



**US Army Corps
of Engineers**



AGREEMENT

CONCERNING IN-LIEU MITIGATION FEES BETWEEN

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

AND

U. S. ARMY CORPS OF ENGINEERS

I. PURPOSE

This is an agreement between the West Virginia Department of Environmental Protection (WVDEP) and the Huntington and Pittsburgh Districts of the U.S. Army Corps of Engineers (USACE). This agreement recognizes that the WVDEP may receive mitigation in-lieu fees from Department of the Army permittees. WVDEP employs these fees to identify and assess ecologically appropriate stream and wetland restoration opportunities in West Virginia; to implement practical plans to protect, purchase, enhance, restore, and monitor selected sites; and to establish financial, technical, and legal mechanisms to ensure long-term success of the mitigation projects.

II. U.S. ARMY CORPS OF ENGINEERS

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

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

C. Establishment of Mitigation Review Team (MRT): The Corps in cooperation with other Federal and state resource agencies will establish a MRT to approve proposed projects and to perform a yearly review of ongoing and completed projects. The MRT will be directly involved in approval of restoration projects by a (simple majority vote or consensus). These (votes/discussions) will occur at scheduled meetings of the MRT. The USACE will chair the MRT and other members shall include the WVDEP, and may include WV Division of Natural Resources (WVDNR), the U.S. Fish and Wildlife Service (USFWS), and the U.S. Environmental

Protection Agency (USEPA). The MRT may develop guidelines or an agreement to further define the conditions under which these fees may be used in accordance with the Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

III. WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

WVDEP is the designated state agency responsible for the protection, conservation and enhancement of the State of West Virginia water resources. WVDEP desires to develop, restore, and enhance water resources in West Virginia for the benefit of its citizens. WVDEP is authorized under Chapter 22 of the Code of West Virginia and the various rules promulgated there under to receive, hold, and account for assets it holds for the purposes of restoring, creating, enhancing or preserving the State's streams and wetlands. The WVDEP may also receive state appropriations, gifts, grants, Federal funds, revolving funds, and other funds from both public and private sources.

IV. IN-LIEU FEE PROGRAM OPERATION

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

B. **Employment of Fees by WVDEP:** WVDEP will employ these fees, as appropriate and with prior MRT written approval, to identify and assess stream and wetland restoration opportunities in West Virginia and to implement practical plans to protect, purchase, enhance, restore, and monitor selected sites. The MRT will work with WVDEP to prioritize and select the most appropriate stream and wetland restoration projects. "Mitigation Review Team Operational Guidelines, Use of In-Lieu Fee Mitigation in West Virginia" will be followed for development and implementation of each project. See attached Appendix A.

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

D. **The WVDEP, in coordination with the WVDNR, will provide a Mitigation Plan for each identified and MRT-approved restoration project.** This plan will provide information on the restoration site location, baseline conditions at the site location, restoration procedures, a schedule of activities, a budget, a monitoring plan, reporting protocols, performance standards

for determining success of the restoration efforts, and financial, technical, and legal provisions for long-term management and maintenance of the restoration site.

V. PROJECT REVIEWS

A. **Project Reviews:** The WVDEP in conjunction with the WVDNR, will schedule project reviews as needed, at which time the WVDEP will present to the MRT a select number of recommended restoration projects. These project reviews will be used to provide the MRT with an overview of the projects and to give the MRT an opportunity to observe and evaluate the properties on which the recommended restoration projects would be undertaken.

B. The WVDEP, in coordination with the WVDNR, will select the dates for the project reviews at least one month in advance of each scheduled date. Each member of the MRT (or representatives for each member) will be invited to the project review.

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

VI. ACCOUNTABILITY

A. **USACE Responsibility:** After the issuance of a DA permit that involves payment of in-lieu fees, the USACE will provide the WVDEP with the name of the DA permittee, the amount of the in-lieu fee, and the agreed payment schedule. The USACE will be responsible for enforcing permit compliance for failure of the responsible party to pay the in-lieu fee.

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

C. The WVDEP will utilize the fee monies solely to identify, design, construct/undertake, monitor and administer mitigation projects in West Virginia.

D. The WVDEP, together with the WVDNR, will ensure that each restoration site is protected in perpetuity by preparing and executing appropriate real estate agreements through the West Virginia Public Lands Corporation. Such agreements will effectively restrict harmful activities that may otherwise jeopardize the purpose(s) of restoration projects and will be established prior to initiation of restoration activities.

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

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

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

VII. REPORTING OBLIGATIONS

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

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

VIII. ADMINISTRATIVE COSTS

A. The WVDEP may incur reasonable administrative costs associated with this in-lieu fee program. These costs will be deducted from the fee monies received. Monies available for administrative costs shall be equal to 5% of each contribution plus all interest accruing on those monies. A separate project account shall be established to record revenues and expenditures for administrative costs. General administrative costs incurred by the WVDEP include, but may not be limited to the following: annual report preparation; initial site visits to investigate potential projects; the annual project review day for on-going and/or completed projects; development of an initial scope of services to be presented to the Corps for approval of individual projects (after

which a detailed scope of services will be prepared as a direct project cost); development of general language for conservation easements; non-project specific but program related meetings with the USACE; and other non-project specific administrative functions related to the program

IX. CONFLICT OF INTEREST

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

X. AMENDMENTS AND TERMINATION

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

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

XI. POINTS OF CONTACT

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


U. S. Army Corps of Engineers
Chief, Regulatory Branch
Operations Division
Huntington District Corps of Engineers
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Huntington, West Virginia 25701-2070
Phone (304) 399-5710
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Chief, Regulatory Branch
Pittsburgh District Corps of Engineers
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222-4186
Phone (412) 395-7155
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e-mail: Michael.J.Cummings@Lrp01.usace.army.mil

West Virginia Department of Environmental Protection
Director, Division of Water and Waste Management
601 57th Street
Charleston, West Virginia 25304
Phone (304) 926-0495
FAX (304) 926-0496
e-mail: lmcclung@wvdep.org

XII. EFFECTIVE DATE

This agreement shall become effective when signed by the Great Lakes and River Division of the USACE and by the WVDEP.



Bruce A. Berwick
Brigadier General, U.S. Army
Division Engineer



Stephanie R. Timmermeyer
Cabinet Secretary
Department of Environmental Protection

25 January 2006
Date

November 29, 2005
Date

APPENDIX A

Mitigation Review Team Operational Guidelines **Use of In-Lieu Fee Mitigation in West Virginia**

INTRODUCTION:

Permits are required through the Rivers and Harbors Act for work in or affecting navigable waters of the United States and through the Clean Water Act for the discharge of dredged and/or fill materials within waters of the U.S. The U.S. Army Corps of Engineers (COE) and West Virginia Department of Environmental Protection (WVDEP) administer this permitting process through the Section 404 Permits and Section 401 State Water Quality Certification. These regulatory agencies, in coordination with the federal and state resource agencies, require that impacts to streams and wetlands be avoided and minimized. Compensatory mitigation may be required when unavoidable impacts will result in the loss of aquatic resource functions and values.

Compensatory mitigation projects are designed to replace aquatic resource functions and values that are adversely impacted by issuance of Department of the Army (DA) permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. These mitigation objectives are stated in regulation, the 1990 Memorandum of Agreement on mitigation between Environmental Protection Agency (USEPA) and the DA, the November 28, 1995 Federal Guidance on the Establishment, Use and Operation of Mitigation Banks ("Banking Guidance") and the November 7, 2000 Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act ("In-Lieu Fee Guidance"), and the December 24, 2002 Regulatory Guidance Letter 02-02 on compensatory mitigation projects.

Compensatory mitigation generally requires the permittee to mitigate on-site or to locate an impaired stream or wetland off-site then restore it to a suitable functional condition. Locating good mitigation sites can be problematic for permittees in certain situations. Another option that can be considered is the payment of in-lieu fees to an entity that will expend the monies to implement stream and wetland restoration projects. The Corps may execute written agreements with these entities for the purposes of in-lieu fee mitigation. The following procedures have been developed in consideration of the "In-Lieu Fee Guidance".

MITIGATION REVIEW TEAM (MRT):

The COE in cooperation with other federal and state resource agencies will establish and chair a MRT which will function to define the conditions under which the in-lieu fees may be used, to approve proposed projects for design and construction with in-lieu fee monies, and to perform a yearly review of ongoing and completed projects. The MRT will be directly involved in approval of enhancement/restoration projects by a simple (majority vote or consensus). These (votes/discussions) will occur at scheduled quarterly meetings of the MRT. Additional meetings may be held on an “as needed” basis and will be agreed upon by a majority of the MRT. At these meetings the MRT will approve preliminary scopes of work on candidate restoration sites and final design plans presented by in-lieu fee recipient for approval so that project design may commence. In order to be considered by the MRT, a scope of work will be submitted 30 days in advance of each quarterly meeting. An administrative record (minutes) of the meetings will be kept on file by the COE.

In order for the MRT to approve construction, design plans will be submitted 60 days in advance of the scheduled quarterly meeting. If the construction project will necessitate a discharge of dredged and/or fill material into waters of the US, then an application for a DA permit will accompany the design plans. The MRT will include a single representative from each COE district, WVDEP, U.S. Fish and Wildlife Service (USFWS), USEPA, and the West Virginia Division of Natural Resources (WVDNR). In West Virginia, which has more than one COE district, the COE district that the project is located within would approve the restoration projects. The in-lieu fee recipient will maintain a schedule of in-lieu fee funds received and expended within each COE district geographic boundary.

When travel is a problem, voting by MRT members may be accomplished via E-mail, FAX, or letter within 3 days of the meeting. The COE, WVDEP, WVDNR, USFWS and USEPA will appoint an individual within their agency to participate as a member of the MRT and pay any travel and labor expenses. No voting team member can charge labor or travel to an in-lieu fee fund.

PROJECT TYPE:

Funded projects must directly relate to compensating for impacts to the aquatic environment that are similar to impacts resulting from the administration of the Corps of Engineers Regulatory Program. When the Corps permits are issued conditioned on the payment of money in-lieu of other mitigation, that money must be used to fulfill the requirements of mitigation to offset the loss to the aquatic environment that the COE is responsible under federal law to protect. These impacts typically result in the physical loss of aquatic habitat and related aquatic functions of streams, wetlands, or other special aquatic sites as defined in 40 CFR 230(q-1). Although there may generally not be a one-to-one relationship between impact sites and mitigation projects, on an overall basis, the projects should balance the loss of aquatic functions to meet the federal goal of no net loss. For example, impacts resulting from permitted coal mining activities in the Southern Coalfield Region should be mitigated by in-kind restoration of functions and values considering opportunities first in the same watershed, river basin, and ecoregion. Types of projects generally acceptable for funding are as follows:

- Full-scale restoration of a stream to its natural pattern, profile and dimension along with creating aquatic habitat and establishing riparian vegetation and floodplain function.
- Removing culverts (daylighting) or concrete lining from stream channels, then restoring the characteristic pattern, profile, dimension, and riparian zone to the affected stream segment.
- Stream enhancement, which includes establishing riparian vegetation, the stabilization of eroding stream banks through bioengineering techniques or other habitat-friendly means and the creation of aquatic habitat in-stream. Bank stabilization measures such as gabions, excessive rip-rap, retaining walls or grouting will not be considered suitable for in-lieu fee funding in most situations.
- Wetland restoration, creation, and enhancement.

- In special circumstances, protection of stream riparian corridors or wetlands through Conservation Easements or acquisition of ecologically sensitive stream corridors or wetlands.

Projects which will not be approved for the expenditure of in-lieu fee money include:

- Projects or planning documents that have a primary purpose of water supply, flood control, sewer improvements, or other water-related improvements that do not involve aquatic habitat restoration work.
- Any project that seeks or receives matching federal funds or grants. The purpose of in-lieu fee is to provide compensatory mitigation of impacts resulting from the COE Regulatory Program. It is not appropriate to expend federal funds or grants to mitigate these impacts because the federal government would essentially be funding mitigation projects for impacts resulting from private actions.
- Projects such as nature trails adjacent to streams, boat ramps, ponds, dams, creating fishing access and similar access projects do not qualify.

CRITERIA FOR PROJECT SELECTION:

In-lieu fee recipients will work with Federal, state, and local agencies, landowners and other entities to locate potential sites for mitigation. Typically, this would include things like degraded or prior-converted wetlands, straightened or channelized streams, unstable stream channels, stream segments lacking riparian vegetation and similar impairments. However, not all degraded or impaired wetlands or streams will qualify as potential mitigation projects to be funded with in-lieu fee monies. A variety of factors will be evaluated to determine if a site is a suitable candidate. These factors include but are not limited to:

- The degree of impairment, need, and functional replacement. Prior-converted wetlands and/or extremely degraded streams ([void of aquatic life or nearly so] that have been straightened, channelized, lined with concrete or culverted) will usually offer good opportunities

for improvements to natural functions and values and will generally be considered as good candidates for in-lieu fee mitigation projects. Likewise, wetlands that have been ditch or dominated by evasive species and/or streams with severe bank erosion or lacking riparian vegetation and similar problems will be considered good candidates. Previously impacted wetlands and/or stream reaches that have recovered (i.e. habitat, water quality, channel stability) will generally not be considered suitable project sites.

- Landowner cooperation. In order for a potential project site to be acceptable, the perspective landowner must be receptive to having wetland and/or stream enhancement or restoration work performed on his/her land and must be willing to allow protection (e.g., through a Deed Restriction, Conservation Easement or similar written agreement) of the subject stream corridor.
- Technical Feasibility and Likelihood of Success. The in-lieu fee mitigation project should focus on natural ecological processes and should be planned and designed to be self-sustaining over time to the extent possible. The work must result in some tangible increase in ecological function and benefit to the wetland and/or stream. Wetland areas and/or stream reaches where insurmountable problems exist, and enhancement/restoration would not provide a legitimate improvement, will not be viewed as a suitable expenditure of in-lieu fee money. For example, if water quality were so poor that the stream is void of life, or nearly so, planting trees or stabilizing its banks or adding aquatic habitat structures would do nothing to expedite recovery. Proposed mitigation techniques need to be well understood and reliable. If technical feasibility of a proposed mitigation technique is uncertain, the MRT may impose special requirements and ask for appropriate reporting. These special requirements may be phased out or reduced once the attainment of prescribed performance standards is demonstrated. It shall be the role of the in-lieu fee recipient to submit a plan detailing specific performance standards to the MRT to ensure the technical success of the project can be evaluated.
- Proximity. As a general rule, project sites should be within the same ecoregion, river basin, and 8 digit HUC as the affected wetlands and/or streams and projects generating the in-lieu fee monies. In order to ensure in-kind functional replacement for streams, the in-lieu fee

mitigation will generally be performed on streams within one stream order of the impacted stream that generated the in-lieu fee monies. Exceptions may be made for Ohio River tributaries in the vicinity of the permitted impact, but not within the basin. The MRT may consider other exceptions.

- **Impaired Streams.** Streams occurring on the 303(d) list and targeted watersheds as identified by Federal and state agencies will receive a higher priority for use of in-lieu fee monies if the habitat restoration work would improve the impairment.
- **Project Size.** To the degree that mitigation opportunities present themselves and the amount of fee money becomes available, larger wetland (5 acres) and/or stream (1000 feet or more) restoration/enhancement projects will receive higher priority than smaller projects.
- **Watershed Management.** In-lieu fee projects may be selected within watersheds where other water quality/stream restoration monies (e.g., 319 grants, NRCS programs) have been allocated when and where such opportunities exist. Whenever possible, in-lieu fee monies will be concentrated within watersheds where a high degree of impairment exists and landowner cooperation is widespread. In-lieu fee mitigation projects should be planned and developed to address the specific resource needs of a particular watershed.

PROJECT PLAN REQUIREMENTS:

A plan submitted to the interagency MRT should include, at a minimum, the following:

1. Location of the proposed mitigation site (Narrative description, maps, lat/long or UTM coordinates)
2. Baseline conditions and characterization of the site including physical and functional assessments, photographs (clear & legible)
3. Plan outlining the type of improvements to functions (physical, chemical, and biological processes) and values that are proposed and how they may be accomplished.

4. Schedule for conducting the activities that will provide compensatory mitigation.
5. Performance standards for determining ecological success that are measurable, meaningful, based on sound ecological principles and directly linked to the functional replacement being proposed for the mitigation project.
6. Reporting protocols and monitoring tailored to fit the specifics of the proposed mitigation project and are pertinent to the chosen performance standards.
7. Financial, technical, and legal provisions for mitigation work and remedial actions and responsibilities.
8. Financial, technical, and legal provisions for long-term management and maintenance.
9. Provision that clearly stating the legal responsibility for ensuring mitigation terms are fully satisfied rests with the in-lieu fee recipient proposing to use the in-lieu-fee monies.
10. "Letter of Intent" signed by landowner must be submitted prior to the MRT approving monies to be spent on project design.
11. Conservation easement or deed restriction must be executed prior to the MRT approving monies to be spent on construction.

Agreement Modification and Withdrawal

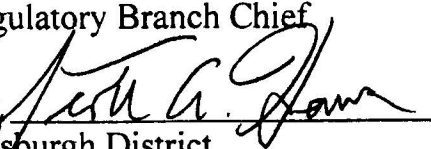
Any signatory entity may propose modifications to these local procedures. The proposed modification shall be made in writing and submitted to all MRT members. Modification shall require unanimity for approval and must be signed by the appropriate signatory official or each signatory. Votes to modify these procedures must occur in person or in writing and all parties of the MRT must vote.

Any MRT member may withdraw from this agreement with 30 days advance written notice to all signatory members.

U.S. Army Corps of Engineers


By: 
Huntington District
Regulatory Branch Chief

Date: 8-6-08

By: 
Pittsburgh District
Regulatory Branch Chief

Date: 2-1-08

U.S. Environmental Protection Agency Region III

By: 
Branch Chief

Date: 6.29.08

U.S. Fish and Wildlife Service:

By: 
Field Supervisor
Elkins Field Office

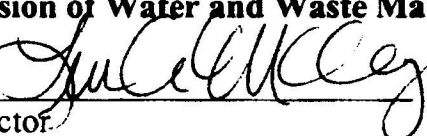
Date: 23 June 2008

West Virginia Division of Natural Resources

By: 
Director

Date: 2/8/08

**West Virginia Department of Environmental Protection
Division of Water and Waste Management**

By: 
Director

Date: 1/25/08