

2020 Instrument, A MODIFICATION

Of the

AGREEMENT

CONCERNING IN-LIEU MITIGATION FEES BETWEEN:

U.S. ARMY CORPS OF ENGINEERS

KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES

2020

LRL-2010-325

MVM-2011-521

LRN-2011-709

I. INTRODUCTION

This Instrument is a modification of the previously approved Kentucky Department of Fish and Wildlife Resources (KDFWR) In Lieu Fee Instrument, Corps I.D. Numbers LRL-2010-325, MVM-2011-521 and LRN-2011-709. The purpose of this modification is to update the terms of the in-lieu fee instrument (“Instrument”), including adoption of the Kentucky Resource-Based, Predefined Service Areas for Third Party Mitigation (LRL-2018-1040), as announced on August 23, 2019. This Instrument shall operate in accordance with the April 10, 2008, “Compensatory Mitigation for Losses of Aquatic Resources” (CFR Vol. 73 No. 70, p 19670-19705 (33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; and Pub. L. 108-136), referenced herein as the “Mitigation Rule”, with sections cited as 33 CFR 332.

This modification retains the KDFWR as the Instrument Sponsor. As such, the Kentucky Wetland and Stream Mitigation Trust Fund (Mitigation Fund), established by Kentucky Revised Statute (KRS 150.255), authorizes the KDFWR to establish wetland and stream compensatory mitigation banks, projects and to receive in-lieu mitigation fees for the Commonwealth's wetlands or streams that may be impacted or filled by any project. Therefore, the Instrument will continue to operate consistent with KRS 150.255.

The Mitigation Fund is deemed a trust and is available solely for the purposes and benefits of the Kentucky wetland and stream mitigation projects. KDFWR agrees to treat funds and any interest accruing to the funds received for the Mitigation Program as Restricted Funds solely for the purposes of compensatory mitigation pursuant to the Clean Water Act and as specified in the Instrument.

II. PURPOSE

The objectives of this Instrument are to establish procedures to compensate for the loss of waters of the United States (WOUS) authorized by DA permits pursuant to Section 404 of the Clean Water Act (CWA; 33 USC 1344) and Section 10 of the River and Harbors Act of 1899 (33 U.S.C. 401, 403). Additionally, these procedure may be applied to compensatory mitigation requirements associated with the approval of Corps’ civil works projects [e.g., Section 2036(c) of the 2007 Water Resource Development Act] or activities conducted on military installations (e.g., 10 U.S.C. 2694b). The Corps shall have the final authority for approval of mitigation activities performed under the Instrument.

- A. This Instrument shall operate in accordance with the requirements and procedures set forth in the Mitigation Rule. All definitions listed in 33 CFR §332.2 shall apply.
- B. The Sponsor desires to restore (rehabilitate, re-establish), enhance, establish, and preserve aquatic resources in Kentucky for the benefit of its citizens. The Sponsor is authorized to receive, hold, and account for assets for the purpose of compensatory mitigation and to implement and manage an in-lieu fee program in accordance with 33 CFR §332.
- C. The Instrument provides the Sponsor with authorization to provide mitigation credits to Department of Army (DA) permittees to be used as compensatory mitigation for DA permits. No mitigation shall be provided by the Sponsor until/unless approved by the

District Engineer (DE), or designee, of the Corps District with jurisdiction over the permitted activity. In certain circumstances, mitigation may be required for actions not associated with a DA permit, such as mitigation required as a result of litigation. In these circumstances, the Sponsor may be authorized by the DE to accept the mitigation responsibility.

- D. The Instrument provides the Sponsor with authorization to provide mitigation credits to compensate for impacts associated with DA civil works projects or projects conducted on military installations, upon approval of the DE, or designee, of the Corps District with jurisdiction over the project. No mitigation shall be provided by the Sponsor until/unless approved by the District Engineer (DE), or designee, of the Corps District with jurisdiction over the activity.
- E. The Sponsor does not have the written or implied authority to approve/issue DA permits or approve use of mitigation for civil works projects or projects implemented on military installations.
- F. Mitigation for wetland or stream impacts within the CWA (CWA; 33 USC 1344) 401 Water Quality Certification that are not also covered by 404 jurisdictions is not typical. However, in the event such mitigation is required, appropriate mitigation could fall within the purview of and be applied to the terms of this instrument.

III. PROGRAM OPERATION

- A. Federally Approved Revisions or Changes to the Mitigation Rule.

Federally approved changes and revisions to the Mitigation Rule shall not automatically require a modification of this Instrument. In the event that such changes/revisions are approved, the Sponsor shall submit, in writing, proposed procedures for implementing the approved revisions/changes, if necessary. The DE shall determine whether implementation of the revisions will require consultation with the IRT or notification of the public, in accordance with the requirement set forth in the revised Mitigation Rule, guidance provided by Corps Headquarters/U.S. Environmental Protection Agency (USEPA) and/or information contained in the approved, revised Mitigation Rule.

- B. Interagency Review Team

The Interagency Review Team (IRT) shall be governed by the Mitigation Rule [33 CFR 332.8(b)]. The IRT currently consists of representatives from the Corps, U.S. Fish and Wildlife Service (USFWS), USEPA, and Kentucky Division of Water (KDOW). The role of the IRT is to facilitate the establishment of third party mitigation through the development of mitigation banking or in-lieu fee instruments. The IRT serves in a consulting role to the Corps; however, the Corps retains full authority for approval of third party instruments used to satisfy compensatory mitigation requirements for DA permits.

1. Corps of Engineers

The Corps is responsible for consulting with members of the IRT in accordance with the requirements of 33 CFR §332.8, providing oversight of the Mitigation Program, and ensuring compliance with Section 404 of the Clean Water Act (CWA) and Section 10 of the River and Harbors act of 1899 (RHA).

There are four Corps Districts covered by this Instrument: Louisville, Nashville, Memphis and Huntington Districts. The Louisville District is the lead District and is responsible for communicating with the Sponsor and coordinating with the IRT on issues related to the Instrument that are not specific to an individual compensatory mitigation project. The District with jurisdiction over an individual compensatory mitigation project is responsible for communicating with the Sponsor and coordinating with the IRT on issues related to those projects.

2. IRT Members

The IRT Members are responsible for advising the Corps in assessing monitoring reports, recommending remedial or adaptive management measures, approving credit releases, and approving Instrument modifications. The procedures for IRT Member review and comment in accordance with 33 CFR §332.8 shall apply.

C. Credits

1. Allocation of Advance Credits

The initial number of advance credits allocated is 300,000 credits in each of the ten service areas. The initial allocation is based on past sales, projected need, identified mitigation sites, and the Sponsor's ability to fulfill sold advanced credits. For example, in the most recent high volume period, the Northern Kentucky Service Area required approximately 100,000 credits in one calendar year. The program should be capable of accommodating high growth periods. To accommodate this level of activity in any service area in multiple consecutive years, and in consideration of three-year credit delivery time, advance credit for streams can be calculated by multiplying the amount of mitigation sales by the three year delivery requirement. Using the Northern Kentucky example, this would yield a need for approximately 300,000 advance credits.

Revisions to the number of advance credit allocations will not constitute a modification of this Instrument; however, changes in allocation of advance credits will be subjected to approval by the Corps. The

following procedures, plus any additional procedures specified by the Corps at the time of the request, shall be followed for revision of advance credit allocation:

- a. The Sponsor shall submit, in writing, justification for revision to the number of allocated advance credits. The request may be for an increase or decrease of the advanced credit allocation.
 - Decreases in allocation of advanced credits are approved upon written notice from the Corps of receipt of justification and posting of decreased allocation on the Sponsor's website. The posting of decreased advance credit allocation must occur no sooner than 10 working days from the date of Corps' receipt of justification. Justification of the reduction in advanced credits shall include a brief narrative explaining why the adjustment is necessary.
 - Increases in allocation of advanced credits shall include revised estimates of past sales, projected need, identified mitigation sites, the ability of the Sponsor to fulfill sold advance credits within the prescribed time frames specified in the Mitigation Rule, and/or other appropriate factors affecting the allocation. No increase in advanced credit allocation may occur without written prior authorization of the Corps. Approved increases in advance credit allocation shall be posted on the Sponsor's website not earlier than 10 business days from the date of Corps written approval.

Once the sold advance credits have been fulfilled, an equal number of advance credits will be re-allocated to the Sponsor for sale or transfer to fulfill new mitigation requirements. The number of advance credits available to the Sponsor at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in this Instrument, minus any that have already been provided but not yet fulfilled (33 CFR §332).

2. Credit Sales

The Sponsor may, but is not obligated to, sell mitigation credits. The Sponsor agrees that mitigation credits sold will be solely for the purposes of compensatory mitigation required for DA permits, civil works projects or activities conducted on military installation, or other approved purposes as described above. Once purchased, mitigation credits may not be refunded, re-

sold or transferred to other entities except with written direction from the Corps.

The Sponsor may sell or transfer mitigation credits to DA permittees to be used as compensatory mitigation for DA Permits, upon approval by the Corps. The approval will be in the form of a DA permit, other Corps authorization. Mitigation credits may be sold to satisfy other federal actions such as enforcement of Clean Water Act violations, but shall be subject to Corps approval.

The Corps shall provide the Sponsor with sufficient information to account for impacts and the required mitigation for each DA permit in which a permittee is approved to purchase mitigation credits from the Sponsor. The Corps shall also provide a copy of the issued DA authorization requiring credit purchase.

In cases where the Corps allows permittees to purchase mitigation credits over time for a single DA permit (phased payments), the Corps must provide, in addition to the above documentation, a schedule for each individual mitigation credit purchase and the amount of mitigation credits to be purchased in each installment payment. Credit rates will apply at the time of payment.

The Sponsor shall provide receipts for credit purchase to the permittee, to the Corps' project manager and to the Corps' RIBITs administrators at the time of sale. The Corps shall accept a copy of the receipt (in pdf format) via email. The Sponsor shall provide a digital copy of the monthly mitigation ledger (sales by service area, re-allocated advanced credits, project credit releases, transfers of credits associated with project close outs) and other information necessary for the Corps to manage the program. The Sponsor shall provide the monthly ledger to the Corps prior to the end of the following month.

3. Credit Cost

The Sponsor shall determine the cost of compensatory mitigation credits in accordance with 33 CFR §332.

The Sponsor will set fees to reflect the expected costs associated with the mitigation, based on "full cost accounting" and include, as appropriate: land or easement acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, maintenance, remediation or adaptive management activities, administrative costs, contingencies (including construction and real estate expenses), long term management and protection, financial assurances, or other costs. The Sponsor may adjust fees as necessary and the fee adjustments without Corps Approval and will not require a modification to this Instrument.

The Sponsor shall notify the Corps, in the form of an email, of all changes to credit costs. The Sponsor shall notify the Corps a minimum of 10 business days prior to implementation of cost adjustment and shall post the revised credit costs per service area on website upon implementation.

The annual report provided by the Sponsor will include a breakdown of the fees and fee modifications and any anticipated changes in fee structure.

4. Fulfillment and Reallocation

Mitigation credits will be identified as advance credits or released credits. Advance credits are made available before mitigation projects have been implemented. Credits are released as mitigation projects are completed and achieve performance milestone. The release credits will be used to fulfill advance credits. Credits will be accounted for by service area.

D. Compensatory Mitigation Project Credits

1. Determination of Credits

Mitigation credits for individual mitigation projects will be determined as part of the compensatory mitigation project approval and credit release process. Mitigation credits will be determined in accordance with 33 CFR §332 and any Corps guidance or protocols in place at the time of project approval. In order to receive mitigation credits all projects must have a Corps approved Project Mitigation Plan.

2. Credit Release Schedule

Released credits shall be tied to performance based milestones. In general, mitigation sites, other than preservation projects (or preservation with buffer enhancement), generally will be subject to the following mitigation credit releases based on the bulleted milestones listed below. Deviations from the milestones schedule will be approved on a case-by-case basis and will be included in the project Mitigation Plan.

- In-Lieu Fee Instrument or Modification Approved. Site Protection Instrument approved and recorded with county. Financial Assurances and Long-Term Management Accounts Implemented. 404 Authorization Issued or project mitigation plan approved by Corps (for projects without discharge of fill material)
- Written acceptance from the Corps of the "As Built" Report and plans and construction completion form received

- Monitoring Reports Accepted, Performance Standards Met and Mitigation Site determined by Corps to be in compliance with authorization
- Final Delineation submitted by Sponsor and accepted by Corps. Final Monitoring Report Accepted, Performance Standards Met and Mitigation Site determined by Corps to be in Compliance with authorization. Fully funded Long Term Management Account. Written release from monitoring from the Corps.

In the case of preservation, 100% of the mitigation credits will be released upon the following: approved Project Mitigation Plan, purchase of the property or purchase of an easement, long term management plan and funding, and implementation of the site protection instrument (i.e. filing with the appropriate county either a conservation easement(s), deed restriction(s), or other legal protection as approved by Corps). For all preservation projects, the Corps must approve all of these items and may add other items, as appropriate.

The terms of the credit release schedule, including amounts and milestones, may vary, depending on project specific considerations, including risk. Each approved project mitigation plan will include the approved credit release schedule.

The Sponsor shall submit documentation to the Corps demonstrating that the relevant milestones have been achieved and request release of the mitigation credits. The release of mitigation credits for a compensatory mitigation site must be approved by the Corps. The Corps will follow the procedures set forth in 33 CFR §332, or as specified in any approved revision to the Mitigation Rule, in making the determination on whether to approve a mitigation credit release.

E. Compensatory Mitigation Projects

1. Compensatory Project Mitigation Plan

The Sponsor must submit a Project Mitigation Plan for each compensatory mitigation project to the Corps. The Project Mitigation Plan must include the information required in 33 CFR §332 and shall reference the Compensatory Planning Framework (CPF).

2. General Considerations

The general considerations for compensatory mitigation set forth in 33 CFR §332 shall be taken into consideration in evaluating compensatory mitigation projects submitted by the Sponsor to the Corps for approval.

Pursuant to 33 CFR §332, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site.

3. Approval

The Corps must approve all compensatory mitigation projects as modifications to this Instrument. Individual compensatory mitigation projects will be reviewed and approved in accordance with 33 CFR §332, in accordance with LRL-2010-323 and with any other regional mitigation procedures approved by the Corps. Mitigation projects involving preservation and not requiring Section 404 and/or Section 10 authorization will be reviewed and approved following 33 CFR §332. A list of previously approved projects is provided in Appendix B. Appendix B will be updated as projects are approved and will be included as an appendix in the Sponsor's annual report.

4. Implementation

The Sponsor is responsible for the implementation, monitoring, maintenance, adaptive management, protection, long-term management, and all other activities associated with the success of the approved compensatory mitigation projects, even if those activities are conducted by other parties. In instances where the Sponsor purchases mitigation credits from a Corps approved mitigation bank, this responsibility is transferred from the Sponsor to the mitigation bank provider as long as the Corps approves the purchase of the credits.

5. Monitoring

The Sponsor is responsible for monitoring compensatory mitigation projects. The Sponsor shall monitor the compensatory mitigation projects in accordance with the approved Project Mitigation Plan for each project. The Sponsor will provide annual monitoring reports on each compensatory mitigation project to the Corps and IRT unless otherwise specified in the project's approved Project Mitigation Plan. The Sponsor remains responsible for monitoring each compensatory mitigation project until written notification of release from monitoring from the Corps.

F. Acceptance of Compensatory Mitigation Responsibilities

1. The Sponsor agrees to assume responsibility for the mitigation requirements of DA permittees for which mitigation credits are purchased from the Sponsor as compensatory mitigation under a DA permit. The DA permittee shall retain responsibility for providing the compensatory mitigation until the Corps has received the appropriate documentation that confirms the Sponsor has accepted the mitigation responsibilities and received payment.
2. The Sponsor shall provide the Corps with documentation confirming the Sponsor has accepted responsibility for providing the required compensatory mitigation for a DA permit. This documentation will consist of a letter to the DA permittee, signed by the Sponsor, identifying the permit number (Corps ID) and stating the number and type of mitigation credits that have been secured from the Sponsor.
3. The Sponsor shall not accept mitigation payments from any entity until the following information has been provided by the Corps: the amount and type of aquatic resources impacted, the location of impacts, the amount and type of credits required to be purchased, the schedule for phased payments (if approved), a copy of the Corps authorization requiring credit purchase and other items, as determined by the Corps.
4. The Sponsor shall not set aside or 'reserve' credits for any entity unless approved or directed by the Corps.
5. The Sponsor shall retain the right to refuse any mitigation credit sales. The Sponsor retains the right to suspend credit sales for a given service area(s). Written notification of credit sale suspension shall be provide to the Corps a minimum of 10 business days prior to implementation. Upon implementation, the Sponsor shall notify the public by posting on the Sponsor's website.

G. Compensation Planning Framework

1. The Compensation Planning Framework (CPF) for the Mitigation Program is attached as Appendix A. The CPF will be used to select, secure, and implement specific compensatory mitigation projects. The CPF describes the geographic service area(s) for the Mitigation Program and how they were selected.
2. Modification of the CPF is considered a significant modification to the Instrument and will be made following the procedures in 33 CFR §332.

H. Timing of Compensatory Mitigation Projects

1. In general, implementation of compensatory mitigation projects will occur

after sufficient funds are available in a service area to undertake a project. Long-term protection and initial physical or biological improvements shall begin by the end of the third full growing season after the end of the calendar year when the mitigation credit(s) are sold, unless the Corps determines that more or less time is needed to plan and implement a project. The Corps has the authority to direct the Sponsor to provide alternative compensatory mitigation, including securing mitigation credits from a Corps approved mitigation bank or other In-lieu fee provider, in the event that the Sponsor does not provide mitigation within three growing seasons after the first advance credit is sold in a service area unless the Corps determines that more or less time is needed.

2. The Sponsor may identify, design, and/or implement mitigation in advance of impacts.
3. The timing of mitigation projects may be affected by IRT consultation, procurement procedures, permitting, compliance with other environmental regulations, and other factors.

I. Instrument Transition

Modification of the Instrument necessitates transitioning funds and projects from the current service area accounting system to service areas as described in LRL-2018-1080. Therefore, to maintain program continuity and assurances for projects funded under previous Instrument(s), service area funds that are/were collected under previous versions of the Instrument and already assigned to approved projects, as well as credit balances, shall be applied to the terms of this Instrument. Unassigned service area funds and credit balances will be redistributed with Corps collaboration and approval.

All current and proposed projects, until the effective date of this Instrument, will be considered on a case by case basis regarding in which proposed service area(s) credits created by a given project should apply because of various circumstances that include available funding within current or proposed service areas, the proximity of projects in relation to new service areas, and the complexity created by overlap of old and new service areas.

Consideration shall be given to appropriateness of a given project, all or in part, to represent a service area(s) for past or future credit sales. Many disparate scenarios exist, and changes in credit sales and project delivery up to the effective date of this Instrument may influence the decision making process.

IV. LONG-TERM PROTECTION

- A. Compensatory mitigation sites will be protected by acquiring conservation easements from private landowners, purchasing property and implementing deed restrictions consistent with the goal of long-term protection, locating project sites on federal public lands that are protected through management plans, deed restrictions, or Memorandums of Agreement, or protection through ownership interest by qualified conservation organization, institutions, or agencies.
- B. The long-term protection instrument must be included in the project mitigation plan. The Corps is responsible for the review and approval of the site protection methods and the language in site protection instruments. Approval and implementation of the long-term protection must be completed prior to release of any mitigation credits for the site.
- C. Long-term protection shall apply to those areas generating mitigation credits. The mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses may be used.

V. REVIEW AND REPORTING

To facilitate assessment of Instrument compliance, reviews of mitigation project sites and the Mitigation Program shall occur periodically, as noted below:

- A. **Mitigation Site Compliance Inspections.** An annual review of approved mitigation sites shall occur at dates agreeable to the Corps. The purpose of these field reviews is to determine the compliance status of approved mitigation projects that have not been released from monitoring, including evaluation of credit release requests, inspection of adaptive management activities, final release of sites from monitoring, or other inspections as deemed appropriate by the Corps. The Sponsor shall distribute the annual Mitigation Site Compliance Inspection Reports to the Corps and IRT and coordinate inspections of the sites, to be scheduled at dates agreeable to the Corps and Sponsor.
- B. **Annual Mitigation Program Compliance Evaluations.** An annual review of Mitigation Program shall occur. The Sponsor will submit an annual Mitigation Program Report to the Corps and IRT by October 31st for the previous state fiscal year (July 1 through June 30). The report shall include an annual report ledger in accordance with 33 CFR §332 and individual ledgers that track the production and debit of advanced and released credits for each compensatory mitigation project.

The Mitigation Program Report will include full accounting of mitigation activities by date and service area showing the beginning and ending balances with the following information:

1. Advance Credits

2. Released Credits
3. Credit purchases
4. Reserve activity including credit generation
5. Permit and date information
6. Income received
7. All disbursements
8. A list of all permits for which in-lieu fee payments were accepted with Corps permit number
9. Estimated fee adjustments
10. Adaptive management recommendations
11. Summary of project status by service area
12. Other information as deemed necessary by the Corps

Additional information may be included at the request of the Corps, IRT or the Sponsor. In the event that the Corps or Sponsor determines a meeting to discuss the report would be beneficial, a mutually agreeable date/time will be coordinated by the Sponsor. The Corps may consider granting an extension of this deadline upon request by the Sponsor.

- C. **Financial Review.** The Corps may request a detailed financial review of the Mitigation Program. This review will occur on an as-needed basis. The Sponsor is responsible for funding this review. As needed, or as requested by the Corps, a detailed financial review will be conducted. The Sponsor shall propose a scope, timeframe and deliverables to the Corps prior to undertaking the financial review. The Financial Report shall be submitted to the Corps, consistent with the agreed-upon scope and timeframes.

All books, accounts, reports, files, and other records pertaining to the Mitigation Program shall be retained and made available at reasonable times for inspection by the Corps. The sponsor shall conduct and pay for independent financial reviews and audits of the Mitigation Program. The frequency of review, reporting standards, and record keeping shall be consistent with Commonwealth of Kentucky standards and requirements. The Corps may require audits of some other time frame.

- D. **After-Action-Reviews (AARs)/Performance Reviews.** The Corps may direct the Sponsor to conduct an After-Action or other Performance Review of specific program elements. The Corps will provide guidance to the Sponsor defining the AAR scope, timeframe and deliverables. The Sponsor shall be responsible for funding and undertaking the AAR. AARs will be undertaken by industry experts.

VI. FINANCIAL ASSURANCES

- A. The Sponsor will provide financial assurances for compensatory mitigation projects associated with the Mitigation Program. The amount of the financial assurances has been determined in accordance with 33 CFR §332.

- B. The Mitigation Program is funded at a rate that is established and based on the actual and forecasted costs of conducting mitigation projects based on current requirements of the Corps. Funds collected from the sales of mitigation credits are deposited and maintained in restricted accounts. Approved mitigation projects are further protected by the contractual agreements for individual projects. The Mitigation Program shall reserve a minimum amount of funds within the account(s) termed the, "Reserve" to be used as financial assurance for remedial actions, long term maintenance of projects, and/or other activities that enhance or further protect mitigation projects, and which can be used to generate additional mitigation credits.

Financial assurances will be provided through individual compensatory mitigation projects and program operations. These may include but not limited to the following:

- 1. Project related financial assurances (insurance, bonds, warranties, and a minimum percent of each project set aside for adaptive management).
- 2. Long-term financial assurances (non-wasting amount of funds for long-term management/maintenance and funds for lapses in mitigation credits).
- 3. Programmatic financial assurances (percent of each credit sales/contingency, past performance).

Mitigation credit costs shall be sufficient to fund the financial assurances listed above.

Based on past performance of the Sponsor, it is anticipated that the financial assurances provided above will be sufficient to address reasonably foreseeable problems that might arise with compensatory mitigation projects including project failures and remediation prior to final credit release. A minimum of three million dollars (\$3,000,000) shall remain in the Reserve for any remedial actions not fully covered by the above assurances.

Any financial assurances differing from those discussed above shall be approved by the Corps in consultation with the Sponsor.

VII. IN-LIEU FEE FUND ACCOUNT

All mitigation payments shall be deposited in the state treasury of the Commonwealth of

Kentucky in a restricted fund account authorized by Kentucky Revised Statute 150.255. The Mitigation Fund is deemed a trust and KDFWR fund account that is to be used solely for the purposes and benefits of Kentucky wetland and stream mitigation projects. All monies that may be generated from the sale or disposal of property, equipment, materials, or other items purchased using in-lieu fee funds shall be reimbursed and deposited to the Mitigation Fund for the sole use and benefit of the Mitigation Program and shall not be diverted for other uses. The Mitigation Fund will be used for in-lieu fee mitigation activities, including: land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, remediation and adaptive management activities, long term management, administration, or other costs necessary to complete mitigation projects. The costs will be set at an amount sufficient to fund all costs associated with operation of the Mitigation Program and implementation of mitigation projects.

Interest and earnings shall remain in the Mitigation Fund for use solely by and for the purposes of the Mitigation Program and providing compensatory mitigation for DA permits. Monies in the Mitigation Fund shall not be diverted for other uses.

The following activities shall be tracked or accounted for separately in the Mitigation Fund:

- Administration
- Service Areas (in-lieu fee project funds)
- Reserve

A. Administrative Funds

The credit costs include an amount to fund the administration of the Mitigation Program. A portion of each credit sold will be separated and tracked in an Administrative Fund. Administrative functions include tasks completed by KDFWR staff, state staff, or professional services, for identifying, planning, and operation of the Mitigation Program. Operation of the program may include other aspects necessary to complete mitigation projects such as staff time, office space and equipment, design, monitoring, management, easement enforcement, legal actions, or other activity. A maximum of thirty (30%) of each credit sold plus an equal amount of any interest accruing on the Mitigation Fund shall be used to fund the administrative tasks. Revenues and expenditures for administrative costs shall be tracked separately. It is anticipated that administrative costs will vary over time. Therefore, changes in cost per credit will reflect adjustments in administrative fees but this change shall not constitute a modification of the Instrument as long as the Administrative Fees do not exceed 30% plus the interest of the credit cost.

B. Service Area Funds

Funds to implement in-lieu fee compensatory mitigation projects shall be deposited into the Mitigation Fund and tracked by service area. These funds will be used to implement compensatory mitigation projects that may include locating and identifying, planning, design, construction, long-term protection, land acquisition, purchase of

easements or other protective measures, mitigation monitoring, contingency, long-term management, and/or other activities. There are ten service areas as discussed in Appendix A.

C. Reserve Funds

A Reserve will be established in the Mitigation Fund. The Reserve will be funds maintained by interest that has accrued to the Mitigation Fund and from a percentage of each credit sold. The Reserve shall be tracked separately from the Service Area Funds and Administrative Funds.

The Reserve shall be used for contingency actions, long-term management and protection activities, additional and/or advanced mitigation, mitigation projects and/or portions of projects, or other programmatic or project-specific actions associated with compensatory mitigation to ensure obligations are fulfilled. All reserve funded activities shall be reported to the Corps. The use of reserve funds shall only require prior approval when those actions funded by reserve will require a new permit or permit modification.

Three million dollars (\$3,000,000) shall remain in the Reserve. Should use of these funds be required, additional accruing interest shall be used to restore the three million dollars (\$3,000,000). This may be adjusted with approval of the Corps and will not constitute a modification of the Instrument.

Funds in excess of the three million dollar limit will may be used to fund specific compensatory mitigation projects. Mitigation credits generated from compensatory mitigation projects funded from the Reserve may be used to compensate for shortfalls in mitigation credits for the Mitigation Program and/or may be used to provide compensatory mitigation for Corps permits in advance of impacts.

Released credits generated by compensatory mitigation projects funded from the Reserve may be sold to DA permittees subject to approval by the Corps. Funds from the sale of released credits generated by the Reserve shall be deposited back into the Reserve.

VIII. FEE SCHEDULE

The fees will be determined for each service area. Changes in fees shall not constitute a modification of the Instrument. The fee schedule for mitigation credit sales is based upon the cost of current and projected representative projects plus requirements included in the Instrument. The fee will be based on the expected costs which include:

- Administration
- Legal fees
- Land costs

- Design/Planning
- Construction (includes labor, planting)
- Monitoring
- Adaptive Management
- Contingency funding
- Long Term Management
- Other unidentified costs

The Corps will determine the appropriate method for assessing stream and wetland units. In the absence of a functional method or other approach, linear feet or acres may be used to determine mitigation units. Because mitigation units and methodology may change over time, and because the changes will be determined by the Corps, implementation of these changes by the Sponsor will not constitute an Instrument modification. Current mitigation units are Adjusted Mitigation Units (AMU) for streams in Service Areas 1-7. The AMU designation is used for wetlands statewide. Ecological Integrity Units (EIU) are used in Service Areas 8-10.

The initial fee schedule will be as follows for streams:

- Service Area 1: \$405/AMU
- Service Area 2: \$415/AMU
- Service Area 3: \$400/AMU
- Service Area 4: \$400/AMU
- Service Area 5: \$415/AMU
- Service Area 6: \$465/AMU
- Service Area 7: \$415/AMU
- Service Area 8: \$880/EIU
- Service Area 9: \$870/EIU
- Service Area 10: \$870/EIU

The initial fee schedule for wetlands in all service areas will be:

- Service Area 1: \$61,500/AMU
- Service Area 2: \$61,500/AMU
- Service Area 3: \$61,500/AMU
- Service Area 4: \$61,500/AMU
- Service Area 5: \$61,500/AMU
- Service Area 6: \$61,500/AMU
- Service Area 7: \$61,500/AMU
- Service Area 8: \$61,500/AMU
- Service Area 9: \$61,500/AMU
- Service Area 10: \$61,500/AMU

IX. MODIFICATION OF THE INSTRUMENT

- A. Modification of the Instrument shall follow the procedures set forth in 33 CFR §332.
- B. For purposes of this Instrument, changes in the allocation of advance credits are not considered a modification to the Instrument. Increase to advance credits may be approved by the Corps upon written request by the Sponsor.
- C. Changes to the CPF are considered modifications subject to the procedures of 33 CFR §332, unless specifically identified otherwise. The CPF, attached as Appendix A, utilizes various sources of external information/data in its mitigation approach and prioritization. These sources of information/data are expected to be updated or modified over time by the external entities responsible for maintaining these sources of information. The Sponsor's use of updated or modified information from these external sources in the application of its CPF is not considered a modification of the CPF or this Instrument.

X. DEFAULT, SUSPENSION, AND TERMINATION

- A. If the Corps determines that the Mitigation Program is not meeting performance standards or complying with the terms of the Instrument, appropriate action will be taken. Such actions may include, but are not limited to: suspending Sponsor mitigation credit sales, decreasing the allocation of advance credits, adaptive management actions, suspending approval of new mitigation projects, directing funds to alternative mitigation, terminating the Instrument, or other actions as approved by the Corps.
- B. Termination:
 - 1. Either the Corps or Sponsor may terminate this Instrument. Termination procedures shall be commenced upon 60 days written notice of either party's intent to terminate the Instrument.
 - 2. Termination procedures are as follows:
 - a. The Sponsor shall provide an accounting of all monies.
 - b. The Sponsor shall complete all existing contracts for projects approved by the Corps under the Instrument and expenses incurred on behalf of these projects
 - c. Unencumbered funds shall be payable as directed by the Corps.
 - 3. Upon termination, should Mitigation monies remain in the Mitigation Fund, the Corps shall direct the Sponsor to transfer the funds to another entity for implementation of stream and wetland mitigation projects and may include funds necessary for long-term management.

XI. CONTRACTUAL DISCLAIMER.

Corps approval of the Instrument constitutes the regulatory approval required for the Mitigation Program to be used to provide compensatory mitigation for the Department of the Army permits pursuant to 33 CFR 332.8. This Instrument is not a contract between the Sponsor or the Property Owner and the Corps or any other agency of the federal government. Any dispute arising under this Instrument will not give rise to any claim by the Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

XII. CONFLICT OF INTEREST

An IRT agency shall be recused from participating in IRT activities associated with projects in which they have a direct or indirect role in funding, contracting, implementation, or other financial involvement.

XIII. FORCE MAJEURE

A. Responsibility for Repair and Remediation

Projects shall be designed to be self-sustaining to the maximum extent possible.

The Sponsor shall be responsible for repair and remediation of compensatory mitigation projects except under the following circumstances:

1. A project is released from monitoring by the Corps; and
2. Damages to the compensatory mitigation project are the result of a Force Majeure.

B. Definition of Force Majeure

For purposes of this Instrument, a Force Majeure shall mean a natural hazard that has a significant impact on the environment and that is beyond the Sponsor's control. Natural hazards shall include, but not be limited to floods, tornados, hurricanes, earthquakes, fires and meteors.

C. Burden of Proof

The Corps will determine whether a Force Majeure event has occurred. The Sponsor shall bear the burden of demonstrating to the satisfaction of the Corps:

1. The natural hazard was caused by circumstances beyond the control of the Sponsor, and/or any entity controlled by the Sponsor, including its contractors and consultants;
2. That neither the Sponsor, nor any entity controlled by the Sponsor, including its contractors and consultants, could have reasonably foreseen and prevented such an event or damages from such event.

XIV. POINTS OF CONTACT

The points of contact for written communication among the parties are as follows or as otherwise specified in the future by written notice to all parties:

Corps of Engineers

U. S. Army Corps of Engineers
Chief, Regulatory Division (currently Michael S. Ricketts)
Louisville District Corps of Engineers
P.O. Box 59
Louisville, Kentucky 40201
Phone
Fax
[e-mail:](#)

U.S. Army Corps of Engineers
Chief, Regulatory Division (currently Michael E. Hatten)
Huntington District Corps of Engineers
502 Eighth Street
Huntington, WV 25701
Phone:
Fax:

U.S. Army Corps of Engineers
Chief, Regulatory Branch (currently Gregg W. Williams)
Memphis District Corps of Engineers
Memphis, TN 38103-1894
Phone:
Fax:

U.S. Army Corps of Engineers
Chief, Regulatory Division (currently Todd N. Tillinger)
Nashville District Corps of Engineers
3701 Bell Road
Nashville, TN 37214

Phone:
Fax:

Sponsor

Kentucky Department of Fish and Wildlife Resources
Mr. Mike Hardin, Assistant Director, Division of Fisheries
1 Sportsman's Lane
Frankfort, Kentucky 40601
Phone (502) 564-7109 ext 4466
Fax (502) 564-3178

Kentucky Department of Fish and Wildlife Resources
Mr. Rob Lewis, P.E., Manager FILO Program
1 Sportsman's Lane
Frankfort, Kentucky 40601
Phone (502) 564-7109 ext 4466
Fax (502) 564-3178

IRT Members

Kentucky Division of Water
UPDATE
300 Sower Blvd
Frankfort, KY 40601

US EPA
Wetlands, Coastal, & Oceans Branch
Chief of Mining Section
UPDATE
61 Forsyth Street, SW
Atlanta, GA 30303

U.S. Fish & Wildlife Service
Kentucky ES Field Office
Mr. Lee Andrews, Field Supervisor
J C Watts Federal Building - Room 265
330 West Broadway
Frankfort, KY 40601

XV. EFFECTIVE DATE:

This Instrument shall become effective when signed by the Louisville, Nashville, Huntington and Memphis Districts of the U.S. Army Corps of Engineers and the Sponsor. IRT members are invited to sign this Instrument as an indication of their agreement to the terms of the Instrument. IRT members may choose to sign the Instrument. The Instrument will not be negated if an IRT member chooses not to sign. The Corps retains the final authority for approval of the Instrument.

CORPS OF ENGINEERS & SPONSOR SIGNATURES

Name & Title

Date

CORPS OF ENGINEERS & SPONSOR SIGNATURES

Name & Title

Date

IRT SIGNATURES

Name & Title

Date

KDFWR APPENDICES

APPENDIX A-KDFWR COMPENSATORY PLANNING FRAMEWORK

APPENDIX B-LIST OF APPROVED COMPENSATORY MITIGATION PROJECTS