



# **In-Lieu Fee Program Final Instrument**

U.S. Army Corps of Engineers Huntington District  
Upper Scioto and Tuscarawas Watersheds

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## **I. In-Lieu Fee Program Objectives**

The Ohio Wetlands Foundation (OWF) Huntington in-lieu fee program (ILFP) will operate in two service areas in east and central Ohio within the Tuscarawas and Upper Scioto watersheds in the U.S. Army Corps of Engineers (USACE) Huntington District. The OWF ILFP will provide third-party compensatory mitigation for unavoidable impacts to wetlands delineated as waters of the United States and waters of the State of Ohio. More particularly, the ILFP will be used to satisfy the compensatory wetlands mitigation requirements of permits issued under Section 404 and 401 of the Clean Water Act, the Ohio Isolated Wetlands Permit Program (IWP, ORC 6111), and Section 10 of the Rivers and Harbors Act. This ILF program does not seek to provide mitigation for stream impacts at this time. However, OWF reserves the right to request an amendment of this instrument to include compensatory mitigation for impacts to streams located within the Huntington USACE District. OWF also reserves the right to request an amendment of this instrument in the future to include additional service areas/watersheds. Any amendment of the instrument to include stream mitigation or additional service areas/watersheds will be coordinated with USACE and the Interagency Review Team (IRT), and will include a public comment period.

The goal of the proposed in lieu fee program is to provide for no-net loss of wetland acreage and aquatic functions for wetlands within the Tuscarawas and Upper Scioto watersheds in the Huntington District. Temporal loss of functions and values will be offset by the use of mitigation ratios as determined by the appropriate regulatory agencies. This Instrument addresses the required elements for operating an ILFP consistent with federal and state requirements including those set forth in 33 CFR Part 332.

## **II. Proposed Service Areas**

The OWF ILFP will operate in two geographically distinct service areas in the Huntington District. The ILFP will designate one service area that consists of the Tuscarawas River (05040001) 8-digit HUC watershed and one that consists of the Upper Scioto River (05060001) 8-digit HUC watershed. Each of the 8-digit HUC watersheds will also have secondary service areas that include the remainder of the 6-digit HUC watershed in which each respective 8-digit HUC primary service area occurs (050400 Muskingum for the Tuscarawas service area and 050600 Scioto for the Upper Scioto service area). The use of a secondary 6-digit HUC service area is proposed due to the small amount of average authorized impacts that occur within the remainder of the 6-digit HUC accounting units (5.0 acres per year for Muskingum, and 0.4 acre per year for Scioto) and due to the lack of IRT-approved mitigation banks or ILFPs in those watersheds. USACE and/or Ohio Environmental Protection Agency (EPA) may authorize the use of the ILFP by permit applicants within the secondary service area on a case by case basis, when other ecologically preferable mitigation is unavailable, and consistent with the watershed approach outlined in 33 CFR 332.8.

Consistent with state law and Ohio USACE and Ohio EPA Guidance, compensatory mitigation for impacts to isolated and jurisdictional Category 1 wetlands of any size and isolated Category 2 wetlands of 0.5 acre or less may be mitigated at any ILFP wetland mitigation project located within the Ohio portion of the Huntington District provided that mitigation credits of the appropriate resource type are not available at an approved mitigation bank.

In cases where multiple ILFP sponsors operate ILFP mitigation projects within the service area, USACE in consultation with the Interagency Review Team (IRT), may direct OWF to transfer funds to another program that has an active mitigation project within the 8-digit USGS HUC where advanced credits have been sold so that mitigation occurs within the same watershed as impacts to the extent practicable. This direction to transfer funds into other ILFPs to promote mitigating wetland impacts within watershed is separate and distinct from the transfer of funds due to ILFP default or the inability to deliver a mitigation site within required timeframes.

### **III. In-Lieu Fee Program Establishment and Operation**

The OWF ILFP will operate by providing restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to the OWF ILFP to develop resources to satisfy compensatory mitigation requirements for Department of the Army or Ohio Isolated Wetland permits. This section details procedures and practices that will be established and followed during the operation of the OWF ILFP.

#### **A. Roles and Responsibilities**

USACE is the party responsible for approval of ILFP instruments and oversight of compliance and mitigation activities associated with Section 404 of the Clean Water Act, and/or Section 10 of the Rivers and Harbors Act. In addition, as chair of the IRT, USACE is responsible for consulting with the IRT in accordance with 33 CFR 332.8.

Ohio EPA is the party responsible for issuing 401 Water Quality Certifications in Ohio, and permitting and oversight of compliance and mitigation activities associated with Ohio's isolated wetland law (ORC 6111). Ohio EPA also participates as a representative on the IRT.

OWF is the sponsor for the ILFP and is responsible for oversight, implementation, and fiscal management of the ILFP as described in this instrument. OWF is a non-profit entity recognized under Section 501(c)3 of the Internal Revenue Code and its operations directly involve the restoration and preservation of wetland and stream resources. As a non-profit, natural resource based entity, OWF meets the requirements of 33 CFR 332.2 to be an In-Lieu-Fee program sponsor. OWF has authority under this instrument to enter into agreements with state agencies, non-profit organizations, for-profit organizations, and individuals to implement the ILFP. All activities conducted by third parties under this instrument are the responsibility of OWF.

#### **B. Project Identification and Development**

##### **1. Project Site Selection**

ILFP mitigation projects will target potential sites best suited to replace lost wetland functions. The evaluation of mitigation sites will include requests for input from existing watershed coordinators, Soil and Water Conservation Districts, other watershed-based groups/NGOs, communities, counties, ecological consultants, and other state and federal resource agencies. Input will also be sought from permit applicants and industry groups in order to better understand the potential need for mitigation in the ILFP service areas in the near future.

Additionally, geographic spatial data resources will be reviewed (such as National Wetland Inventory Maps, Natural Resources Conservation Service Soil Surveys, U.S. Geological Service StreamStats, and aerial imagery) to help identify and review each potential mitigation site. OWF will request timely feedback from the IRT concerning potential mitigation sites prior to developing a conceptual mitigation plan.

Emphasis will be placed on identifying sites that have existing conditions (soils, hydrology, and/or native vegetation) that are conducive to aquatic resource restoration, enhancement, establishment, and/or preservation; are locally and regionally significant in terms of their contribution or potential contribution to reduce sediment and/or nutrient loading and are owned by entities willing to participate in the ILFP. Project sites will be selected and developed in accordance with the information detailed in the Compensation Planning Framework (Appendix D).

The majority of the wetland impacts in the OWF ILFP service areas likely to be mitigated for on ILFP sites are expected to be of palustrine emergent, palustrine forested, and palustrine scrub-shrub Cowardin classification. The acreage and types of wetlands proposed to be mitigated for on each site will be commensurate with the type required by permittees seeking to obtain compensatory mitigation from the ILFP. Site specific information regarding prospective ILFP project sites will be provided within conceptual mitigation plans once potential ILFP project sites have been identified. All conceptual mitigation plans and instrument amendments regarding the addition of ILFP mitigation sites will be coordinated with the District Engineer in consultation with the IRT.

## 2. Mitigation Plan

A mitigation plan will be developed for each ILFP project and is subject to approval by the IRT. Mitigation plans will be developed and implemented in accordance with 33 CFR 332.4 and will include the following required elements:

- |                               |                               |
|-------------------------------|-------------------------------|
| 1. Project objectives         | 7. Maintenance plan           |
| 2. Site selection criteria    | 8. Performance standards      |
| 3. Site protection instrument | 9. Monitoring requirements    |
| 4. Baseline information       | 10. Long-term management plan |
| 5. Credit determination       | 11. Adaptive management plan  |
| 6. Work plan                  | 12. Financial assurances      |

## 3. Ecological Performance Standards

OWF will propose performance standards for each ILFP site for IRT review and approval. These performance standards will be used to assess whether the project is developing into the desired resource type, providing the expected functions, and meeting any other applicable metrics according to the terms detailed in 33 CFR 332.5. Performance standards may be based upon variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology, or other aquatic resource characteristics such as diversity of flora and fauna, consistent with the Mitigation Rule (33 CFR 332.5).



## 4. Project Approval and Instrument Modifications

Approved projects or the expansion of a previously approved project site may be added as an amendment to the Instrument in accordance with 33 CFR 332.8(g). For amendments or modifications of the Instrument, OWF will submit a written request for an instrument modification accompanied by appropriate documentation (e.g. mitigation plan) as detailed in 33 CFR 332.8(d). The process for review and approval of amendments will generally follow the process for instrument approval.

As ILFP project sites are identified and optioned or otherwise secured (e.g. written agreement to purchase or to protect in a manner consistent with the Mitigation Rule), OWF will submit mitigation plans to the District Engineer that include all applicable items listed in 33 CFR 332.4(c)(2-14). Within 30 days of receipt of OWF's formal request for an instrument modification, the District Engineer will notify OWF whether the instrument modification request is complete under 33 CFR 332.8(d)(2). Within 30 days of receipt of a complete instrument modification request and mitigation plan, the District Engineer will provide public notice of the request. The comment period will be 30 days, unless otherwise determined by the District Engineer. Copies of all comments will be provided to IRT members and OWF within 15 days of the close of the public comment period per 33 CFR 332.8(d)(4). OWF will review the comments and discuss concerns and issues with the IRT. Within 90 days of receipt of the complete amendment by the IRT members, the District Engineer will notify OWF of the status of the IRT review. Specifically, the District Engineer must indicate to OWF if the amendment is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the amendment, the District Engineer will indicate the nature of those concerns. A revised plan may be submitted to the District Engineer and the IRT for additional comments, if necessary.

At any point, OWF may declare that the mitigation plan is a final submission and request approval from the District Engineer. Within 30 days of receipt of the final plan, the District Engineer will notify the IRT members whether or not he intends to approve the Instrument amendment. Project approval will be based upon several factors, including: site suitability, long-term sustainability, benefits to rare and endangered natural resources, maximum ecological return on expended funds, and other factors. The District Engineer may add specific requirements and restrictions to each proposed mitigation project. These include conditions on authorizations through the Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act permit process that could be required for a mitigation project.

The District Engineer may use a streamlined modification review process for changes reflecting adaptive management of the ILFP, credit releases, changes in credit releases and credit release schedules, and changes that the District Engineer determines are not significant. OWF will work with the District Engineer to identify other non-significant modifications that would be suitable for review under the streamlined modification review process. In this event, the District Engineer will notify the IRT members of this determination and provide them with copies of the proposed modification. IRT members have 30 days to notify the District Engineer if they have concerns with the proposed modification. If IRT members notify the District Engineer of such concerns, the District Engineer will attempt to resolve those concerns. The District Engineer will notify the IRT members of his intent regarding the proposed modification within 60 days of providing the notice to the IRT members. If no IRT member objects, the District Engineer will notify OWF of his final decision, and if approved, arranged for it to be signed by the appropriate parties per 33 CFR 332.8(g)(2).



The IRT shall meet on a regular basis, as determined by the IRT chair, to review and approve ILF projects and discuss any program management issues. The IRT shall be responsive to OWF in terms of providing feedback and guidance on proposed mitigation sites and mitigation plans. OWF shall be responsive to IRT questions and inquiries as the program sponsor.

## 5. Project Implementation

OWF or its authorized agents will provide the necessary personnel, equipment, and materials to implement ILFP wetland mitigation projects. Within one year of the first advanced credit sale, OWF will submit a mitigation and monitoring plan to the District Engineer (using procedures outlined in Section III(B)(4) of this instrument). Land acquisition and initial physical and biological improvements will be completed by the third full growing season after the first advanced credit in that service area is sold, unless the District Engineer determines that OWF requires more time to plan and implement a project due to a lack of sufficient credit sales. It will not be considered a default of the terms set forth in this Instrument if an insufficient number of credits are sold in a given service area to accrue enough funds to implement an environmentally sustainable project. If this occurs, the District Engineer may direct OWF to transfer funds to any project or proposal that it deems appropriate, in a manner similar to the process described in Section III (E) of this instrument.

## 6. Monitoring

Monitoring of ILFP projects will be conducted to determine if the project is meeting its performance standards and trending towards success as described in 33 CFR 332.6. Each project-specific mitigation plan will include a monitoring plan that will describe the performance standards to be monitored, the methods for monitoring, the length of the monitoring period, the dates that the reports must be submitted, and the frequency for submitting monitoring reports. OWF will be responsible for submitting monitoring reports to the IRT based upon terms set forth in the approved mitigation plan. At the request of an authorized representative of USACE or the IRT, OWF shall allow access to ILF project sites to determine compliance with the terms in the instrument.

The content and level of detail of the monitoring reports will be commensurate with the scale and scope of the mitigation project, as well as the mitigation project type. Each report shall contain, at a minimum, the following information:

1. Monitoring results with comparisons to performance standards
2. Plans, maps, and photographs to illustrate site conditions
3. A narrative summarizing the condition of the project
4. Recommendations for adaptive management, if needed

## 7. Instrument Re-Evaluation

After a period of not more than 5 years from the date of approval, the OWF ILFP instrument will be re-examined to evaluate the objectives and results of the ILFP. The District Engineer, IRT, and OWF will work in good faith to identify strengths and weaknesses within the OWF ILFP, and suggest or recommend adaptive changes to the ILFP and/or this ILFP Instrument.

## **C. Accounting Procedures and Account Reporting Protocols**

The ILFP shall establish and maintain a ledger of advance credits, credit development and credit sales for each service area. Transactions will be tracked in terms of how the credits are generated, *i.e.*, the cost of establishment, restoration, enhancement and/or preservation of forested or non-forested wetlands. Information in the ledger shall also include fulfillment and replenishment of advance credits, the beginning and ending balance of available credits and permitted impacts for each resource type, all additions and subtractions of credits, and any other changes in credit availability (*e.g.*, additional credits released, credit sales suspended by USACE, etc.). Site specific ledgers shall track credits released by type, credits used to fulfill advance credits, and credits sold directly to permittees.

The ILFP shall annually provide USACE with a statement of account(s) holding ILFP funds. The account reports are to be submitted to USACE by March 31 of each year. The reports will include information related to all income, disbursements, and interest earned for each service area account, all permits for which fees were accepted for each service area (including USACE permit number and/or state permit number, the service area in which the authorized impacts are located, the amount of authorized impacts, the amount of required compensatory mitigation, the amount paid to the ILFP, and the dates the funds were received from the permittee), a description of program expenditures (*e.g.* land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration), the balance of advance credits and released credits at the end of the report period for each service area, and other information as required by USACE and the IRT.

## **D. Legal Responsibility for Mitigation**

The permittee retains responsibility for providing compensatory mitigation until the appropriate number and resource type of credits have been secured from the OWF ILFP and USACE and/or Ohio EPA has received documentation that the OWF ILFP has accepted the responsibility for providing the compensatory mitigation. The written notification will be provided by OWF to USACE and/or Ohio EPA and will provide permit number, amount of mitigation required as per terms of the permit, and statement identifying the type and number of credits purchased by the applicant. This notification may be provided by OWF to USACE electronically (via email or facsimile), by overnight carrier or by U.S. Mail. OWF, USACE, and Ohio EPA shall establish a point of contact for documentation of all transactions at the time of instrument approval. Revisions to the point of contact shall be made in writing to the USACE regulatory division chief, the Director of Ohio EPA, or to the President of OWF as appropriate.

## **E. In-Lieu Fee Program Account**

OWF shall be permitted to retain up to 15% of all ILFP payments to offset cost of operations and overhead and development of the ILFP instrument/amendments as well as ongoing cost to identify mitigation sites (including costs to work with agencies, watershed groups, etc. to assist with development of watershed plans and to assess potential mitigation sites). The remainder of payments received by the ILFP will be deposited into an interest bearing, FDIC-insured account or series of accounts to ensure account levels remain within FDIC insurance limits.

OWF shall account for the funds in accordance with generally accepted accounting principles, and the accounts shall be subject to audit by the District Engineer when deemed necessary after giving notice to OWF. Interest earned by the ILFP and proceeds from the sale of ILFP credits shall remain in the account until approved for use by the District Engineer. Funds in excess of the amount needed for mitigation projects within a designated service area shall be held in reserve in the ILFP and utilized for future expenses associated with new mitigation projects in that service area or for un-anticipated remedial work for projects previously completed by OWF within the service area. Disbursements of funds from those held in reserve in the ILFP account will require approval from the District Engineer, in consultation with the IRT. Appropriate supporting information to justify the disbursement will be provided to the District Engineer and IRT commensurate with the amount of funds to be released.

The District Engineer, in consultation with the IRT, will determine whether financial assurances are warranted for an ILFP project. If financial assurances are warranted, they may be provided in a form agreeable to OWF and the District Engineer and may include construction performance bonds, letters of credit or sufficient existing funds in the ILFP account. It is anticipated that financial assurances will not typically be required beyond documentation of payment by permit applicants for credits purchased from OWF and deposit of funds into FDIC insured banking accounts.

For an ILFP project, OWF shall obtain adequate site ownership or formalized access and site protection agreements and initiate biological and physical improvements within three full growing seasons of the date of the first advance credit in the service area being secured by a permittee. If more than three years pass from the date of permit issuance and a mitigation site has not been secured, USACE may direct that the funds be allocated to any project or proposal that it deems appropriate, and that mitigation liability to the ILFP shall be reduced accordingly and transferred to the party receiving such funds. If directed by the District Engineer, OWF will transfer funds to the separate party equal to the value paid for credits purchased from OWF. OWF may be permitted by the District Engineer to retain all or a portion of the administrative fee provided that it can demonstrate the portion of the administrative fee that has been expended to date in an effort to identify a suitable mitigation site to fulfill the mitigation credit requirements.

As per 33 CFR 332.8(n)(4), the District Engineer, at his discretion, may allow extensions of the three-year time limit. As an alternative to extending time allowed to implement a project, the District Engineer may direct OWF to disburse funds from the ILFP account to provide alternative compensatory mitigation. Funds paid to the OWF ILFP by applicants will be used to pay for site selection, planning, IRT coordination, design, ecological and cultural resource coordination, acquisition, implementation, monitoring, management and protection of ILFP projects as approved by the District Engineer. Long-term maintenance and management funding will be determined on a project basis and will include funds to support the long-term care and protection of the compensatory mitigation project.

The District Engineer may audit the records pertaining to the ILFP accounts. Complete budgets for ILFP projects will be approved as part of mitigation plans. An annual report will be presented within 60 days of the end of each calendar year and submitted to USACE for review. Reports will include detailed summaries of the ILFP, funds received, credits sold or transferred and expenses incurred, including administrative expenses. The District Engineer will require notification of all deviations in excess of the approved budget. Specific IRT approval will be required for deviations above 10% and at the discretion of the District Engineer. USACE may review ILFP records with 14 days advance written notice. When so requested, OWF shall provide all books, accounts, reports, files, and other records relating to the ILFP.

## F. Advanced Credits

Advanced credits are any credits approved by the IRT for sale by OWF prior to the development and approval of a site specific mitigation and monitoring plan. Per Section 33 CFR 332.8(n) (1)(i-iii), the number of advance credits will be determined by the District Engineer, in consultation with the IRT, and will be specified for each service area in the instrument. The number of advance credits will be based on the following considerations:

- (i) The Compensation Planning Framework (Appendix D)
- (ii) The OWF's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas
- (iii) The projected funding necessary to begin planning and implementation of in-lieu fee projects

The amount of advance credits assigned to the Tuscarawas service area is 135, and the amount of advance credits assigned to the Upper Scioto service area is 110. Details regarding the advanced credits are outlined in Appendix B. The amount of advanced credits within each service area is based on the average amounts of wetland impacts authorized by Section 401 and Isolated Wetland permits in the last nine State of Ohio fiscal years (2004 through 2012), and wetland impacts authorized by Section 404 Nationwide Permits from 2010 through 2012. The average annual impacts authorized by these permits within each service area are then multiplied by an average mitigation ratio of 2:1, and finally multiplied by three with the anticipation that mitigation projects will take a minimum of three years to become established and to merit additional advance credit release/fulfillment. See Appendix C for a map of the ILFP service areas.

Per 33 CFR 332.8(n)(3), as released credits are produced by ILFP projects, they must be used to fulfill any advance credits that have already been provided within the project service area before any remaining released credits can be sold or transferred to permittees. Once previously provided advance credits have been fulfilled, an equal number of advance credits may be re-allocated to OWF for sale or transfer to fulfill new mitigation requirements, at the discretion of the District Engineer, in consultation with the IRT, and consistent with the terms of the instrument. Advanced credits will be deemed fulfilled as interim performance goals are met for each ILF project. The District Engineer, in consultation with the IRT, will review ILFP projects in accordance with the interim and final performance goals to determine the appropriate amount of advance credits to be replenished. The number of advance credits available to OWF at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in the instrument, minus any that have already been provided but not yet fulfilled. Projects that have successfully demonstrated that they have met interim performance goals established for each ILF project and are in excess of the amount of advance credits sold, may be used by OWF to sell to applicants as equivalent to mitigation bank credits.

Mitigation site evaluation, selection and design will begin upon sale of mitigation credits. Land acquisition or access and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the District Engineer determines that more or less time is needed to plan and implement an in-lieu fee project.



If the District Engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing seasons after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow OWF additional time to plan and implement an in-lieu fee project, the District Engineer must direct OWF to disburse funds from the ILFP account to provide alternative compensatory mitigation to fulfill those compensation obligations. Additionally, advanced credits sold cannot be offset with the release of additional credits until a completed mitigation project meets interim performance goals in accordance with the credit release schedule approved with each site's mitigation plan.

## **G. Method for Determining Project-Specific Credits and Fees and Draft Fee Schedule**

Project-specific credits may be determined by the IRT using standard ratios for wetlands as indicated in the USACE guidance document *Guidelines for Wetland Mitigation Banking in Ohio (July 2011 as amended or as agreed to by the IRT and OWF)*. *Guidelines for Wetland Mitigation Banking in Ohio* can be downloaded from the following website:

<http://www.lrb.usace.army.mil/Portals/45/docs/regulatory/MitandMon/guidelineswetlandmitigation-Ohio.pdf>

Per Section 332.8(o)(5)(ii), the cost of compensatory wetlands mitigation credits provided by a mitigation bank or ILFP is determined by the sponsor. For ILFPs, the cost per credit must include expected costs associated with the restoration, establishment, enhancement, and/or preservation, and long-term management of aquatic resources in each service area. These costs must be based on full cost accounting and include, as appropriate, expenses such as land acquisition, title search, project planning and design, engineering and surveying, construction, plant materials, labor, legal fees, monitoring, and remediation of adaptive management activities, as well as administration of the ILFP. The cost per unit credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The cost per unit of credit must also take into account the resources necessary for the long-term management and protection of the ILF project. In addition, the cost per unit credit must include financial assurances that are necessary to ensure successful completion of ILF projects. The fees charged for credits shall be reviewed, at minimum, on an annual basis, or more often as deemed appropriate by OWF. This review will take place within three months of the completion of the Annual Report and per the requirements of Section 332.8(o)(5)(ii). OWF will rely on the extensive knowledge it has developed over more than 20 years of operation to develop credit prices. For credit costs, see Appendix B.

## **H. Credit Release Schedule**

Per 33 CFR 332(8)(o), release of credits will be tied to performance-based milestones (permitting, site protection, construction, planting, and/or establishment of plant and animal communities). When determining the credit release schedule (i.e. advanced credit replenishment), factors to be considered may include the type of ILFP project (e.g., restoration, enhancement, or establishment), the likelihood of success, the nature and amount of work needed to generate the credits, and the aquatic resource type(s) and function(s) to be provided by the ILFP project. The District Engineer will determine the credit release schedule, including the share to be released only after full achievement of performance standards, after consulting with the IRT.

Once released, credits may be used to satisfy compensatory mitigation requirements of a Department of the Army permit if the use of credits for a specific permit has been approved by the District Engineer. Ohio EPA, as a member of the IRT, may also consider the use of ILFP credits, consistent with Ohio permitting requirements, to provide compensatory mitigation for impacts to wetlands authorized under Ohio's isolated wetland and Section 401 regulatory programs. The terms of the credit release schedule will be specified in the approved mitigation plan. When an ILFP project is implemented and is achieving the performance-based milestones (interim goals) specified in the credit release schedule, credits are generated in accordance with the credit release schedule for the approved mitigation plan. If an ILFP project does not achieve those performance-based milestones, the District Engineer may modify the credit release schedule, including reducing the number of credits.

## **I. Long-Term Management Strategy**

The ILFP projects completed by OWF will include an appropriate entity to assure long-term stewardship. Established, restored, enhanced, or preserved wetlands and their buffers shall be protected in perpetuity in a site protection instrument that shall run with the land and shall remain in place in the event of transfer of the land. Per 33 CFR 332.8(t)(2), real estate instruments, management plans, or other long-term protection mechanisms used for site protection must be finalized before advance credits can become released credits. If portions of acquired properties are not used for compensatory mitigation, those portions may be excluded from the long-term protection mechanisms. Owners and long-term stewardship providers will typically be units of government including: metropolitan park districts; Soil and Water Conservation Districts; Ohio Department of Natural Resources or other appropriate natural resource/educational entities. In some cases, non-governmental organizations or watershed-based organizations may be engaged to provide long-term stewardship and/or ownership of compensatory mitigation projects. Achieving an ecologically stable mitigation project that achieves the maximum level of aquatic ecosystem functions and services with the minimum amount of human involvement will be the goal of each ILFP mitigation project. The Long-Term Management and Maintenance Plan shall include, at a minimum, provisions for:

- 1) Periodic inspections to evaluate the site for signs of trespassing or vandalism. Maintenance will include reasonable actions to deter trespassers and repair any damaged features.
- 2) Monitoring the condition of structural elements and facilities of the site such as signage, water level control structures, fencing, roads, and trails and provisions to repair said structures, if necessary.

OWF will be responsible for developing a Long-Term Management and Maintenance Plan for each mitigation site. OWF will enter into an agreement with the long-term management entity/owner. This agreement will be provided to USACE and shall include the requirement that the long-term manager/owner shall manage the site consistent with the terms of the project mitigation plan. Once a mitigation site has met its performance goals and has been transferred to the site steward, the steward will be tasked with meeting any and all long-term management responsibilities outlined in that site's management and maintenance plan. OWF shall transfer the long-term management funds/account or otherwise arrange for disbursements from such funds/account to the land stewardship entity once the IRT has concurred that the project has met the established performance goals or IRT approved modified performance goals and monitoring can be stopped. Since the long-term financial needs vary by project, the amount of management funds transferred to the long-term stewardship/owner will be established in the mitigation plan for each mitigation project.

Per 33 CFR 332.7(a)(3), the real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the District Engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

## **IV. Other Provisions**

### **A. Legal Responsibility for Providing Compensatory Mitigation**

Per 33 CFR 332.8(d)(6)(ii)(c), OWF assumes all legal responsibility for satisfying the wetlands mitigation requirements of the authorized USACE and/or Ohio EPA permits for which fees have been paid in full by the permit applicant(s) to OWF. The transfer of liability will be established in a manner consistent with the Instrument approved by USACE in accordance with 33 CFR Part 332 and the permit issued by USACE and/or Ohio EPA. OWF will assume the responsibility for all aspects of mitigation until the Site Closure Letter is issued. Upon the issuance of the Site Closure Letter by USACE, OWF may transfer long-term management to the entity designated in the instrument modification for that mitigation project or an alternative entity if approved by the IRT.

### **B. Default Provisions**

If the District Engineer determines that the ILFP is in default of the Instrument, appropriate action will be taken. Default of the Instrument can include failure to meet performance standards, failure to submit monitoring reports, failure to maintain annual and/or individual ledgers, failure to report approved credit transactions, and failure to comply with other terms of the instrument. Appropriate remedial actions available to the District Engineer may include, but are not limited to, suspending credit sales, directing funds to alternative approved ILFP's, adaptive management, decreasing available credits, utilizing financial assurances, or terminating the ILFP Instrument.

USACE or OWF may terminate the final ILFP Instrument by providing sixty (60) days written notice to the other parties. Prior to termination, OWF shall provide an accounting of funds and shall complete payment on contracts for projects approved by the IRT, acting through USACE, and any expenses incurred on behalf of the account. Upon termination, after payment of all outstanding obligations, the remaining funds in the ILFP shall be paid to a similar conservation entity(s) if required by USACE. In the event that the ILFP is closed, OWF is responsible for fulfilling any remaining obligations for credits sold, unless the obligation is specifically transferred to another entity as agreed upon by USACE in consultation with the IRT. Funds remaining in the ILFP account after these obligations are satisfied must continue to be used for restoration, establishment, enhancement, and/or preservation of wetlands and associated upland buffers, unless otherwise approved by the District Engineer.

### **C. Project Closure Procedures**

Within ninety (90) days following the end of the monitoring period specified in the mitigation plan for each project site, or following a written request by OWF upon satisfaction of the performance standards for a project site, as determined by the IRT, or USACE on behalf of the IRT, shall issue a written certification of satisfaction to OWF and thereafter any remaining contingency funds for that mitigation project shall be made available to the general balance of the fund, or to OWF for use in long-term management of the mitigation project site.



Prior to closure of a mitigation project site, the IRT may perform a final compliance inspection to evaluate whether all success criteria have been achieved. Upon the determination by the IRT that:

- 1) All applicable success criteria have been achieved;
- 2) All released Credits for that mitigation project site have been debited;
- 3) A Long-Term Management Plan is in place;
- 4) The IRT has received a GIS shapefile or similar exhibit depicting the location and extent of the mitigation project;
- 5) A long-term steward has been secured and provided with a management endowment; and
- 6) The mitigation project site has complied with the terms of this instrument and the mitigation plan.

Once the mitigation project site closes, and the period of long-term management commences, OWF's responsibility and liability for the mitigation project ceases.

## **D. Force Majeure**

OWF will not be responsible for project failure that is attributed to natural catastrophes such as flood, fire, drought, or regional pest infestation that the District Engineer determines is beyond the reasonable control of OWF to prevent or mitigate. OWF shall bear the burden of demonstrating that the Force Majeure event was caused by circumstances beyond the control of OWF and the damage is irreparable by any practical and reasonable means. The District Engineer, in consultation with the IRT, shall exercise reasonable discretion in determining whether an event is Force Majeure.

## **E. Dispute Resolution**

Resolution of disputes between IRT members, OWF and the IRT, and in the event that an IRT member objects to the District Engineer's (or designee's) proposal to approve any amendment to this instrument, the process for addressing any objections shall follow the dispute resolution process set forth in 33 CFR 332.8(e). Resolution of disputes related to overall program management or as it pertains to individual ILFP projects (e.g., satisfaction of performance standards) will be resolved between OWF and the District Engineer in consultation with the IRT.

## **F. Validity of the Instrument**

This Instrument will become valid on the latter date of the signature of OWF and the Huntington District Engineer or designee. This Instrument may only be amended or modified with the written approval of OWF and the District Engineer or designee.

## **G. Notice**

Any notice required or authorized hereunder shall be deemed to have been given (i) when delivered by hand, or (ii) three working days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or (iii) sent by Federal Express, United Parcel Service (UPS) or a similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party), or (iiii) via email with return receipt requested and effective upon confirmation of receipt:

District Engineer or Designee  
U.S. Army Corps of Engineers, Huntington District  
502 Eighth Street  
Huntington, West Virginia 25701  
LRH.Permits@Lrh01.usace.army.mil

Vincent E. Messerly, President  
Ohio Wetlands Foundation  
1220 Stone Run Court  
Lancaster, Ohio 43130  
vmesserly@ohiowetlands.org

## **H. Invalid Provisions**

In the event that one or more of the provisions contained in this Instrument is found to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this Instrument shall not be construed as invalid, illegal, or unenforceable.

## **I. Binding**

This Instrument shall be immediately binding upon OWF and its successors, assignees, and legal representatives upon signing by OWF and Huntington District, District Engineer for the Huntington District of the Corps of Engineers, or designee.

## **J. Liability of Regulatory Agencies**

The Huntington District, Ohio EPA, and signing IRT members that administer the ILFP to protect wetlands and serve the public's interest will not guarantee the availability of credits to any entity, or ensure the financial success of the ILFP bank, specific individuals, or entities. The public should not construe this Instrument as a guarantee in any way that the IRT will approve sale of credits from the ILF program, or that the regulatory agencies will forgo other mitigation options that may also serve the public interest.

## **K. Right to Refuse Service**

USACE or Ohio EPA approval of purchase or transfer of credits from the OWF ILFP does not signify OWF's acceptance or confirmation of OWF's offer to sell or transfer credits. OWF reserves the right to refuse to sell or transfer credits from the OWF ILFP at its sole discretion.

## V. Signatures

### Ohio Wetlands Foundation:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

### Huntington District Engineer:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

### Optional IRT Agency Signatures

#### Natural Resource Conservation Service:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

#### Ohio Department of Natural Resources:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

#### Ohio Environmental Protection Agency:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

#### U.S. Environmental Protection Agency:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

#### U.S. Fish and Wildlife Service

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

# Appendix A

## Definitions

**Adaptive management** means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems.

**Advance credits** means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area where applicable. The instrument must also contain a schedule for fulfillment of advance credit sales.

**Buffer** means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.

**Compensatory mitigation** means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

**Compensatory mitigation project** means compensatory mitigation implemented by the permittee as a requirement of a DA permit (i.e., permittee-responsible mitigation), or by a mitigation bank or an in-lieu fee program.

**Condition** means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region.

**Credit** means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.

**DA** means Department of the Army.

**Days** means calendar days.

**Debit** means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions is based on the resources impacted by the authorized activity.

**Enhancement** means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

**Establishment** (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.

**Fulfillment of advance credit sales of an in-lieu fee program** means application of credits released in accordance with a credit release schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the advance credits. Only after any advance credit sales within a service area have been fulfilled through the application of released credits from an in-lieu fee project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credits from that project be sold or transferred to permittees. When advance credits are fulfilled, an equal number of new advance credits is restored to the program sponsor for sale or transfer to permit applicants.

**Functional capacity** means the degree to which an area of aquatic resource performs a specific function.

**Functions** means the physical, chemical, and biological processes that occur in ecosystems.

**Impact** means adverse effect.

**In-kind** means a resource of a similar structural and functional type to the impacted resource.

**In-lieu fee program** means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

**In-lieu fee program instrument** means the legal document for the establishment, operation, and use of an in-lieu fee program.

**Instrument** means mitigation banking instrument or in-lieu fee program instrument.

**Interagency Review Team (IRT)** means an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.

**Mitigation bank** means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.



**Mitigation banking instrument** means the legal document for the establishment, operation, and use of a mitigation bank.

**Off-site** means an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to the parcel containing the impact site.

**On-site** means an area located on the same parcel of land as the impact site, or on a parcel of land contiguous to the impact site.

**Out-of-kind** means a resource of a different structural and functional type from the impacted resource.

**Performance standards** are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

**Permittee-responsible mitigation** means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

**Preservation** means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

**Re-establishment** means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

**Reference aquatic resources** are a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.

**Rehabilitation** means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

**Release of credits** means a determination by the district engineer, in consultation with the IRT, that credits associated with an approved mitigation plan are available for sale or transfer, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved.

**Restoration** means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

**Riparian areas** are lands adjacent to streams, rivers, lakes, and estuarine-marine shorelines. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality.

**Service area** means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument.

**Services** mean the benefits that human populations receive from functions that occur in ecosystems.

**Site Closure Letter** means a letter issued by USACE to OWF that indicates that monitoring is no longer necessary and that OWF has met all the established or IRT revised performance goals for a mitigation site and that the site can now be transferred to the long term owner and/or stewardship provider.

**Sponsor** means any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program.

**Standard permit** means a standard, individual permit issued under the authority of section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899.

**Temporal loss** is the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the district engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time.

**Watershed** means a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean.

**Watershed approach** means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA permits.

**Watershed plan** means a plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.



## Appendix B

### Advanced Credits and Credit Cost

HUC Basin	HUC Sub-basin	Primary Stream Name	Advance Wetland Credit <sup>1</sup>	Cost Per Mitigation Credit	2004-12 SFY Average 401/Isolated Authorized Impacts to Wetlands (acre)	2010-2012 Average Nationwide Permit Authorized Impacts to Wetlands (acre)	Average Annual Impacts to Wetlands (acre)
6-digit HUC	8-digit HUC (or combination as per ORC 6111)						
050400	-01	Tuscarawas	135	\$45,000	16.5	5.93	22.43
050600	-01	Upper Scioto	110	\$45,000	13.8	4.37	18.17

<sup>1</sup> Advance credits are based on the average annual amount of wetland impacts, times an average mitigation ratio of 2:1, and then multiplied by three with the anticipation that mitigation projects will take a minimum of three years to become established and to merit additional advance credit release/fulfillment.

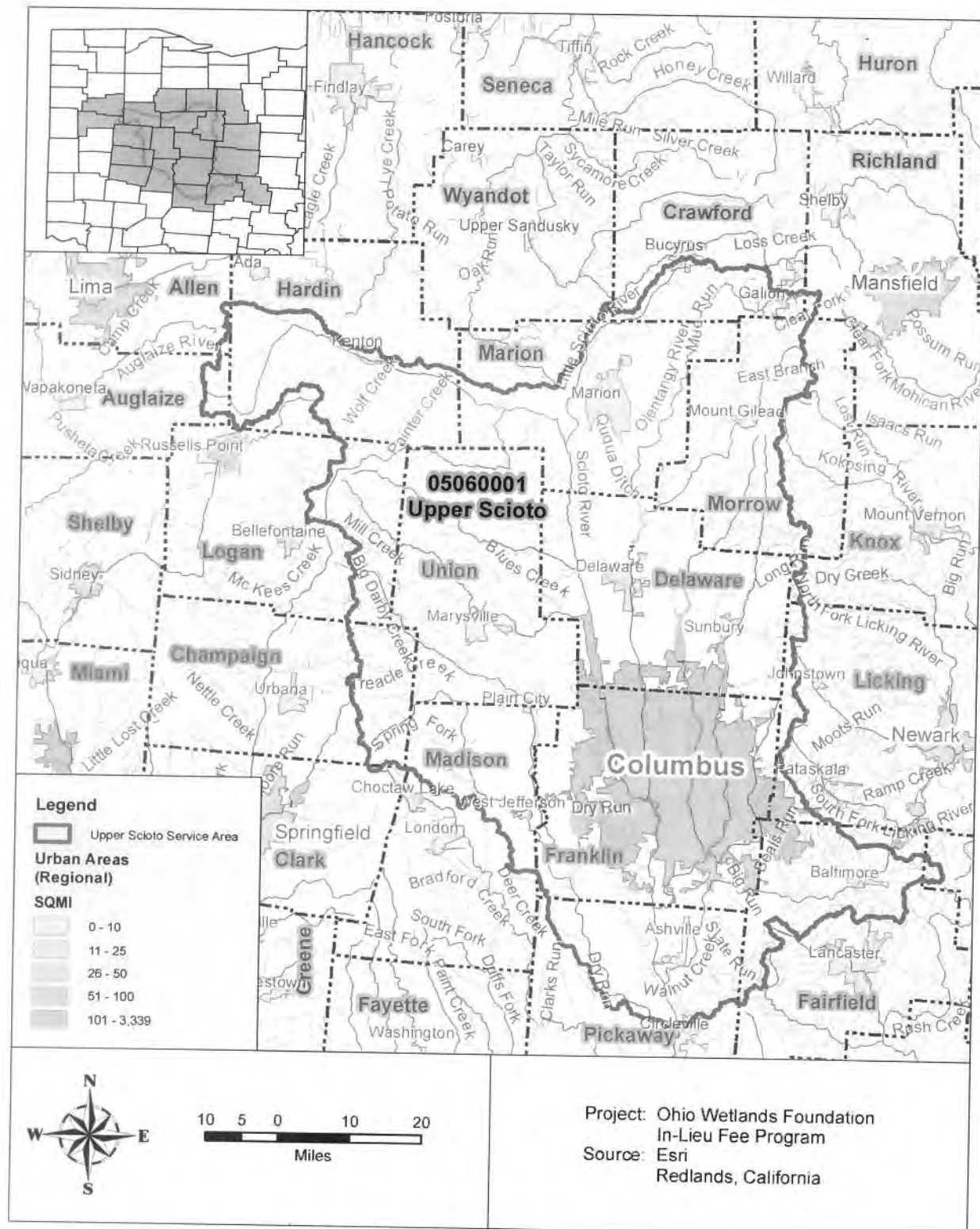


## **Appendix C**

### **Location of Service Areas on Ohio Map**

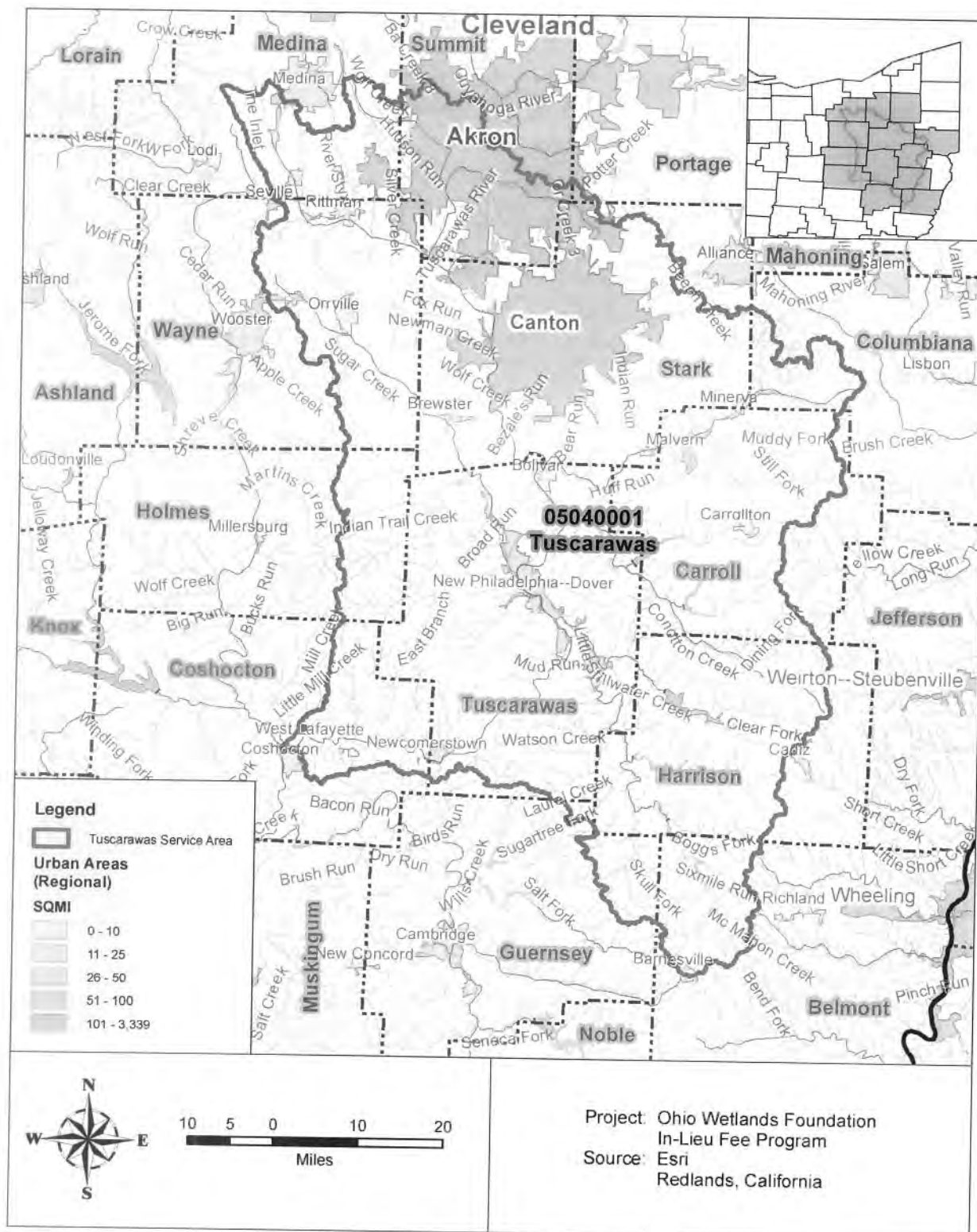


# Upper Scioto Service Area





## Tuscarawas Service Area







# **Appendix D**

## **Compensation Planning Framework**



## **Element I**

***Geographic service areas including a watershed-based rationale for the delineation of each service area***

The OWF ILFP will operate in two distinct service areas based upon single 8-digit HUC watersheds.

- Tuscarawas River watershed within Ohio (HUC 05040001).
- Upper Scioto River (HUC 05060001).

OWF will provide compensatory mitigation for permitting impacts within the same 8-digit HUC in which the impacts occur, or, with approval from the District Engineer upon consultation with the IRT, within the secondary geographic service area. The secondary geographic service areas are defined as each 6-digit HUC.

## **Element II**

***Description of threats to aquatic resources in the service areas, including how the in-lieu fee program will help offset impacts resulting from those threats***

The OWF ILFP will help to offset impacts resulting from the threats described below by providing replacement wetland acreage, functions, and values through restoration, establishment, enhancement, or by preserving the highest quality water resources, as appropriate.

### **Tuscarawas Service Area**

Water quality threats in the Tuscarawas River watershed result from several different sources, including municipal and individual residential waste water treatment systems, removal of riparian corridor, dams/impoundments, channelization, agriculture, dairy and cattle farming, urban runoff, invasive species, climate change, oil and gas extraction operations (Figure 1), and coal mining operations (Figure 2). Urbanization in the north portion of the sub-basin has contributed to continuing threats to aquatic resources and water quality. Some communities have experienced recent burgeoning population growth; the population of the City of Green in Summit County near the headwaters of the Tuscarawas River grew by 12.6% between the 2000 and 2010 United States censuses.

### **Upper Scioto Service Area**

Water quality threats in these watersheds result from several different sources, including municipal and individual residential waste water treatment systems, removal of riparian corridor, dams/impoundments, agricultural runoff (nutrient enrichment, atrazine), sedimentation, invasive species, climate change, and expansion of urban areas.

Increasing urbanization is a major threat to aquatic resources and of paramount concern for the long-term sustainable management of the remaining natural areas in this portion of Ohio. Portions of the Upper Scioto sub-basin have experienced rapid population growth within the past few decades. According to the U.S. Census Bureau, Delaware County, which is drained in part by the Olentangy River, was listed as the 22<sup>nd</sup> fastest growing county in the United States, and the fastest growing county in Ohio (Delaware County Regional Planning Commission 2012). These threats are of particular importance within this sub-basin, as several communities use surface water bodies as sources of municipal drinking water.

## Element III

### *An analysis of historic aquatic resource loss in the service areas*

#### **Tuscarawas Service Area**

The Tuscarawas Service Area has a legacy of agriculture, heavy industry, coal mining, and urbanization that has resulted in extensive impacts to aquatic resources in the watershed, both in terms of outright loss and water quality degradation.

Agriculture has been a primary commercial focus of large portions of the sub-basin, including Wayne, Medina, and Holmes Counties within the Chippewa Creek and Sugar Creek watersheds, dating back to the initial settlement of this portion of the state in the early 1800s. In addition to the conversion and draining of wetlands to cropland, agricultural activities resulted in sedimentation of the watersheds' creeks and rivers, and was often coupled with direct manipulation (ditching, channelization, installation of dams) to control the flow of water through the landscape. Dairy farming has been widespread within portions of the sub-basin (primarily in the Sugar Creek watershed); farms within Holmes, Stark, Tuscarawas, and Wayne Counties account for nearly 25% of the total milk production and 26% of the total number of dairy cows in the State of Ohio today.

Industrial activity in areas such as Akron and its suburbs, Canton, Massillon, New Philadelphia, and Dover resulted in the construction of large factories and other facilities. Many of these industries utilized toxic chemicals and heavy metals in their day to day operations. Accidents, intentional dumping, and other releases of toxic waste into water bodies have been persistent problems in the region.

Expansion of urban areas associated with large cities and villages in the north of the sub-basin, including Akron, Barberton, Wadsworth, Canton, and Massillon, among others, have resulted in direct impacts to streams and wetlands, and conversion of open space to more intensive land uses. Failing septic systems, combined sewer overflows, and storm water runoff have all contributed to the degradation of water quality in this service area. Growth of these communities has also resulted in increased development of roads and other modes of transportation, resulting in fragmentation of wetland and natural areas. Large numbers of dams have been constructed on the Tuscarawas River and its tributaries for water supply and flood control. These dams have a profound effect on the flow regime of the lower Tuscarawas River.

#### **Upper Scioto Service Area**

The Upper Scioto Service Area has a legacy of intensive agriculture, and urbanization associated with the City of Columbus and its suburbs. These influences have resulted in extensive impacts to aquatic resources in the watershed, both in terms of outright loss and water quality degradation.

Outside of the Columbus metropolitan area, the majority of the Upper Scioto River and associated watersheds are characterized by land utilized for the production of agricultural crops, as well as areas used for dairy and livestock production. Large portions of Hardin, Union, Marion, Morrow, Delaware, Madison, Pickaway, and Fairfield Counties are devoted to these land uses. Historically, this sub-basin contained large amounts of low-lying, forested wetlands. These rich soils were subsequently drained, resulting in productive agricultural areas characteristic of this ecoregion. Loss of riparian corridors, nutrient enrichment, sedimentation, and direct manipulation of water resources (ditching, channelization, installation of dams) also resulted from the intensive agriculture that has occurred here for centuries.

The City of Columbus metropolitan area has a population of almost 2 million people according to the 2012 census estimates. Columbus and its suburbs have had a strong influence on the water resources in their vicinity. Their growth in the 1800's and 1900's resulted in direct impacts to streams and wetlands, and conversion of open space to more intensive land uses. Failing septic systems, combined sewer overflows, and storm water runoff have all contributed to the degradation of water quality in this service area. Additionally, several large streams and rivers, including the Olentangy River and the Scioto River, have been extensively dammed to control flooding and to provide drinking water to the surrounding municipalities.

## Element IV

### *An analysis of current aquatic resource conditions in the service areas*

#### Tuscarawas Service Area

The Tuscarawas River watershed, located within portions of Summit, Medina, Stark, Carroll, Columbiana, Tuscarawas, Harrison, Holmes, Belmont, Wayne, Guernsey, and Coshocton Counties in the Erie Ontario Lake Plain and Western Allegheny Plateau ecoregions, drains an area of approximately 2,589 square miles in Ohio. The watershed includes a physically and demographically diverse region of the State, incorporating densely populated urban areas in the cities of Akron, Massillon and Canton, and more sparsely populated, rural areas within the rolling region southeast of Dover and New Philadelphia. The Muskingum River is formed by the confluence of the Tuscarawas River and the Walhonding River in Coshocton.

During the 2003 to 2005 Ohio Environmental Protection Agency (EPA) physical, chemical and biological study of the Tuscarawas River watershed, only 50% of the 141 sites sampled met full aquatic life use attainment (Ohio EPA 2008). Ohio EPA's 2009 Total Maximum Daily Load (TMDL) report determined that the primary causes of impairment in the Tuscarawas River watershed included nutrient enrichment, habitat alteration, sediment, organic enrichment/dissolved oxygen, and pathogen. Although not specifically addressed in the TMDL report, acid mine drainage affects several tributaries in the lower Tuscarawas River watershed.

Additional water quality degradation was documented in the Tuscarawas sub-basin during the 1998 physical, chemical, and biological study of the Sugar Creek watershed. Sugar Creek is a large, north-south flowing tributary that joins the Tuscarawas River in Dover in Tuscarawas County. Sugar Creek drains approximately 365 square miles in portions of Wayne, Tuscarawas, Holmes, Stark and Coshocton counties. Intensive dairy farming and row crop agriculture is abundant within the Sugar Creek watershed. According to the 1998 Ohio EPA report,

*"The extent of non-attainment throughout most of the watershed distinguished Sugar Creek as one of the most degraded basins in all of Ohio. Agricultural land use has promoted siltation and habitat destruction across most of the watershed. Polluted runoff from agricultural and mining sources further acted to suppress aquatic life use attainment" (Ohio EPA, 1998)*

Conversely, portions of the Tuscarawas River watershed area dominated by less intensive land use, with little to no major cities or villages. Some of these watershed support good water quality.



Sandy Creek is a large tributary of the Tuscarawas River located in portions of Columbiana, Stark, Carroll, and Tuscarawas Counties. Sandy Creek has a watershed area of approximately 504 square miles, including Nimishillen Creek (188 square miles) and Still Fork (71 square miles). Land cover in the Sandy Creek watershed is dominated by deciduous forest, with components of pasture and agriculture. According to the 2010 biological and water quality study of Sandy Creek (Ohio EPA, 2013), 34 of the 45 sampling sites assessed fully met the designated or aquatic life use designation. Impairments were primarily caused by channelization, agriculture, low-head dams, and coal mining activities.

### **Upper Scioto Service Area**

The Upper Scioto 8-digit HUC is part of the Scioto River watershed. The Scioto River drains an area of approximately 6,513 square miles within portions of 31 counties in the Erie Ontario Lake Plains, Western Allegheny Plateau, and Eastern Corn Belt Plains ecoregions within central Ohio. The Upper Scioto River HUC is primarily comprised of relatively flat land with several densely populated urban areas, including the City of Columbus and its suburbs. The main tributary of the Scioto River, the Olentangy River, joins the Scioto in Columbus.

The middle Scioto River mainstem was studied by Ohio EPA in 1996. Physical, chemical and biological sampling along the river indicated that 35.6 miles (75.6%) of the middle Scioto River was in full attainment of existing aquatic life uses. Partial attainment was indicated for 11.5 miles (24.4%). Impairments were primarily a result of impoundments (Griggs Dam) along the river and treated effluent and combined sewer discharges associated with the more urbanized area downstream of Interstate 270.

One of the highest quality and most biologically diverse streams in the state is located within the Upper Scioto sub-basin: Big Darby Creek. Big Darby Creek and its tributaries drain approximately 555 square miles of predominantly high productivity agricultural areas in Champaign, Franklin, Logan, Madison, Pickaway, and Union counties. During the 2001 and 2002 physical, chemical, and biological study of Big Darby Creek and its tributaries, 66.4% of the 128 sites assessed met full aquatic life use attainment, 24.6% met partial attainment, and 9.4% were in non-attainment of their aquatic life use designation. Big Darby Creek is listed as a State and National scenic river, and is classified by Ohio EPA as Exceptional Warmwater Habitat for much of its length. Floodplain wetlands occur within the riparian corridor of Big Darby Creek.

The Olentangy River, Whetstone Creek, and select tributaries were sampled by Ohio EPA in 2003-2004. The Olentangy River has a watershed area of 543 square miles and is the main tributary of the Scioto River, joining the Scioto in Columbus. During the 2003-2004 physical, chemical and biological study conducted by Ohio EPA, 34 (45.95%) sampling sites fully met either the designated or the recommended aquatic life use, 23 (31.08%) sites partially met, and 17 (22.97%) of the sites were not attaining their designated or recommended use. The primary sources of impairment were high intensity agricultural land use activities, failing on-site wastewater treatment systems, and dams.

## **Element V**

### ***Aquatic resource goals and objectives***

OWF will provide enhancement, establishment, restoration and or preservation of wetlands within the service areas of the ILFP as compensatory mitigation for permitted impacts to these water resources.

In addition to this general goal, OWF will strive to align its activities with the objectives of existing watershed action plans and the operations of conservation organizations functioning within the service areas. Information regarding these plans and groups are provided below.

### **Tuscarawas Service Area**

Several watershed action plans have been endorsed or are in development for watersheds within the Tuscarawas River sub-basin. These include action plans covering Wolf Creek, Nimishillen Creek, and Huff Run (a tributary of Conotton Creek). These documents were developed or are in development by Northeast Ohio Four County Regional Planning and Development Organization (NEFCO) and the Huff Run Watershed Restoration Partnership. These documents outline goals and procedures to protect, restore and enhance natural resources and regional assets of tributaries of the Tuscarawas River. These plans utilized input from watershed community stakeholders to identify important issues and pinpoint resources needing restoration, protection, conservation, and/or preservation so that a long term vision for the watersheds could be developed and attained.

### **Watershed Management Goals**

The watershed action plans identified management recommendations to help improve the quality of life and water quality within the watersheds of the Tuscarawas River. The following management strategies are approaches that OWF ILF projects may specifically address.

- Protecting sites around riparian corridors or sites that have unique habitat features.
- Reducing erosion and sedimentation.
- Establish forested buffer strips adjacent to streams near farm croplands.
- Increase quality of riparian corridors along streams.
- Create wildlife habitat in formerly inhabitable areas affected by acid mine drainage or related landscape.
- Restoration of reclaimed mine sites to reduce acid mine drainage.
- Increase wetland acreage within the watershed to reduce flooding severity.
- Create or restore wetland areas.
- Permanently protect and restore natural, high quality wetlands areas.
- Restore and protect active floodplain area.

### **Upper Scioto Service Area**

Numerous watershed action plans have been developed for watersheds that fall within the Upper Scioto sub-basin. These watershed action plans specifically target the Upper Scioto River, Bokes Creek/Mill Creek, Upper Olentangy, Lower Olentangy, Upper Big Walnut Creek, Lower Big Walnut Creek, Lower Alum Creek, Rocky Fork, and Blacklick Creek. These watershed action plans were developed by a variety of stakeholders, including watershed groups, soil and water conservation districts, and non-government organizations. Specific organizations which have created or contributed to watershed action plans within the service area include: Delaware Soil and Water Conservation District, Friends of Alum Creek and Tributaries, Friends of Big Walnut Creek and Tributaries, Mid-Ohio Regional Planning Commission, Friends of the Lower Olentangy Watershed, Olentangy Watershed Alliance, and the Union Soil and Water Conservation District.

These documents and resources outline goals and procedures to protect, restore and enhance watersheds' natural resources and regional assets within the Upper Scioto sub-basin. These plans utilized input from watershed community stakeholders to identify important issues and pinpoint resources needing restoration, protection, conservation, and/or preservation so that a long term vision for the watershed could be developed and attained.

#### Watershed Management Goals

The action plans in place for watersheds within the Upper Scioto sub-basin provide recommendations to help improve the water quality and biological integrity of these resources. The following management strategies are approaches that OWF ILF projects may specifically address.

- Promote conservation of wetlands and natural stream channels.
- Create wetlands in targeted areas to reduce storm water run-off from directly entering streams and creeks.
- Create localized areas for wetland mitigation sites.
- Participate in activities that preserve and restore current agricultural land into metro parks.
- Create vernal pools.
- Increase the diversity and quality of riparian habitat along the Scioto River mainstem.
- Create riparian forest buffers and wetlands on agricultural croplands or marginal pasturelands.
- Develop wetlands, riparian and aquatic habitat areas.
- Construct filter strips along riparian corridors.

## **Element VI**

### ***Prioritization strategy for selecting and implementing mitigation activities***

Potential sites for ILF mitigation projects will target priority conservation habitats best suited to replace lost wetland functions. The search for mitigation sites will seek input from existing watershed coordinators, Soil and Water Conservation Districts, other watershed-based groups/NGO's, permit applicants, communities, counties, ecological consultants, and other state and federal resource agencies. Additionally, geographic spatial data resources will be reviewed (such as National Wetland Inventory Maps, National Resource Conservation Service Web Soil Surveys, U.S. Geological Service StreamStats, and aerial imagery) to help identify and review each potential mitigation site.

Emphasis will be placed on identifying sites that are locally and regionally significant in terms of their contribution or potential contribution to provide key wildlife habitat; reduce sediment and/or nutrient loading, provide public access for recreation and education; and are owned by entities willing to participate in the ILFP.

The site prioritization key presented in Appendix E will be utilized to evaluate and select potential sites for ILFP mitigation projects.

## Element VII

### *Preservation objectives*

33 CFR 332.3(h) states that preservation must protect resources that provide important physical, chemical or biological functions. These resources must be under threat of destruction or adverse modification. Preserved sites must be permanently protected through an appropriate real estate or legal instrument.

Under the OWF ILFP, preservation projects will incorporate objectives identified within the watershed approach to protecting aquatic habitat and functions. These projects may include preservation of high quality wetlands, protecting areas of critical habitat for threatened or endangered species, or conserving important natural areas. These areas may include sites identified in regional watershed action plans, or conservation plans developed by U.S. Fish and Wildlife Service, or Ohio Department of Natural Resources, Division of Wildlife.

In accordance with the federal mitigation rule, preservation-only projects may be used to provide compensatory mitigation when the following criteria are met:

- The resources to be preserved provide important physical, chemical, or biological functions for the watershed;
- The resources to be preserved contribute significantly to the ecological sustainability of the watershed;
- Preservation is determined by the District Engineer to be appropriate and practicable;
- The resources are under threat of destruction or adverse modification;
- The preserved site will be permanently protected through an appropriate real estate or other legal instrument.

## Element VIII

### *Description of stakeholder's involvement*

As the ILFP sponsor, OWF will work closely with federal and state agencies, other conservation partners, and private landowners to identify projects that take into account local knowledge and planning efforts. OWF has worked extensively with a wide variety of government agencies, NGOs, and county and local administrators in the past. OWF will work collaboratively with partners in Ohio to evaluate wetland and stream mitigation opportunities, and to develop mitigation plans and assessment strategies. Projects will be evaluated using standard quantitative assessment methodologies pre- and post-project implementation to help determine the effect of the restoration activities on the aquatic ecosystem. Use of standard assessment methodologies will allow for the performance of OWF ILF projects to be compared against other restoration activities.

In addition to the expertise and experience of the program sponsor, OWF regularly collaborates with environmental consultants that provide additional knowledge and technical proficiency to help identify, implement, and evaluate the performance of a restoration project. OWF will work closely with volunteers and local partners to create projects that maximize conservation potential and target water quality improvements.



OWF will strive to create strong relationships and partnerships with conservation groups and private landowners that share common restoration and preservation goals and strategies. These bonds will allow OWF to further target and prioritize projects with the maximum potential for improving the aquatic ecosystem, protecting important wildlife habitat, and enhancing existing conservation strategies and goals. OWF will continue to foster relationships with partners from federal, state, local, academic, industry, and private entities to ensure that successful conservation and restoration projects are completed.

Potential partners and stakeholders include:

➤ **Federal Government Agencies**

- U.S. Army Corps of Engineers
- U.S. Fish and Wildlife Service
- Natural Resource Conservation Service
- U.S. Environmental Protection Agency
- National Park Service
- National Oceanic and Atmospheric Administration

➤ **State Agencies**

- Ohio Environmental Protection Agency
- Ohio Department of Natural Resources
- Ohio Historic Preservation Office

➤ **Other**

- Conservation organizations
- Watershed action groups (including but not limited to the Mahoning River Consortium, and Little Beaver Creek Land Foundation)
- Soil and Water Conservation Districts
- Land trusts
- Private landowners
- Industry groups
- Environmental consultants

These partners can assist with a variety of tasks related to the ILF program, including identifying potential mitigation projects, holding easements or environmental covenants, assisting with the development and implementation of monitoring programs, and providing long-term management and resource protection.

## **Element IX**

### ***Description of long-term protection and management***

OWF will be responsible for developing and implementing a long-term protection and management plan for each OWF ILF project. On privately-owned property, including property held by OWF or other conservation organizations, real estate instruments will be developed and recorded to provide legal mechanisms to protect aquatic resources in perpetuity. Draft conservation easements or equivalent protection mechanisms will be submitted to the IRT as part of each project mitigation plan for review and approval.

In the event that projects are implemented on publicly-owned property, long-term protection and management may be provided through facility management plans or integrated natural resource plans.

To the maximum extent practicable, OWF ILF projects will be designed to require little or no long-term management efforts once performance standards have been achieved. OWF will be responsible for maintaining OWF ILF program projects consistent with the mitigation plan to ensure long-term viability as functional aquatic resources. OWF shall retain responsibility unless the long-term management responsibility is formally transferred to a USACE approved long-term manager. The long-term management plan developed for each OWF ILF project will include a description of anticipated management needs with annual cost estimates and an identified funding mechanism (such as non-wasting endowments, trusts, contractual arrangements with future responsible parties, or other appropriate financial instruments).

The final conservation easement or equivalent mechanism for long-term protection will be submitted to the IRT for review upon acquisition of the site and will be the first milestone for which credit release can occur. Upon achieving its performance standards and approved transfer of the project for long-term management and protection OWF will request that USACE issue written "closure certification" in coordination with the IRT.

## **Element X**

### ***Program monitoring and reporting***

As detailed in Section III of the Instrument, OWF will submit an Annual Program Report to the IRT no later than March 31 of each year and will include program data from the previous calendar year (January 1 – December 31).

OWF will periodically provide an evaluation report documenting performance and success of the OWF ILF program as established in the Instrument and Compensation Planning Framework. This evaluation report will identify programs strengths, and any perceived weaknesses in implementation of the program's projects. Finally, these reports will provide documentation of any proposed changes to the Compensation Planning Framework.

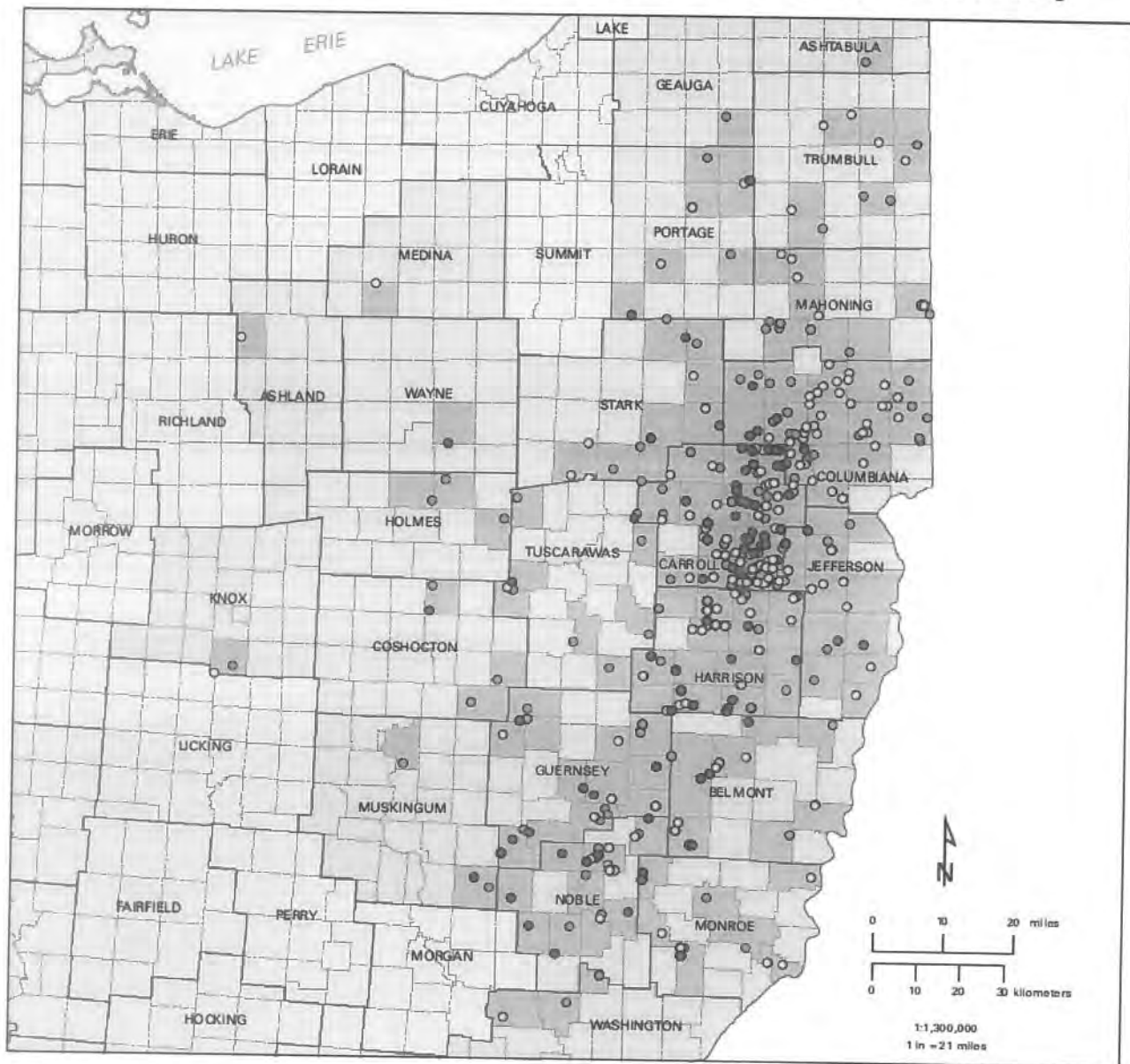
Annual mitigation monitoring reports will be submitted to USACE for each OWF ILF project. These reports will document the current status of the water resources on the mitigation sites, and will provide details regarding the trajectory of the site to meet established performance standards.





# Appendix D, Figure 1

## Horizontal Utica-Point Pleasant Well Activity



### EXPLANATION

Horizontal well status as of: 9/5/2013

- PERMITTED - Permitted, Not Drilled, or Canceled. (287)
- DRILLED - Drilled or Drilling (384)
- PRODUCING - Producing or Plugged Back (125)
- INACTIVE - Drilled Inactive or Shut in (2)
- PLUGGED - Final Restoration or Lost Hole (8)
- Dry and Abandoned (3)

Well permit information from the ODNR Division of Oil and Gas Resources Management

Recommended citation:  
Ohio Department of Natural Resources, 2013, Horizontal Utica-Point Pleasant Well Activity in Ohio, scale 1:1,300,000, revised 9/5/2013.

OPERATOR	COUNT
ANGLADARD & P ONSHORE LLC	10
ANTERO RESOURCES CORPORATION	29
ATLAS NOBLE LLC	5
BEUSA ENERGY LLC	1
BP AMERICA PRODUCTION COMPANY	4
BRAMMER ENGINEERING INC	2
CARRIGO (UTICA) LLC	3
CHESAPEAKE APPALACHIA LLC	6
CHESAPEAKE EXPLORATION LLC	490
CIEVIRON APPALACHIA LLC	7
CNTL GAS COMPANY LLC	37
DEVON ENERGY PRODUCTION CO	13
ECLIPSE RESOURCES LLP	5
ENERVEST OPERATING L	17
EQT PRODUCTION COMPANY	4
GULFPORT ENERGY CORPORATION	66
VALCON OPERATING COMPANY INC	5
HALL DRILLING LLC (OIL & GAS)	3
HESS OHIO DEVELOPMENTS LLC	20
HESS OHIO RESOURCES LLC	6
HO ENERGY LLC	16
HL CORP ENERGY COMPANY	6
MOUNTAINEER KEYSTONE LLC	6
POC ENERGY INC	10
R E GAS DEVELOPMENT LLC	21
SERRA RESOURCES LLC	3
SWAYLP	1
TRIAD HUNTER LLC	4
UTO ENERGY INC	5
<b>TOTAL</b>	<b>870</b>

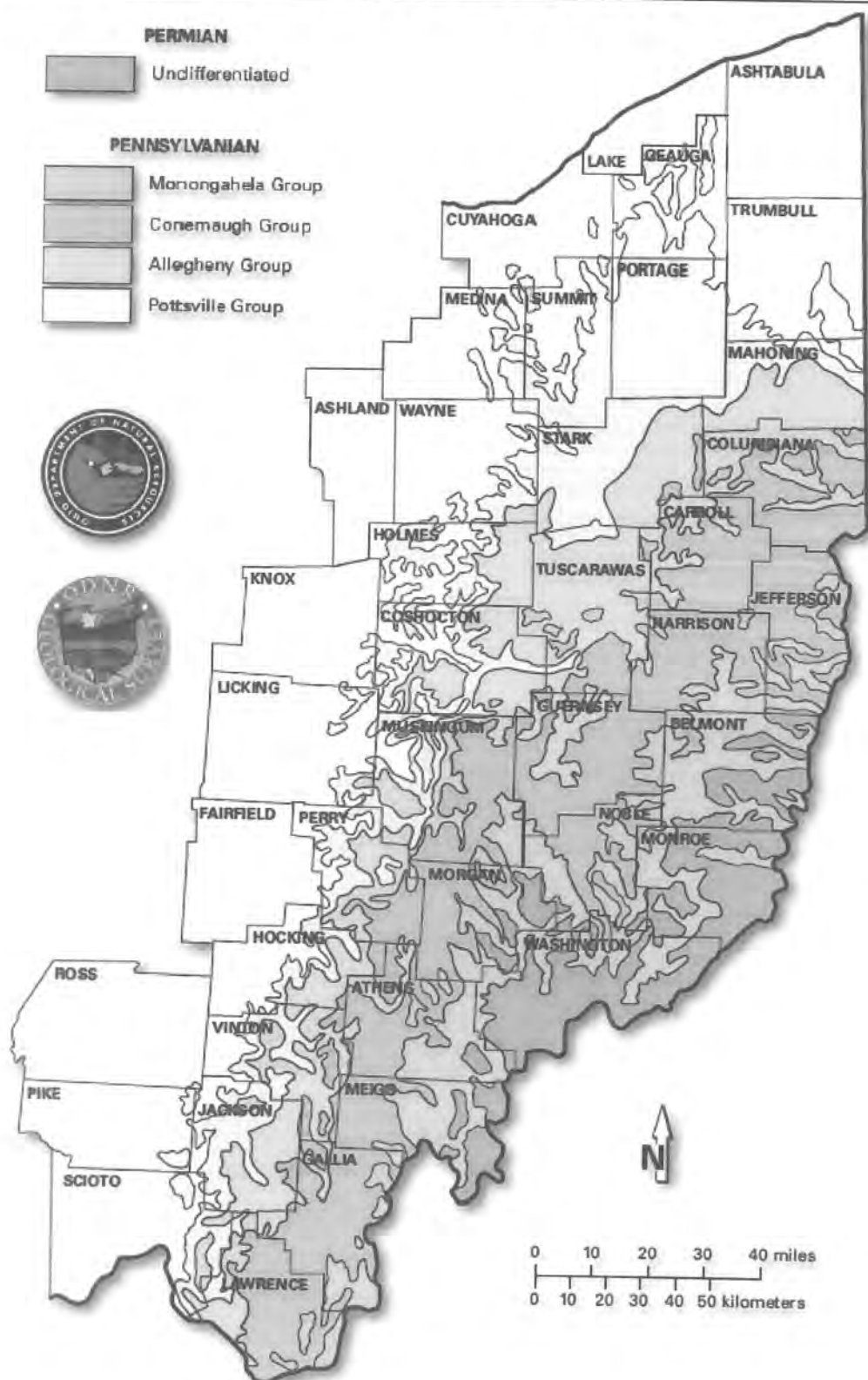






# Appendix D, Figure 2

## Map of Coal-Bearing Rocks of Ohio







# Appendix E

## Site Prioritization Key

Potential OWF ILFP mitigation project sites will be identified based upon input received from watershed coordinators, Soil and Water Conservation Districts, other watershed-based groups/NGO's, permit applicants, communities, counties, ecological consultants, and other state and federal resource agencies. Potential sites will be evaluated and ranked using the following key in order to identify the site(s) with the highest potential for mitigation success. Final site selection will be made in close consultation with the IRT.

1. Select ILF project service area. Review compensation planning framework to identify watershed water resource restoration, enhancement, establishment, or preservation priorities
2. **Site Analysis:** Once identified, site(s) will be examined using publically available data (including but not limited to: historic aerials, National Wetland Inventory, Ohio Wetland Inventory, National Land Cover Database, USEPA WATERS, and County Soil Surveys) to determine the suitability of the site to support a successful wetland mitigation project. Sites will be scored based upon the following criteria or by alternative assessment methods as appropriate.
  - a. Is the entire site mapped as a wetland?
    - i. Yes Score = 0
    - ii. No Score = 1
  - b. Are there adjacent wetlands in close proximity to the site?
    - i. Yes Score = 1
    - ii. No Score = 0
  - c. Are there adjacent preserves, parks, or conservation lands?
    - i. Yes Score = 1
    - ii. No Score = 0
  - d. Is the site underlain by a predominance of hydric soils, or non-hydric soils with hydric inclusions?
    - i. Yes Score = 1
    - ii. No Remove site from consideration
  - e. Does the site receive a significant portion of its hydrology from a nearby stream, river, or other waterbody?
    - i. Yes Score = 1
    - ii. No Score = 0
3. **Site Procurement:** OWF will examine if the landowner (for privately owned parcels) or land manager/resource agency (for publically owned parcels) is interested in supporting a wetland mitigation project on the property. If so, OWF will determine if it is possible to a) secure the site by purchasing the property, b) protect the mitigation area by placing a conservation easement on the site, or 3) partner with the agency to act as a long-term management entity.
  - i. Yes Score = 1
  - ii. No Remove site from consideration

4. **Site visit.** OWF will conduct a site visit to examine the parcel in greater detail to determine the potential success of wetland mitigation projects on the site.
- a. Does the site acreage allow for adequate quantities of mitigation for the proposed mitigation project?
    - i. Yes, site exceeds required acreage Score = 2
    - ii. Yes, site meets required acreage Score = 1
    - iii. No Remove site from consideration
  - b. Does the site have logistical or environmental issues that would jeopardize the success of the mitigation project?
    - i. Yes Score = 0
    - ii. No Score = 1
  - c. Will the site provide potential habitat for a federal or state threatened or endangered species?
    - i. Yes Score = 1
    - ii. No Score = 0
  - d. Will the site help to buffer a high quality natural area (Category 3 wetlands, riparian corridors, streams/rivers, etc.) through improvements in water quality or physical protection?
    - i. Yes Score = 1
    - ii. No Score = 0
5. Rank site(s).
6. Consult with IRT for preliminary review of highest ranked site(s). Schedule site visit(s) as needed.

## **Appendix F**

### **Comment Response Letters**





November 19, 2013

Sheila Newman, Biologist  
USACE, Huntington District  
4969 Dillon Dam Road  
Zanesville, Ohio 43701

**RE: RESPONSES TO IRT DRAFT INSTRUMENT COMMENTS**

**Ohio Wetlands Foundation In-Lieu Fee Program**

**Tuscarawas and Upper Scioto Watersheds, Huntington District, U.S. Army Corps of Engineers**

Dear Ms. Newman:

This letter provides responses and additional supporting information related to the comments received from the Interagency Review Team (IRT) from its review of the Ohio Wetlands Foundation (OWF) In-Lieu Fee Program (ILFP) draft instrument for the Tuscarawas and Upper Scioto watersheds in the Huntington District. The draft instrument comments were received from U.S. Army Corps of Engineers (USACE) Huntington District on August 26, 2013. The following IRT members provided comments on the draft instrument: USFWS, USACE Buffalo, USEPA, and USACE Huntington.

OWF has addressed the requested changes and comments in the attached revised instrument. OWF will not discuss all of the edits in this letter, as many of the requested edits were relatively simple in nature and related to specific vocabulary changes or text updates to match 33 CFR Part 332. However, OWF does believe that a few requested changes warrant additional discussion and supplemental information in order explain and support OWF's position on certain comments received from the IRT. These items will be discussed in detail herein.

OWF requests a meeting with you to review this letter and the attached revised instrument document as soon as possible. Our hope would be that this meeting would serve as an additional opportunity for us to explain the changes made to the instrument and assist you in your determination that OWF has addressed the concerns expressed by the IRT adequately as per 33 CFR 332(8). We believe that this would greatly facilitate the resolution of any outstanding issues and allow for the prompt approval and implementation of this important mitigation option in the Huntington District. Please advise when we might be able to meet at your offices.

**Advanced Credits and Nationwide Permit Impact Data**

USEPA and USACE Huntington both provided comments related to the number of advanced credits requested for the Tuscarawas and Upper Scioto service areas. Specifically, USEPA stated,

*...that the number of advanced credits is too high in both proposals. OWF should consider basing the number of advanced credits for each service area on the actual amount of mitigation that has been required by the Ohio Environmental Protection Agency's 401 Water Quality Certification and Isolated Wetland Permitting Program over the last several years (for each service area), since that information is critical to understanding and projecting what the demand for mitigation may be in the future.*







In its comments, USACE Huntington asked for supporting information related to impacts authorized by the Nationwide Permit program administered by USACE. OWF carefully considered the comments made by EPA and USACE Huntington and offers the following response.

OWF submitted a draft prospectus and a final prospectus to the IRT in March 2012, and January 2013, respectively. OWF consulted with the Corps and the IRT after submittal of these two procedural milestone documents and sought feedback from the IRT. OWF and the IRT extensively discussed the method of calculating the number of advanced credits at a meeting held with the IRT on December 12, 2012. The amount of advanced credits referenced in the formal prospectus submitted on January 16, 2013 was consistent with the calculation method discussed with the IRT the previous month. The comments submitted by the IRT after review of the January 16, 2013 prospectus did not identify any concerns with the method by which the number of advanced credits was determined. The amount of advanced credit specified in the draft instrument was determined consistent with the manner in which they were calculated in the January 16, 2013 prospectus.

In order to ensure a representative evaluation of mitigation requirements in the relevant watersheds, the data utilized by OWF to calculate the number of advanced credits in the revised instrument was expanded to include the 2012 Ohio EPA 401/Isolated Wetlands report. Additionally, OWF has submitted a Freedom of Information Act (FOIA) request to USACE Huntington requesting impact data from the Nationwide Permit program from 2010-2012 in the Huntington District. These data will be provided to you immediately once they are received. This expanded data set will result in a final amount of advanced credits that will be included in Appendix B of the revised instrument.

The suggestion by USEPA that the amount of compensatory mitigation should be used rather than the amount of actual impact is flawed in our opinion, as the amount of compensatory mitigation historically required is likely to include mitigation plans that incorporated substantial on-site mitigation, particularly in light of the lack of meaningful off-site mitigation options in the affected watersheds. Until very recently, on-site mitigation was the standard operating procedure for Ohio EPA as per OAC 3745-1-54 for impacts to jurisdictional wetlands. The mitigation ratio for on-site mitigation can be as low as 1:1. If an applicant participates in the ILFP, the applicable mitigation ratio will range from 1.5:1 to 3:1 as per OAC 3745-1-54. Therefore, we strongly believe that utilizing the average amount of impact and applying an average mitigation ratio of 2:1 is more reflective of the actual quantity of compensatory mitigation expected in the ILFP service areas.

#### **ILFP Project Site Information**

USEPA asked for specific information regarding prospective ILFP project sites. OWF has provided additional general information within the instrument regarding potential aquatic resources mitigation activities at ILFP project sites. Details about actual prospective ILFP sites will be included within instrument amendments for the addition of mitigation sites to the OWF ILFP. All amendments will be coordinated with the District Engineer and the IRT for review and comment. OWF believes that including actual prospective ILFP sites in the instrument would be very distractive to the review and approval of the instrument, as project specific concerns and discussions would undoubtedly occur.

#### **Right to Refuse Service**

USACE Huntington asked that OWF further explain the intent of the Right to Refuse Service clause located in Section IV, K of the revised instrument. The primary reason to include this clause is to ensure the viability of the OWF ILFP in a given service area. If there is a documented lack of market demand for mitigation in a service area, it could make it economically impracticable to accept



payment for in lieu fee credits if the amount of credits is small and it is apparent that the payment will not be sufficient to support mitigation site development. Although OWF does not believe that this type of event is likely to occur based on the proposed service areas, we feel that its inclusion in the instrument is necessary to safeguard the success of the ILFP. Our intent will be to work proactively with permit applicants as well as with the USACE and/or Ohio EPA in advance of permit issuance to ensure that mitigation plan proposals and permit terms are acceptable to all parties, including OWF. The simple requirement that permit applicants have a purchase agreement from the ILFP prior to issuance of a permit should help ensure that this type of scenario is avoided.

#### **Project Specific Disbursements**

USACE Buffalo provided a comment related to the disbursement of funds to an ILFP project if the project specific budget is exceeded, and stated that, *"The Federal Rule doesn't appear to allow for the 10% deviation. All disbursements must be approved by the DE"*. OWF understands the need for the District Engineer to review and approve financial disbursements to ILFP projects. However, OWF feels that this would place an unnecessary burden on the District Engineer and the IRT, as it is an unfortunate reality that project planning and construction costs sometimes exceed the budgets allocated to them. As such, OWF has retained the originally proposed language related to small disbursements from the draft instrument, but has modified it to match language in the recently authorized West Virginia Department of Environmental Protection ILFP from the Huntington District.

#### **Itemization of Fifteen Percent Administrative Fee**

USACE Huntington commented on the potential itemization of revenues and expenditures of the administrative fee. OWF strongly objects to this proposal for the following reasons. First and foremost, OWF is a very small organization and its day-to-day efforts encompass multiple interwoven objectives, including participating in watershed protection groups, site design, and project site identification. For example, evaluating sites for a mitigation bank or an individual mitigation project may also result in the identification of a prime ILF site. Meaningfully segregating these efforts would be very difficult and would not facilitate the ILFP. Second, the compilation and review of administration costs would be very burdensome to both the Corps and OWF. Third, establishing a reasonable blanket administrative fee is consistent with other recently approved ILFPs, including the Ducks Unlimited New York ILFP and the New Hampshire ILFP. Accordingly, we do not believe it would be advantageous to require the itemization of the administrative fee.

#### **Initiation of Mitigation Site Evaluation, Selection, and Design**

OWF's existing operations require the ongoing evaluation of potential mitigation projects in order to anticipate and identify optimal sites to provide compensatory mitigation for individual permit applicants and potential future bank sites. In that regard, OWF maintains active and ongoing communications with watershed groups, park districts, conservancy groups, individual landowners and others with interests in resource restoration and preservation. As such, OWF is constantly evaluating mitigation sites and this effort will increase in the affected watersheds upon approval of the ILFP. In light of the three (3) year period from the date of first credit sale in which to initiate site development, OWF will promptly identify optimal sites and begin formal site evaluation (engineering, etc.) and site design after initial credit sales. OWF anticipates that its understanding of the historical and likely future mitigation requirements in the relevant ILFP watersheds will allow OWF to accurately gauge and respond to anticipated ILF credit purchases and to initiate site acquisition, design and development (including development in phases) consistent with ILFP requirements.





### **Retaining Administrative Fee**

USACE Buffalo and USFWS questioned if OWF should be permitted to retain all or a portion of the administrative fee if directed by the District Engineer to transfer funds to another entity to fulfill mitigation requirements. OWF understands the comments provided by both agencies, but feels that a blanket statement regarding the return of the entire administrative fee does not adequately capture potential real-world scenarios that may foreseeably occur during operation of the ILFP. Two examples that illustrate conceivable events are provided below:

*Example 1.* OWF sells credits within a service area and spends two years performing research, engineering, and planning for an identified mitigation project site. A mitigation bank within the watershed is then authorized, and the District Engineer directs OWF to transfer the funds received by the ILFP to the mitigation bank. OWF will have incurred considerable expenses during those two years, and the loss of funds would substantially impact the operation of the ILFP.

*Example 2.* OWF sells credits within a service area where an authorized mitigation bank is in operation but does not have credits available. One month after selling credits in the ILFP, the mitigation bank receives a release of credits, and the District Engineer directs OWF to transfer funds received by the ILFP to the mitigation bank. OWF has incurred very little if any expenses on the development of the ILFP project site; transferring the vast majority of the administrative fee to the mitigation bank is feasible.

OWF will work in good faith with the District Engineer and the IRT to address these issues on a case by case basis if and when they occur.

OWF appreciates the comments received from USACE and the IRT, and has carefully evaluated the feedback received from commenters. OWF is confident that the ILFP instrument adequately addresses the concerns of both the sponsor and the IRT and complies with all applicable regulations. OWF looks forward to meeting with you very soon to review this letter and the attached document. We also look forward to working with you and the IRT on the approval of the final ILFP in the Huntington District. Identifying site specific mitigation options for permit applicants has been very difficult and establishment of the ILFP will assist to provide timely and predictable permitting.

Sincerely,

Vincent E. Messerly, PE  
President, Ohio Wetlands Foundation

cc: Ohio IRT Members

Enclosure



**VIA EMAIL**

February 14, 2014

Sheila Newman, Biologist  
USACE, Huntington District  
4969 Dillon Dam Road  
Zanesville, Ohio 43701

**RE: RESPONSES TO IRT REVISED INSTRUMENT COMMENTS**

**Ohio Wetlands Foundation In-Lieu Fee Program**

**Tuscarawas and Upper Scioto Watersheds, Huntington District, U.S. Army Corps of Engineers**

Dear Ms. Newman:

This letter provides responses and additional supporting information related to the comments received from the Interagency Review Team (IRT) based on its review of the Ohio Wetlands Foundation (OWF) In-Lieu Fee Program (ILFP) revised instrument for the Tuscarawas and Upper Scioto watersheds in the Huntington District. The IRT comments on the revised draft instrument were received from U.S. Army Corps of Engineers (USACE) Huntington District on February 7, 2014. The following IRT members provided comments on the draft instrument: USFWS, Ohio EPA, USEPA, and USACE Huntington.

The final instrument attached herein addresses comments received from the IRT. Specific documentation of each change and supporting information is provided below, as appropriate. Responses to the comments and changes to the final instrument are organized by agency in the order the comments were provided to OWF.

I note that OWF is responding to a second set of agency comments and that Ohio EPA has provided comments yet did not comment on the previous version of the draft ILFP instrument. Additionally, a number of the comments made by the IRT in this second round of comments relate to issues which were not noted as a concern in the prior draft of the instrument. While OWF appreciates the opportunity to respond to these comments and continues to work diligently with the IRT, the federal mitigation regulations establish specific procedures and schedules for the review and approval of ILFP programs. We look forward to promptly moving forward with approval of this final instrument to provide a needed mitigation option in the relevant watersheds.

**USACE Huntington**

- 1) *III. E. third paragraph. Sentence beginning - If so directed.....to that organization. This sentence is problematic grammatically.*

This sentence was re-written to read, "If directed by the District Engineer, OWF will transfer funds to the separate party equal to the value paid for credits purchased from OWF by a permittee".

- 2) *III. E. fourth paragraph. The District Engineer will require notification of all deviations from the approved budget. Specific IRT approval will be required for deviations above 10% and at the discretion of the District Engineer.*







This section was re-written. The new text is very similar to the text provided in USACE Huntington's comment. The text from USACE was amended to indicate that, "...all deviations in excess of the approved budget" will require notification to the District Engineer.

- 3) *III F. Second paragraph Impact acreage.....on-site permittee responsible mitigation....Explain, revise, or remove*

This sentence was removed from the final instrument. Credit calculation methods were previously documented and this sentence was determined to be unnecessary.

- 4) *III. F. third and fourth paragraphs. Remove the statements regarding trajectory. Tying credit releases to the standard performance steps as defined in the Ohio Banking Guidelines would eliminate future ambiguity regarding trajectory.*

References to trajectory have been removed from the paragraphs referenced in this comment. The instrument now indicates that interim performance goals will be used by the District Engineer, in consultation with the IRT, to determine if advanced credits can be replenished (i.e. credit releases). Interim performance goals may follow the *Ohio Banking Guidelines* if appropriate for a specific ILF project, but it is anticipated that the interim performance goals will need to be adapted to fit the in-lieu-fee mitigation process as well as site specific adaptations. Also, see related response to Ohio EPA comment (2).

- 5) *Third paragraph ....Once previously provided advance credits.....consistent with the terms of the instrument. This assumes that advance credit replenishment will be automatic. IRT concurrence that advance credits have been fulfilled is required prior to the replenishment of advance credits.*

This sentence has been updated, and now concludes with, "...at the discretion of the District Engineer, in consultation with the IRT, and consistent with the terms of the instrument".

- 6) *III. I. Further explain... If portions of acquired properties.....excluded from long term protection. Why would properties acquired with in lieu fee program funds be excluded from mitigation?*

If OWF acquires a property for use within the in-lieu fee program, it is possible that portions of the site may not be suitable for aquatic resource mitigation. For example, an access drive and parking area used to access a project site would not generate credits for sale by the sponsor, and permanent protection of those areas would not be necessary to assure the success of the project. It is likely that some ILF sites will become public parks/wildlife areas. With this in mind, the long term owners/stewards may require that a portion of a site be utilized for public parking, restrooms, shelter facilities, etc. The areas where these facilities are located may need to be left out of the long term protective instruments in order to allow for their development and use.

- 7) *IV. D. Force Majeure needs further discussion.*

The force majeure clause within OWF's instrument is very similar in structure and function to other recently authorized in-lieu fee programs in the region, including Ducks Unlimited New York and West Virginia Department of Environmental Protection. OWF stresses that the IRT and District Engineer have the sole discretion to determine if an event is a force majeure.





## Ohio EPA

Ohio EPA did not have any comments on the draft instrument submitted to the IRT in May 2013. The federal Rules require IRT members to fully and promptly provide comments on draft ILF instruments in order to avoid piecemeal review and unnecessary delay. Nonetheless, OWF has carefully considered Ohio EPA's comments and provides the following responses:

- 1) *Under Part II (Proposed Service Areas) on page 1, Ohio EPA would recommend a re-wording of the first paragraph to be consistent with the Ohio watershed-focused approach to compensatory mitigation. Specifically, preference for mitigation should occur within the 8-digit HUC in which wetland impacts occur. Consultation with and approval from the IRT Chair will be needed in order to go outside of the 8-digit HUC of wetland impacts to the 6-digit HUC.*

OWF believes that the current wording of the section referenced in Ohio EPA's comment is in line with the watershed-based approach to compensatory mitigation as outlined in the Federal Rule. Additionally, Element I within the Compensation Planning Framework explicitly states that the District Engineer's decision to use the secondary service area (6-digit HUC) will be made only after consultation with the IRT. No changes have been made to the ILFP instrument relative to this comment.

- 2) *Section 3, Ecological Performance Standards (pg. 3) - Ohio EPA stresses that performance standards for all OWF In-Lieu Fee Program projects mirror the performance standards as set forth in the "Guidelines for Wetland Mitigation Banking in Ohio" document (March, 2011). Performance standards should not be "proposed on a project-by-project basis". This will lead to inconsistencies in the performance criteria, and therefore, the evaluation of the success of ILF projects in comparison to Ohio mitigation banks.*

OWF appreciates Ohio EPA's desire to achieve consistency with respect to performance criteria. The text in the ILFP instrument related to performance standards mirrors the Federal Rule. Additionally, each project proposed to be added to the in-lieu fee program will be individually reviewed by the IRT, and the IRT and the District Engineer will have an opportunity to comment on the proposed performance standards for each in-lieu fee project. OWF anticipates that performance standards will be similar to the standards established in the "Guidelines for Wetland Mitigation Banking in Ohio", but as the IRT has noted, this document is guidance, not a rule, and deviation from guidance is often both appropriate and acceptable. Therefore, OWF believes that referencing the Federal Rule is more appropriate for the instrument. This allows for consideration of unique projects and recognizes that guidance documents can and do change based upon new scientific research and overall understanding of the development of successful compensatory mitigation projects and wetland restoration. No changes have been made to the ILFP instrument relative to this comment.

- 3) *Section 5, Project Implementation (pg.5) - Ohio EPA finds the wording of this paragraph a bit confusing. Specifically, please provide clarification of "service area" as it is referenced in the following sentence, "In the event that only a small number of credits are sold in a service area. OWF may make a request to the IRT to satisfy mitigation obligations in an adjacent service area subject to the approval of the District Engineer."*

Inclusion of this sentence in the Huntington instrument was an oversight, as it was intended for the Pittsburgh District instrument since it includes adjacent service areas (the Huntington ILFP currently has no adjacent service areas). The sentence referenced in Ohio EPA's comment has been removed from the final instrument.



In addition to the changes made in response to Ohio EPA's comments above, OWF also added language to Section 3.H (page 9) of the instrument regarding the potential use of in-lieu fee credits to satisfy compensatory mitigation requirements of Ohio EPA's isolated wetland and Section 401 regulatory programs. Use of in-lieu fee credits for these programs was discussed elsewhere in the instrument, but was not specifically referenced in Section 3.H in the revised instrument.

### USFWS

- 1) *If the DE directs ILF funds to be transferred to another entity to satisfy the mitigation obligations, the funds that are transferred should be adequate to fulfill the mitigation, in its entirety. The third party entity to which the funds are transferred presumably has administrative costs of its own, which should be covered by the funds transferred to it. I continue to believe that, if the DE directs OWF to transfer ILF funds to a third party to fulfill the mitigation obligations, the entire value of those ILF credits should be transferred (including the 15% OWF uses for administrative costs). Again, if OWF believes that it will be unable to provide adequate mitigation within 3 years of the first credit sale, it should reconsider whether offering ILF credits for sale in that particular Service area is viable.*

The ILFP sponsor does not control all of the market conditions associated with the establishment of an ILFP in a watershed. An ILFP sponsor may incur substantial costs associated with mitigation site identification, evaluation and design. The ILFP sponsor does not control permitting decisions and mitigation requirements or the subsequent establishment of mitigation banks in a given service area. The instrument provides that the District Engineer retains the discretion to award all or a portion of the administrative fee to OWF when supported by the given circumstances. No changes have been made to the ILFP instrument relative to this comment.

### USEPA

- 1) *OWF uses the term "creation" throughout the Compensation Planning Framework. Instead, OWF should use the term "establishment" to be consistent with the 2008 Compensatory Mitigation Rule.*

All occurrences of "creation" have been replaced with the term "establishment" within the Compensation Planning Framework.

- 2) *EPA feels the number of advanced wetland credits proposed for the Tuscarawas and Upper Scioto Watersheds is too high. We recommend the IRT discuss a way forward to evaluate the proposed number of advanced wetland credits and determine what is appropriate for each service area in consideration of the following :*

- *Compensation planning framework*
- *Service area size*
- *Resources available to the program*
- *OWF's past project performance*
- *Financing needed for mitigation projects*
- *Other considerations, such as overlapping service areas between this ILFP proposal and TNC's OH statewide ILFP proposal*

Per 33 CFR Part 332.8(n)(1)(i-iii), the Federal Rule states that the number of advance credits will be based on the following considerations:





- (i) The compensation planning framework;
- (ii) The sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and
- (iii) The projected financing necessary to begin planning and implementation of in-lieu fee projects.

OWF has provided additional supporting information related to the need for mitigation in these watersheds based upon past permitted impacts. The method used to calculate the number of advance credits requested in the instrument was established in consultation with the IRT during the course of multiple IRT meetings (through the draft prospectus, prospectus and draft instrument phases). The amount of advanced credit specified in the ILFP instrument is consistent with these discussions. OWF feels that the information provided to date justifies the advance credit request.

OWF appreciates the comments from USACE and the IRT, and has carefully evaluated the feedback received from commenters. OWF is confident that the attached ILFP final instrument adequately addresses the concerns of both the sponsor and the IRT and complies with all applicable regulations. OWF requests a meeting with you and Mark Taylor to discuss these changes and the steps needed for final authorization of the instrument.

Sincerely,

Vincent E. Messerly, PE  
President, Ohio Wetlands Foundation

Cf: Mark Taylor, USACE Huntington (VIA Email)

Enclosure



## Appendix G

### References

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Wise, Maureen. 2005. *Huff Run Watershed Action Plan*. Mineral City, Ohio.

## V. Signatures

Ohio Wetlands Foundation:

Signature: Vincent E. Messerly Date: May 2, 2014

Print: Vincent E. Messerly

Huntington District Engineer:

Signature: Ginger Mullins Date: May 9, 2014

Print: GINGER MULLINS

### Optional IRT Agency Signatures

Natural Resource Conservation Service:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

Ohio Department of Natural Resources:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

Ohio Environmental Protection Agency:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

U.S. Environmental Protection Agency:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

U.S. Fish and Wildlife Service

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

