

North Carolina Department of Environmental Quality's
Division of Mitigation Services In-Lieu Fee Instrument

**AGREEMENT TO CONTINUE THE OPERATION OF NORTH CAROLINA'S
IN-LIEU FEE PROGRAMS OPERATED BY THE NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL QUALITY'S DIVISION OF
MITIGATION SERVICES PURSUANT TO 33 CFR PARTS 325 AND 332 AS
REVISED EFFECTIVE JUNE 9, 2008 (FEDERAL MITIGATION RULE)**

This agreement to continue the In-Lieu Fee (ILF) operations of the North Carolina Department of Environmental Quality's (NCDEQ) Division of Mitigation Services (NCDMS) is entered into this 27th day of July, 2010, by and between the NCDMS ("Sponsor"), the U.S. Army Corps of Engineers (USACE), the U.S. Environmental Protection Agency (USEPA), the U.S. Fish and Wildlife Service (USFWS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Division of Water Resources (NCDWR), the North Carolina Division of Coastal Management (NCDCM), and the National Marine Fisheries Service (NMFS).

This agreement supersedes the following agreements governing NCDMS operations:

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

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of this agreement, the MOA and MOU, as referenced above become null and void and any requirements contained therein are no longer applicable.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

I. Authorities

- A. The Secretary of the Army** – The Secretary of the Army is responsible for the administration of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Permits issued under these authorities generally require compensatory mitigation to replace aquatic resource functions and values that are unavoidably lost as a result of those permits. This agreement is set forth in compliance with 33 CFR Parts 325 and 332 published on April 10, 2008 (Federal Mitigation Rule). In addition, compensatory mitigation objectives and guidance are provided in the 1990 Memorandum of Agreement between the Environmental Protection Agency and The Department of the Army concerning the Determination of

Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, where not superseded by 33 CFR Part 332.

- B. Division of Mitigation Services** – The NCDMS is a non-regulatory program housed in the NCDEQ that provides mitigation in compliance with requirements set forth in this agreement and in N.C.G.S. 143-214.8 through N.C.G.S. 143-214.13.
- C. North Carolina Division of Water Resources** – The NCDWR, which is within the NCDEQ, has responsibility for administering Section 401 of the Clean Water Act (regulated under 15A NCAC 2B .0500) and state rules governing isolated wetlands (15A NCAC 2H .1300).
- D. North Carolina Division of Coastal Management** – The NCDCM, which is within the NCDEQ, has responsibility for administering the North Carolina Coastal Management Program under the rules of the Coastal Resources Commission (15A NCAC Chapter 7), and the NC Dredge and Fill Law.

II. General Provisions

A. Purpose of the Division of Mitigation Services

The purpose of the NCDMS is to provide a comprehensive, natural resource enhancement program that identifies ecosystem needs at the watershed level and preserves, enhances, and restores ecological functions within target watersheds while addressing impacts from anticipated NCDOT transportation projects and permitted impacts from other development projects. All mitigation activities will be coordinated by the NCDMS with participation by State and Federal agencies and will be eligible for funding through multiple sources, including, but not limited to, programmed transportation funding. The goals of the NCDMS are to:

1. Provide effective protection of the natural resources of the State by assessing, prioritizing, restoring, enhancing and preserving ecosystem functions and providing compensatory mitigation with projects that focus on functional improvement.
2. Advance environmental stewardship through the identification of unique projects that, if implemented, would provide substantial benefit and protection to the natural resources of the State of North Carolina.
3. Execute the requirements placed on the NCDEQ by the North Carolina Wetlands Restoration Program Act (N.C.G.S. 143-214.8, et seq.).
4. Enhance the natural resources of North Carolina by addressing watershed needs.
5. Fully satisfy compensatory mitigation requirements for authorized impacts on a programmatic, watershed scale.

6. Satisfy the compensatory wetland, stream and buffer mitigation needs of the NCDOT transportation program in advance of project impacts.
7. Provide a means for organizing, steering, funding, and implementing compensatory mitigation efforts in the State of North Carolina.

B. Role of the Interagency Review Team

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

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

C. Transfer of Permit Liability – ILF

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

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

D. Transfer of Permit Liability – NCDOT

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

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

III. Funding Provisions

The NCDMS receives funding for wetland and stream mitigation from two primary sources: the NCDOT and customers of the Statewide Stream and Wetland ILF program. All mitigation payments made pursuant to this agreement are deposited into the Ecosystem Restoration Fund (N.C.G.S. 143-214.12). The Ecosystem Restoration Fund is broken into two separate accounts: one for payments received from the NCDOT under the NCDOT Stream and Wetland ILF Program pursuant to agreed upon business protocols and one for

all other customers accessing the NCDMS's Statewide Stream and Wetland ILF program. These accounts are maintained by the Office of State Budget and Management. Funds are only used for program administration and the selection, design, acquisition, implementation and management of compensatory mitigation projects. All interest earned on these accounts will be used for purposes of compensatory mitigation. The NCDMS will make all financial data available to the DE upon request. Additional details regarding the two primary funding sources include:

A. Funding: In-Lieu-Fee Program

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

B. Funding: NCDOT

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

IV. Operational Provisions

A. Geographic Service Area

The NCDMS agrees to provide mitigation for permitted impacts within the same geographic service area as specified in the permit unless the DE, has agreed to an alternative. The NCDMS shall make every effort to inform the DE and the IRT that a request may be forthcoming such that permit decisions are made with this knowledge. In the event that the NCDMS cannot provide the mitigation in the same geographic service area and the responsibility for satisfying the permit conditions has been accepted by the NCDMS, then any additional mitigation requirements will be the responsibility of the NCDMS.

This instrument applies only to mitigation projects and permitted impacts occurring within the State of North Carolina (See Service Area Map in Appendix II). The geographic service areas for North Carolina will be as follows:

Basin Name	HUC8	Service Area	12 HUCS
Albemarle-Chowan	03010201	03010201, 03010202, 03010203, 03010204, 03010205	All
	03010202		
	03010203		
	03010204		
	03010205		
Cape Fear	03020302	03020302	All
	03030002	03030002	All
	03030003	03030003	All
	03030004	03030004	All
	03030005	03030005	All
	03030006	03030006	All
	03030007	03030007	All+03020302502, 030203020402, 030203020403, 030203020401
French Broad-Holston	06010102	06010102	All
	06010103	06010103, 06010108	All
	06010105	06010105	All
	06010106	06010106	All
	06010107	06010107	All
	06010108	06010103, 06010108	All
Kanawha	05050001	05050001	All
Lower Pee Dee	03040201	03040201, 03040203, 03040204	All
	03040203		
	03040204		
	03040206	03040206, 03040208	All
	03040208		
Middle Tennessee-Hiwassee	06020002	06020002, 06020003	All
	06020003		
Neuse	03020201	03020201	All
	03020202	03020202	All
	03020203	03020203	All
	03020204	03020204	All
Onslow Bay	03020301	03020301 03020302	All Except 03020302502, 030203020402, 030203020403, 030203020401
	03020302		
Pamlico	03020101	03020101	All
	03020102	03020102	All
	03020103	03020103, 03020104, 03020105	All
	03020104		
	03020105		
Roanoke	03010103	03010103 Cold/Cool	Cold/Cool
	03010102	03010102, 03010103 Warm, 03010104	Warm

	03010104				All
	03010106	03010106, 03010107			
	03010107				
Santee	03050101	03050101, 03050102 Warm, 03050103 (Lower Catawba SA*)	03050101 Warm (Not in Lower Catawba SA*)	03050101 Cold/Cool, 03050102 Cold/Cool, 03050103 Cold/Cool, 03050105 Cold/Cool, 03050109 Cold/Cool	Split on Thermal and CT 03 Service Area
	03050102				
	03050103				
	03050105				
	03050109				
Savannah	03060101	03060101, 03060102			All
	03060102				
Upper Pee Dee	03040101	03040101 Cold/Cool			Cold/Cool
		03040101 Warm			Warm
	03040102	03040102			All
	03040103	03040103			All
	03040104	03040104			All
	03040105	03040105			All
	03040202	03040202			All
Upper Tennessee	06010201	06010201, 06010202, 06010203, 06010204			All
	06010202				
	06010203				
	06010204				

*Formerly called the Catawba 03 Service Area

B. Permit Decisions

1. USACE Permit Decisions

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

Once a permit decision has been made, the USACE will provide a copy of the permit authorization document, containing the mitigation conditions, to the NCDMS. The conditions will include the quantity of required mitigation, type of mitigation, and geographic service area in which the impact occurred. For

wetland mitigation, the conditions will specify whether the required mitigation is Riparian, Non-Riparian, or Coastal.

The USACE will evaluate the NCDMS program as necessary. Such evaluations will focus on the consistency of the NCDMS strategy with USACE regulations and guidelines for compensatory mitigation. The USACE will provide in writing to the NCDMS any appropriate recommendations resulting from that evaluation.

2. NCDEQ Permit Decisions

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

C. Advance Credits

1. Advance Credits Allocation

Pursuant to 33 CFR Part 332, USACE allocated advance credits by river basin and 8-digit CU for use by the NCDMS. This amendment modifies the advance credit allocation to follow the new geographic service areas as described in section I.C. above. The NCDMS will provide an annual advance credit debit ledger that provides the amount of advance credits that have been utilized or transferred during the prior year.

Table 1 – Advance Credit Allocation by Geographic Service Area

Basin Name	HUC8	Advance Credit Allocation		Service Area
		Stream	Wetland	
Albemarle-Chowan	03010201	0.00	0.00	03010201, 03010202, 03010203, 03010204, 03010205
	03010202	9,746.00	30.00	
	03010203	0.00	0.00	
	03010204	10,254.00	45.00	
	03010205	10,000.00	215.00	
Cape Fear	03030002	52,841.00	112.00	03030002
	03030003	23,571.00	34.00	03030003
	03030004	35,717.00	120.00	03030004
	03030005	18,458.00	187.00	03030005
	03030006	18,723.00	59.00	03030006
	03030007	20,691.00	93.00	03030007
French Broad-Holston	06010102			06010102
	06010103	15,000.00	15.00	06010103, 06010108
	06010105	42,417.00	18.00	06010105
	06010106	4,470.00	9.00	06010106
	06010107			06010107
	06010108	7,113.00	8.00	06010103, 06010108
Kanawha	05050001	24,000.00	20.00	05050001
Lower Pee Dee	03040201	4,504.00	32.00	03040201, 03040203, 03040204
	03040203	11,888.00	126.00	
	03040204	4,593.00	24.00	
	03040206	4,249.00	18.00	03040206, 03040208
	03040208	5,270.00	17.00	
Middle Tennessee-Hiwassee	06020002	9,000.00	17.00	06020002, 06020003
	06020003	3,000.00	3.00	
Neuse	03020201	156,033.00	118.00	03020201
	03020202	4,551.00	57.00	03020202
	03020203	5,681.00	22.00	03020203
	03020204	3,235.00	173.00	03020204
Onslow Bay	03020301	7,252.00	134.00	03020301 03020302
	03020302	8,748.00	61.00	
Pamlico	03020101	4,636.00	16.00	03020101
	03020102	4,640.00	13.00	03020102
	03020103	4,500.00	22.00	03020103, 03020104, 03020105
	03020104	11,631.00	16.00	
	03020105	2,594.00	13.00	
Roanoke	03010103	5,856.00	13.00	03010103 Cold/Cool
				03010102, 03010103 Warm, 03010104

	03010102	3,000.00	14.00	03010106, 03010107		
	03010104	5,623.00	14.00			
	03010106	3,000.00	13.00			
	03010107	2,521.00	11.00			
Santee	03050101	51,047.00	27.00	03050101, 03050102 Warm, 03050103 (Lower Catawba SA*)	03050101 Warm (Not in Lower Catawba SA*)	03050101 Cold/Cool, 03050102 Cold/Cool, 03050103 Cold/Cool, 03050105 Cold/Cool, 03050109 Cold/Cool
	03050102	19,989.00	26.00			
	03050103	25,964.00	37.00			
	03050105	25,000.00	25.00			
	03050109					
Savannah	03060101	6,000.00	15.00	03060101, 03060102		
	03060102	2,500.00	5.00			
Upper Pee Dee	03040101	67,903.00	31.00	03040101 Cold/Cool		
				03040101 Warm		
	03040102	12,239.00	18.00	03040102		
	03040103	8,494.00	21.00	03040103		
	03040104	21,444.00	20.00	03040104		
	03040105	42,416.00	55.00	03040105		
	03040202	3,000.00	3.00	03040202		
Upper Tennessee	06010201			06010201, 06010202, 06010203, 06010204		
	06010202	4,767.00	8.00			
	06010203	10,371.00	5.00			
	06010204	4,862.00	17.00			

*Formerly called the Catawba 03 Service Area

2. Method for Revising Advance Credit Allocations

Because credit release schedules for mitigation projects may last beyond 5 years, and due to unpredictable changing demands for mitigation, it is anticipated that this allocation will need to be revised periodically to reflect changing needs of the program. For revisions to the total number of advance credits allocated to service areas, the NCDMS must submit a request in writing for approval by the DE in consultation with the IRT.

D. Small Impacts

If, within any geographic service area, the cumulative outstanding mitigation requirements in any given North Carolina State Government Fiscal Year are less than 2,000 linear feet of stream or 3 acres of wetlands, the NCDMS may make a request to the DE and IRT to satisfy the mitigation requirements by use of credits from an adjacent geographic service area within the same river basin, use of High Quality Preservation, implementation of BMPs identified in a watershed planning areas, or other mitigation options as approved by the DE and IRT. Penalties, to include additional mitigation, may apply if it is determined to be appropriate by the DE in consultation with the IRT. The IRT, with the concurrence of the DE, will provide a response within 60 days of the proposal. In the event that the proposal is not acceptable, the NCDMS will be obligated to satisfy the mitigation requirements pursuant to the conditions of the permit.

E. Timing of Project Delivery

1. Definitions

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

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

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

- i) A permit modification request made by the NCDOT;
- ii) A change in the wetland and/or stream field verified amounts by the USACE;

- iii) Increased projected mitigation needs resulting from programmed NCDOT impact projections that are greater than the annual projected amounts;
- iv) A decision or permit requirement made by a State or Federal regulatory or review (resource) agency that occurs later than Concurrence Point 4C in the Merger 01 Process or at an equivalent review point for projects not in the Merger 01 process.
- v) Changes in Anticipated Timing of Road Projects. If additional revenue or pressing transportation needs warrant advancement of a project in the TIP schedule, the NCDOT will coordinate with the NCDMS to determine a schedule, consistent with this section of this agreement, for the delivery of the required mitigation.
- vi) Any mitigation needed to offset projected impacts where NCDOT plans to pursue mitigation bank purchases or any permittee provided mitigation are not unanticipated mitigation.

2. Mitigation Timing for All NCDMS Projects

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

3. Mitigation Timing for NCDOT Projects

- i) For mitigation projects provided to meet anticipated NCDOT mitigation needs, the NCDMS will comply with the following additional performance schedule and timeline:
 - a) Between the date of this agreement and Jun 30, 2013, the NCDMS will have mitigation instituted for each applicable USACE permit by the end of the North Carolina state fiscal year (June 30) in which that permit was issued.
 - b) Between July 1, 2013 and June 30, 2015, the NCDMS will have completed construction of mitigation for each applicable USACE permit at the time of permit issuance.

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

- ii) **Modification of Timeframes for NCDOT Mitigation**

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

- iii) **Unanticipated Mitigation Requests for NCDOT Mitigation**

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

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

F. Program Reporting Protocols

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

1. Annual Report

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

- a. All income received, disbursements, and interest earned by the program account.
- b. A list of all permits for which ILF program funds were accepted, which must include the following information:
 - i) USACE ORM ID Number
 - ii) NCDWR Permit Number
 - iii) NCDCM Permit Number
 - iv) Geographic service area in which the impacts occurred
 - v) Amount of authorized impacts
 - vi) The required amount of compensatory mitigation
 - vii) The amount paid to the ILF program
 - viii) The date the funds were received from the Permittee
- c. A description of the expenditure of funds from the program account, which must include the following information:
 - i) Acquisition Costs
 - ii) Planning Costs, to include watershed planning
 - iii) Construction costs
 - iv) Monitoring Costs
 - v) Maintenance costs
 - vi) Adaptive Management and Contingencies
 - vii) Administrative costs
- d. For advanced credits, the NCDMS shall report the balance of Advance Credits and Released credits by each geographic service area.

2. Debit Ledger

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

- a. List of approved mitigation sites with amount and type of stream and wetland resource, geographic service area and stage of implementation
- b. Beginning and ending available credit amount with permitted impact(s) for each resource type
- c. All additions and subtractions of credits, and any other changes in credit availability
- d. A Compliance Status Report that provides the following:
 - i) Geographic service area
 - ii) Deficit in the required mitigation
 - iii) USACE, NCDWR, and NCDCM permit numbers

- iv) Proposed actions the NCDMS intends to take to correct any non-compliance

3. Additional Information

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

G. Program Review

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

H. Project Delivery

1. Mitigation Sites

- a. The NCDMS shall manage, facilitate or perform the identification, acquisition, planning, construction, monitoring, remedial action and long term management/maintenance necessary to provide compensatory mitigation for impacts to waters and wetlands anticipated to be authorized by USACE permits. The NCDMS shall complete such work within the time frames described in this agreement. Sites shall be selected in accordance with the Compensation Planning Framework (see Appendix 1).
- b. The NCDMS shall prepare a site-specific mitigation plan for all proposed compensatory mitigation projects intended to meet the requirements of Section 404, Section 10, Section 401, and CAMA permits. Each such site specific mitigation plan shall be prepared in accordance with the guidelines contained in 33 CFR 332.4
- c. For each compensatory mitigation project, the NCDMS shall prepare annual monitoring reports, as specified in the mitigation plan, until success criteria have been met or until the DE, in consultation with the IRT, determines that site monitoring can be discontinued.
- d. For each preservation site acquired by the State of North Carolina through the NCDMS to satisfy mitigation requirements of Section 404, Section 10, Section 401 and CAMA permits, prior to acquisition, the NCDMS shall prepare a report generally describing the site. The report will describe for each site the ecological and watershed functions of the preservation site,

and their importance to the region; demonstrable degradation threats including a description of threatened resources; the long-term management plan; an explanation of the legal mechanisms to be used to preserve the site, including copies of any proposed real estate instruments; and a description of any easements or other encumbrances on the property.

- e. The NCDMS shall provide a copy of each site-specific mitigation plan, annual monitoring report, final report, and preservation report to the DE, and each member of the IRT within 30 days of completion of the document. This requirement may be satisfied by posting such reports on an accessible website, with e-mail notification to each recipient that such reports have been posted.
- f. The NCDMS shall maintain a website accessible to the general public and shall post all site-specific mitigation plans, preservation reports, monitoring reports and watershed plans on the website in a timely manner.

2. Review of New Projects

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

I. Perpetual Protection/ Real Estate Provisions

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

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

The NCDMS will transfer responsibility for the long-term management of mitigation sites to a Stewardship entity, as approved by the IRT and DE. In addition, the NCDMS may transfer ownership or management responsibilities of mitigation site properties on a case-by-case basis to appropriate non-profit conservation organizations, state or local government entities, or land trusts for management and monitoring, with approval by the IRT and DE. The terms and conditions of this conveyance shall not conflict with the intent and provisions of the preservation mechanism nor shall such conveyance enlarge or modify the uses specified in the preservation mechanism.

J. Financial Assurances Procedures:

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

K. Project Establishment and Operation

1. Credit Generation

For the purposes of this agreement, re-establishment and rehabilitation, as defined in the Federal Mitigation Rule have been combined under the Restoration category.

The number of credits proposed to be generated by each mitigation project, along with the rationale for estimating the credit yield, will be provided in the mitigation plan and will be based on current DE and IRT guidance.

2. Credit Release schedules

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

3. Credit Release Approval

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

- a. Approval of the final mitigation plan;
- b. Recordation of the preservation mechanism, as well as a title opinion acceptable to the USACE covering the property;
- c. Completion of the initial physical and biological improvements to the mitigation site pursuant to the mitigation plan;
- d. Receipt of necessary DA permit authorization or written DA approval for projects where DA permit issuance is not required. Under no circumstances shall any mitigation project be debited until the necessary DA authorization has been received for the mitigation plan and the credits are released.

4. Mitigation types

Mitigation credits shall be reported according to the following types:

- a. Cold/Cool Stream

- b. Warm Stream
- c. Riparian Wetland
- d. Non-Riparian Wetland
- e. Coastal Wetland

5. Monitoring:

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

6. Contingency Plans:

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

7. Project Closure

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

8. Maintenance and Long-Term Management Provisions:

The NCDMS agrees that its projects will be designed to be self-sustaining to the maximum extent practicable. The NCDMS shall be responsible for maintaining its projects, consistent with the mitigation plan, until transferred to an approved stewardship entity.

L. Compensation Planning Framework

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

M. Default and Closure Provisions

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

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

N. Grandfathering

It is agreed that mitigation projects that are instituted (see Definitions, Section IV(F)(3)(a)) prior to the execution of this agreement will be subject to the provisions of the operational agreements that were in place at the time those projects were

instituted, and that credits from projects that have been instituted prior to the date of execution of this agreement may be used to satisfy compensatory mitigation requirements. Additionally, all mitigation requirements for which the NCDMS is responsible, which are included in permit authorizations dated prior to the execution of this agreement, will be subject to the provisions of the operational agreements that were in place at the time of the issuance of the permit authorization.

V. Miscellaneous

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

IN WITNESS WHEREOF, the parties hereto have executed this modification to the Agreement entitled "Agreement to Continue the Operation of North Carolina's In-Lieu Fee Programs Operated by the North Carolina Department of Environmental Quality's Division of Mitigation Services Pursuant to 33 CFR Parts 325 And 332 as Revised Effective June 9, 2008":

North Carolina Department of Environmental Quality

By: _____ **Date:** _____
Donald R. van der Vaart, Secretary for Natural Resources

United States Army Corps of Engineers

By: _____ **Date:** _____
Kevin P. Landers, Sr., Colonel, U.S. Army, Wilmington District Commander

Appendix I

DMS Compensation Planning Framework

DMS applies multi-scale watershed planning to set and achieve goals for maintaining and improving aquatic resources throughout North Carolina. To comport with the 2008 Mitigation Rule, DMS's watershed approach shall focus on functional replacement and provide watershed-specific data to inform all mitigation efforts across the State of North Carolina. Function-based priorities support linkages between all watershed stressors and project specific goals of compensatory mitigation projects.

DMS develops River Basin Restoration Priority Plans (RBRPs) for each river basin within the state. To better comply with the 2008 Federal Mitigation Rule (33 CFR Parts 325 and 332), DMS shall apply function-based watershed priorities. Targeted Resource Areas (TRAs) are delineated based upon baseline functional resource conditions and opportunities for functional improvement. TRAs support the CFR requirements for a watershed approach by identifying and prioritizing areas where aquatic resource restoration, enhancement and preservation of existing aquatic resources are important for maintaining and improving aquatic resource function (33 CFR Part 332.3(c)(2)(iv)). As DMS transitions to TRAs, DMS will continue to incentivize project implementation within currently defined priorities at the USGS 14-digit watershed scale.

DMS develops Regional Watershed Plans (RWPs) and Local Watershed Plans (LWPs) to focus on watersheds with unique resources that are at risk of future threats based upon distributions of aquatic resource impacts and associated mitigation needs. Through multi-scale functional assessments and evaluations of existing and future land use, DMS is able to identify the types and locations of compensatory mitigation that provide functional uplift and conservation in dynamic landscapes.

Geographic Service Area(s) (CFR sections i)

The defined geographic services areas are sized to ensure that the aquatic resources provided by mitigation will effectively compensate for permitted environmental impacts. In accordance with the federal rule, the economic viability of the in-lieu fee program was also considered in determining the size of service areas. DMS utilized a number of data sets to determine the final geographic service areas including:

- USGS National Watershed Boundary Dataset¹
- Functional loss and replacement opportunity
- Ecoregion boundaries (Level III)
- Habitat types (thermal regimes)
- History of mitigation delivery (impacts, pricing and opportunities)
- Size and connectivity to adjacent CU

Analysis of Aquatic Resources (Historic and current condition, documentation of threats) (CFR sections ii-iv)

DMS evaluates multiple data sources to inform both historic and current aquatic resource condition and evaluate existing threats. Data analyses incorporated as part of River Basin Restoration Priority (RBRPs) plans, Regional Watershed Plans (RWPs) and Local Watershed Plans (LWPs) examine water quality, habitat and hydrology through examination of land use/land cover, physico-chemical water quality data, and biological monitoring data. In addition, DMS evaluates watershed plans and reports developed by other agencies and organizations and solicits feedback from local watershed stakeholders to pursue maximum data capture. Current aquatic resource conditions and mitigation opportunities are further informed by field evaluations, evaluating responses from Requests for Mitigation proposals and DMS Project Managers. Population trends, projected DOT impacts and In-Lieu-Fee types, amounts and locations of receipts are considered in conjunction with current resource conditions to identify current and future threats to aquatic resources.

The above data provide multiple lines of evidence to describe current aquatic resource conditions and future threats. DMS uses these data to support identification of watersheds that exhibit the best opportunities to address watershed functions threatened by existing or future impacts. As additional data sources become available, DMS will evaluate their utility for informing functional condition.

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

Data analyses and stakeholder input are used to identify goals and objectives at various watershed scales. DMS re-evaluates data from existing watershed plans and RBRPs to identify stressors and assets associated with water quality, habitat and hydrology. Aquatic

¹ USGS National Watershed Boundary Dataset (WBD) 20140924 National Shapefile File Geodatabase Feature Class, Accessed September 2014

resource goals and associated management recommendations are linked to functional improvement priorities for each service area.

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

DMS will seek traditional and alternative mitigation opportunities that support watershed improvement goals identified for each GSA. This may include implementation of traditional stream and wetland projects as well as alternative mitigation projects (eg. Regenerative Stormwater Conveyance, stormwater wetlands) that contribute to functional improvement and support the long-term sustainability of the aquatic resource. This supports DMS's approach to integrate sound science and data to implement projects that optimize uplift given the specific conditions and constraints in the watershed and the project boundaries.

DMS will analyze higher resolution data for individual CUs and incentivize implementation of projects in priority watersheds that address functional restoration goals identified in the analysis (detailed in ii-iv above). All projects will be technically evaluated. Projects that link watershed stressors and restoration goals with project design, monitoring and success criteria will be prioritized for mitigation funding. Further incentives are provided for projects located in existing watershed planning areas, projects that address identified stressors and special watershed study areas identified by other agencies and organizations (ex. Division of Water Resources, US Fish and Wildlife Service).

Preservation objectives (CFR Section vii)

Preservation projects identified through watershed analyses will be linked to the watershed goals and objectives and implemented according to project delivery mechanisms outlined in Section IV.H.1(d). Projects will demonstrate landscape significance and support long-term sustainability of the aquatic resource. Sites identified as priorities by other agencies or stakeholders and that provide unique functional uplift will be incentivized. These projects may include, but are not limited to, habitat for federal or state threatened or endangered species.

Public and private stakeholder involvement (CFR Section viii)

DMS incorporates stakeholder input in its prioritization and implementation process through evaluation of multiple state, regional and local data sources as well as consideration of localized planning efforts and feedback from resource professionals. In addition, DMS solicits feedback from mitigation providers on existing aquatic resource conditions and opportunities within the GSAs through project proposal briefings and online surveys.

Long-term protection and management strategies (CFR Section ix)

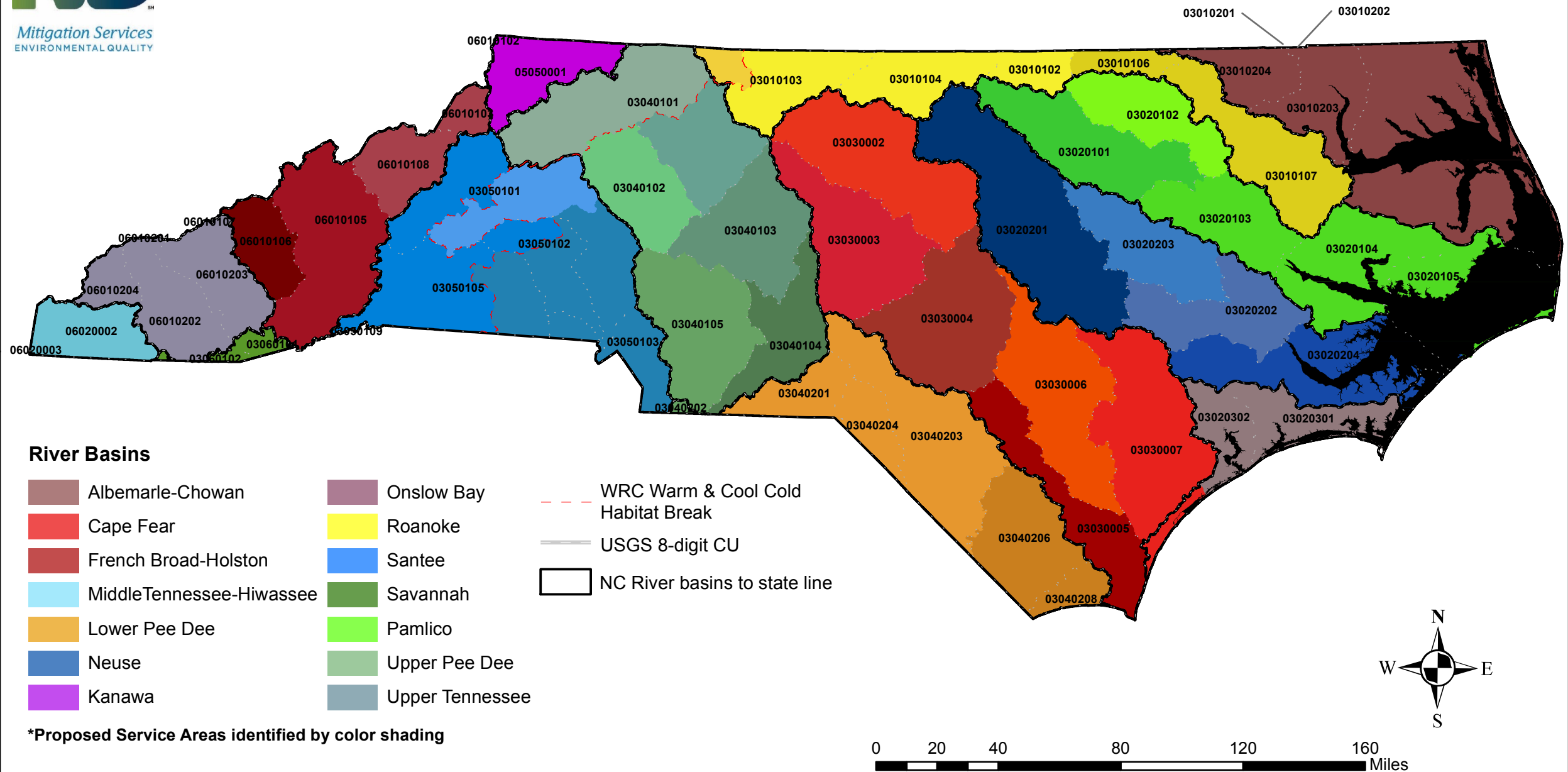
DMS will transfer responsibility for the long-term management of mitigation sites to an approved stewardship entity as described in Section IV.K.8.

Periodic evaluation and reporting (x)

Watershed data for GSAs are updated as new data become available and/or based upon changes in watershed conditions or extensive impact projections. Watershed planning results and updates will be reported through the DMS website. DMS will provide briefings to the IRT upon request. DMS further documents the linkage of watershed goals to individual mitigation projects through individual project mitigation plans, pre-and post-project monitoring and project closeout summary reports.



DMS Proposed Service Area Boundaries





North Carolina Department of Environment and Natural Resources

Beverly Eaves Perdue, Governor

Dee Freeman, Secretary

January 11, 2010

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

Dear Col. Ryscavage:

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

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

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

Sincerely,

Dee Freeman
Secretary

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

1601 Mail Service Center, Raleigh, North Carolina 27699-1601
Phone: 919-733-4984 \ FAX: 919-715-3060 \ Internet: www.enr.state.nc.us/ENR/

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