

# **Virginia Aquatic Resource Trust Fund (VARTF)**

2019 – Amended and Restated Program  
Instrument

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PROGRAM INSTRUMENT EXHIBITS

- Exhibit A. Compensation Planning Framework
- Exhibit B. Advance Credit Limits
- Exhibit C. Fee Schedule
- Exhibit D. Site Development Plan and Exhibits
- Exhibit E. Credit Sale and Credit Availability Statement

# **VIRGINIA AQUATIC RESOURCES TRUST FUND**

## **2019 AMENDED AND RESTATED IN-LIEU FEE PROGRAM INSTRUMENT**

### **1. Program Sponsor**

**NAME:** The Nature Conservancy (Conservancy)

**POC:** Karen Johnson, Director of Wetland and Stream Mitigation

**ADDRESS:** 530 East Main Street, Suite 800, Richmond, VA 23219

**TELEPHONE NUMBER:** 804-249-3416

**E-MAIL ADDRESS:** [Karen\\_johnson@tnc.org](mailto:Karen_johnson@tnc.org)

### **2. Interagency Review Team**

The Interagency Review Team (IRT) is established by the Norfolk District U.S. Army Corps of Engineers (USACE) and the Virginia Department of Environmental Quality (DEQ) to review the documentation necessary for the establishment, use, operation, and management of mitigation banks, in-lieu fee programs, and associated Mitigation Sites (a Site or Sites). The USACE and DEQ will serve as Chairs of the IRT. Where this Amended and Restated In-Lieu Fee Program Instrument (Instrument) refers to action by the IRT, it is intended that the IRT will act through the Chairs.

The IRT may also include representatives from other federal, tribal, state and local regulatory and resource agencies (collectively, the "Non-Chair IRT Members"). The Non-Chair IRT Members may advise the IRT Chairs in assessing potential Sites and Site proposals, draft and final Site Development Plans (SDP) and Mitigation Work Plans (MWP), monitoring reports, recommending remedial or adaptive management measures, approving credit releases, approving Site funding requests and closures, and approving modifications to this Instrument or an SDP.

If the IRT approves this Instrument, the IRT Chairs will provide the Conservancy written notification of approval and forward the final Instrument to the Conservancy for the Conservancy's signature accepting the terms and conditions of the approved Instrument. This Instrument will not be valid until signed by the appropriate officials authorized to act on behalf of the USACE, DEQ and the Conservancy.

While the signatures of the Non-Chair IRT Members are not required in order for the IRT Chairs to approve this Instrument, the Non-Chair IRT Members may provide their concurrence by signing this Instrument, if they so choose. As an alternative to signing this Instrument, an IRT member may submit a letter or other written correspondence expressing concurrence with this Instrument. The concurring IRT Members may terminate their concurrence or participation by providing written notice to the Conservancy and the IRT Chairs. Such termination or concurrence shall not invalidate this Instrument.

### **AGENCIES:**

#### **Chairs and Signatories:**

U.S. Army Corps of Engineers (USACE)

Virginia Department of Environmental Quality (DEQ)

Non-Chair IRT Members:

Virginia Marine Resources Commission (VMRC)

U.S. Environmental Protection Agency (EPA)

U.S. Fish and Wildlife Service (FWS)

National Oceanic & Atmospheric Association-National Marine Fisheries Service (NOAA)

U.S. Department of Agriculture - Natural Resource Conservation Service (NRCS)

Virginia Department of Game and Inland Fisheries (DGIF)

Virginia Department of Conservation and Recreation (DCR)

Virginia Department of Forestry (DOF)

Virginia Department of Historic Resources (DHR)

**3. Relevant Authorities and Guidance**

The establishment, use, operation, and maintenance of the Program and associated Sites are carried out in accordance with the following authorities and guidance:

A. Federal:

1. Clean Water Act (CWA) (33 USC 1251 et seq.);
2. Rivers and Harbors Act of 1899 (RHA) (33 USC 403);
3. Fish and Wildlife Coordination Act (16 USC 661 et seq.);
4. Regulatory Programs of the USACE of Engineers, Final Rule (33 CFR Parts 320-332);
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
6. Endangered Species Act (16 USC 1531 et. seq.);
7. Magnuson Stevens Fishery Conservation and Management Act (16 USC 1801 et. seq.); and
8. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990);

B. Commonwealth of Virginia:

1. Sections § 62.1-44.15:20-23 of the Code of Virginia;
2. Virginia Water Protection Permit Program Regulation (9 VAC 25-210 et seq.);
3. Section § 28.2-2.1308 of the Code of Virginia; and
4. Guidelines for the Establishment, Use, and Operation of Tidal Wetland Mitigation Banks in Virginia (4 VAC 20-390-10 et seq.).

**4. Purpose and Nature of the In-Lieu Fee Program Instrument**

This Virginia Aquatic Resources Trust Fund Program Instrument among the USACE, DEQ, and the Conservancy confirms, defines, and approves the establishment and processes for the Virginia Aquatic Resources Trust Fund Program (Program). This Instrument amends and restates the Virginia Aquatic Resources Trust Fund Program Instrument dated July 14, 2011, which amended the Memorandum of Understanding dated December 18, 2003, which previously amended the initial Virginia Wetlands Restoration Trust Fund Program Memorandum of Understanding dated August 18, 1995.

The purpose of the Program is to provide an in-lieu fee mechanism for compensatory mitigation for impacts to aquatic resources, while maximizing the benefit to the aquatic environment and the public interest. The purpose of this Instrument is to confirm and update guidelines, responsibilities and standards for the establishment, use, operation and maintenance of the Program, for impacts authorized by Department of Army (DA) permits, or Virginia Water Protection (VWP) Permits, Virginia Marine Resource (VMRC) Permits and in other cases if agreed upon by the USACE, DEQ, VMRC, and the Conservancy. The Conservancy intends to achieve no net loss of existing wetland acreage and functions and no net loss of stream functions pursuant to Va. Code § 62.1- 44.15:21(B), and to accomplish mitigation projects in Virginia efficiently and at beneficial economies of scale to provide for a significant net gain of aquatic resource functions and values where possible.

Although the Virginia Aquatic Resources Trust Fund described in this Instrument is referred to herein as the "Program" for the convenience of the parties, this Instrument shall not be deemed to establish or qualify as a "trust" under state or federal law.

The USACE's or DEQ's approval of purchase of Credits from the Program does not signify the Conservancy's acceptance or confirmation of the Conservancy's offer to sell or transfer Credits. The Conservancy may, but is not obligated to, sell mitigation Credits. The Conservancy may elect, in its sole discretion, to reject specific Credit sales for impacts to sensitive or priority resources or based on the Conservancy's ability to mitigate for the impacts in the appropriate watershed. The sale of Credits by the Conservancy shall be subject to the Conservancy's policy regarding conflict of interest and the Conservancy may decline to sell Credits to any person if doing so would violate such policy. Credit sales shall also be subject to the Conservancy's policy regarding corporate engagement, and to the Conservancy's delegations of transactional authority, which require review and approval by a person or persons with appropriate transactional authority.

USACE approval of this Instrument constitutes the regulatory approval required for the Program to be used to provide compensatory mitigation for Department of the Army (DA) permits pursuant to 33 C.F.R. § 332.8(a)(1). This Instrument is not a contract between the Conservancy and USACE or any other agency of the federal government. Any dispute arising under this Instrument will not give rise to any claim by the Conservancy for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

DEQ approval of this Instrument constitutes regulatory approval for the Program to be used to provide compensatory mitigation for permits according to § 62.1-44.15:20-23 of the Virginia Code, and Virginia Administrative Code 9VAC25-210 et. seq. This Instrument is not a contract between the Conservancy and DEQ, or any other agency of the state government. Any dispute arising under this Instrument will not give rise to any claim by the Conservancy for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

Provided the Program complies with applicable law and with the terms and conditions of this Instrument, including but not limited to the Instrument itself and the applicable SDPs, Released Credits and Advance Credits may satisfy compensatory mitigation requirements of DA, DEQ, and VMRC permits that authorize activities within the Program's Geographic Service Areas or individual Site's Geographic Service Area.

IRT approval of the Program does not warrant or guarantee the ultimate viability of the Program as a mitigation mechanism or as a viable business enterprise.

This Instrument does not provide authorization to impact any environmental resources, including wetlands, streams, and/or other Waters of the U.S. or other State Waters. The Conservancy must obtain all required permits or other authorizations necessary to construct, operate, and maintain the Sites.

Resources of the Program shall consist of funds paid to the Conservancy by DA, DEQ, or VMRC permittees through Credit sales, or other parties as approved by the USACE, DEQ, and VMRC to compensate for losses to aquatic resources. The above-described funds shall be delivered to the Conservancy to be held in the In-Lieu Fee Program Account (Account) and used by the Conservancy to implement Sites as described herein.

## **5. Effective Date and Term**

This Instrument shall be effective upon the date that it is executed by the USACE, DEQ and the Conservancy. DEQ's approval of this Instrument is not valid for a term exceeding ten (10) years. Therefore, if the term expires prior to DEQ's approval of a subsequent renewal term, sale of Advance and Released Credits shall be suspended until DEQ has approved a renewal term. The Conservancy shall be responsible for compliance with this Instrument and any subsequent SDPs until each Site is closed in accordance with the Program's Site closure procedures or until all Credits are sold, whichever is later.

## **6. Definitions**

The Mitigation Rule, codified at 33 C.F.R. Part 332, defines several terms used in this Instrument and in the exhibits to the Instrument. These definitions are incorporated into this Instrument as if fully stated herein. In addition, the initially-capitalized terms used in this Instrument are defined as set forth below.

1. **BENEFICIARY OF FINANCIAL ASSURANCES** – The party that agrees to receive distributions from Financial Assurances, and upon receipt of any such distribution, to use those distributions in accordance with the objectives of the applicable SDP (hereinafter defined) and the particular financial assurance instrument.
2. **CONSERVATION EASEMENT** – A “conservation easement”, as defined in the Virginia Conservation Easement Act, VA Code § 10.1-1009, is incorporated as if fully stated herein. For the purposes of the Instrument, an “open-space easement”, as defined in the Virginia Open-Space Land Act, VA Code § 10.1-1700, may be considered a conservation easement by the IRT on a case-by-case basis where the IRT determines that the terms and conditions of the open-space easement are appropriate to protect the purposes of the Site and the IRT receives assurance from the open-space easement holder that it has sufficient authority and willingness to enforce those terms and conditions.

3. CONSERVATION EASEMENT HOLDER - A “holder”, as defined in the Virginia Conservation Easement Act, VA Code § 10.1-1009, is incorporated as if fully stated herein. For the purposes of the Instrument, a “public body”, as defined in the Virginia Open-Space Land Act, VA Code § 10.1-1700, may be considered a conservation easement holder by the IRT on a case-by-case basis where the IRT determined that an open-space easement is an appropriate Site protection instrument.
4. CREATION (ESTABLISHMENT) – The manipulation of the physical, chemical, or biological characteristics present to develop a wetland, other aquatic resource, or buffer where one did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.
5. CREDIT – A unit of measure representing the accrual or attainment of aquatic resource function, condition, or other performance measure at a Site. A Credit also represents the mitigation liability of the Program.
  - a. ADVANCE CREDITS – Credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved Site Development Plan.
  - b. POTENTIAL CREDITS – The total number of Credits that the IRT determines would be generated if the Site is constructed as described in the Mitigation Work Plan (MWP) and if the Site meets all Performance Standards.
  - c. RELEASED CREDITS – Potential Credits that have been released by the Chairs in accordance with the Site’s Credit Release Schedule.
  - d. AVAILABLE CREDITS – Released or Advanced Credits that have not been Sold or Debited. Only Available Credits may be sold or Debited.
6. CREDIT AVAILABILITY STATEMENT – A written statement provided by the Conservancy to potential credit purchasers stating the number and type of Available Credits.
7. DEBIT – A unit of measure representing the reduction of Credits from the Program or from a Site corresponding to the loss of aquatic resource function at an impact or project site.
8. ENDOWMENT – An institutional fund or part thereof that, under the terms of a gift instrument is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use (VA Code 64.2-1100).
9. ENHANCEMENT (REHABILITATION)- The manipulation of the physical, chemical, or biological characteristics of an existing and degraded wetland, other aquatic resource, or buffer to heighten, intensify, or improve one or more resource function(s). Enhancement results in the gain of selected resource function(s) but does not result in a gain in resource area. Rehabilitation should be shown as Enhancement in most cases of compensatory mitigation, in order to differentiate between re-establishment and assist in tracking no net loss of wetland acreage for the Commonwealth of Virginia.

10. FINANCIAL ASSURANCE- A mechanism used to guarantee some aspect of the Site's performance. Financial Assurances may include a contingency account, endowment, performance bond, casualty insurance, letter of credit, or other mechanism acceptable to the IRT.
11. GEOGRAPHIC SERVICE AREA (GSA) – The geographic area within which impacts can be mitigated.
  - a. Program Geographic Service Area – The geographic area within which impacts can be mitigated through Advance Credits from an In-Lieu Fee (ILF) Program.
  - b. Site Geographic Service Area - The geographic area within which impacts can be mitigated at a specific Site as designated in each Site-specific SDP.
12. GROWING SEASON – Per the Regional Supplements to the USACE Wetland Delineation Manual, the Growing Season is that portion of the year when soil temperatures at 12 inches below the soil surface are higher than biological zero (5° C). Growing Season can be approximated using air temperature data from wetland (WETS) climate tables (NRCS National Water and Climate Center) or by documented evidence of above- ground growth and development of vascular plants AND the use of soil temperature as an indicator of microbial activity.
13. IN-LIEU FEE PROGRAM ACCOUNT (ACCOUNT) - An account at a financial institution that is a member of the Federal Deposit Insurance Corporation in to which any and all monies, including all accrued interest, associated with the sale or transfer of Credits in accordance with this Instrument. Funds in the Account may only be used to provide compensatory mitigation for DA, DEQ, and VMRC permits (including selection, acquisition, design, implementation, administration and management of Sites).
14. INVASIVE, NUISANCE, OR UNDESIRABLE SPECIES (INU) – A category of species that threatens the diversity or abundance of desirable native species, ecological stability, natural resources, economic activity, or human activity. INU species are defined to include those species listed on the current Virginia Department of Conservation and Recreation (DCR) Invasive Species Plant List, as well as any animal or plant species determined by the IRT to be a nuisance or otherwise undesirable to the performance of Sites in Virginia. The Conservancy is responsible for obtaining a list of INU species, so that it can include inventory and treatment of those species deemed by the IRT to be nuisance or undesirable species, concurrent with SDP approval.
15. LEDGER – An accounting of Program and Site Credits and Debits.
16. LONG-TERM MANAGEMENT PLAN (LTMP) – A description of how the Site will be managed and how management activities will be funded after performance standards have been achieved and the Site has been closed. The LTMP objective is to ensure the long-term sustainability of the Site. The LTMP will identify the party responsible for and the mechanisms the Conservancy will establish to finance Long-Term Management.
17. LONG-TERM STEWARD (LTS) – The party responsible for carrying out the Long-Term Management Plan.

18. MITIGATION SITE (SITE or SITES) – A Site or Sites where aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation of authorized impacts to similar resources. The Site or Sites are developed in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of Sites, and are operated under this Instrument and a Site-specific SDP.
19. MITIGATION WORK PLAN (MWP) – All technical work methods and descriptions for the Site, which, if required, eventually support the verification of a permit for construction work in jurisdictional wetlands and streams of the United States. The MWP is separated into the following two submissions for each Phase or portion of the Site:
  - a. CONCEPTUAL MITIGATION WORK PLAN (CMWP) - The CMWP is submitted by the Conservancy as part of the SDP during the IRT’s review of the proposed Site. The CMWP should describe to the IRT the conceptual methods and techniques used to design and build the Site. The required contents of the CMWP are further outlined in the SDP template at Exhibit D to this Instrument.
  - b. FINAL MITIGATION WORK PLAN (FMWP) – The FMWP is the construction plan, consisting of final grading, design, and engineered specifications, which is approved by the District Engineer prior to issuing a permit for work within jurisdictional waters of the United States. The required contents of the FMWP are further outlined in the SDP template at Exhibit D to this Instrument.
20. PERMITTEE – Party securing Credits from the Conservancy to use as compensatory mitigation for a permit issued to that party by a federal, state, or local government agency.
21. PHASE – A separate segment or stage of Site construction or development. In order to separate a Site into Phases, the Conservancy must demonstrate, to the satisfaction of the IRT that the initial Phase would be ecologically viable and acceptable as a standalone Site, or when paired with other Program Sites within the same GSA, if additional Phases are never constructed. Subsequent Phases must build upon the ecological and aquatic resource functions of the initial Phase.
22. PRESERVATION – 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 ecologically important aquatic resources and associated buffers in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.
23. PROPERTY OWNER – The individual, entity or parties that hold the title to the land that the Conservancy proposes to include in a Site.
24. REGULATORY IN-LIEU FEE AND BANK INFORMATION TRACKING SYSTEM (RIBITS) – A web-based application developed and managed by the USACE to track mitigation bank and in-lieu fee program activity including credit transactions.
25. RESTORATION (RE-ESTABLISHMENT) - The manipulation of the physical, chemical,

or biological characteristics of a wetland, other aquatic resource, or buffer where it previously existed with the goal of returning natural/historic functions. Wetland restoration is the process of re-establishing wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration is the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions. Reestablishment results in rebuilding a wetland, other aquatic resource or buffer and results in a gain in wetland or other aquatic resource area and functions or a gain in stream functions.

26. SITE DEVELOPMENT PLAN (SDP) - The overall plan governing establishment, restoration, creation, enhancement and/or preservation of aquatic resources and associated upland buffers on the Site. See the SDP template at Exhibit D to this Instrument.
27. SITE PROTECTION INSTRUMENT – A written description of the legal restrictions, arrangements and obligations, including Site ownership that will be used to ensure the long-term protection of a Site.
28. ILF SPONSOR (SPONSOR) – Any non-profit or government entity responsible for establishing and operating an in-lieu fee mitigation program. Under an Instrument, the ILF Sponsor assumes legal responsibility for providing compensatory mitigation once a permittee secures Credits from the ILF Sponsor.

## **7. Transfer of Responsibility for Compensatory Mitigation**

The Conservancy assumes responsibility for a Permittee's required compensatory mitigation up to the number of Credits sold to offset the impacts associated with a given permit once the Permittee has (1) secured the appropriate number and resource type of Credits from the Conservancy; and (2) the IRT has received documentation that confirms that the Conservancy has accepted legal responsibility for providing the required compensatory mitigation for a given permit. As indicated in the Accounting Procedures described in this Instrument, the Conservancy shall complete the Credit Sale Statement, included as Exhibit E to this Instrument, within five (5) business days of each Credit sale.

Credits secured by a Permittee shall not be resold or otherwise Debited again.

## **8. Other Laws and Agency Authorities Not Affected By this Approval**

The USACE, DEQ, or VMRC have sole discretion to determine the amount and type of compensatory mitigation necessary to offset the impacts of permits issued in accordance with their respective regulatory programs. This discretion includes determining, in accordance with applicable regulatory program regulations, the number and type of Credits required to mitigate for permits issued by such agency and whether a particular Permittee's proposed compensatory mitigation approach, including use of any particular mitigation bank, Site or Program Credit(s), will satisfy permit requirements.

If the Conservancy encounters on a Site a previously unidentified archaeological or other cultural resource, or evidence that a threatened or endangered species may be affected, the Conservancy must immediately stop work at such Site and notify the USACE and DEQ of what has been found. Coordination with the Virginia Department of Historic Resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and/or other Federal or State resource agencies will commence, and the Conservancy will subsequently be advised when it may recommence work. This Instrument will not be construed to circumscribe or to limit the

authority of resource agencies to make consultative recommendations, nor will it alter the extent of any potential consultative recommendation that may be made by a resource agency in the future.

## **9. Site Development Plan**

### **A. Site Approval Process**

To offset liabilities accumulated through Advance Credit sales, the Conservancy shall submit proposals for specific Sites and funding approvals in accordance with this Instrument. Each Site requires approval by the IRT Chairs, in consultation with the Non-Chair IRT members (33 CFR §332.80); (9 VAC 25-210-116.D.3.). Site proposals will be based on the Compensation Planning Framework (Exhibit A) and must include all elements identified at 33 CFR §332.8(d)(2) and any other information the IRT determines to be necessary. If an Initial Evaluation Letter (IEL) allows the Conservancy to proceed with an SDP, then the Conservancy shall create and submit an SDP for review and approval.

### **B. Site Development Plan (SDP)**

Each SDP must include the 12 elements identified at 33 CFR §332.4(c)(2)-(14). See the SDP template at Exhibit D to this Instrument. Each SDP shall be incorporated as a modification to this Instrument and following approval becomes a part of this Instrument (33 CFR §332.8(g)). The IRT Chairs may delegate authority to review and approve SDPs to an individual employed by such agency.

If the IRT approves the proposed SDP, the IRT Chairs will provide the Conservancy written notification of approval and forward the final SDP to the Conservancy for the Conservancy's signature accepting the terms and conditions of the approved SDP. The SDP will not be valid until signed by the appropriate officials authorized to act on behalf of the USACE, DEQ, and the Conservancy.

While the signatures of the Non-Chair IRT Members are not required in order for the IRT Chairs to approve an SDP, the Non-Chair IRT Members may provide their concurrence by signing the SDP, if they so choose. By signing the SDP, the Non-Chair IRT members indicate their concurrence with approval of the subject SDP. As an alternative to signing the SDP, an IRT member may submit a letter or other written correspondence expressing concurrence with the SDP. The concurring IRT Members may terminate their concurrence or participation by providing written notice to the Conservancy and the IRT Chairs. Such termination or concurrence shall not invalidate the SDP.

SDPs should include, if applicable, the following exhibits:

Exhibit A. Vicinity and Location Maps

Exhibit B. Property Assessment & Warranty Checklist

Exhibit C. Site Selection Criteria

Exhibit D. Geographic Service Area

Exhibit E. Mitigation Work Plan

Exhibit F. Performance Standards

Exhibit G. Crediting and Debiting Procedures

Exhibit H. Credit Release Schedules

Exhibit I. Credit Sale and Credit Availability Statements

Exhibit J. Monitoring and Reporting Requirements

Exhibit K. Site Operations Maintenance Plan

Exhibit L. Long-Term Management Plan

Exhibit M. Adaptive Management Plan

Exhibit N. Site Protection Instrument

## **10. Objectives**

The Sites will be planned and constructed to create self-sustaining natural aquatic systems that achieve the intended level of aquatic ecosystem functionality with minimal human intervention, including long-term Site management and maintenance.

Detailed Objectives specific to each Site will be included in the Site-specific SDP (See SDP Template at Exhibit D).

## **11. Site Selection**

The VARTF Compensation Planning Framework (Exhibit A) describes the Conservancy's approach to Site Selection for Sites proposed by the Program.

Each Site will be evaluated using the most current version of the Site Selection Criteria Guidelines. The results will be included in each Site-specific SDP. Provided that each Site meets Performance Standards, the Chairs, in consultation with the IRT, have concluded that the proposed Site is ecologically suitable to provide compensatory mitigation for permitted impacts within the Site's GSA.

## **12. Geographic Service Area**

### **A. Program Geographic Service Areas**

This Program will operate in Virginia within those areas in which this Program is authorized to provide compensatory mitigation (Program Service Areas), which are the whole or partial watersheds or geographic areas within Virginia of the: Atlantic Ocean, Chesapeake Bay, Chowan River, Lower James River, Middle James River, Upper James River, New River, Potomac River, Rappahannock River, Roanoke River, Shenandoah River, Tennessee River and York River basins. These Program Service Areas are further described and illustrated in the Compensation Planning Framework (Exhibit A). Program activities, including Credit sales (impacts, payments, and liabilities), Credits status (Advance, Available and Released), and Sites will be tracked and reported by Program Service Area.

### **B. Site Geographic Service Areas**

The Site's GSA will be defined, and its justification will be described and depicted in each Site-specific SDP. The GSA will be determined based on the most current version of the National

Watershed Boundary Data Set or by the hydrologic unit system or dataset utilized when the SDP is approved.

### **13. Baseline Information**

A detailed description of the current Baseline Conditions for each Site will be included in each Site-specific SDP and associated exhibits.

### **14. Mitigation Work Plan**

The Conservancy plans to establish and/or maintain aquatic habitats and upland buffers in accordance with the Site-specific Mitigation Work Plan (MWP) and Site Operations Maintenance Plan until each Site is closed. IRT approval of each Site is limited to the mitigation project described in the MWP. The MWP will be separated into two submittals—the Conceptual Mitigation Work Plan (CMWP) and the Final Mitigation Work Plan (FMWP). Specific content requirements for these submittals are further detailed in each Site-specific SDP.

Modifications of the FMWP, other than those made in accordance with an IRT-approved Site-specific Adaptive Management Plan (AMP), require written IRT approval. If the Conservancy wishes to modify the FMWP, it must submit a written request to the IRT Chairs. The request should explain the reasons for requesting the modification and demonstrate that the modified FMWP would still result in an acceptable FMWP according to existing Site conditions and the objectives of the Site. If the IRT elects to approve the requested modification, the IRT may condition its approval on the Conservancy's acceptance of a change to the number of Credits created by the Site in accordance with the Determination of Credits provisions of the SDP. (See SDP Template at Exhibit D.)

The Conservancy must follow the procedures outlined in the AMP to notify the IRT if the project cannot be constructed in accordance with the FMWP.

### **15. Performance Standards**

The Performance Standards for each Site will be set forth in each Site-specific SDP (See SDP Template at Exhibit D). The IRT Chairs may use any available information, including but not limited to Monitoring Reports and observations during Site visits, to determine whether Performance Standards are met within the Site.

### **16. Site Protection Instrument**

The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall Site must be provided long-term protection through a Site Protection Instrument. The Site Protection Instrument must be approved in writing by the Chairs and recorded in the chain of title for the Site lands. As further indicated in the Site's Credit Release Schedule, the IRT will not release any Credits until the Conservancy has provided evidence to the Chairs that the Site Protection Instrument has been recorded in the property records of the appropriate County or City. If the Site is established on land owned by the Federal government or by the Commonwealth of Virginia, Site protection may be provided through facility management plans or integrated natural resource management plans, as appropriate, where property transfer recordation in the chain of title might not be practicable or otherwise legally available.

The Site Protection Instrument shall establish in the Conservancy or an appropriate third party, such as an Easement Holder, the right to monitor and enforce the Site protection provisions. The Conservancy shall provide to the IRT evidence that the identified third party is authorized

by Virginia law to perform the functions granted to it and that the identified third party has accepted, in writing, its third-party enforcement responsibilities. Such written acceptance may be in the form of a letter from the identified third party, on its official letterhead, addressed to the Conservancy, or any other written format deemed acceptable to the IRT. The documentation of the third party's acceptance shall identify a mechanism for financing enforcement responsibilities and demonstrate that the third party and the Conservancy have reached agreement on both the financing mechanism and the amount of funds to be provided.

Conservation Easements are the preferred type of Site Protection Instrument. If it is not practicable to identify a third-party Conservation Easement Holder, the Conservancy shall document its efforts to do so and alternative Site protection such as a Declaration of Restrictions may be used.

The Site Protection Instrument shall:

- a. Prohibit incompatible uses (e.g., clear cutting, subdivision of Site property, mineral extraction, or other uses) that might otherwise jeopardize the objectives of the Site;
- b. Clearly require that the Property Owner provide the IRT reasonable access to the Site to perform inspections and collect data;
- c. Establish the right of the Easement Holder and/or IRT to monitor and enforce Site protections;
- d. Include the lender's and trustee's written agreement, either via separate documentation or as a signatory of the Site Protection Document to subordinate the lien, dignity, and priority of any deed of trust to the covenants and restrictions in the Site Protection Instrument;
- e. Ensure, through written subordination agreement, either via separate documentation or as a signatory of the Site Protection Document that the Site Protection Instrument is given superior priority to any easement or other real property interest that the IRT reasonably determines has potential to conflict with the mitigation and conservation purposes of the Site;
- f. Contain a provision requiring 60-day advance notification to the Chairs before any action is taken to void or modify the Site Protection Instrument or establishment of any other legal claims over the Site.
- g. Contain a provision stating that the Site Protection Instrument cannot be altered, amended, modified, vacated, or terminated in whole or in part in any way without the express written approval of the Chairs in consultation with the IRT; and
- h. Be recorded over all property within the Site.

Where appropriate and approved in writing by the Chairs in consultation with the IRT, multiple Site protection instruments recognizing compatible uses (e.g., hunting, fishing, or grazing rights) may be used.

## **17. Determination and Use of Credits**

### **A. Advance Credits**

Specification of the Advance Credit limits within each Program Service Area, and the fee schedule for those Advance Credits are set out in Exhibits B and C, respectively. The Conservancy and IRT will evaluate Advance Credit limits as needed. Modifications to Advance Credit limits may be requested by the Conservancy and adjusted by the IRT as deemed necessary to offset compensatory mitigation needs in the Commonwealth of Virginia.

Advance Credit limits are based on the following considerations.

1. The Compensation Planning Framework;
2. The Conservancy's past performance for implementing aquatic resource restoration, creation, enhancement, and/or preservation activities in the Program Service Area;
3. The projected financing necessary to begin planning and implementation of In-Lieu fee Sites;
4. The availability of mitigation bank Credits in each Service Area; and
5. Any other information determined to be necessary by the Chairs, in consultation with the IRT.

The Conservancy will reevaluate these considerations and submit the information to the IRT Chairs if any changes to the Advanced Credit limits are proposed. An increase in Advanced Credits will be considered a modification to this Instrument.

#### **B. Released Credits associated with a Site**

Released Credits must offset or fulfill all Debited Advance Credits in the Service Area of the Site. Any remaining Released Credits can be sold or transferred to permittees for the purpose of offsetting impacts that occur within the Service Area of the Site. Once previously Debited Advance Credits have been satisfied, an equal number of Advance Credits is re-allocated to the Conservancy for sale or transfer to fulfill new mitigation requirements.

Once the mitigation liability associated with all Debited Advance Credits within a Service Area has been met, Released Credits may be sold for other permits or projects within the Site's Service Area. The Conservancy has the authority to negotiate any marketable price for Released Credits. Released Credits generated by preservation will only be sold in conjunction with a number of Released Credits generated by restoration or creation in the same GSA to meet no net loss, unless otherwise approved by the IRT.

Land acquisition and the initial physical and biological improvements associated with a Site must be completed by the third full growing season after the first Advance Credit in that Service Area is sold or debited, unless the IRT determines that more time is needed to plan and implement a Site in that Service Area. The Conservancy will utilize all available options for identification of suitable Sites to offset liabilities including outreach to conservation partners and requests for proposals (RFP) to deliver Sites or mitigation bank Credits. If the Conservancy has not identified a suitable Site to offset an Advance Credit sale within two (2) years of the sale, the Conservancy will release an RFP to offset the mitigation liability by 3<sup>rd</sup> party delivery of Sites or mitigation bank Credits. When the Conservancy considers available mitigation options generated by the RFP, they will give preference to the purchase of available mitigation bank Credits that align with the Compensation Planning Framework.

In the event that there are no Sites or mitigation bank Credits or Sites available to offset the mitigation liability, the Conservancy will discuss alternative options with the IRT to fulfill

those compensation liabilities.

### **C. Potential Credits associated with a Site**

The IRT will determine the number of Potential Credits at the time of SDP approval, by applying the IRT approved assessment methodology or methodologies identified in the SDP to the mitigation project described in the Conservancy's CMWP. The Conservancy is responsible for completing and submitting documentation necessary to enable the IRT's approval of Credits. The IRT may conduct Site visits or request additional information to verify the information provided by the Conservancy.

Potential Credits are not available for sale or debiting until the IRT releases them in accordance with the Credit Release Schedule in each Site-specific SDP.

Nothing in this Instrument entitles the Conservancy to a change in the number of Potential Credits generated by a Site after the SDP is approved. However, the Conservancy may request that the IRT reevaluate the number of Potential Credits based on the Conservancy's FMWP and/or the Site's as-built plans or monitoring reports. If the IRT concludes that the assessment methodology or methodologies described in the SDP demonstrate a difference between the number of credits approved prior to SDP signature, approved during the FMWP, and/or approved based on the as-built Site conditions, the IRT may revise the number of Potential Credits in accordance with the findings of the updated assessment.

## **18. Credit Release Schedule**

The Conservancy may request that Potential Credits be converted to Released Credits in accordance with the Credit Release Schedule in each Site-specific SDP. All Credit releases must be approved by the IRT and based on the IRT's determination that Performance Standards described in each Site-specific SDP and any other applicable requirements have been achieved. The Credit Release Schedule is structured around appropriate construction and ecological milestones; however, early achievement of Performance Standards will not accelerate Credit release.

Available Credits may be used as compensatory mitigation for permits issued under Section 401 and 404 of the CWA, Section 10 of the Rivers and Harbors Act of 1899, Section 62.1-44.15:20-23 of the Code of Virginia, Section 28.2-1308 of the Code of Virginia. Where approved by the permitting agency or agencies, a permittee may use Available Credits to satisfy mitigation requirements of other regulatory programs. However, once a Released Credit is debited for any purpose, the Credit is no longer an Available Credit and cannot be debited again. When credits are sold to satisfy requirements of other programs, the Site must maintain the ability to meet all applicable standards and requirements set forth in this Instrument and the SDP, including meeting no net loss standards applicable to 9VAC25-120-116(A) of the Code of Virginia within the remaining credits used as compensatory mitigation.

## **19. Accounting Procedures**

### **A. Full Cost Accounting and Fee Schedule**

The Conservancy will determine the funding needed to provide mitigation Credit. The Fee Schedule is shown for each Program Service Area in Exhibit C. The cost per unit of Credit must take into account the expected costs associated with the restoration, creation, enhancement and/or preservation of aquatic resources in a particular Service Area. Such costs must be based on full cost accounting according to 33 CFR § 332.8(o)(5)(ii) and will reflect, as appropriate, expenses related to

selection, design, acquisition, implementation, monitoring, management, and protection, as well as costs associated with Program operation and management. In addition, the cost must also include the cost of providing financial assurances that are necessary to ensure successful completion of Sites and may reflect other factors as deemed appropriate by the Conservancy, the USACE and/or DEQ.

The Conservancy will evaluate the credit fee schedule on an annual basis. Fees may be adjusted by the Conservancy as deemed necessary to reflect the full cost accounting. Fee adjustments will be coordinated with the IRT for approval and will be considered a streamlined modification to this Instrument.

### **B. Program Credit Ledger Procedures**

The Conservancy shall establish and maintain a ledger system for tracking the release and debiting of Credits from Sites, the debit or sale of Credits (Advanced or Released), and financial transactions between the Conservancy and permittees. The adopted system shall be approved by the IRT. Credit generation, Credit transactions and other financial transactions related to the Program shall be tracked both on a programmatic basis (*i.e.*, the number of available Credits for the entire Program across all Service Areas), within each basin, for each resource type (stream, non-tidal wetland and tidal wetland), and separately for each individual compensatory Site undertaken by the Program.

The sale, conveyance, or transfer of Credits includes all natural services, functions and values associated with the natural resources (*e.g.* wetlands, streams) from which Credits were derived. Credits may be used to compensate for environmental impacts under other programs (civil works, Superfund Program removal and remedial actions, supplemental environmental projects for state and federal enforcement actions, etc.). Each Credit may not be used or debited more than once.

Within five (5) business days after each Credit sale, the Conservancy shall upload to RIBITS copies of the completed Credit Sale Statement (Exhibit L of the SDP) and the bill of sale and update the Site ledger in RIBITS to reflect the transaction.

At a minimum, each RIBITS ledger entry must include the following categories of information: Name of Permittee, USACE, DEQ, and VMRC Permit Numbers (as applicable), Type of Permits, Locality, Type of Impacted System (Cowardin Classification), Amount of Permitted Wetland and/or Stream Impacts, Amount of Wetland and/or Stream Credits Debited from the Bank, United States Geological Survey Hydrologic Unit Code (HUC), Impact Location Latitude/Longitude, and Date of Transaction. Wetland impacts and Credits should be reported to the hundredth of an acre. Stream impacts and Credits should be reported to the 1 linear foot (whole number - no decimals).

The Conservancy shall provide true and accurate Credit Availability Statements to prospective purchasers when requested. Credit Availability Statements shall only be issued if the Conservancy has Available Credits at the time the statement is requested. Credit Availability Statements shall contain, at a minimum, the following information: Program or Site name, Conservancy name, type of credits available (stream/wetland and Advance/Released), number of credits currently available, date, impact project name, USACE and DEQ permit numbers (if assigned), a map of the Program or Site GSA with the impact location indicated, impact location HUC, and latitude and longitude.

In each Credit Availability Statement, the Conservancy shall certify that the information provided is true and accurate based on the information provided to the Conservancy by the prospective

purchaser. The submittal or transmission of false or inaccurate Credit Availability Statements may be treated as noncompliance with this Instrument.

**C. In Lieu Fee Program Account (Account)**

The Conservancy shall receive and expend funds in the manner and with the limitations identified below.

Account. Payments made to this Program by permit applicants, permittees or other parties as approved by the USACE, DEQ, and/or VMRC to compensate for losses to aquatic resources will be deposited into an interest-bearing account at a financial institution that is a member of the Federal Deposit Insurance Corporation. All interest and earning accruing to the Account shall remain in the Account for use by the Conservancy for the purposes of providing compensatory mitigation. The funds will be owned and managed by the Conservancy. The funds will be dispersed after the Conservancy receives written approval from the IRT Chairs unless otherwise indicated in this Instrument. The Conservancy shall account for the funds so held in accordance with generally accepted accounting principles. The IRT shall have oversight of and the ability to audit the Account. The USACE and DEQ may review Account records at reasonable times and after providing fourteen (14) days written notice to the Conservancy. When so requested by the IRT, the Conservancy shall make available to the IRT all books, accounts, reports, files, and other records relating to the Account.

1. If the Conservancy accepts funds from any entity for purposes other than compensation for losses to aquatic resources under this Program, those funds must be held in separate accounts. Notwithstanding the foregoing, the Program shall be audited once every five (5) years by an independent auditor, the cost of which shall be a programmatic expense of the Program. The audit shall consist of a fiscal audit, a program audit, and such other programmatic aspects as determined by the Conservancy, USACE, and DEQ.

Prior to the effective date of this Instrument, pursuant to the 1995 MOU as amended by the 2003 Amendment, and as further amended by the 2011 Program Instrument, contributions or payments made by permit applicants, permittees or other parties, as approved by the USACE and DEQ, were deposited into the Account. Such payments received after the effective date of this Instrument will be deposited into the existing Account. Funds in the Account prior to the execution of this Instrument, and not allocated for expenditure for an approved Site, may be used to fund Sites approved pursuant to this Instrument and subject to its terms.

The Account may only be used, upon approval by the IRT, for selection, design, acquisition, implementation, monitoring, management, protection, and stewardship of compensatory Sites, and may include a small percentage for administrative costs of the Program.

2. Fund Allocation and Expenditures. The Conservancy shall track and allocate Program funds by resource (non-tidal wetland, tidal wetland, and stream) and

Program Service Area (river basin). Funds expended may be used for individual or multiple Sites or for programmatic expenses. All expenditures shall be accounted for in the minimum cost of Credits in each Program Service Area. The funds will be allocated and tracked as described below to assure proper management and accounting of deposits and expenditures as follows:

- a. Programmatic expenses. Certain expenses are not assigned to individual Sites and are tracked as programmatic expenses. Expenses associated with programmatic needs may include, without limitation, staff salary, programmatic audits, general transportation, equipment, contracts for services, and staff development.
- b. Site budgets and expenses. Each Site will be assigned a project number (ex. AO-6). The Conservancy will track all funds budgeted and expended for that Site. Expenses associated with a Site may include, without limitation, selection, design, appraisals, land/easement acquisition, implementation, restoration, creation, monitoring, management, protection, legal, closing, equipment and materials necessary to accomplish mitigation activities, and stewardship. A final Site budget will be provided for each Site upon approval of the SDP.

### 3. Programmatic Funds

- a. General Fund. Interest and any other earnings produced by the Program and proceeds from the sale of Site lands and Released Credits, shall remain in the Account until approved for use by the IRT. These funds will be tracked within the General Fund category and are not allocated to specific aquatic resources or Service Areas. Funds allocated for specific Sites that are unspent at Site Closure shall remain with the Program and shall be disbursed in accordance with this Instrument for Sites, Program expenses, or other projects approved by the IRT.
- b. Statewide Development Fund (SDF). Five hundred thousand dollars (\$500,000.00) was approved and allocated beginning in 2008 for the SDF. This fixed amount of funds remains in the Program Account. The SDF may be used to pay the cost of initial Site assessment and development activities for potential Sites. Money from the SDF used for Sites that result in an approved SDP are accounted for in the approved Site Budget and are repaid to the SDF upon approval of the Site Budget.
- c. Program Contingency Fund – Five hundred thousand dollars (\$500,000.00) was approved and allocated in 2011 for a statewide Program Contingency Fund. These funds remain in the Account and are tracked as a separate category. This fund may be used to fund unanticipated Program or Site expenses not covered by a Site Budget.

4. Administrative Fee. The Virginia Business Unit of the Conservancy shall receive an administrative fee in the amount of eight percent (8%) of the funds received from Advance Credit and Released Credit sales when such funds are deposited to the Account. The fee will come from the deposited funds and is deemed to represent and reimburse reasonable overhead and related administrative costs of administering the Program. Administrative fees do not require IRT approval for

expenditure.

5. Site Funds

- a. Maintenance and Monitoring – For each Site, an amount shall be included in the Site Budget and allocated for Site monitoring, operations, and corrective action needs. Funds from this category will be used to cover planned and unanticipated costs which may arise during the monitoring and operation of the Site.
- b. Site Protection Endowment Fund – For each Site, an amount shall be identified and allocated in the Site Budget and placed into the VARTF Endowment Fund or transferred to the Site Protection Instrument Holder, if other than the Conservancy. Site Protection Endowment Funds are to be used for Site protection monitoring and enforcement.
- c. Long-Term Management Endowment Fund – For each Site, an amount shall be identified and allocated in the Site Budget and placed into the VARTF Endowment Fund or transferred to the Long-Term Steward, if other than the Conservancy, for implementation of Long-Term management.

6. Funding Approvals. Program funds are used to support Conservancy staff dedicated to operation and fulfillment of Program obligations. Position budgets require approval of the IRT Chairs. The positions that were approved prior to the Effective Date of this Instrument shall be considered approved per the most current terms of their respective budgets. The Conservancy may decide when to hire seasonal staff, outside contractors, parties, or consultants to accomplish Program objectives.

Complete budgets for each Site must be submitted to the IRT Chairs for review and approval. Changes in amounts among budget line items is permitted. Any increase in excess of ten percent (10%) of the overall approved budget for a Site will require the IRT's approval.

**20. Monitoring Requirements**

The Conservancy shall submit an as-built report no more than ninety (90) days after a Site or a Site Phase is fully constructed. Thereafter, the Conservancy shall monitor each Site according to the Site-specific Monitoring Requirements set forth in each SDP. The Conservancy shall not deviate from these Monitoring Requirements without written approval from the IRT Chairs.

The performance monitoring period for each Site or each Site Phase shall be ten (10) years. The monitoring period begins during the first full Growing Season following Site construction, and the scheduled monitoring report is due by January 31<sup>st</sup> for the previous calendar year's monitoring.

The Conservancy shall prepare a monitoring report during Years 1, 2, 3, 5, 7, and 10 of the monitoring period. Monitoring reports may also be requested by the IRT during any non-monitoring years (Years 4, 6, 8, and/or 9) at the reasonable discretion of the IRT and may be limited to monitoring of areas that did not attain Performance Standards or required adaptive management as identified in previous monitoring reports or Site visits. If the Conservancy fails

to submit one or more required monitoring reports, the IRT may require one or more additional years of monitoring and reporting to document Site compliance.

The Chairs may reduce the monitoring period or monitoring requirements, if the IRT concludes that the Site has met its Performance Standards and that the full Monitoring Requirements are not necessary to ensure that the Site will meet its objectives. Conversely, the Chairs may extend the monitoring period if the IRT determines that Performance Standards have not been met or the Site is not on track to meet its objectives. Even if the monitoring period or Monitoring Requirements are reduced, the IRT typically requires a full Year-10 monitoring report in order to provide a baseline for Long-Term Management. In no case shall a reduction of Monitoring Requirements be interpreted to preclude the IRT from requiring this Year-10 report.

## **21. Financial Assurances**

The Conservancy shall provide financial assurances in the form of funding for each Site to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. The amount of the required funding shall be determined by the IRT Chairs, in consultation with the IRT and the Conservancy, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the Conservancy, and any other factors deemed appropriate.

The funding must be included with Site budgets and will be allocated once approved by the IRT prior to implementation of each Site. Funding must remain allocated to the Site, so that it remains allocated until the Chairs determine that the Site is successful in accordance with its performance standards.

## **22. Maintenance Plan**

The Maintenance Plan for each SDP is a description and schedule of regular maintenance requirements to ensure the continued viability of the mitigation resources once initial construction is completed for a Site and until the Site enters Long-Term Management.

## **23. Long-Term Management**

### **A. The Long-Term Management Plan**

Prior to the release of Credits, the Conservancy must submit a Long-Term Management Plan (LTMP) for each Site or Site Phase for IRT review. The LTMP shall describe the Site-specific Long-Term Management needs, include an itemized estimate of the annual cost of meeting those needs, and indicate whether a third party has been granted the right to enforce the Site Protection Instrument and identify appropriate funding for such enforcement activities. No Credits will be released until the Chairs, in consultation with the IRT, have approved the LTMP in writing.

At year five (5) and year ten (10), concurrent with the Maintenance Plan report and prior to Site closure, the Conservancy shall assess the LTMP to account for any changed circumstances. If it is determined that the LTMP needs to be revised, it shall include updates to the description of Long-Term Management needs and the itemized estimate of annual costs. The revised LTMP is subject to the approval of the IRT Chairs, and failure to submit a satisfactory LTMP may be treated as noncompliance with the SDP.

## **B. Responsibility for Long-Term Management**

Long-Term Management commences after Site Closure. The Conservancy shall be responsible for carrying out the LTMP unless the Conservancy transfers Long-Term Management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager. Whether the Conservancy retains Long-Term Management responsibilities or transfers them, the SDP refers to the party responsible for Long-Term Management as the Long-Term Steward.

If the Conservancy transfers Long-Term Management responsibilities to a third party, the proposed Long-Term Steward must be approved by the Chairs, in consultation with the IRT. On request of the IRT, the Conservancy shall provide support for the land stewardship-related qualifications of the proposed Long-Term Steward.

The Long-Term Steward is responsible for carrying out the approved LTMP. The LTMP shall require that the Long-Term Steward demonstrate that it is completing the tasks identified in the LTMP by submitting status reports to the IRT. The frequency of such reports should be tailored to the needs of the Site. In addition, the LTMP shall include language making any modification of the LTMP subject to approval from the Chairs, in consultation with the IRT.

## **C. Funding Long-Term Management Activities**

The Conservancy shall establish an endowment fund or transfer sufficient funds to an existing endowment fund to finance Long-Term Management activities. The instrument or agreement establishing the endowment or transferring funds to an existing endowment shall restrict use of the funds to the activities described in the LTMP. The instrument or agreement is subject to IRT approval. For the purposes of this Instrument, this fund is called the Long-Term Management Fund. The Long-Term Management Fund is intended to be an enduring source of funding for the activities described in the approved LTMP. If the Long-Term Management Fund is to be established utilizing a funding mechanism other than an endowment, the Conservancy must submit the alternative mechanism to the IRT for approval and demonstration that the alternative mechanism would be sufficiently funded and managed to meet the needs of Long-Term Management in accordance with the justification requirements as outlined in more detail below.

For each Site or Site Phase, the Conservancy shall submit a justification for the fully funded amount of the Long-Term Management Fund, and this justification shall be attached to the LTMP. The justification shall demonstrate that earnings income generated by the Long-Term Management Fund, after accounting for inflation and any anticipated annual account maintenance fees, is reasonably expected to cover the estimated annual cost of Long-Term Management. The justification shall include an investment policy statement for the Long-Term Management Fund specifying the types of investments planned to generate earnings and the expected average annual rate of return. The justification shall include a table with line-items for all Long-Term Management tasks. Each line-item shall include task descriptions, the unit used for pricing purposes (e.g., each item, hours, linear feet, etc.), number of units required to complete a discrete occurrence of the task, cost per unit, cost per discrete task occurrence, discrete task recurrence interval, and total annual cost for each task. The table shall also account for administration expenses (10% of total annual costs) and contingency expenses (20% of total annual costs).

Based on the justification table, the Conservancy shall calculate the projected total annual cost of carrying out the LTMP. The Conservancy shall identify a reasonable capitalization rate that accounts for inflation and any account maintenance fees. The fully funded amount of the Long-Term Management Fund shall be determined by dividing the projected total annual cost by the

identified capitalization rate. Both the capitalization rate and the fully funded amount are subject to Chair approval, after IRT review of the Conservancy's justification.

The Conservancy must deposit Program funds into the Long-Term Management Fund within thirty (30) calendar days of Site Budget approval, as part of each SDP approval.

#### **24. Noncompliance**

If the IRT determines that the Conservancy is in noncompliance with any provision of this Instrument or an SDP or that a Site is otherwise not meeting Performance Standards, the Chairs may take appropriate action, including but not limited to, suspending Credit sales, initiating adaptive management, decreasing Available Credits, requiring alternative compensation, and/or terminating the SDP or Program Instrument. Prior to taking action to address any such noncompliance by the Conservancy, the IRT shall provide the Conservancy with written notice of such noncompliance and an opportunity to resolve the noncompliance.

The IRT Chairs, in consultation with the IRT, shall direct appropriate and necessary funds to alternative compensatory mitigation projects in cases where the Conservancy does not provide compensatory mitigation in accordance with the time frame specified in Section 17.B.

#### **25. Adaptive Management Plan**

An Adaptive Management Plan for a Site shall be developed by the Conservancy for each Site and included in the SDP. The Adaptive Management Plan will guide decisions for revising compensatory mitigation plans, addressing design revisions during construction, responding to field conditions during the monitoring period for Performance Standards, and/or implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation performance.

Adaptive Management may be required as a result of deficiencies detailed in one or more mitigation monitoring reports or Site visits or for other noncompliance issues as deemed necessary by the Chairs, in consultation with the IRT. The IRT may direct that the Conservancy implement Adaptive Management either alone or in combination with other measures identified in an SDP, to address failure of a Site to meet Performance Standards and/or Noncompliance.

#### **26. Program and Site Closure**

##### **A. Program Closure Procedures**

The USACE, DEQ or the Conservancy may terminate this Instrument by giving ninety (90) days written notice to the other parties. Prior to termination by the Conservancy or reasonably promptly after receipt of such notice from USACE or DEQ, the Conservancy shall provide an accounting of funds and complete payment on contracts for projects approved by the IRT and any expenses incurred on behalf of the Program. Upon termination, after payment of all outstanding obligations, any remaining amounts in the Account shall be paid to any entities as specified by the IRT. In the event that the Program is closed, the Conservancy is responsible for fulfilling any remaining mitigation liabilities, unless the liability is specifically transferred to another entity as agreed upon by the USACE, DEQ, and the Conservancy. Appropriate funds will be provided through the Account to meet the Conservancy's outstanding obligations and stewardship requirements. Where obligations are transferred to another entity, appropriate funds, as determined by the IRT, will be transferred so that the successor entity may fulfill its

responsibility to bring the transferred obligation to completion. Monies or amounts remaining in the Account after these obligations are satisfied must continue to be used for the selection, design, acquisition, implementation, and management of Sites until such funds are depleted or expended.

### **B. Site Closure**

An individual Site will close only after the Conservancy submits, and the Chairs in consultation with the IRT approve, a request for Site Closure. The request for Site Closure must include:

Documentation that the Site has met and continues to meet its Performance Standards as described in the SDP.

1. Confirmation that all Released Credits for that Site or Phase have been Debited or forfeited;
2. The final IRT approved LTMP;
3. A final LTMP Map, with the location of all mitigation activities and other implements or structures (e.g. gates, fencing, berms, etc.) that will require Long-Term Management;
4. An inventory of existing INU species onsite to be used by the Long-Term Steward for management purposes;
5. Documentation that the Long-Term Steward has been approved by the IRT;
6. Confirmation that the Long-Term Steward is authorized to access and use funds in the Long-Term Management Fund;
7. Proof, through an appropriately recorded Site Protection Instrument, that the Long-Term Steward has been granted a perpetual right to access the Site to perform Long-Term Management tasks;
8. If wetland Credits have been sold and it is determined to be necessary by the IRT, a wetland delineation of the Site that has been confirmed by the USACE; and
9. Confirmation that the Conservancy has prepared and submitted to the IRT and the appropriate locality (upon request by the locality) a GIS shapefile or similar exhibit depicting the location and extent of the Site.

The IRT may perform a final compliance inspection to evaluate whether all Performance Standards have been met. If the Chairs provide written approval of the Conservancy's request for Site Closure, the Site will be considered closed, and no further Credit sales are authorized. Upon Site Closure, the monitoring and maintenance period closes and Long-Term Management shall commence.

## **27. Reporting Protocols**

### **A. Annual Report**

The Conservancy shall submit to the IRT an Annual Report by March 31st of each year. The Annual Report shall include detailed summaries of Account deposits and

disbursements made for each Program Service Area over the previous calendar year (January 1- December 31). It shall include an annual ledger report showing the beginning and ending balance of Available Credits, sold or debited Credits, permitted impacts for each resource type in each service area, all additions and subtractions of Credits, and any other Credit changes (e.g., Credits released, Credits suspended), as well as monies paid into the Program and/or expended for Mitigation Projects, and any remaining balances. The Conservancy will also provide an analysis of liabilities, offset status, and financial standing. Not later than sixty (60) days after delivery of the Annual Report to the USACE and DEQ, each agency shall provide acknowledgement of receipt of the Annual Report and an anticipated timeline for providing any comments regarding programmatic status, progress, and project implementation for each GSA with respect to meeting the objectives of the Program and federal and state regulations.

The USACE and DEQ may require additional reporting, as necessary, consistent with the full cost accounting standards and the Mitigation regulations at 33 CFR §332.S(o) and (q); 9 VAC 25-210-116.

### **C. Monitoring Report**

The Conservancy shall submit monitoring reports for Sites to the Chairs, for coordination with the IRT, in accordance with Section 18 of this Instrument and the approved monitoring requirements of each Site-specific SDP. Reports shall be uploaded to RIBITS and notification sent to the Chairs by January 31st of each monitoring year for the previous calendar year's monitoring.

### **D. Maintenance Report**

The Conservancy shall submit maintenance reports to the Chairs, for coordination with the IRT, in accordance with the Instrument and the approved Site Operations Maintenance Plan in the SDP. Reports shall be uploaded to RIBITS and notification sent to the Chairs by January 31st of each monitoring year for the previous calendar year's monitoring.

## **28. Other Provisions**

### **A. Pre-2011 Sites**

Many of the approved Sites existing at the time of the Effective Date of this Instrument were approved prior to the 2011 Instrument and are subject to older mitigation requirements and standards. These Sites will continue to comply with the monitoring requirements, success criteria, and credit release schedules that applied at the time each such Site was approved. All Credits generated from these pre-2011 Sites may continue to be used to offset Program liabilities, Advance Credit liabilities, or may be sold as Released Credits. Sites initiated prior to the Effective Date of this Instrument may be closed with IRT approval once applicable criteria have been met.

### **B. No Property Rights from Instrument or SDP Approval**

IRT approval of this Instrument and subsequent SDPs does not provide the Conservancy or Long-Term Steward any property rights in or to the Site lands, and by approving the SDP, the IRT makes no warranty or other assertion that the Conservancy or Long-Term Steward has the right to access or perform any work on the property. IRT approval of the SDP does not authorize any injury to property or invasion of other rights.

### **C. IRT Reliance on Conservancy's Certification of Property Rights**

In approving specific Sites, the IRT will rely on the Conservancy's certification that it possesses

property rights that are sufficient to carry out the proposed compensatory mitigation project and to preserve the Site property in perpetuity. The Conservancy is responsible for complying with each SDP, notwithstanding limitations on the Conservancy's property rights, and the Conservancy may be required to provide alternative compensatory mitigation sufficient to replace any debited Credits if the Conservancy is unable to comply with an SDP. Nothing in an SDP shall be construed as a limitation on the liability of the Conservancy or its officers for making false statements.

#### **D. Controlling Language**

Any exhibits or other documents executed in accordance with this Instrument are intended to be consistent with the terms of this Instrument. To the extent possible, the terms, conditions, and requirements of exhibits and associated documents should be interpreted in a manner that avoids or limits conflict between the Instrument, SDPs and the exhibits. In the event of a conflict, the language in the Instrument shall be controlling.

#### **E. Eminent Domain**

If the Site is taken in whole or in part through eminent domain, the Chairs may consult with the IRT to determine impacts of the taking on total Site area and/or functions. If the Site has unsold Credits, the IRT may reduce the Potential Credits, including unsold Released Credits, available from the Site to account for the loss of Site area and/or functions. The area of loss may include both the area secured through eminent domain and the area within the Site affected by the condemnation (e.g., through alteration of the hydrologic regime of the surrounding areas or compromising the ecological objectives for which the Site was created).

#### **F. Modification**

Modifications to this Instrument or to individual SDPs, including exhibits, shall be in accordance with the procedures of 33 C.F.R. § 332.8(d), unless the IRT Chairs determine that the requested modification is appropriate for streamlined review, as described at 33 C.F.R. § 332(g)(2). Modifications may require the use of the most current approved In-Lieu Fee Instrument and/or SDP template in use in Virginia.

#### **G. Notice**

Any notice required or permitted hereunder shall be deemed to have been given when received, in the office of the individual or organization to whom notice is directed. Notice may be delivered by (1) hand delivery; (2) electronic mail; (3) United States mail, postage prepaid, by registered or certified mail, return receipt requested; or (4) Federal Express or similar next day nationwide delivery system.

#### **H. Invalid Provisions**

In the event any one or more of the provisions contained in this Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provisions hereof, and this Instrument will be construed as if such invalid, illegal, or unenforceable provision had not been contained herein.

#### **I. Headings and Captions**

Any paragraph heading or caption contained in this Instrument will be for convenience of reference only and will not affect the construction or interpretation of any provisions of this Instrument.

#### **J. Counterparts**

This Instrument may be executed by the parties in any combination, in one or more counterparts, all of which together will constitute but one and the same Program Instrument.

### **K. No Liability of Regulatory Agencies**

The responsibility for financial success and risk to the investment initiated by the Conservancy rests solely with the Conservancy. The IRT agencies administer their programs to best protect and serve the public's interest in its waterways. The IRT does not guarantee the financial success of Programs, Sites, specific individuals, or entities. Accordingly, there is no guarantee of profitability for any individual Site. Conservancy should not construe this Instrument as a guarantee in any way that the agencies will ensure sales of Credits from this Program or specific Sites or that the agencies will forgo other mitigation options that may also serve the public interest. Because the agencies do not control the number of mitigation banks proposed or the resulting market impacts upon success or failure of individual banks, any information, conclusions, or expectations regarding the potential and future demand for Credits are the sole responsibility of the Conservancy.

### **L. Transfer of Site/SDP Ownership**

Transfer or sale of a Site to a new Sponsor shall be treated as a modification to the SDP, provided that the original Sponsor notifies the Chairs no less than sixty (60) days prior to the proposed transfer or sale. This notification shall:

1. Identify the proposed new Sponsor;
2. Describe the new Sponsor's mitigation project qualifications;
3. If the new Sponsor is registered with the Virginia State Corporation Commission (SCC), the new Sponsor shall provide proof of SCC registration. In addition, the new Sponsor must provide documentation demonstrating that the party signing the Site transfer signature page has been appropriately authorized, in accordance with Virginia law, to sign on behalf of the corporation;
4. Provide documentation that the new Sponsor has the requisite access rights to the Site property;
5. Provide documentation that ownership or control of the Long-Term Management Fund has been transferred to the new Sponsor; and
6. Identify replacement financial assurances, as appropriate.

The Conservancy shall provide additional information, as requested by the IRT. If the modification is approved, the transfer shall be effective only after the new Sponsor's execution of the Site transfer signature page described in Exhibit D accepting the terms of the SDP and all of its exhibits.

**Virginia Aquatic Resources Trust Fund:**

**Date:** *July 18, 2019*

The Conservancy's signature below indicates that the Conservancy accepts and agrees to comply with the terms and conditions of this Program Instrument.

**THE NATURE CONSERVANCY**, a District of Columbia non-profit corporation

**X**   
\_\_\_\_\_  
Locke W. Ogens, Virginia State Director  
The Nature Conservancy, Program Sponsor

This Instrument becomes effective when the appropriate officials, designated to act for the USACE and for DEQ, have signed below.

**INTERAGENCY REVIEW TEAM**

By the IRT Chair(s):

**X**  
\_\_\_\_\_  
William T. Walker, Chief, Regulatory Branch  
U.S. Army Corps of Engineers, Norfolk District

**X**  
\_\_\_\_\_  
David L. Davis, CPWD, PWS, Director, Office  
of Wetland & Stream Protection, VADEQ

**Virginia Aquatic Resources Trust Fund:**

**Date:**

The Conservancy's signature below indicates that the Conservancy accepts and agrees to comply with the terms and conditions of this Program Instrument.

**THE NATURE CONSERVANCY**, a District of Columbia non-profit corporation

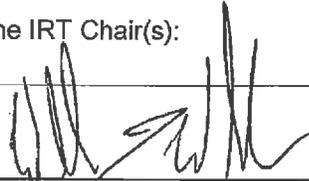
X

Locke W. Ogens, Virginia State Director  
The Nature Conservancy, Program Sponsor

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By the IRT Chair(s):

X 

William T. Walker, Chief, Regulatory Branch  
U.S. Army Corps of Engineers, Norfolk District

X 

David L. Davis, CPWD, PWS, Director, Office  
of Wetland & Stream Protection, VADEQ

Members of the IRT may sign the Instrument, if they so choose. By signing the Instrument, the IRT members indicate their approval of the subject in-lieu fee program.

By the IRT Member(s):

X

IR.T. Member

X

IR.T. Member

## EXHIBITS

- A. Compensation Planning Framework
- B. Advance Credit Assignment
- C. Advance Credit Fee Schedule
- D. Site Development Plan Template and Exhibits
- E. Credit Sale and Credit Availability Statement