Corps of Engineers Responses to Public Notice Comments

Virginia Aquatic Resources Trust Fund Instrument

The Corps has received many comments in response to our Public Notice of December 28, 2009, and the Public Notice of February 28, 2011, in which we announced the initial and final draft Memorandum of Agreement ("MOA" or "Instrument") between the Virginia Aquatic Resources Trust Fund ("VARTF" or the "Fund"), the Norfolk District Corps of Engineers ("Corps"), and the Virginia Department of Environmental Quality ("DEQ"). The purpose of the MOA is to establish guidelines, responsibilities and standards for the establishment, use, operation and maintenance of the Fund in a way that brings the existing Fund, which is an in lieu fee ("ILF") entity into compliance with Corps regulations, 33 CFR 332, known as the "Mitigation Rule" ("Rule") governing compensatory mitigation for activities authorized by Department of the Army permits.

Comments are listed sequentially, and the Corps response follows. Where similar comments would have resulted in the same response, only one comment is shown.

1. Comment: The Instrument does not affirm the preference for mitigation banks specified in the Mitigation Rule.

Response: Corps regulations (33 CFR 332.3 (b) (2)) state that the district engineer should give preference to the use of mitigation bank credits when certain considerations are applicable (such as the fact that an approved mitigation bank has the appropriate number and type of credits available, an approved plan, appropriate real estate instrument and financial assurances in place). However, the regulation also states that the same considerations may be used to override this preference in certain circumstances, such as when an in-lieu fee (ILF) program has released credits available from a specific approved in-lieu fee project. The use of the preference hierarchy is a regulatory decision made by the Norfolk District Corps of Engineers and/or the Virginia DEQ.

2. Comment: The instrument should be revised to include additional guidance on the pricing of advance credits. Minimum pricing is insufficient to assure that intended compensatory mitigation is provided for and maintained under the program. Below market pricing of advanced credits discourages the creation of mitigation banks and is, therefore, plainly inconsistent with the Mitigation Rule. In-lieu fee programs in other states have incorporated additional guidance on credit pricing to eliminate these concerns. In addition to the rules considerations, advance credit pricing must account for and consider market pricing of mitigation bank credits.

Response: 33 CFR 332.8(o) (5) (i) states that the cost of compensatory mitigation credits provided by a mitigation bank or in-lieu fee program is determined by the sponsor. Section(ii) states that the per unit credit costs must include the expected costs associated with restoration, establishment, enhancement, and/or preservation of aquatic resources. An ILF program must use full cost accounting methods, to include as appropriate, land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, adaptive management, contingency fees associated with planning, construction and real estate, long-term management, and financial assurances. The Corps is responsible to ensure that the in-lieu-fee program credit pricing represents, at a minimum, the costs required to provide the credits.

The ILF sponsor may determine that it is in its interests or that of the public to provide a fee schedule for those released credits, but the Rule does not require a fee schedule for released credits.

3. Comment: Both Sponsor and Corps must regularly assess and adjust pricing to ensure that fee schedules accurately reflect current trends in mitigation bank credit prices.

Response: The Corps evaluates and ensures that credit prices are set in accordance with the criteria set out in 33 CFR 332.8(o) (5), which includes the requirement that costs be based on full-cost accounting including, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation, administration of the program, contingency costs, financial assurances, etc. The actual cost of compensatory mitigation credits is determined by the sponsor. However, the Corps may at its discretion consider market trends in mitigation bank prices to help make this determination.

4. Comment: The Instrument eliminates the preference for mitigation bank credits and leaves mitigation banks at a competitive disadvantage. Released credits ("excess credits") not otherwise debited against advance credits should be sold in accordance with preferences stated in the Mitigation Rule and only when (a) mitigation banks are not practicable and (b) mitigation credits are not available for sale. Without such restriction, the competitive disadvantages between a mitigation bank and in-lieu fee program, which are otherwise offset by the preference for mitigation bank credits are not offset.

Response: The Instrument is not required to address preference or competition. The District Engineer, through the permit decision-making process, determines when or if preference is appropriate. 33 CFR 332.3(a) states the District Engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost. When evaluating compensatory mitigation options, the DE will consider what is environmentally preferable. In making this determination he/she must assess the likelihood for ecological success and sustainability, the location of the compensation site and its significance in the watershed, and in many cases the costs of the mitigation project. In many cases the use of available bank credits will be environmentally preferable, because mitigation bank credits are generated in advance of impacts. In this case the District Engineer may give preference to the use of mitigation bank credits. In other cases, ILF credits may be equivalent, such as when Released Credits from an in-lieu fee project are available because Released Credits also represent mitigation already in the ground for which success criteria has been met (33 CFR 332.3 (b) (2) and 33 CFR 332.8 (n) (3)).

5. Comment: The Instrument offers no pricing guidance for Excess Credits. The Corps has the authority under the Rule to restrict the sale of excess Credits to the preference stated in the rule

Response: 33CFR 332.8 (o)(5)(i) states that the cost of compensatory mitigation credits provided by a mitigation bank or ILF program is determined by the sponsor.

If excess released credits have been generated by work accomplished in advance of impacts under the equivalent standards used to approve mitigation bank credits; the credits are of the appropriate resource type and number; and the credits are located within the same watershed as the impact area, then the credits may be considered equivalent to mitigation bank credits and may override any preference for mitigation bank credits (33 CFR 332.8(a) (3)). The permittee may choose whether to use available bank credits or available excess released ILF credits. The reasons for preference or overrides of preference are stated in 33 CFR 332.3(b) (2).

6. Comment: It is unclear how the Corps and the IRT determined the number of advance credits that may be sold.

Response: The Fund determined the number of advance credits in consultation with the Corps and the Virginia DEQ (33 CFR 332.8(n) (1) (2)). The number of advanced credits is based on the historic number of impacts taken in by the Fund in each watershed, the ability of the Program to mitigate for those impacts, the number of available bank credits or released credits in those watersheds, and the agencies' perceived need in a given watershed.

7. Comment: A complete draft instrument must include a methodology for determining future project specific credits and fees. This appears to be missing from the instrument.

Response: The methodology for determining future credits and fees (required under 33 CFR 332.8(a) (6) (IV) (C)) is laid out in section V. D. of the Program instrument. Appendix C of the February 28, 2011 public notice lists the compensation ratios used by the sponsor to determine project specific credits. Appendix D includes a draft fee schedule per credit.

8. Comment: The Instrument needs to include an actual limitation on the sale of credits outside of the service areas consistent with the mitigation rule. This should only be allowed in limited circumstances.

Response: As set out in the regulations, the District Engineer will consider the type and location options in the order presented in the regulations. Generally, the required compensatory mitigation should be located within the same watershed as the impact site and should be located where it is most likely to successfully replace lost functions and services.

9. Comment: The use of preservation alone or implementation of Best Management Practices is not consistent with the no-net-loss of aquatic resources policy and should not be considered as alternatives in the Instrument.

Response: Preservation is discussed under 33 CFR 332.3 (h). Preservation to the extent appropriate and practicable is performed in conjunction with restoration or enhancement of aquatic resources. In the past, the Norfolk District has required at least a 1:1 restoration for all impacts to ensure "no net loss." "No net loss" for impacts for which the Fund receives mitigation funds will be accounted for on a watershed basis.

10. Comment: Stream and wetland mitigation site development plans should be the same as required of mitigation bankers .

Response: The Fund is required to submit the same level of detail and criteria in mitigation plans (which includes such components as site selection, site protection, baseline information, work plan, maintenance plan, performance standards, monitoring requirements, long-term management plan, adaptive management plan and financial assurances) as required for bankers; see 33 CFR 332.4 (c) (iii) (2-14).

11. Comment: We feel that setting an arbitrary time to meet the 3 year goal may be unrealistic; therefore, additional thought should be put into establishing this goal.

Response: The 3 year time period is stated in the Rule under 33 CFR 332.8(n) (4). This goal can be varied, depending on the circumstances.

12. Comment: A Long-Term Management Fund should be established for each Mitigation Bank Site and placed in an escrow account to be used in accordance with the approved Long-Term Management Plan. The maximum amount of funds released annually shall not exceed four percent of the fund's value. No funds shall be released if monitoring was not conducted.

Response: A long term management plan and appropriate financial assurances will be established and administered consistent with the same standards that apply to mitigation banks (33 CFR 332.4(c)).

13. Comment: The per acre cost in the Potomac Basin (HUC #2070008, 2070010, and 2070011) should be increased from $100,000 to $125,000 in Appendix D. Pricing does change with Market Conditions – but ideally, in a market, pricing reflects all direct and indirect costs plus the cost needed to cover financial investment risk.

Response: See response to Number 2 above. The same regulations apply to this response.

14. Comment: We have made a substantial investment in a bank and are obliged to make further investments in coming years. We were made aware of a change in final instrument reference above that negates the need of respective groups to secure credits through existing banks. We have been asked to sign a letter by other mitigation banks affected, but receiving 50 form letters has less impact than receiving one letter written from someone impacted. As you review and consider the proposed changes, I trust that you will reach the conclusion to continue the preference of purchasing credits from existing banks over merely acquiring credits through the trust fund.

Response: Although there have been some changes to the draft instrument put out on public notice in December 28, 2009 and the public notice of February 28, 2011, there has been no change in the Mitigation Rule, nor with the discussion of possible preferences in certain circumstances, as set out in the Rule. Reference is made to our answer in comments in 4 and 5 above.

15. Comment: The trust fund may not be able to meet no net loss because of its emphasis on preservation and targeting of high value ecological resources. 50% of stream credits are to come from rehabilitation and enhancement. The VARTF 2009 annual report indicates that this goal is not being met.

Response: The Fund is required to utilize the same ratios as mitigation bankers and permittee responsible mitigation, as set forth in Appendix C, to achieve no net loss on a watershed basis. TNC may be able to obtain or link substantial preservation parcels with mitigation parcels. This additional preserved property is categorized as "other preserved land" in the annual report and does not generate credits for sale, but is simply an added ecological benefit.

With regard to stream credits, prior to 2006 there was no unified methodology for crediting streams. Therefore, funds received prior to 2006 did not have to be used to achieve no net loss as it is currently defined by the United Stream Methodology (2006). Prior to 2006, the Corps placed greater emphasis on preservation of buffers along streams. Nevertheless, the VARTF has been able to generate 30-50% stream rehabilitation and enhancement over its life. However, funds received after 2006 for stream restoration should meet the standards as set forth by the USM.

16. Comment: The IRT routinely limits the bank service areas to physiographic area in a partial watershed to which is located. It should instead state that the service areas shall be limited to those that the IRT is granting to mitigation banks at the time of site development plan approval.

Response: The Fund service areas were established in 1995 and remain the same today. However, under the new Instrument, the new Fund project sites will restrict the service areas by physiographic province to be consistent with banks, unless otherwise approved by the District Engineer and DEQ.

17. Comment: The 2010 MBI (MBI Template) requires financial assurances to be in an amount sufficient to acquire replacement compensatory mitigation. The trust fund should adhere to this condition. In addition, the trust should also be required to have an itemized list of requirements for its long-term management plan and be approved by the IRT.

Response: A long term management plan and appropriate financial assurances will be established and administered consistent with the same standards that apply to mitigation banks (33 CFR 332.4(c)).

18. Comment: The Instrument states that all funds in excess of those needed for long-term management of a Mitigation Project may return to the general balance of the Fund after the 5th year of monitoring if the site is successful. It also states that a Preservation project may be closed once success criteria have been met. Success criteria may be met in Year 1. This language would allow a Mitigation Project to be closed after only 1 year of monitoring. The MBI Template requires 10 years of monitoring for banks regardless of the mitigation activity. In addition, the MBI Template states in Section VI.B. that "monitoring may be terminated or the extent of monitoring may be reduced over part or the entire site at the discretion of the IRT." The language in the Trust Fund Instrument should be changed to read the same or the equivalent granted and applied to mitigation banks.

Response: Section V.A. of the Instrument states that "Within 90 days following the end of the 10-year monitoring period, or following a written request by the Conservancy no sooner than the end of the 5-year monitoring period, for each Mitigation Project and upon satisfaction of the Success Criteria, as determined by the IRT, the IRT shall issue written confirmation to the Conservancy and thereafter any remaining contingency funds in excess of that needed for use in long-term management of the Mitigation Project Site shall be made available to the general balance of the Fund." The IRT has the discretion to make a confirmation at year 5 if monitoring indicates success. This is consistent with the discretion that the IRT may exercise with mitigation banks. The same is true for the second part of this comment. Success of preservation sites is different than success for a restoration or enhancement site as "success" for preservation requires an appropriate permanent land protection document duly signed and recorded. Thus, for preservation, success may indeed occur sooner than with sites that contain restoration or enhancement activity. Therefore, preservation sites may be closed upon meeting success criteria and approval by the Corps and DEQ.

19. Comment: This compensation planning framework section states that priority is given to projects that replace lost functions and values, and that no credit will be approved until there is compensatory mitigation for lost functions and values. This appears to conflict with the compensation planning framework which details how Conservation by Design appears to place more emphasis on targeting sites with higher quality ecological attributes that may be more suitable for preservation as opposed to restoration or enhancement. It also appears to conflict with the process by which Advance Credits are released long before any functions and values are replaced.

Response: The Compensation Planning Framework (33 CFR 332.8(c)) is a guideline based on an ecological planning model to geographically locate mitigation projects on a watershed basis. There is no intent to target only areas suitable for preservation. Within these higher ecologically valuable watersheds are many opportunities to accomplish stream and wetland restoration.

20. Comment: The Instrument should clearly state that if bank credits are available and the only Trust Fund credits that are available are Advance Credits, then the COE and DEQ shall require compensatory mitigation to be purchased from a bank.

Response: Please refer to the responses to questions 4 and 5.

21. Comment: The initial physical and biological improvements on a Mitigation Project must be completed by the 3rd full growing season after initial debiting of Advance Credits. The MBI Template clearly states in Section V.F.1. that a banker must complete these activities by the end of one full growing season after initial debiting. The language in the Trust Fund Instrument should be changed to read the same or equivalent granted and applied to mitigation banks.

Response: The Rule establishes the three year time frame (33 CFR 332.8(n)). The length of three years takes into account the fact that, unlike banks that sites identified at the time of establishment, the very nature of an ILF program means that sites may not be identified up front. Mitigation bank and ILF advance credits are not the same. When bankers are selling advance credits, their sites have already been protected and designed. When an ILF sells advance credits, it is because there are no available bank credits in the service area.

22. Comment: This section states that stream credits will be determined using the most recent version of the Unified Stream Methodology (USM) or another method approved by the IRT. This allows the Trust Fund to use potentially various methodologies that the banking community cannot use. The advantage of using one system, specifically the USM, is so that credits are determined equitably regardless of the site. The MBI Template mandates Section V.D. that stream credits are determined using the most recent version of USM "except for mining projects located in the coal region." The language in the Trust Fund Instrument should be changed to read the same as the MBI Template.

Response: The provision is not intended to allow the Fund to use some other type of stream methodology; rather, the wording simply takes account of the fact that, should the regulatory agencies select a new stream assessment methodology or revise the current USM, the MOA would not need to be revised to allow use of that new methodology. This is consistent with the way the IRT would handle a bank.

23. Comment: The IRT, and in particular the Corps Counsel, has recently approved Eminent Domain language that is applicable when the banker owns the property or has a mitigation easement on the property. This language would also be applicable to TNC when it owns the property or has received a donated conservation easement on the property. The language in the Trust Fund Instrument should be commensurate with the language applied to mitigation banks.

Response: Fund sites sometimes have multiple property and easement owners and the issue of eminent domain may be different than when a mitigation bank is involved. However, the result is the same as with Banks in that any compensation received in a taking or eminent domain situation that represents the value of the mitigation must be used for replacement mitigation. In fact, for the Fund, the requirement goes even further because the IRT has the discretion to approve how the replacement funds from a taking will be used to offset the loss, and the loss must be offset in the same service area as the impact.

24. Comment: Program reporting protocols require the Trust Fund to provide the Corps and DEQ statements/reports from all financial institutions and escrow agents holding funds for the Trust Fund. Section VI.E. Of the MBI Template however, requires bankers to also post financial reports regarding escrow funds to RIBITS so they're publicly available. The Trust Fund Instrument should require this also.

Response: The Fund Annual Report is publicly available and details the financial reporting for all program activities. Individual project site ledgers will be included on RIBITS.

25. **Comment:** The proposed Instrument does not provide equivalent standards to all forms of compensatory mitigation and it tilts the mitigation playing field to give unilateral advantage to what the Final Rule mandates should be the secondary alternative. Operation of the Trust Fund in a manner consistent with the current version of the Instrument could negatively impact the successful mitigation of impacts to aquatic resources in Virginia. Selling of Trust Fund Advance Credits as currently proposed would result in an excessive time lag between impacts and implemented mitigation; performance monitoring would end prematurely; and the establishment of new mitigation banks would be threatened.

Response: The Rule (33 CFR 325 and 332) requires the establishment of equivalent standards for permittee-responsible mitigation, mitigation banks, and ILF mitigation to the maximum extent practicable. The Rule requires that both banks and ILFs be subject to the same requirements for plan approval, ecologically-based performance standards and monitoring, adaptive management, financial assurances, and long term management. In addition, the Rule requires that banks and ILFs determine the cost of compensatory mitigation credits. The Corps is responsible to ensure that the mitigation costs are sufficient to cover costs associated with land acquisition, planning and design, construction, planting, labor, financial assurances, site protections, contingencies, long-term management, catastrophic costs, and stewardship. The Corps will evaluate individual budgets for each mitigation project and will review annual reports as specified in 33 CFR 332.8.

Individual ILF project plans must include and address the mitigation plan elements, the same as is required of mitigation banks (332.4(c) (1)-(14)). ILF program instruments also follow the same process of instrument development as banks (prospectus, public notice, draft instrument, final instrument) (see 332.8(d)).

Banks and ILF's may have some differences with respect to procedural and crediting requirements. ILFs are allowed a limited number of advance credits (specified in their program instruments) in each service area prior to implementing a mitigation project (33 CFR 332.8(n)). Those advance credits are intended to capitalize ILF operations. On the other hand, mitigation bank credits may, in certain circumstances, be given a preference over advance credits. Banks and ILFs also differ in terms of establishment requirements:

a) Compensation Planning Framework (CPF) - ILFs are required to develop a essentially a watershed approach or CPF used to strategically select mitigation projects. Banks are not required to have a CPF.

b) ILF Program account – ILFs are required to establish an account that can only receive mitigation fees and can only be used to fund mitigation projects. The ILF is required to report all revenues and expenditures annually to the IRT. This is not required of bank sponsors.

c) Project approval – The IRT is required to review and approve all ILF mitigation project proposals including project funding. Bank sponsors do not have to divulge expenditures or seek IRT approval of expenditures.

d) Alternative mitigation – In the event that an ILF project is not implemented within three growing seasons of the first debit of advance credits in a service area, the Corps can direct the ILF to fund an alternative mitigation project from the ILF program account.

26. Comment: Given the definition of "Full Cost Accounting" located in Section II.9 as well as the language found in the second paragraph of Section V.D regarding the determination of credit prices, there seems to be an unexplained anomaly in the Chowan basin credit pricing. This pricing needs to be adjusted to reflect the same standards and costs of the other Virginia watersheds.

Response: The Chowan basin presents many opportunities for providing wetland mitigation. The access and ease of restoration in this basin is reflected in the full cost accounting and the prices established in this basin.

27. Comment: The Draft Instrument does not include an equivalent financial assurance requirement similar to those placed on private banks for the release of advance credits. Private banks are required to provide a financial assurance in the form of a letter of credit or bond for the full replacement value of the advance credits in the event that the banker fails to successfully create, restore or preserve an equivalent number of credits to compensate for the advance release.

Response: All funds necessary to perform mitigation projects, including financial assurances, are maintained in an interest-bearing account prior to initiating a project. The Fund also sets aside funds for long-term management and monitoring and maintenance. The Fund sets aside funds in its budget for each mitigation project as a contingency for use in taking corrective actions for projects. These funds are itemized costs in the budget for each mitigation project.

28. Comment: The VARTF represents a subsidized resource commitment that is not representative of the costs and operation of private markets. As has been a practice in past years, the Fund should be closed in those watersheds containing authorized and operational private banks. Bringing the Fund on-line under the terms found in the Draft Instrument will create a disincentive for private markets to remain engaged in restoring aquatic resources in the Commonwealth, potentially negating much of the net benefit that could be gained from a truly "equivalent" approach to mitigation.

Response: Same Answers as numbers 4 and 5. It should be noted that the Fund has been in place since 1995, at which time there were very few banks. The number of banks in Virginia has increased in the ensuing 15 years, since the Fund has been in operation.

29. Comment: In keeping with the intent of 33 CFR 332.8, the main function of the program should be to address small impacts in low velocity basins " where mitigation banks and permittee-responsible mitigation are not practicable". Given the existing mitigation banks in Virginia, particularly the more populated eastern portions of the state, this is a particularly salient point. Notwithstanding this intended use of in-lieu fee funds, it appears that the Program is being established with the intent of competing with commercial banks. As a result the program will compete with banks on price, and as currently contemplated is well equipped to do so.

Response: Low velocity basins are not specifically addressed in the Rule. The Rule provides for Banks and ILFs to set their own goals and objectives with the approval of the IRT. As stated in the MOA, the intended purpose of the Fund is "to establish an additional mechanism to provide compensatory mitigation for impacts to aquatic resources authorized by Clean Water Act or Virginia Water Protection permits while maximizing the mitigation benefit to the aquatic environment and the public interest." "A primary function of the Fund is to restore and preserve as many aquatic resources, buffers, and other beneficial lands in their natural condition as possible with the funds available." This has been the goal of the VARTF since the inception of the initial 1995 MOU and also in the amended 2003 MOU. The intent of the Program is explained in 1 above and in the Rule (Preamble). The Rule requires that ILFs and Bank Sponsors establish their own costs for mitigation projects. Also, see response to number 1 above.

30. Comment: TNC can provide mitigation in a service area different than that of the associated impacts (in circumstances involving less that 2000 LF of stream impact or less than three acres of wetland impact within a given service area in a given year) which provides an implicit advantage to the Program. Commercial banks are not able to make sales out of service area under similar circumstances. The Program should be held to the same standard.

Response: The Rule requires a watershed-based approach to selecting service areas for both Banks and for the Fund. As with banks, individual fund mitigation sites will define the project specific service areas.

31. Comment: Please detail what financial assurances will be required to be posted by the TNC. Also, please explain why this would differ from private mitigation banks.

Response: The Rule requires financial assurances for both Banks and In-Lieu fees. In accordance with the Rule, the District Engineer will require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. "In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project." Thus, varying financial assurances may be required. For example, the Fund receives mitigation payments in advance of construction and these funds are set aside in an interest-bearing account to cover the future mitigation costs (including contingency or remediation costs) of proposed projects. The IRT reviews the budget for each proposal in accordance with full cost accounting principles and ensures that there are sufficient funds to execute the project. In most cases, an amount equal to 20% of construction costs is set aside until the project is closed (completes its 10 year monitoring phase). Thus, it is possible that projects may not require traditional financial assurances such as performance bonds or letters of credit because sufficient funds are already set aside for use much as funds are set aside in an escrow account.

32. Comment: There is no mention of a requirement for public notice of individual sites that fall under the instrument. We recommend that each site proposed by the fund be put on public notice.

Response: As required by the 2008 Rule, a public notice will be issued with each site as a modification to the instrument.

33. Comment: The Priority Conservation Areas table on page 54 appears to be a duplication of the Rappahannock River Watershed from page 64. Also, Table page 64 is missing data.

Response: This information will be included in the final instrument.

34. Comment: The proposed instrument proposes quarterly submission of financial reports. The mitigation rule only requires annual submission, and thus to reduce costs we recommend changing this to annual. We did not see any reporting protocols for credit sales transactions and suggest that this be clarified. 33 CFR 332.8(i) (3) lists items to be reported on an annual basis and includes permit information (e.g. permit number, amount of authorized impacts, amount of mitigation purchased) and credit balances, in addition to financial documentation and summaries. 33 CFR 332.8(p) (2) also requires separate ledgers for the overall ILF program and each project. Implementation of sales transaction reporting for the VARTF program would match current mitigation banking protocols.

Response: The Rule only requires annual reporting. The Fund voluntarily submits quarterly reports, and this is not prohibited. TNC will use vouchers similar to those currently in use. These vouchers will include project number, applicant, impacts, type, HUC, Basin, credits required, and other information deemed necessary. Vouchers be used to provide to applicants the credits required to satisfy permit requirements. There are no requirements for the Fund to guarantee costs for any length of time; however, the Fund is not prohibited from doing so. Applicants will be required to provide proof of purchase to the Corps and DEQ prior to initiating work, just as they are required to do when purchasing Bank credits.

35. Comment: We also recommend that the program account discussed in Section XI should have a method to separately track funds allocated from the generation of credits (and to be used for perpetuation of the program) from those to be held in perpetuity for the occurrence of catastrophic events and long-term maintenance of mitigation sites and those to be held for the 10-year monitoring and intensive maintenance period. Separation would help ensure funds intended for long-term site sustainability or catastrophic events would not be unintentionally used toward the current site operation and the development of other mitigation projects, and also in the accounting efficiency.

Response: The Corps concurs. The Fund is currently budgeting and tracking funds for long-term maintenance and catastrophic protection.

36. Comments: Will the proposed service areas follow HUCs applied to mitigation banks, which are broken at Physiographic Province boundaries?

Response: The service areas for general tracking and reporting are specified in the proposed ILF instrument. The Fund will identify project specific service areas including Physiographic Province at the time each site is proposed.

37. Comment: Will all documentation associated with in-lieu fee site establishment be posted on Ribits?

Response: Yes, a modification to Ribits is under development. Once it has been modified, ILF sponsors will post their information here, as with banks.

38. Comment: The draft instrument is stated to be "complete". However, the instrument does not follow the mitigation banking instrument template distributed by the Corps in April 2008. Similarly and perhaps more importantly will it follow the newer version of the template which is very near completion? Please clarify.

Response: The Rule (332.8(d)) requires equivalent standards for Banks and ILF's. However, there is no requirement for the same form to be used and, given the fact that ILF's and Banks have some differences, the use of an identical template would not be practicable or appropriate. However, please note that the ILF MOA contains the required elements required by the Rule for a complete ILF program instrument (see 33 CFR 332.8(d) (6) (ii)). It is possible that this MOA will serve as the foundation of a template for future ILF's.

39. Comment: VDHR compliance has to be demonstrated to obtain the Nationwide Permit 27 permit which must be completed prior to advanced credits being released. Will the TNC be required to complete a Phase I Archaeology Study? Have these been completed for the sites used as the basis of the advanced credits?

Response: Conservancy ILF sites have been subject to Section 106 review and will continue to be reviewed as required. Individual projects that require a Corps permit will comply with section 106. They must submit an application for NWP 27 similar to any other applicant. Corps project managers coordinate proposed projects with the VDHR and obtain comments. Phase I archaeological studies may be required as appropriate prior to verification of a permit.

40. Release Credits: A credit release schedule has not been provided. Please clarify.

Response: TNC will include a credit release schedule for each mitigation project site. The credit release schedule will be consistent with that specified for banks under the current MBI template.

41. Comment: No Net Loss-Please provide a summary of the projects that have been implemented that reflect "no net loss" (50/50) by the preservation, enhancement and restoration activities.

Response: See the Fund Annual Report. ILFs are not required to show no net loss on a project by project basis. Since an ILF pools or combines funds from small projects to produce larger mitigation projects, each mitigation site does not necessarily correlate to impacts. TNC is required to demonstrate no net loss for all impacts on a service area basis.

42. Comment: The IRT body does not reflect the Virginia Department of Game and Inland Fisheries, Virginia Marine Resources Commission, NOAA, and the Virginia Department of Forestry. The IRT members should be consistent with the current IRT bank members.

Response: The Corps and DEQ, as co-chairs, have discretion to decide who shall sit at the IRT meetings. FWS, EPA, NOAA, and VDGIF are members of the IRT. Other agencies may participate by request.

43. Comment: The draft instrument states that "The Conservancy shall not be required to give bond or security pursuant to this instrument." This appears to conflict directly with 33 CFR 332.3(n) which requires financial assurances for all compensatory mitigation projects. The Program should be required to obtain the same financial assurances as a bank: Performance bond (or equivalent), monitoring and maintenance fund, and long term management fund. There are significant financial consequences associated with procuring financial assurances. Failure to require the Program to provide the same assurances as banks provides a material financial advantage to the Program. We can attest from experience that the cost of procuring financial assurances to meet the requirements of the Federal and State regulators in Virginia is substantial.

Response: The Rule requires financial assurances for both Banks and In-Lieu fees. In accordance with the Rule, the District Engineer will require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. "In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project." Thus, varying financial assurances may be required. For example, the Fund receives mitigation payments in advance of construction and these funds are set aside in an interest bearing account to cover the future mitigation costs (including contingency or remediation costs) of proposed projects. The IRT reviews the budget for each proposal in accordance with full cost accounting principles and ensures that there are sufficient funds to execute the project. In most cases, an amount equal to 20% of construction costs is set aside until the project is closed (completes its 10 year monitoring phase). Thus, it is possible that projects may not require traditional financial assurances such as performance bonds or letters of credit because sufficient funds are already set aside for use—much as funds are set aside in an escrow account.

44. Comment: Does the Conservation by Design (CBD) satisfy no net loss and meet all of the requirements set forth by of the mitigation rule, the banking guidelines, and the latest version of the mitigation banking template?

Response: CBD Methodology is the compensation planning framework to be used by TNC when identifying project sites, and satisfies all the requirements set forth by the Rule. No net loss is determined by the difference of credits generated and credit liability in each service area (watershed). No Net loss is a Corps program requirement and may be achieved in aggregate.

45. Comment: The TNC receives 8% of the funds deposited for overhead and administrative costs. The current allocation is 3% is this increase reasonable?

Response: The increase is reasonable. VA DEQ held a meeting in 2007 at which a number of mitigation bankers expressed concern that TNC's overhead was not high enough to reflect its true cost of delivering this program. While in most years the Conservancy feels that 3 % is more than adequate to address its overhead, this increase is intended to provide a buffer should 3% not be adequate. The amount of overhead is used in part to determine the cost of credits.

46. Comments: The following provided positive and supportive comments with regard to the Fund: Department of Conservation and Recreation, Mr. Dennis Liberman, Northern Virginia Soil and Water Conservation District, the City of Harrisonburg, Bedford County, and Western Virginia Land Trust.

47. Comment: Dredge and fill activities must not cause significant environmental degradation

Response: The decision to authorize wetland and/or stream impacts is a permit decision that is made by the Corps of Engineers, through the established permit review process (33 CFR 320.4). In order to issue a permit, a proposed project must comply with the Clean Water Act 404(B)(1) guidelines and must not be contrary to the public interest (33 CFR 320.4 (b). Compensatory Mitigation is required by Corps and EPA regulations (33 CFR 320.4(r), 33 CFR 332, and 40 CFR 230.1).

It is not the responsibility of a mitigation bank or ILF program to evaluate project impacts and to determine what is practicable and appropriate compensatory mitigation. It is the mitigation provider's responsibility to provide the required type, kind, and amount of compensatory mitigation authorized by the District Engineer. This MOA is established so that the Fund provides the various forms of compensatory mitigation: restoration, creation, enhancement, and preservation in accordance with the ratios, success criteria, and performance standards established by the Norfolk District and the Virginia DEQ and in accordance with the Rule.

48. Comment: The in-lieu fee program fails to assure structural and functional replacement of streams and wetlands

Response: See response to questions 25 and 29.

Our regulations indicate that when mitigation is determined to be "necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions." Additionally, "in cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required." (33 CFR 332.3(f)(1))

However, the rest of this portion of our regulations states that "if a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used." (33 CFR 332.3(f)(1))

There is no standardized functional assessment procedure for wetland impacts approved by the Corps for use in Virginia. The Corps uses a ratio methodology as a surrogate in accordance with the Rule (33 CFR 332.3(f)(1)). As stated above, compensatory mitigation is a decision made during the permit review process in accordance with regulations.

Stream compensation outside of coal mining projects is currently evaluated using the Unified Stream Methodology (USM).

The Norfolk District has processed few permit applications for mountain top mining projects, and the previous Nationwide Permit 21 that could be used to authorize mountaintop mining, has been suspended and may not longer be used. The Fund has historically received relatively few impacts associated with these surface coal mining activities. Additionally, two other factors will mean that future impacts related to surface mining activities will likely be a smaller part of the overall operations of Fund under the Instrument.

First, the Big Sandy drainage (one of two, along with the Tennessee, located in the coal mining areas of Virginia) is not included in the proposed operating area for the Fund. This decision was first proposed by the Fund's sponsor, The Nature Conservancy, and has been accepted by the Corps of Engineers.

Second, The Tennessee basin is an important area for the Fund and TNC. Many of the mitigation projects it has taken on, including those in the Tennessee basin provide, preserve, enhance, or restore habitat for state and/or federally-listed species and have documented occurrences of Virginia Natural Heritage elements. Fund projects often provide direct and indirect improvement to impaired streams as well. As such, this drainage is included as a proposed operating area for the Fund in the Instrument. However, extending a basic approach that has been in place since 2003, TNC reserves the right to accept or reject obligations for impacts greater than three (3) acres of wetlands, greater than two thousand (2,000) linear feet of streams, or payments from impacts to Heritage resources as defined by the Virginia Department of Conservation and Recreation, Division of Natural Heritage.

Therefore, providing compensation for wetland and stream impacts in the coal mining areas in Virginia (the Big Sandy and Tennessee River drainages) is, and is expected to remain, a very small portion of the overall Fund operations.

A hydrogeomorphic (HGM) functional assessment methodology for evaluating high gradient ephemeral and intermittent stream system impacts in eastern Kentucky and West Virginia has been developed for coal mining activities and is being considered for use to evaluate impacts to similar systems in Virginia. Should the Fund accept monies for these impacts this HGM methodology may play a substantial role in determining appropriate and practicable mitigation for stream impacts.

49. Comment: <u>The in-lieu fee program fails to meet CWA requirements</u>

Response: See our response to questions 47 and 48.

50. Comment: <u>The in-lieu fee program will not assure compensation for harm beyond the footprint of the fill</u>.

Response: The ILF program could be considered as possible mitigation to offset specific coal mining impacts during the review process of a future specific permit application in the Tennessee watershed. The Fund's compensation planning framework would help provide ecological precepts to develop appropriate mitigation. However, the purpose of the Fund is to provide compensatory mitigation, in accordance with the requirements of the mitigation rule, and the polices, practices, and procedures of the Norfolk District Corps of Engineers. Impacts to streams as a result of Mountain Top Mining, occur only in the big Sandy and the Tennessee watersheds.

There have been very few permit applications processed by Norfolk District for these types of impacts. Therefore, the Fund is not specifically designed to provide compensatory mitigation for impacts related to Mountain Top mining. The Corps and DEQ would decide after this permit review as to whether the Fund would be appropriate to compensate for mountain top mining impacts on a case-specific basis.

51. Comment: Mitigation is not likely to succeed

Response: See our answers to comments 47, 48, and 50.

52. Comment: The in-lieu fee program will lead to hot spots of environmental degradation

Response: See our answers to comments 47, 48, and 50.

53. Comment: The in-lieu fee program fails to comply with public notice and comment requirements

Response: This is incorrect. A public notice was issued for the draft instrument twice, once in December 2009 and again in February 2011. In addition, and in accordance with our regulations at 332.8(g)(1), the addition of project sites to ILF programs would entail modification of the program instrument. That modification must follow the process used for mitigation bank and ILF program development (332.8(d) of the regulations) and is subject to public notice and coordination with the Interagency Review Team.

27 JUNE 2011
Date

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