conditions at the site location, restoration procedures, a schedule of activities, a budget, a monitoring plan, reporting protocols, performance standards for determining success of the restoration efforts, and financial, technical, and legal provisions for long-term management and maintenance of the restoration site.

V. FIELD DAYS

A. Field Days: The KDFWR will schedule field days as needed, at which time the KDFWR will present to the MRT a select number of recommended restoration projects. These field days will be used to provide the MRT with an overview of the projects and to give the MRT an opportunity to observe and evaluate the properties on which the recommended restoration projects would be undertaken.

B. The KDFWR, in coordination with the MRT, will select the dates for the field days at least one month in advance of each scheduled date. Each member of the MRT (or representatives for each member) will be invited to the field day at least one month in advance of each scheduled date.

C. Annual Inspection: The KDFWR agrees to schedule a yearly inspection for the MRT to review active and/or completed project sites. The inspection will take place within 60 days of the submittal of the annual report to the MRT.

VI. ACCOUNTABILITY

A. Corps Responsibility: After the issuance of a DA permit that involves payment of in lieu fees to the Fund, the Corps will provide the KDFWR with the name of the DA permittee, the amount of the in-lieu-fee, and the agreed payment schedule.

B. KDFWR Responsibility: The KDFWR agrees to accept DA permit in-lieu-fees as restricted assets in the Fund. Monies in the Fund received from DA Permittees are for the sole use of the MRT-approved stream and wetland restoration projects conducted by KDFWR or other entities. Distribution of such monies to other MRT-approved entities by the KDFWR is on a project-by-project basis and is limited to each project's budgetary estimate, as approved by the MRT. Interest accruing from monies on deposit in the Fund will become part of the Fund.
The KDFWR recognizes its responsibility for ensuring that the mitigation terms of each permittee paying in-lieu fees to the Fund are fully satisfied. However, the KDFWR is not responsible for acts of nature or third party actions that may impact restoration projects.

C. The KDFWR agrees to utilize the Fund solely to identify stream and wetland restoration projects in Kentucky, to determine the level of effort required for each such project, and to undertake and monitor each project.

D. The KDFWR will ensure that each restoration site is protected in perpetuity by consulting with the property owner on which the restoration project takes place relative to appropriate real estate arrangements. Such arrangements that effectively restrict harmful activities that may otherwise jeopardize the purpose(s) of the restoration project will be established prior to initiation of restoration activities.

E. Restoration projects will be planned and developed to address specific resource needs of the watershed in which the project is located. Restoration projects will be planned to be self-sustaining over time to the extent possible; however, long-term maintenance requirements may be necessary and appropriate in some cases (e.g., maintenance of fire-dependant communities or

invasive exotic species control).

F. The KDFWR, when possible, will identify restoration projects for consideration by the MRT, acquire access to the restoration sites, and initiate physical and biological improvements by the first full growing season following collection of in-lieu fees from each Corps-approved permittee. When delayed beyond the first growing season with MRT approval, the KDFWR will initiate physical and biological improvements no later than the second full growing season.

G. The KDFWR will provide supporting documentation (including a scope of services and a budgetary estimate) for each approved project to the MRT for record keeping and fund management purposes.

VII. REPORTING OBLIGATIONS

A. Financial: KDFWR will provide an annual financial statement. The report shall include a beginning Fund balance, revenues collected for the year, expenditures for the year and an ending balance. The statement and all reports pertaining to the Fund shall be prepared according to generally accepted accounting procedures. The MRT reserves the right to have all Fund records audited at any time. The financial statement shall be provided to MRT within 90 days of the end of the state's fiscal year.

B. KDFWR Annual Project Report: The KDFWR agrees to provide the MRT with an annual report regarding the receipt and employment of DA permit in lieu fees from the Fund by River Basin (i.e. Big Sandy, Cumberland, and Kentucky River Basins). The report shall include: all expenditures by project for prior years and report year, description and status of work conducted on each project during the report year, and any additional information required in the approved project restoration plan. This report also will be provided to the MRT within 90 days of the end of the state's fiscal year.

VIII. ADMINISTRATIVE COSTS

A. The KDFWR may incur reasonable administrative costs associated with this in lieu fee program. These costs will be deducted from the Fund. Monies available for administrative costs shall be equal to 5% of each contribution to the Fund plus 5% of any interest accruing on the Fund. A separate project account shall be established to record revenues and expenditures for administrative costs. General administrative costs incurred by the KDFWR include, but may not be limited to the following:

- annual report preparation
- initial field visits to investigate potential projects
- the annual field day for on-going and/or completed projects
- development of an initial scope of services to be presented to the Corps for approval of individual projects (after which a detailed scope of services will be prepared as a direct project cost)
- development of general language for conservation easements
- non-project related meetings with the Corps

- other non-project specific administrative functions

B. Individual projects shall be charged for indirect costs based on KDFWR's Indirect Cost Plan as submitted to and approved by the US Department of Interior.

IX. CONFLICT OF INTEREST

No employee or members of their immediate family of either agency may solicit or accept directly or indirectly any gratuity, gift, favor, entertainment, loan or anything of monetary value or hold any interest in any company, business or organization that is contracted by KDFWR to perform work with DA permit in lieu fee monies.

X. AMENDMENTS AND TERMINATION

A. This agreement may be amended in writing by the mutual written consent of the parties involved.

B. Any party may terminate this agreement with written notice given 90 days in advance. Prior to termination, the KDFWR shall provide an accounting of monies and shall complete payments on existing contracts for projects approved by the Corps and expenses incurred on behalf of these projects. Upon termination, should monies remain in the Fund, the Corps shall direct that payments be made from that account to non-profit, governmental, or quasi-governmental entities for application of the monies to stream and wetland restoration projects.

XI. POINTS OF CONTACT

The points of contact for written communication among the parties are:

U. S. Army Corps of Engineers
Chief, Regulatory Branch (currently James M. Townsend)
Operations Division
Louisville District Corps of Engineers
P.O. Box 59
Louisville, Kentucky 40201
Phone (502) 315-6675
FAX (502) 315-6677
e-mail James.M.Townsend@lrl02.usace.army.mil

Kentucky Department of Fish and Wildlife Resources
Director, Division of Fisheries (currently Benjy Kinman)
KDFWR
Game Farm Road
Frankfort, Kentucky 40601
Phone (502) 564-7109 ext 466
FAX (502) 564-4519
e-mail Benjy.Kinman@mail.state.ky.us

XII. EFFECTIVE DATE

This agreement shall become effective when signed by the Commander, Great Lakes and Ohio River Division of the U.S. Army Corps of Engineers on behalf of the Huntington, Louisville and Nashville Districts and by the KDFWR.

Steven R. Hawkins
Brigadier General, U.S. Army
Division Engineer

Date

C. Thomas Bennett
Commissioner, KDFWR

Date