

North Carolina Department of Environment and Natural Resources' Ecosystem
Enhancement Program In-Lieu Fee Instrument

AGREEMENT TO CONTINUE THE OPERATION OF NORTH CAROLINA'S
IN-LIEU FEE PROGRAMS OPERATED BY THE NORTH CAROLINA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES'
ECOSYSTEM ENHANCEMENT PROGRAM PURSUANT TO 33 CFR PARTS
325 AND 332 AS REVISED EFFECTIVE JUNE 9, 2008 (FEDERAL
MITIGATION RULE)

This agreement to continue the In-Lieu Fee (ILF) operations of the North Carolina Department of Environment and Natural Resources' (NCDENR) Ecosystem Enhancement Program (NCEEP) is entered into this 28 day of July, 2010, by and between the NCEEP ("Sponsor"), the U.S. Army Corps of Engineers (USACE), the U.S. Environmental Protection Agency (USEPA), the U.S. Fish and Wildlife Service (USFWS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Division of Water Quality (NCDWQ), the North Carolina Division of Coastal Management (NCDCM), and the National Marine Fisheries Service (NMFS).

This agreement supersedes the following agreements governing NCEEP operations:

- Memorandum of Agreement (MOA) Among the U.S. Army Corps of Engineers, N.C. Department of Transportation and N.C. Department of Environment and Natural Resources signed in 2003 and all successive amendments
- Memorandum of Understanding (MOU) between the U.S. Army Corps of Engineers and the N.C. Department of Environment and Natural Resources on In-Lieu Fee Compensatory Mitigation signed in 1998 and all successive amendments

Upon execution of this agreement, the MOA and MOU, as referenced above become null and void and any requirements contained therein are no longer applicable. The signatories to this instrument recognize that cooperation between the USACE, NCDENR, and NCDOT is critical to the continued development of advanced, high-quality mitigation, and are committed to continue efforts that have been on-going since the establishment of the NCEEP.

I. General Provisions

A. Purpose and Mission of the Ecosystem Enhancement Program

The purpose of the NCEEP is to provide a comprehensive, natural resource enhancement program that identifies ecosystem needs at the local watershed level and preserves, enhances, and restores ecological functions within target watersheds while addressing impacts from anticipated NCDOT transportation projects and permitted impacts from other development projects. All ecological enhancement activities are to be undertaken by the NCEEP with participation by State and Federal agencies and

will be eligible for funding through multiple sources, including, but not limited to, programmed transportation funding. The goals of the NCEEP are to:

1. Provide effective protection of the natural resources of the State by assessing, prioritizing, restoring, enhancing and preserving ecosystem functions and providing compensatory mitigation for development impacts by addressing watershed or basin needs and developing enhancement projects where the most benefit would be experienced.
2. Advance environmental stewardship through the identification of unique enhancement opportunities that, if implemented, would provide substantial benefit and protection to the natural resources of the State of North Carolina.
3. Execute the requirements placed on the NCDENR by the North Carolina Wetlands Restoration Program Act (N.C.G.S. 143-214.8, et seq.) (aka the North Carolina Ecosystem Enhancement Program).
4. Enhance the natural resources of North Carolina by addressing watershed needs.
5. Fully satisfy compensatory mitigation requirements for authorized impacts on a programmatic, watershed-level basis.
6. Satisfy the compensatory wetland, stream and buffer mitigation needs of the NCDOT transportation program in advance of project impacts.
7. Provide a means for organizing, steering, funding, and implementing ecosystem enhancement efforts in the State of North Carolina.

B. Role of the Interagency Review Team

The Interagency Review Team (IRT) is chaired by the District Engineer (DE) of the USACE, Wilmington District. Membership includes USEPA, USFWS, NCWRC, NCDWQ, NCDCEM and NMFS. The primary role of the IRT is to assist the DE in the review of monitoring reports, the evaluation of mitigation plans, the recommendation of remedial measures, the approval of credit releases, and the approval of modifications to this agreement. The IRT's role and responsibilities are more fully set forth in Sections 332.8 of the Federal Mitigation Rule. The IRT will work to reach consensus on its actions.

The parties to this agreement intend that the members of the IRT will review such documents and mitigation sites as each considers necessary to provide meaningful input, and express any recommendations, concerns, or potential improvements concerning the implementation of the NCEEP to the NCDENR. Comments on the use of the NCEEP to provide compensatory mitigation for particular permits will be made during the permit process for each permit.

C. Transfer of Permit Liability – ILF

Acceptance of a payment is an acknowledgement by the NCEEP that NCEEP, and not the applicant, is responsible for satisfying the compensatory mitigation requirements of the Section 404, Section 401 or CAMA permit. Upon receipt of payment from a Permittee, the NCEEP shall issue documentation to the Permittee and the USACE project manager stating that they accept full responsibility for providing compensatory mitigation as required by the permit conditions. This documentation shall include the permit number, and a statement indicating the number and resource type of credits that have been secured from the NCEEP. Transfer of mitigation liability to the NCEEP, including, but not limited to, the identification and selection of sites, property rights acquisition, mitigation plan design and development, construction, monitoring, preservation, and long-term management and maintenance of the required mitigation, occurs upon the DE's receipt of the acceptance documentation from the NCEEP. In satisfaction of the compensatory mitigation requirements, the NCEEP shall provide compensatory mitigation of the type and in the amount and Hydrologic Unit Code (HUC) specified in the Section 404, 401 and/or CAMA permit, or as otherwise authorized on a case-by-case basis by the DE in consultation with the IRT.

Conditions contained within the permit authorization(s) shall stipulate the 8-digit HUC, amount and type of mitigation, or other case-by-case provision as determined by the DE. Additionally, the permit conditions shall state that no discharge authorized by the permit may be conducted until the Permittee is in possession of the acceptance documentation from the NCEEP stating that the NCEEP accepts full responsibility for the required mitigation.

D. Transfer of Permit Liability – NCDOT

Pursuant to this instrument, the NCEEP agrees to accept full responsibility for mitigation required by Section 404, Section 401, and CAMA permit authorizations issued to the NCDOT for all projects where the NCEEP has previously provided a letter of acceptance to the NCDOT. Upon receiving a copy of the issued permit, the NCEEP shall provide documentation to the NCDOT and the USACE project manager stating that they accept full responsibility for providing compensatory mitigation as required by the permit conditions. This documentation shall include the permit number, and a statement indicating the number and resource type of credits that have been secured from the NCEEP. Transfer of mitigation liability to the NCEEP, including, but not limited to, the identification and selection of sites, property rights acquisition, mitigation plan design and development, construction, monitoring, preservation, and long-term management and maintenance of the required mitigation, occurs upon the DE's receipt of this acceptance documentation from the NCEEP. In satisfaction of the compensatory mitigation requirements, the NCEEP shall provide compensatory mitigation of the type and in the amount and Hydrologic Unit Code (HUC) specified in the Section 404, 401 and/or CAMA permit, or as otherwise authorized on a case-by-case basis by the DE in consultation with the IRT.

Conditions contained within the permit authorization(s) shall stipulate the 8-digit HUC, amount and type of mitigation, or other case-by-case provision as determined by the DE. Additionally, the permit conditions shall state that the NCDOT remains responsible for the mitigation until the NCDOT and the USACE are in possession of final documentation from the NCEEP stating that the NCEEP accepts full responsibility for the required permitted mitigation.

II. Authorities

- A. The Secretary of the Army** – The Secretary of the Army is responsible for the administration of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Permits issued under these authorities generally require compensatory mitigation to replace aquatic resource functions and values that are unavoidably lost as a result of those permits. This agreement is set forth in compliance with 33 CFR Parts 325 and 332 published on April 10, 2008 (Federal Mitigation Rule). In addition, compensatory mitigation objectives and guidance are provided in the 1990 Memorandum of Agreement between the Environmental Protection Agency and The Department of the Army concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, where not superseded by 33 CFR Part 332.
- B. Ecosystem Enhancement Program** – The NCEEP is a non-regulatory program housed in the NCDENR that provides mitigation in compliance with requirements set forth in this agreement and in N.C.G.S. 143-214.8 through N.C.G.S. 143-214.13.
- C. North Carolina Division of Water Quality** – The NCDWQ, which is within the NCDENR, has responsibility for administering Section 401 of the Clean Water Act (regulated under 15A NCAC 2B .0500) and state rules governing isolated wetlands (15A NCAC 2H .1300).
- D. North Carolina Division of Coastal Management** – The NCDPCM, which is within the NCDENR, has responsibility for administering the North Carolina Coastal Management Program under the rules of the Coastal Resources Commission (15A NCAC Chapter 7), and the NC Dredge and Fill Law.

III. Funding Provisions

The NCEEP receives funding for wetland and stream mitigation from two primary sources: the NCDOT and customers of the ILF program. All mitigation payments made pursuant to this agreement are deposited into the Ecosystem Restoration Fund (N.C.G.S. 143-214.12). The Ecosystem Restoration Fund is broken into two separate accounts: one for payments received from the NCDOT pursuant to agreed upon business protocols and one for all other customers accessing the NCEEP's ILF program for stream and wetland mitigation. These accounts are maintained by the Office of State Budget and Management. Funds are only used for program administration and the selection, design, acquisition, implementation and

management of compensatory mitigation projects. All interest earned on these accounts will be used for purposes of compensatory mitigation. The NCEEP will make all financial data available to the DE upon request. Additional details regarding the two primary funding sources include:

A. Funding: In-Lieu-Fee Program

Payments into the Ecosystem Restoration Fund from ILF customers are made based on fees established pursuant to N.C.G.S. 143-214.11 and promulgated in 15A NCAC 2R .0402. The NCEEP's fees for stream and wetlands mitigation are established by an analysis of known, historic and expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources. All program costs including expenses for land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, remediation or adaptive management activities, and long-term management, as well as administration of the program are accounted for in the establishment of fees. The NCEEP will provide in its annual report an analysis of the program's cost data and determine whether or not a fee adjustment is necessary.

B. Funding: NCDOT

Provisions for the funding of compensatory mitigation provided for the NCDOT is provided in a separate operating agreement between the NCDENR and the NCDOT.

IV. Operational Provisions

A. Geographic Service Area

The NCEEP agrees to provide mitigation for permitted impacts within the same 8-digit catalog unit (CU) (as defined by USGS) in which the impact occurs unless the DE, in consultation with the IRT, has agreed to an alternative. The NCEEP shall make every effort to inform the DE and the IRT that a request may be forthcoming such that permit decisions are made with this knowledge. In the event that the NCEEP cannot provide the mitigation in the correct CU and the responsibility for satisfying the permit conditions has been accepted by the NCEEP, then any additional mitigation requirements will be the responsibility of the NCEEP.

This instrument applies only to mitigation projects and permitted impacts occurring within the State of North Carolina.

B. Compensation Planning Framework

All mitigation projects provided by the NCEEP under the terms of this agreement will comply with the Compensation Planning Framework presented in Appendix I.

C. Permit Decisions

1. USACE Permit Decisions

The USACE will make decisions concerning compensatory mitigation requirements for permits or authorizations issued to the NCDOT and any other entity that wishes to utilize the NCEEP for some or all of its compensatory mitigation requirements as part of its decision on the individual permit or general permit authorization for each proposed project, in compliance with all applicable USACE regulations, guidance and the § 404(b)(1) guidelines. The parties to this agreement recognize that permit decisions regarding the need for, type, quantity, and appropriateness of compensatory mitigation are to be made by the USACE within the permit process required for each proposed project.

Once the permit decision has been made, the USACE will provide a copy of the permit authorization document, containing the mitigation conditions, to the NCEEP in a timely manner. The conditions will include the quantity of required mitigation, type of mitigation, and 8-digit Hydrologic Unit Code for the Basin in which the impact occurred. For stream mitigation, the conditions will specify the stream temperature (i.e., Cold, Cool, or Warm water). For wetland mitigation, the conditions will specify whether the required mitigation is Riparian Riverine, Riparian Non-Riverine, Non-Riparian, or Coastal.

The USACE will evaluate the NCEEP program at least annually. That evaluation will focus on the consistency of the NCEEP strategy with USACE regulations and guidelines for compensatory mitigation. The USACE will provide in writing to the NCEEP any appropriate recommendations resulting from that evaluation.

2. NCDENR Permit Decisions

Nothing in this agreement shall abrogate or limit the regulatory decision authority of the appropriate NCDENR permitting agencies.

D. Advance Credits

1. Advance Credits Allocation

Pursuant to 33 CFR Part 332, the following number of advance credits have been allocated by river basin and 8-digit CU for use by the NCEEP. The NCEEP may transfer available advance credits from one CU to another within the same river basin without prior approval from the DE or IRT. The NCEEP will provide an annual advance credit debit ledger that provides the amount of advance credits that have been utilized or transferred during the prior year.

Table 1 – Advance Credit Allocation by River Basin

River Basin	Cataloging Unit	Advance Stream Credits	Advance Wetland Credits
BROAD		50,000	25
	03050105	50,000	25
CAPE FEAR		170,000	635
	03030002	62,841	112
	03030003	29,571	8
	03030004	53,717	125
	03030005	13,458	368
	03030006	9,723	4
	03030007	691	18
CATAWBA		145,000	60
	03050101	121,047	37
	03050102	15,989	0
	03050103	7,964	23
CHOWAN		20,000	80
	03010201	0	0
	03010202	0	0
	03010203	4,746	65
	03010204	15,254	15
FRENCH BROAD		60,000	20
	06010105	45,417	16
	06010106	1,470	4
	06010108	13,113	0
HIWASSEE		20,000	20
	06020002	20,000	20
	06020003	0	0
LITTLE TENNESSEE		20,000	20
	06010202	1,862	2
	06010203	2,767	0
	06010204	15,371	18
LUMBER		20,000	155
	03040203	15,888	136
	03040204	1,593	9
	03040206	249	3
	03040207	2,270	7
NEUSE		55,000	515
	03020201	41,533	68
	03020202	4,551	7
	03020203	681	22
	03020204	8,235	418
NEW		30,000	20
	05050001	30,000	20
PASQUOTANK		20,000	215
	03010205	20,000	215

River Basin	Cataloging Unit	Advance Stream Credits	Advance Wetland Credits
ROANOKE		20,000	20
	03010102	0	1
	03010103	7,856	0
	03010104	9,623	4
	03010106	0	1
	03010107	2,521	14
SAVANNAH		20,000	20
	03060101	20,000	20
	03060102	0	0
TAR-PAMLICO		20,000	20
	03020101	4,636	5
	03020102	140	0
	03020103	0	1
	03020104	14,631	11
	03020105	594	3
WATAUGA		20,000	50
	06010103	20,000	50
WHITE OAK		20,000	195
	03020106	9,252	134
	03030001	10,748	61
YADKIN		165,000	155
	03040101	26,903	6
	03040102	10,239	8
	03040103	8,494	5
	03040104	36,444	15
	03040105	78,416	50
	03040201	4,504	71
	03040202	0	0

2. Method for Determining Advance Credit Allocations

The numbers in the table above represent an initial allocation of advance credits. The initial quantity of advance credits has been based on an analysis of the predicted future impacts and the associated mitigation requirements for both NCDOT projects and other development activities within each river basin over the next 5 year period. The NCDOT mitigation needs have been based on the NCDOT's Transportation Improvement Program (TIP), Division, Ferry, and other transportation plans and forecasted mitigation needs over the next 5 years through 2014. The advance credits for other development activities and mitigation needs have been calculated using the annual average historical mitigation payments into the program over the last 7 years, and is intended to provide sufficient credits so that the program can continue to accept payments at that level for the next 5 years. For each river basin, the estimate was rounded up to the nearest 5000 credits for streams and 5 credits for wetlands. A minimum of 20,000 advance stream credits and 20 advance wetland credits are provided for the initial advance credit allotment for each river basin. The total

basin advance credit allocation was then divided up by individual CUs based on the percentage of projected mitigation need within each CU.

3. Method for Revising Advance Credit Allocations

Because credit release schedules for mitigation projects last beyond 5 years, and due to unpredictable changing demand of mitigation, it is anticipated that this allocation may need to be revised periodically to reflect changing needs of the program. For revisions to the total number of advance credit allocated to a river basin, or to transfer advanced credits between river basins, or between CUs within the same river basin, the NCEEP must submit a request in writing for approval by the DE in consultation with the IRT.

E. Small Impacts

If, within any 8-digit cataloging unit, the cumulative mitigation requirements in any given North Carolina State Government Fiscal Year are less than 1,000 linear feet of stream or 3 acres of wetlands, the NCEEP may make a request to the DE and IRT to satisfy the mitigation requirements by use of credits from an adjacent cataloging unit within the same river basin, use of High Quality Preservation, implementation of BMPs identified in a Local Watershed Plan, or other mitigation options as approved by the DE and IRT. Penalties, to include additional mitigation, may apply if it is determined to be appropriate by the DE in consultation with the IRT. The IRT, with the concurrence of the DE, will provide a response within 60 days of the proposal. In the event that the proposal is not acceptable, the NCEEP will be obligated to satisfy the mitigation requirements pursuant to the conditions of the permit.

F. Project Delivery

1. Mitigation Sites

- a. The NCEEP shall manage, facilitate or perform the identification, acquisition, planning, construction, monitoring, remedial action and long term management/maintenance necessary to provide compensatory mitigation for impacts to waters and wetlands anticipated to be authorized by USACE permits. The NCEEP shall complete such work within the time frames described in this agreement. Sites shall be selected in accordance with the Compensation Planning Framework and with any other guidelines established by the DE and IRT.
- b. The NCEEP shall prepare a site-specific mitigation plan for all proposed compensatory mitigation projects intended to meet the requirements of Section 404, Section 10, Section 401, and CAMA permits. Each such site specific mitigation plan shall be prepared in accordance with the guidelines contained in 33 CFR 332.4 (12 Elements of Mitigation Plans), included as Appendix II of this document.

- c. For each compensatory mitigation project, the NCEEP shall prepare annual monitoring reports, as specified in the mitigation plan, until success criteria have been met or until the DE, in consultation with the IRT, determines that site monitoring can be discontinued.
- d. For each preservation site acquired by the State of North Carolina through the NCEEP to satisfy mitigation requirements of Section 404, Section 10, Section 401 and CAMA permits, prior to acquisition, the NCEEP shall prepare a report generally describing the site. The report will describe for each site the ecological and watershed functions of the preservation site, and their importance to the region; demonstrable degradation threats including a description of threatened resources; the long-term management plan; an explanation of the legal mechanisms to be used to preserve the site, including copies of any proposed real estate instruments; and a description of any easements or other encumbrances on the property. Provisions required to be included in the preservation mechanism shall be in compliance with current USACE policy and guidance.
- e. The NCEEP shall provide a copy of each site-specific mitigation plan, annual monitoring report, final report, and preservation report to the DE, the NCDOT (as appropriate), and each member of the IRT within 30 days of completion of the document. This requirement may be satisfied by posting such reports on an accessible website, with e-mail notification to each recipient that such reports have been posted.
- f. The NCEEP shall maintain a website accessible to the general public and shall post all site-specific mitigation plans, preservation reports, monitoring reports and watershed plans on the website in a timely manner.

2. Review of New Projects

Review of new mitigation projects will be in accordance with 33 CFR 332.8. As new project sites are identified and secured, the NCEEP will seek approval of the projects concurrent with the permit process specific to each restoration or enhancement project. The parties to this agreement agree that the NCEEP is authorized to expend a limited portion of funds, as determined by the NCEEP, for the purposes of advanced planning and project design in advance of seeking formal DE and IRT approval through the permit or other process. Permit applications and other project documentation will include a mitigation plan that contains the information stipulated in 33 CFR Part 332. Each plan will contain a credit release schedule consistent with current USACE policy and guidance. Issuance of the 404 permit indicates that the NCEEP may expend funds and proceed with development of the mitigation project. If no DA permit is necessary, the DE will provide the NCEEP with written approval or rejection of the expenditure of funds for the mitigation project. The DE, in consultation with

the IRT, will make every effort to review plans in a timely manner and provide sufficient information to remedy any deficiencies found in the plan.

3. Timing of Project Delivery

a. Definitions

Construction or constructed mitigation: A mitigation site has been constructed in its entirety, to include planting, and an as-built report has been produced. As built reports must be sealed by an engineer prior to project closeout, if appropriate.

Institute(d): A mitigation site has been identified and acquired and a contract has been issued for the design and implementation of the mitigation project.

Unanticipated mitigation: Additional stream and/or wetland impacts that may occur as a result of:

- i) A permit modification request made by the NCDOT;
- ii) A change in the wetland and/or stream field verified amounts by the USACE;
- iii) Increased projected mitigation needs resulting from programmed NCDOT impact projections that are greater than the annual projected amounts;
- iv) A decision or permit requirement made by a State or Federal regulatory or review (resource) agency that occurs later than Concurrence Point 4C in the Merger 01 Process or at an equivalent review point for projects not in the Merger 01 process.
- v) Changes in Anticipated Timing of Road Projects. If additional revenue or pressing transportation needs warrant advancement of a project in the TIP schedule, the NCDOT will coordinate with the NCEEP to determine a schedule, consistent with this section of this agreement, for the delivery of the required mitigation. The NCDOT can then, at its discretion, set an appropriate advanced letting date based on the availability of mitigation. In the event that the NCEEP cannot satisfy the compensatory mitigation requirements for the advanced NCDOT project, the NCDOT may propose to use alternate mitigation options, including, but not limited to, the existing NCEEP ILF program or other mitigation providers, to satisfy the compensatory mitigation requirement.

b. Mitigation Timing for All NCEEP Projects

Land acquisition and the initial physical and biological improvements, including planting, necessary to satisfy the mitigation requirements found in the DA permit must be completed by the end of the third full state fiscal year (ending on June 30th) after the NCEEP receives payment (in the case of ILF mitigation), or a permit is issued (in the case of NCDOT mitigation). The NCEEP shall seek written approval from the DE at least 60 days prior to the deadline when additional time is required to achieve these initial improvements on a project to satisfy a permitted requirement.

c. Mitigation Timing for NCDOT Projects

i) For mitigation projects provided to meet NCDOT mitigation needs, the NCEEP will comply with the following additional performance schedule and timeline:

a) Between the date of this agreement and Jun 30, 2013, the NCEEP will have mitigation instituted for each applicable USACE permit by the end of the North Carolina state fiscal year (June 30) in which that permit was issued.

b) Between July 1, 2013 and June 30, 2015, the NCEEP will have completed construction of mitigation for each applicable USACE permit at the time of permit issuance.

c) By July 1, 2015, the NCEEP will have completed the construction of mitigation sites for each applicable USACE permit at least 2 years ahead of the date of permit issuance.

ii) Modification of Timeframes for NCDOT Mitigation

The signatory agencies acknowledge that there may be instances in which the timeframes, as specified above, may not be met due to circumstances beyond the NCEEP's control. In those cases, the USACE may modify these timeframes, on a case-by-case basis, provided a written request to the USACE is made by the NCEEP at least 6 months in advance of permit issuance.

iii) Unanticipated Mitigation Requests for NCDOT Mitigation

In the event that unanticipated mitigation is required for any USACE permit and upon NCEEP acceptance and USACE approval, the NCEEP will satisfy the additional compensatory mitigation requirements using one of the following processes:

- a) When credit assets are available that meet conditions of this agreement and are not otherwise obligated to projects, the NCEEP will use those assets and debit accordingly.
- b) When credit assets that meet permit conditions are not available, and upon documentation of appropriate funding from the NCDOT, the NCEEP will plan and institute the required mitigation within one year of its receipt of a USACE permit.

G. Perpetual Protection/ Real Estate Provisions

The NCEEP will ensure that all mitigation sites that are used to satisfy compensatory mitigation requirements will remain within the public domain in fee simple title in perpetuity and/or that appropriate preservation mechanisms, including conservation easements and deed restrictions, approved by the DE, are placed on the sites and that sites will be managed in perpetuity in accordance with the long-term management plan included within the mitigation plan or report for the property. Preservation mechanisms shall be recorded in the land records at the Office of the Clerk of the Superior Court in the county in which the land lies. A copy of the recorded preservation mechanism, showing book and page numbers of the recorded location, shall be provided to the Wilmington District's point of contact for NCEEP mitigation.

Preservation mechanisms shall be perpetual, preserve all natural areas, and prohibit all use of the property inconsistent with its use as mitigation property, including any activity that would materially alter the biological integrity or functional and educational value of wetlands or streams within the mitigation site, consistent with the mitigation plan. The purpose of the preservation mechanism will be to assure that future use of the mitigation site will result in the restoration, protection, maintenance and enhancement of wetland and stream functions described in the mitigation plan. The preservation mechanism must contain a provision requiring 60 day advance notification to the DE before any action is taken to void or modify the preservation mechanism, including transfer of title to, or establishment of any other legal claims over, the project site. The standard provisions to be included in all preservation mechanisms shall be consistent with current USACE policy and guidance. These provisions may be modified with written approval from the DE on a case-by-case basis.

The NCEEP will transfer responsibility for the long-term management of mitigation sites to the NCDENR Stewardship Program, or other entity, as approved by the IRT and DE. In addition, the NCEEP may transfer ownership or management responsibilities of mitigation site properties on a case-by-case basis to appropriate non-profit conservation organizations, state or local government entities, or land trusts for management and monitoring, with approval by the IRT and DE. The NCEEP is responsible for ensuring that the preservation mechanism is re-recorded to ensure that the NCEEP remains within the chain of title. The terms and conditions of this conveyance shall not conflict with the intent and provisions of the preservation

mechanism nor shall such conveyance enlarge or modify the uses specified in the preservation mechanism.

H. Financial Assurances Procedures:

The NCEEP is committed to the requirements found in this instrument and to the implementation, monitoring and long term management of its mitigation projects. In accordance with the letter of commitment from Secretary of the NCDENR dated January 11, 2010, which is attached as appendix III to this document, the DE has determined that no additional financial assurances are required.

I. Project Establishment and Operation

1. Credit Generation

For the purposes of this agreement, re-establishment and rehabilitation, as defined in the Federal Mitigation Rule have been combined under the Restoration category. Additionally, the parties to this agreement agree that creation of aquatic resources should only be undertaken as a last resort.

The number of credits proposed to be generated by each mitigation project, along with the rationale for estimating the credit yield, will be provided in the mitigation plan and will be based on current DE and IRT guidance. Alternatively, credit generation may be based on a functional or condition assessment tool approved by the DE and the IRT on a case-by-case basis.

2. Credit Release schedules

The terms of the credit release schedule for each project will be specified in the approved mitigation plan, in accordance with current DE and IRT guidance.

3. Credit Release Approval

As projects approach milestones associated with credit release, the NCEEP will submit a request for credit release to the DE along with documentation substantiating achievement of criteria required for release to occur. It is anticipated that the review of projects for credit release will be done in groups to facilitate the review and approval of such releases. The parties to this agreement agree that an initial allocation of credits, as specified in the mitigation plan can be released by the NCEEP without prior written approval of the DE upon satisfactory completion of the following activities:

- a. Approval of the final mitigation plan;
- b. Recordation of the preservation mechanism, as well as a title opinion acceptable to the USACE covering the property;

- c. Completion of the initial physical and biological improvements to the mitigation site pursuant to the mitigation plan;
- d. Receipt of necessary DA permit authorization or written DA approval for projects where DA permit issuance is not required. Under no circumstances shall any mitigation project be debited until the necessary DA authorization has been received for its construction or the DE has otherwise provided written approval for the project in the case where no DA authorization is required for construction of the mitigation project.

4. Mitigation types

Mitigation credits shall be reported according to the following types:

- a. Streams: cold, cool and warm
- b. Wetland – Riparian Riverine, Riparian Non-Riverine, Non-Riparian, and Coastal.

5. Monitoring:

The NCEEP will monitor each of its mitigation sites in accordance with the monitoring plan specified in the mitigation plan including the identification of problem areas that may compromise the success of the mitigation site. The NCEEP will make every effort to provide monitoring reports to the DE and IRT by April 1 of each year. It is expected that these reports will be provided in an electronic format and posted on the appropriate website unless a request is made for a traditional paper copy. The IRT shall make every effort to conduct site inspections they deem necessary to ensure that projects are meeting stated success criteria. In the event that projects are not meeting success criteria to the extent that the generation of credit may be suspended or curtailed, the DE shall make every effort to inform the NCEEP of such decisions in a timely manner, but no later than 30 days after receipt of written comments from the IRT.

6. Contingency Plans:

In the event that the NCEEP discovers that one of its projects is not meeting its stated performance criteria, including the failure of structures on stream projects, the NCEEP shall notify the DE and IRT as soon as possible and provide a proposed remedial action plan for ensuring that the site meets its success criteria. Corrective measures may include but are limited to, site modifications, design changes, revisions to maintenance requirements, or revised monitoring requirements.

7. Project Closure

At the end of the monitoring period, and provided all success criteria have been met, the DE, in consultation with the IRT, will issue project closeout notification. In the event the DE, in consultation with the IRT determines that a project is not fulfilling its performance standards or it is unlikely to do so after implementing remedial measures, the DE may reduce or invalidate the anticipated credits generated by a project and require that the NCEEP produce credits from another site to fulfill any outstanding permit requirements. Under no circumstances shall the number of credits generated by a site or credits previously assigned to a specific permit requirement (as shown in the debit ledger) change after the site has been closed out, unless authorized by the DE in consultation with IRT on a case-by-case basis.

8. Maintenance and Long-Term Management Provisions:

The NCEEP agrees that its projects will be designed to be self-sustaining to the maximum extent practicable. The NCEEP shall be responsible for maintaining its projects, consistent with the mitigation plan, to ensure their long term viability as functional aquatic resources. In the event a long term management plan is specified in the mitigation plan, the NCEEP will be responsible for ensuring that the identified funding mechanism is implemented.

J. Program Reporting Protocols

All approved credit transactions shall be reported to the DE by providing copies of the transfer of mitigation liability documentation for each issued permit, which will be included in the administrative record for the instrument. The NCEEP shall be subject to the following reporting protocols, detailing activity from July 1 to June 30 of each year:

1. Annual Report

The NCEEP will provide a comprehensive annual report each year on October 1st to the DE, the NCDOT and members of the IRT. This report will include at a minimum the following elements:

- a. All income received, disbursements, and interest earned by the program account.
- b. A list of all permits for which ILF program funds were accepted, which must including the following information:
 - i) USACE ORM ID Number
 - ii) NCDWQ Permit Number
 - iii) NCDCM Permit Number

- iv) 8-digit HUC in which the impacts occurred
 - v) Amount of authorized impacts
 - vi) The required amount of compensatory mitigation
 - vii) The amount paid to the ILF program
 - viii) The date the funds were received from the Permittee
- c. A description of the expenditure of funds from the program account, which must include the following information:
- i) Land Costs
 - ii) Planning Costs, to include watershed planning
 - iii) Construction costs
 - iv) Monitoring Costs
 - v) Maintenance costs
 - vi) Adaptive Management and Contingencies
 - vii) Administrative costs
- d. For advanced credits, the NCEEP shall report the balance of Advance Credits and Released credits by each geographic service area.

2. Debit Ledger

The NCEEP shall also provide a Debit Ledger annually to the DE that contains the following:

- a. List of approved mitigation sites with amount and type of stream and wetland resource, 8-digit CU and stage of implementation
- b. Beginning and ending available credit amount with permitted impact(s) for each resource type
- c. All additions and subtractions of credits, and any other changes in credit availability
- d. A Compliance Status Report that provides the following:
 - i) 8-digit HUC
 - ii) Deficit in the required mitigation
 - iii) USACE, NCDWQ, and NCDPCM permit numbers
 - iv) Proposed actions the NCEEP intends to take to correct any non-compliance

3. Additional Information

On a case-by-case basis, the NCEEP may be asked to provide any other information that the IRT and/or DE deems necessary for the continued operation of the ILF program.

K. Program Review

The DE in consultation with the IRT shall review NCEEP reports to determine program compliance and identify any necessary course corrections. Failure of the NCEEP to make any corrections identified in writing by the DE in a timely manner could result in immediate termination of the use of the program for Section 404/Section 10 compensatory mitigation. Notice of termination by the DE pursuant to this paragraph shall be in writing and provided to the NCEEP, the IRT and the NCDOT.

L. Default and Closure Provisions

Any delay or failure of the NCEEP to comply with the terms of this agreement shall not constitute a default hereunder if and to the extent that such delay or failure is primarily caused by any act, event or conditions beyond the NCEEP's reasonable control and significantly adversely affects its ability to perform its obligations hereunder including: (i) acts of God, lightning, earthquake, fire, landslide, or interference by third parties; (ii) condemnation or other taking by any governmental body; (iii) change in applicable law, regulation, rule, ordinance or permit condition, or the interpretation or enforcement thereof; (iv) any order, judgment, action or determination of any federal, state or local court, administrative agency or government body; or (v) the suspension or interruption of any permit, license, consent, authorization or approval. If the performance of the NCEEP is affected by any such event, the NCEEP shall give written notice thereof to the DE and IRT as soon as is reasonably practicable. If such event occurs before the final availability of all credits for a project, the NCEEP shall take remedial action to restore the property to its condition prior to such event, in a manner sufficient to provide adequate mitigation to cover credits that were used for permit requirements prior to such delay or failure to compensate for impacts to waters authorized by Department of the Army permits. Such remedial action shall be taken by the NCEEP only to the extent necessary and appropriate, as determined by the DE in consultation with the IRT. If such an event prevents a mitigation project from meeting the time requirements established in this agreement, the DE may, in its discretion, modify the timeline requirements.

Upon 30 days written notice to the NCDENR, the USACE may request closure of the NCEEP's ILF programs. In the event that the ILF operations of the NCEEP are closed, the NCDENR is responsible for fulfilling any remaining permit obligations held by the NCEEP including the successful completion of ongoing mitigation projects. Funds remaining in the NCEEP mitigation accounts after these obligations are satisfied should continue to be used for restoration, enhancement, and/or preservation of aquatic resources.

M. Grandfathering

It is agreed that mitigation projects that are instituted (see Definitions, Section IV(F)(3)(a)) prior to the execution of this agreement will be subject to the provisions of the operational agreements that were in place at the time those projects were instituted, and that credits from projects that have been instituted prior to the date of execution of this agreement may be used to satisfy compensatory mitigation requirements. Additionally, all mitigation requirements for which the NCEEP is responsible, which are included in permit authorizations dated prior to the execution of this agreement, will be subject to the provisions of the operational agreements that were in place at the time of the issuance of the permit authorization.

V. Miscellaneous

- A. Effective Date:** For the purposes of the DA Permit Program (Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899), this agreement will become effective on the date it is signed by both the ILF Program Sponsor (NCEEP) and the USACE Wilmington District DE. For the purposes of providing mitigation for impacts authorized by the NCDWQ and the NCDCM, this agreement will become effective on the date(s) it is signed by both the ILF Program Sponsor (NCEEP) and officials representing NCDWQ and NCDCM, respectively. In the event that a resource agency chooses not to sign this agreement, it will be noted in the signature block for that agency. This agreement may be amended or modified with the written approval of the DE, in consultation with the IRT.
- B. Dispute Resolution:** If the NCDENR and the IRT have any disputes pertaining to this agreement, the parties agree to resolve such disputes in accordance with the procedures set forth in section 332.8(e) of the Federal Mitigation Rule.
- C. Participation Termination:** Any agency participant may terminate its participation in this agreement with notice in writing, through the USACE to all other parties to this agreement. Termination shall be effective fourteen (14) days from placing notices in the United States mail. All remaining parties shall continue to implement and enforce the terms of this agreement.
- D. Amendments:** Amendments and modifications to this agreement shall be made in accordance with the procedures set forth in section 332.8 of the Federal Mitigation Rule.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement entitled "Agreement to Continue the Operation of North Carolina's In-Lieu Fee Programs Operated by the North Carolina Department of Environment and Natural Resources' Ecosystem Enhancement Program Pursuant to 33 CFR Parts 325 And 332 as Revised Effective June 9, 2008":

Sponsor: North Carolina Ecosystem Enhancement Program

By: _____ **Date:** _____
William Gilmore, Director

North Carolina Department of Environment and Natural Resources

By: _____ **Date:** _____
David Knight, Assistant Secretary for Natural Resources

United States Army Corps of Engineers

By:  _____ **Date:** 28 July 2010
Jefferson M. Ryscavage, Colonel, U.S. Army, Wilmington District Commander

North Carolina Division of Water Quality

By: _____ **Date:** _____
Coleen Sullins, Director

North Carolina Division of Coastal Management

By: _____ **Date:** _____
James H. Gregson, Director

IN WITNESS WHEREOF, the parties hereto have executed this Agreement entitled "Agreement to Continue the Operation of North Carolina's In-Lieu Fee Programs Operated by the North Carolina Department of Environment and Natural Resources' Ecosystem Enhancement Program Pursuant to 33 CFR Parts 325 And 332 as Revised Effective June 9, 2008":

Sponsor: North Carolina Ecosystem Enhancement Program

By: William Gilmore **Date:** 7/28/2010
William Gilmore, Director

North Carolina Department of Environment and Natural Resources

By: David Knight **Date:** 7/29/10
David Knight, Assistant Secretary for Natural Resources

United States Army Corps of Engineers

By: _____ **Date:** _____
Jefferson M. Ryscavage, Colonel, U.S. Army, Wilmington District Commander

North Carolina Division of Water Quality

By: _____ **Date:** _____
Coleen Sullins, Director

North Carolina Division of Coastal Management

By: _____ **Date:** _____
James H. Gregson, Director

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Sponsor: North Carolina Ecosystem Enhancement Program

By: _____ **Date:** _____
William Gilmore, Director

North Carolina Department of Environment and Natural Resources

By: _____ **Date:** _____
David Knight, Assistant Secretary for Natural Resources

United States Army Corps of Engineers

By: _____ **Date:** _____
Jefferson M. Ryscavage, Colonel, U.S. Army, Wilmington District Commander

North Carolina Division of Water Quality

By: _____ **Date:** _____
Coleen Sullins, Director

North Carolina Division of Coastal Management

By:  _____ **Date:** 07/30/10
James H. Gregson, Director

IN WITNESS WHEREOF, the parties hereto have executed this Agreement entitled "Agreement to Continue the Operation of North Carolina's In-Lieu Fee Programs Operated by the North Carolina Department of Environment and Natural Resources' Ecosystem Enhancement Program Pursuant to 33 CFR Parts 325 And 332 as Revised Effective June 9, 2008":

Sponsor: North Carolina Ecosystem Enhancement Program

By: _____ **Date:** _____
William Gilmore, Director

North Carolina Department of Environment and Natural Resources

By: _____ **Date:** _____
David Knight, Assistant Secretary for Natural Resources

United States Army Corps of Engineers

By: _____ **Date:** _____
Jefferson M. Ryscavage, Colonel, U.S. Army, Wilmington District Commander

North Carolina Division of Water Quality

By: _____ **Date:** 2/2/11
Coleen Sullins, Director

North Carolina Division of Coastal Management

By: _____ **Date:** _____
James H. Gregson, Director

North Carolina Wildlife Resources Commission

By: _____ **Date:** _____
Gordon Myers, Director

United States Environmental Protection Agency

By: _____ **Date:** _____
A. Stanley Meiburg, Acting Regional Administrator

United States Fish and Wildlife Service, Raleigh Field Office

By: _____ **Date:** _____
Pete Benjamin, Field Supervisor, Raleigh Field Office

United States Fish and Wildlife Service, Asheville Field Office

By: _____ **Date:** _____
Brian Cole, Field Supervisor, Asheville Field Office


National Marine Fisheries Service

By: Miles M. Croom **Date:** 12/15/2010
Miles Croom, Assistant Regional Administrator, Habitat Conservation Division

North Carolina Wildlife Resources Commission

By: _____ **Date:** _____
Gordon Myers, Director

United States Environmental Protection Agency

By:  _____ **Date:** 8/27/2010
A. Stanley Meiburg, Acting Regional Administrator

United States Fish and Wildlife Service, Raleigh Field Office

By: _____ **Date:** _____
Pete Benjamin, Field Supervisor, Raleigh Field Office

United States Fish and Wildlife Service, Asheville Field Office

By: _____ **Date:** _____
Brian Cole, Field Supervisor, Asheville Field Office

National Marine Fisheries Service

By: _____ **Date:** _____
Miles Croom, Habitat Conservation Division Chief

Appendix I

North Carolina Ecosystem Enhancement Program Compensation Planning Framework

Introduction

Since its inception in 1997, the Ecosystem Enhancement Program (NCEEP) (formerly known as the Wetlands Restoration Program) has had an emphasis on the application of watershed planning principles in the delivery of compensatory mitigation projects. At first, the program concentrated on using available data and information (mostly from the North Carolina Division of Water Quality) to develop **River Basin Restoration Priority Plans (RBRPs)** (formerly called Watershed Restoration Plans) to target specific areas within each of the state's seventeen river basins for restoration investments. In 2001, the program began developing detailed **Local Watershed Plans (LWPs)** to identify high quality, watershed based mitigation projects for the North Carolina Department of Transportation.

The NCEEP develops **RBRPs** for each of the seventeen river basins by conducting a detailed screening that includes GIS analysis of problems, assets, opportunities, field reconnaissance and stakeholder outreach for each eight-digit Catalog Units (CUs) (500-2000 mi²) within a river basin (1000-10,000 mi²). Through this analysis, the NCEEP identifies restoration goals for each Cataloging Unit throughout the basin. This screening process further results in the identification of priority watersheds at the 14-digit hydrologic unit scale, identified as Targeted Local Watersheds (TLWs). TLWs receive priority for NCEEP planning and restoration project funds. The NCEEP updates RBRPs on an as needed basis, but no less frequent than every five years.

Through its strategic planning process, the NCEEP evaluates impacts across the state of North Carolina from the NC Department of Transportation, the private sector, municipalities, school districts, military bases and other applicants to meet compulsory state and federal stream, wetland, buffer and nutrient offset requirements. By consolidating the mitigation requirements of multiple small projects, the NCEEP is able to implement large-scale watershed restoration efforts that restore or enhance water quality, habitat, and hydrology in the watersheds of greatest need throughout the state.

The distribution of impacts and associated mitigation need dictates where the NCEEP initiates a LWP. LWPs are a more intensive watershed examination completed for one or more 14-digit hydrologic units (HUs) totaling an area typically between 30-150 mi². The NCEEP planning staff review the TLWs associated with a CU and through further analysis, determine which targeted watershed or group of watersheds would be the best candidate(s) for development of a LWP. The NCEEP performs a detailed watershed analysis for the LWP area and identifies priority subwatersheds (~1-5 sq.mi.) that represent areas that provide the greatest potential for watershed functional improvement. LWPs are developed collaboratively with representatives of local governments, environmental resource professionals, nonprofit organizations, and local communities. Watershed plan products for

RBRPs and LWPs searchable by county or river basin are available on the NCEEP's website: <http://www.nceep.net/pages/lwplanning.htm>.

The foundation of the NCEEP's local watershed planning process is the identification of watershed assets as well as key factors contributing to degradation of watershed functions, focusing on water quality, hydrology and habitat. The NCEEP defines a watershed plan as a watershed-specific evaluation of aquatic resource conditions developed in conjunction with relevant stakeholders that identifies and prioritizes potential project opportunities to address watershed needs through restoration, enhancement, preservation, and non-traditional strategies. At a minimum the watershed plan should include the following six elements: local stakeholder involvement, monitoring, identification of watershed stressors, development of comprehensive management strategies, prioritized project sites and post-plan monitoring. The NCEEP fully supports watershed plans developed by other state, federal, tribal and/or local government agencies or appropriate non-governmental organizations that demonstrate these six key components and will work to implement projects in these planning areas. An overview of the NCEEP's decision process to develop an LWP is included as Figure 1 (see end of this section).

Compensation Planning Framework

(i) Geographic service areas (GSA)

The NCEEP will provide mitigation for permitted requirements within the same 8-digit catalog unit (CU) (as defined by USGS) as the location of the impact unless the DE in consultation with the Interagency Review Team (IRT) has agreed to an alternative. The NCEEP may request flexibility from the 8-digit CU service area on a case-by-case basis.

(ii) Threats to aquatic resources in the service area(s)

The NCEEP reviews spatial datasets and reports during development of the RBRP to assist in identification of TLWs. Datasets provide an overview of core watershed data including existing water quality data (e.g. NC Division of Water Quality (DWQ) ambient monitoring data, TMDL studies, NPDES discharger info), GIS datasets and reports (e.g. Basinwide Assessment Report, Wildlife Action Plan, NC Natural Heritage Program surveys). All available and appropriate data sets and reports are included in this analysis and the list above is not intended to be comprehensive. Appropriate data is further analyzed and developed for the more intensive LWP.

Data analysis for LWPs includes landcover and aerial photography analyses that assist planners in determining the threats posed to aquatic resources from forest conversion, poor riparian habitat and increased impervious surface coverage. The most recent Transportation Improvement Project (TIP) data is also considered in this analysis in order to help forecast where secondary and cumulative impacts occur in the future. Once spatial data and reports have been reviewed, the NCEEP conducts windshield assessments of the watershed to verify the accuracy of aerial photography and landcover datasets, better understand the composition of sub-watersheds within the local watershed planning area and look for threats to aquatic resources that may or may not be evident from spatial data.

This information helps the NCEEP identify threats to aquatic resources and delineate priority subwatersheds (~1-5 sq.mi.) based on land use/cover, governmental jurisdictions, pollution sources and monitoring data and identify problems and assets that are present throughout the watershed. These priority subwatersheds become the focus areas for the NCEEP's project implementation efforts. More detailed information on aquatic resource threats is developed through watershed monitoring as described below in Section (iv).

(iii) Analysis of historic resource losses in the service area(s)

LWPs examine trends in water quality data and land use to assess the aquatic resource loss within a watershed. Existing monitoring data from DWQ and others including ambient monitoring data, benthic and fishery data, DWQ habitat scores and special studies conducted by DWQ are reviewed. Land use data is updated and compared with historical datasets such as those available in local Soil and Water Conservation District/Natural Resource Conservation Service and county government offices. Special reports and surveys produced by the NC Natural Heritage Program, NC Wildlife Resources Commission (e.g. NC Wildlife Action Plan) and NC Department of Transportation are also reviewed. All of this information is used to assess change in stressors to stream and wetland resources and help identify key problems and the associated functional loss of water quality, habitat and hydrology. This information is then translated into watershed goals. The **Preliminary Findings Report** summarizes watershed conditions, threats and historic aquatic resource loss based on available data and makes recommendations where data gaps should be filled for a more accurate analysis.

(iv) Analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation

Based on analysis of existing datasets the NCEEP identifies data gaps and develops a monitoring plan for the priority subwatersheds (~1-5 sq. mi.) delineated in (ii) above. Monitoring data is used to support and expand upon existing data. Monitoring should typically include water chemistry (nutrients, fecal coliform, total suspended sediments, dissolved oxygen, pH, and specific conductance), biological data (benthos and fish) and habitat assessments (in-stream habitat, riparian habitat). If adequate data currently exists for a parameter, the NCEEP does not include the parameter in the monitoring plan. Conversely, some watersheds require additional monitoring such as analysis of metals to complete data gaps and identify key watershed stressors responsible for degradation of watershed functions (water quality, habitat and hydrology). Additional monitoring is justified by conditions within the watershed and data gaps uncovered in the Preliminary Findings Report. Where appropriate and feasible, the NCEEP will incorporate watershed modeling to help focus on problem areas and target management strategies. The NCEEP summarizes information on current aquatic resource conditions in a **Watershed Assessment Report**.

(v) Aquatic resource goals and objectives for each service area

The NCEEP works with stakeholders to develop aquatic resource goals and objectives at the initiation of the watershed planning effort. Once resource conditions and watershed

functions are evaluated through existing datasets and watershed monitoring, goals and objectives are refined to better address identified watershed stressors.

The NCEEP develops a **Watershed Management Plan** that identifies management strategies for stressors and identified problem areas. Strategies include stream and wetland restoration, enhancement and preservation, BMPs, as well as institutional measures undertaken by federal, state and local governments to improve and protect aquatic resources. A **Project Atlas** is developed that identifies projects for implementation by the NCEEP and other parties. Each LWP includes a table that summarizes stressors/ issues and the associated watershed goals and management strategies.

(vi) Prioritization strategy for selecting and implementing compensatory mitigation activities

The NCEEP prioritizes compensatory mitigation activities within a particular GSA first in a LWP developed by the NCEEP or watershed plan developed by other state, federal, tribal and/or local government agencies or appropriate non-governmental organization. If a watershed plan developed by an outside entity does not meet the NCEEP's six element criteria, the NCEEP builds upon the existing planning effort in order to ensure it complies with the NCEEP's watershed plan criteria. If a watershed plan is not available in the CU of impact, and the NCEEP determines substantial compensatory mitigation is required within the GSA, the NCEEP will initiate a new LWP. If compensatory mitigation requirements for a GSA are too small to justify development of a new LWP and a watershed plan does not currently exist, the NCEEP will focus projects within the TLW for that particular CU. Projects that are not located in an LWP or TLW will be reviewed by the IRT and at a minimum should reference the most recent RBRP for a particular basin and state how the proposed mitigation project addresses the restoration goals for that particular CU.

Through the watershed planning process, the NCEEP prioritizes mitigation projects based upon watershed uplift, feasibility (e.g. project constraints, size) and stakeholder input. Prioritization focuses efforts in priority subwatersheds and may incorporate modeling data to determine which projects, or group of projects, address watershed stressors and will contribute to watershed improvements. Compensatory mitigation projects may include stream and wetland restoration, enhancement and preservation as well as BMPs. Due to the fact that many impacts to water quality, habitat and hydrology functions are tied to development pressures associated with urbanization, BMPs and alternative mitigation strategies may be highly ranked in urban watersheds based upon feasibility and the opportunity to provide watershed improvement. The NCEEP implements projects identified in the Project Atlas and links project specific restoration goals and objectives to those identified in the LWP.

(vii) Preservation objectives

332.3(h) States: *Preservation. (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met:*

- (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;*
- (ii) 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;*
- (iii) Preservation is determined by the district engineer to be appropriate and practicable;*
- (iv) The resources are under threat of destruction or adverse modifications; and*
- (v) 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).*

Preservation projects identified in the Project Atlas will be linked to the watershed goals and objectives for water quality, habitat and hydrology. The NCEEP will document that the preservation site is under threat of destruction or adverse modification. Stand alone preservation projects will be coordinated with the IRT.

(viii) Public and private stakeholder involvement

The NCEEP initiates stakeholder involvement at the beginning of the watershed planning effort. The composition of the stakeholder group varies dependent on the region and level of interest expressed by different organizations/agencies and may include both public and private entities, but at a minimum, the NCEEP will contact the following public and private entities to inform them of the watershed planning process:

- DWQ Regional Office
- DWQ Basinwide Planner
- Local Natural Resource Conservation Service (NRCS)
- Soil & Water Conservation District (SWCD)
- Resource Conservation and Development Program (RC&D) representative
- County Cooperative Extension Office
- NC Department of Transportation (NCDOT) Project Development & Environmental Analysis
- NCDOT Division Office
- NC Wildlife Resources Commission
- NC Division of Forest Resources
- NC Division of Coastal Management (if applicable)
- NC Division of Land Resources
- CWMTF field representative
- Local Governments (including Planning Director and Utilities Director)
- Regional Councils of Government

- Metropolitan Planning Organizations (MPOs)/Rural Planning Organizations (RPOs)
- Universities and/or colleges in study area
- US Fish and Wildlife Service Regional Office
- United States Army Corps of Engineers Field Office
- US Environmental Protection Agency
- National Marine Fisheries Service (if applicable)
- National Oceanic and Atmospheric Administration (if applicable)
- Local land trusts
- The Nature Conservancy
- Environmental Defense Fund
- Private landowners/community representatives

At a minimum, the NCEEP will update the stakeholder group at meetings conducted at plan initiation and following completion of the Watershed Assessment Report and Watershed Management Plan and Project Atlas.

Technical Advisory Committees composed of a subset of the larger stakeholder group may also be developed in some watersheds to assist the NCEEP in plan development and implementation.

(ix) Long-term protection and management strategies

Mitigation sites that are used to satisfy compensatory mitigation requirements are surveyed and demarcated and remain within the public domain in fee simple title in perpetuity and/or have appropriate preservation mechanisms in perpetuity, approved by the DE, placed on the sites. Project sites are managed in accordance with the long-term management plan included within the mitigation plan or report for the property.

The NCEEP transfers responsibility for the long-term management of mitigation sites to the NCDENR Stewardship Program and provides funding to the Stewardship Program for monitoring (to ensure site integrity and inspect for easement breaches) legal protection and defense, and biological management activities (affirmative activities or remedial actions to maintain conservation value) as specified in the mitigation plan. With approval by the DE, the NCEEP may transfer ownership or management responsibilities of mitigation site properties to appropriate non-profit conservation organizations, local governments, or land trusts for management and monitoring. The NCEEP is responsible for ensuring that the preservation mechanism is re-recorded to ensure that the NCEEP remains within the chain of title.

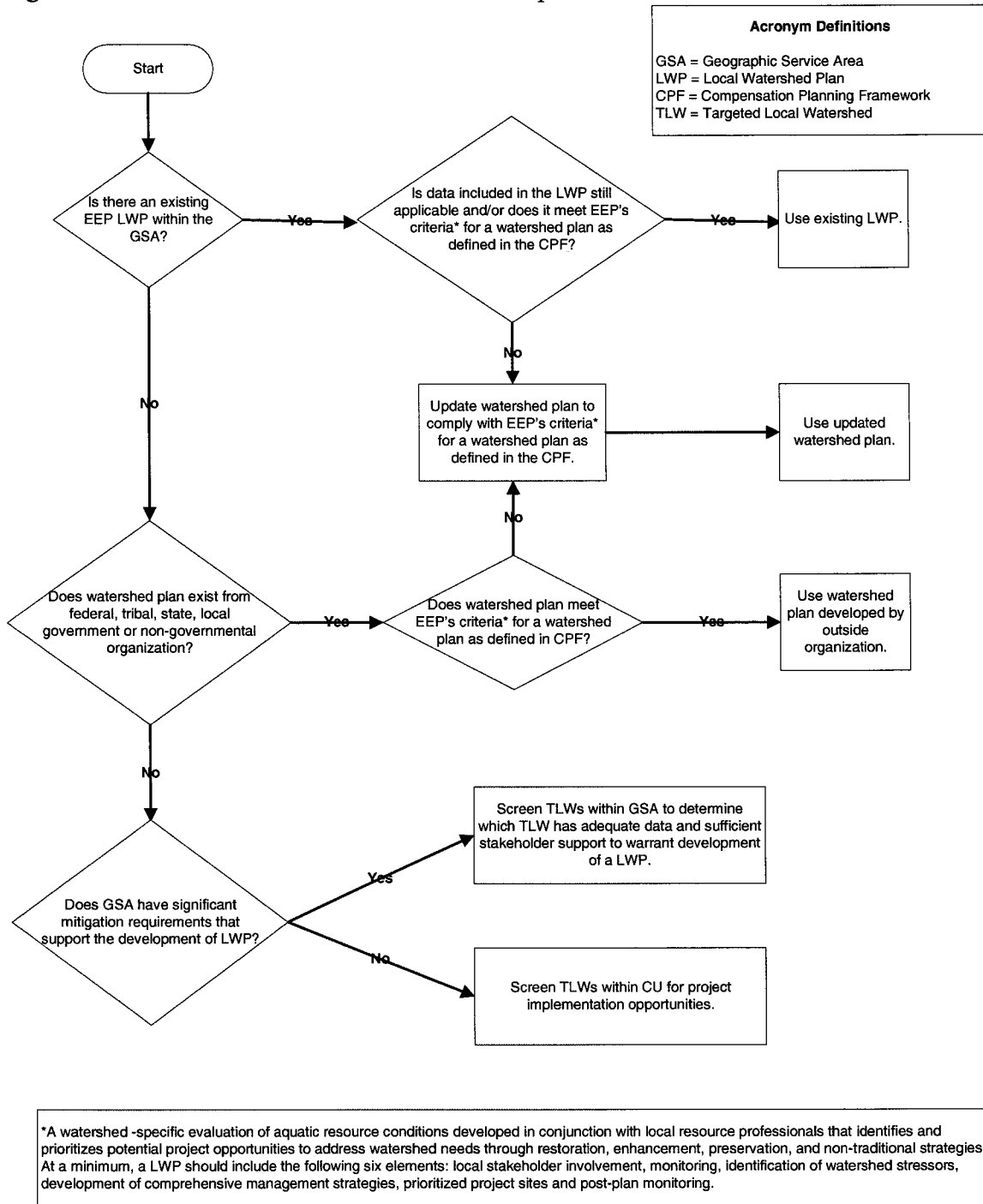
(x) Periodic evaluation and reporting

The NCEEP will provide annual reports to the IRT with updates on the progress of each watershed plan and project implementation. Information on the NCEEP's watershed planning efforts, including watershed plan products searchable by county or river basin is available on the NCEEP's website: <http://www.nceep.net/pages/lwplanning.htm>.

The NCEEP maintains a list of projects implemented in watershed planning areas. These may include projects identified in plans produced by the NCEEP (previously produced or current), projects located in watershed planning areas, but not identified in a project atlas and projects located in watershed plans produced by entities outside of the NCEEP.

Each mitigation plan developed for a project identifies the watershed plan associated with the project and links project specific goals and objectives to the goals and objectives identified in the watershed plan.

Figure 1. NCEEP Local Watershed Plan Development Decision Tree



Appendix II

12 Elements of Mitigation Plans Pursuant to 33 CFR 332.4

1. Objectives. A description of the resource type(s) and amount(s) that will be provided, the method of compensation (restoration, establishment, preservation, etc.), and how the anticipated functions of the mitigation project will address watershed needs.
2. Site selection. A description of the factors considered during the site selection process. This should include consideration of watershed needs and practicability of accomplishing ecologically self-sustaining aquatic resources restoration, establishment, enhancement, and/or preservation at the mitigation project site.
3. Site protection instrument. A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the mitigation project site.
4. Baseline information. A description of the ecological characteristics of the proposed mitigation project site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the location of the mitigation site, and other characteristics appropriate to describe the compensation. The baseline information should include a delineation of waters of the United States on the proposed mitigation project site.
5. Determination of credits. A description of the number of credits to be provided including a brief explanation of the rationale for this determination.
6. Mitigation work plan. Detailed written specifications and work descriptions for the mitigation project, including: the geographic boundaries of the project; construction methods, timing and sequence; source(s) of water; methods for establishing the desired plant community; plans to control invasive plant species; proposed grading plan; soil management; and erosion control measures. For stream mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings.
7. Maintenance plan. A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.
8. Performance standards. Ecologically-based standards that will be used to determine whether the mitigation project is achieving its objectives.
9. Monitoring requirements. A description of parameters monitored to determine whether the mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting monitoring results to the DE must be included.

10. Long-term management plan. A description of how the mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management.
11. Adaptive management plan. A management strategy to address unforeseen changes in site conditions or other components of the mitigation project, including the party or parties responsible for implementing adaptive management measures.
12. Financial assurances. A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the mitigation project will be successfully completed in accordance with its performance standards.

Appendix III

Letter of Commitment from NCDENR to Continue Funding for NCEEP Projects



North Carolina Department of Environment and Natural Resources

Beverly Eaves Perdue, Governor

Dee Freeman, Secretary

January 11, 2010

Colonel Jefferson Ryscavage
District Commander
U.S. Army Corps of Engineers
Wilmington District
69 Darlington Avenue
Wilmington, NC 28403

Dear Col. Ryscavage:

As you are aware, the Department of Environment and Natural Resources ("NCDENR") implements compensatory mitigation projects through an in-lieu fee program which is administered through our Ecosystem Enhancement Program ("EEP"). The purpose of this letter is to provide you with NCDENR's formal commitment, pursuant to the provisions of 33 CFR 332.3(n)(1), to faithfully pursue and complete all compensatory mitigation projects for which we assume that obligation. As a government agency, our program is based on both legislatively-enacted statutes and codified rules.

The North Carolina Department of Environment and Natural Resources is committed to providing and completing mitigation projects needed to satisfy any requirements formally assumed by EEP. The program carefully monitors all costs associated with mitigation projects developed to satisfy mitigation requirements to ensure that the existing fee schedule provides revenues needed to cover all anticipated expenditures for all project phases from land acquisition through long-term stewardship. If changes in fees are necessary, the Department will pursue them. If shortfalls are experienced because fees are insufficient, the Department is committed to covering costs to meet permit requirements that have been assumed by the program.

It is our agency's desire that this letter provide financial assurances for all requirements accepted by EEP and for all mitigation projects provided by EEP. We request your determination that no additional financial assurances are necessary. Please do not hesitate to contact me if you have questions or need anything else.

Sincerely,

Dee Freeman
Secretary

Cc: Ken Jolly, USACE
Scott McLendon, USACE
Justin McCorkle, USACE
David Knight
Bill Gilmore

1601 Mail Service Center, Raleigh, North Carolina 27699-1601
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