Indiana Stream & Wetland Mitigation Program
Final In-Lieu Fee Program Instrument

FEB 16, 2018

Prepared for:

INDIANA DEPARTMENT OF NATURAL RESOURCES
and

INDIANA NATURAL RESOURCES FOUNDATION
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I. INTRODUCTION

USACE approval of this Instrument constitutes the regulatory approval required for the Indiana Stream and Wetland Mitigation Program (IN SWMP) to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 C.F.R. 332.8(a)(1). This Instrument is not a contract between the Sponsor or Property Owner 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 Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

This document shall constitute the instrument (Instrument) that governs the establishment, operation and use of the Indiana Stream and Wetland Mitigation Program (IN SWMP) sponsored by the Indiana Department of Natural Resources (IDNR).

II. PURPOSE

The Indiana Stream and Wetland Mitigation Program (IN SWMP) will be used for compensatory mitigation for unavoidable impacts to waters of the United States (WOUS) and isolated wetlands in the State of Indiana. Permits are required by the U.S. Army Corps of Engineers (Corps) through Section 404 of the Clean Water Act (CWA) for the discharge of dredged or fill materials within WCUS, through Section 10 of the Rivers and Harbors Act for structures or work in or affecting navigable waters of the U.S., and by the Indiana Department of Environmental Management (IDEM) under Section 401 Water Quality Certification of the CWA and, for wetlands that are not WOUS, Indiana’s State Isolated Wetlands law (Indiana Code 13-18-22).

The objectives for the IN SWMP are as follows:

- Meet current and expected demand for mitigation credits.
- Achieve ecological success on a watershed basis by providing wetland and stream functions and services that are appropriate to the service area and by integrating IN SWMP projects with other conservation activities whenever possible.
- Provide an alternative to permittee-responsible, project specific, compensatory mitigation that will effectively replace functions and services lost through permitted direct and secondary impacts.
- Provide mitigation credits to resolve Section 401 and 404 of the CWA and Indiana’s Isolated Wetland Permit enforcement cases.

This Instrument provides the IDNR with authorization to provide mitigation credits to Corps and IDEM permittees to be used as compensatory mitigation for Corps and IDEM permits, upon approval by the District Engineer (DE), or the Corps’ official representative, at the Corps District.
with jurisdiction over the permitted activity and/or IDEM. Approval shall be in the form of a Corps and/or IDEM permit; the IDNR does not have the written or implied authority to approve Corps or IDEM permits.

III. PROGRAM OPERATION

A. INTERAGENCY REVIEW TEAM

The Corps will form an Interagency Review Team (IRT) comprised of the Corps (Louisville District (Chair), Chicago District, and Detroit District), US Environmental Protection Agency (USEPA), US Fish and Wildlife Service (USFWS), IDEM, US Department of Agriculture Natural Resource Conservation Service (NRCS) and representatives invited by the Corps from other federal, state, tribal, and local resource agencies that would have a substantive interest in the establishment and management of the Indiana Stream and Wetland Mitigation Program (IN SWMP) sponsored by IDNR. The Corps may designate different representatives of the agencies listed above and may invite additional members to serve on the IRT for specific IN SWMP mitigation projects (Mitigation Rule p. 19680 §332.8(b)).

1. Corps of Engineers:

The Corps is responsible for consulting with the IRT in accordance with the requirements of 33 CFR §332.8, providing oversight of the IN SWMP, and ensuring compliance with the CWA Section 404 and the Rivers and Harbors Act Section 10.

There are three Corps Districts covered by this instrument – Louisville, Chicago, and Detroit Districts. Louisville District is the lead District and will serve as the District Engineer (DE) and is responsible under this instrument for communicating with the IDNR regarding programmatic and instrument decisions and coordinating with the IRT. However, the Chicago and/or Detroit District may request that responsibility be delegated for IN SWMP mitigation projects that are proposed to be located within their respective regulatory program area.

2. IRT Members

The IRT members are responsible for advising the Corps in assessing monitoring reports, recommending remedial or adaptive management measures, and providing input on credit releases, credit release schedules, and Instrument modifications. The procedures for IRT member review and comment in 33 CFR §332.8 shall apply. IRT members shall recuse themselves from all activities related to a project when their agency has a direct or indirect role in funding, contracting or other financial involvement with that specific project.
B. SERVICE AREAS

The IN SWMP will operate statewide in the 11 service areas (SA) listed below. The individual service areas consist of the listed 8-digit HUC (hydrologic unit code) watersheds, or portions of said 8-digit HUCs located within the State of Indiana.

(a) Calumet-Dunes (04040001, 07120003)
(b) Kankakee (07120001, 07120002)
(c) St. Joseph River (04050001)
(d) Maumee (04010003, 04010004, 04010005, 04010007)
(e) Upper Wabash (05120101, 05120102, 05120103, 05120104, 05120105, 05120106, 05120107)
(f) Middle Wabash (05120108, 05120109, 05120110, 05120111, 05120113, 05120203)
(g) Upper White (05120201)
(h) Whitewater-East Fork White (05080001, 05080002, 05080003, 05120204, 05120205, 05120206, 05120207)
(i) Lower White (05120202, 05120208, 05120209)
(j) Upper Ohio (05090203, 05140104, 05140101)
(k) Ohio-Wabash Lowlands (05120113, 05140201, 05140202)

The Descriptions of the geographic service area(s) and their basis are provided in the Compensation Planning Framework (Appendix B).
C. CREDITS

1. Allocation of Advance Credits

Table 1 below shows the advance credits that will be allocated to the IN SWMP upon approval by service area.

A base allocation of 45,000 stream credits and 90 wetland credits is made for each service area. This allocation is based on an analysis of required mitigation for Corps 404 and IDEM isolated wetland permits in each service area using data from 2009-2015. This analysis indicated that large mitigation requirements, while not the norm, do occur regularly. The base allocation will ensure that the IN SWMP can be a source of compensatory mitigation occasionally for atypical large projects, and still have sufficient credits available for typical impacts, particularly in service areas with fewer impacts in the 2009-2015 timeframe analyzed.

Further analysis of required mitigation indicated that the base allocation would be insufficient to meet projected demand in certain SAs. In these SAs a larger allocation is required.

Large projects that required greater than 20 acres of wetland mitigation and/or 10,000 linear feet of stream mitigation, as well as the cumulative impacts from the construction of I-69 and coal production were excluded from our analysis to determine the estimated demand for advance credits.

<table>
<thead>
<tr>
<th>Service Area</th>
<th>Wetland Credits</th>
<th>Stream Credits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calumet-Dunes</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>St. Joseph River (Lake MI)</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Maumee</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Kankakee</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Upper Wabash</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Middle Wabash</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Upper White</td>
<td>120</td>
<td>60,000</td>
</tr>
<tr>
<td>Whitewater-East Fork White</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Lower White</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Upper Ohio</td>
<td>90</td>
<td>45,000</td>
</tr>
<tr>
<td>Ohio-Wabash Lowlands</td>
<td>115</td>
<td>50,000</td>
</tr>
</tbody>
</table>

Table 1. Advance Credits by Service Area

Additionally, in the event that a large credit purchase was proposed that would exceed the available advance credits at the time of purchase, the IDNR, in consultation with the Corps, may request up to an additional fifty percent (50%) advance credit allocation for
the Lower White, Middle Wabash, and Ohio-Wabash Lowlands SAs, and up to an additional thirty-five percent (35%) advance credit allocation in each of the other eight (8) SAs above that listed in Table 1 above without modification of this Instrument; however, this request must be submitted in writing and approved by the Corps after consultation with the IRT. The granting of advance credits would be conditioned upon a three-year credit delivery, unless otherwise extended, in writing, by the Corps. This percentage is very conservatively based upon the 2009-2015 Corps mitigation data that was analyzed by the IDNR.

2. Credit Sales

The IDNR may sell available Advance or Released credits to Corps and/or IDEM permittees to be used as compensatory mitigation for Corps and/or IDEM Permits, upon approval by the Corps and/or IDEM. 33 CFR §332.3(b)(1) states that the DE shall consider the type and location options for compensatory mitigation in the order presented in 33 CFR §332.3(b)(2)-(6). The approval from the Corps and/or IDEM will be in the form of a Corps and/or IDEM permit.

Once sold to a permittee, mitigation credits may not be re-funded, re-sold or transferred to other entities except with the approval of the Corps and/or IDEM. Updated credit ledgers shall be submitted to the Corps by the 10th of each month, however if no credits were sold or transferred in the prior month an updated ledger is not required. The Corps will update RIBITS as appropriate.

The permittee, the Corps, and/or IDEM, shall provide the IDNR with sufficient information to account for impacts and the required mitigation for each Corps and/or IDEM permit in which the permittee is approved to purchase mitigation credits from the IDNR. No credits will be sold until IDNR receives the following documentation from either the permittee, the Corps, and/or IDEM:

i. Corps District and IDEM project managers
ii. Corps permit number and date of authorization
iii. IDEM Water Quality Certification (WQC) and/or isolated wetlands permit number and date of issuance
iv. Service Area
v. Project name
vi. Permittee information (name, address, phone number)
vi. Project Coordinates (Latitude and Longitude)
viii. Linear feet and/or acres of impacted WOUS and/or isolated wetland
ix. Functional or other mitigation units lost
x. Type of waters impacted
xi. The number of functional or other mitigation units required of the IDNR to compensate for the impacts, including temporal loss and/or cumulative impacts
xii. Other information as deemed necessary by the Corps and/or IDEM
3. Credit Cost

Fees for the IN SWMP will be determined solely by IDNR (33 C.F.R. §332.8(o)(5)(i)). The fees shall be subject to change as determined by IDNR at their sole discretion. Changes in fees shall not constitute a modification of this Instrument as long as the maximum percent of each project component does not exceed the value specified in Table 2.

Based on the analysis of the required mitigation for Corps 404 and IDEM isolated wetland permits in each service area using data from 2009-2015, a business model was built to estimate the expected demand for advance credits from the IN SWMP. This was used to estimate the size of the initial IN SWMP project in each service area, how soon additional projects could be expected to be implemented, and the full cost to implement the initial project.

Table 2 gives a percent range for each of the components of a project in order for the program to provide complete compensatory mitigation delivery and accounts for the full cost accounting as required by 33 C.F.R. §332.8. The variability is due to the fact that every service area is different and each project will have its own set of variables and costs. These ranges are not meant to be fixed and will be adjusted by the IDNR as necessary based upon periodic reviews of costs to operate the program.

<table>
<thead>
<tr>
<th>Project Component</th>
<th>Percent of Credit Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land Acquisition/Protection</td>
<td>up to 50%</td>
</tr>
<tr>
<td>Engineering Design/Project Management</td>
<td>up to 20%</td>
</tr>
<tr>
<td>Financial Assurances</td>
<td>up to 20%</td>
</tr>
<tr>
<td>Construction</td>
<td>up to 60%</td>
</tr>
<tr>
<td>Monitoring / Adaptive Management</td>
<td>up to 20%</td>
</tr>
<tr>
<td>Long Term Management</td>
<td>up to 20%</td>
</tr>
<tr>
<td>Contingencies</td>
<td>up to 15%</td>
</tr>
<tr>
<td>IN SWMP Administration Fee</td>
<td>up to 15%</td>
</tr>
</tbody>
</table>

Table 2. IN SWMP Project Component Breakdown

Finally, the estimated costs to implement the initial IN SWMP project in each service areas were divided by the target project size to determine the draft fee schedule for IN SWMP which is included in Appendix C.

As IN SWMP mitigation projects are identified, designed, constructed and operated, the fee schedule will be updated regularly based upon refined estimates of the target project sizes, costs and anticipated credit sales.
4. Credit Types and Units

<table>
<thead>
<tr>
<th>Credit Class</th>
<th>Credit Unit</th>
<th>Resource Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wetland</td>
<td>Acre</td>
<td>Emergent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Scrub-Shrub</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Forested</td>
</tr>
<tr>
<td>Stream</td>
<td>Linear Feet</td>
<td>Perennial</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Intermittent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ephemeral</td>
</tr>
</tbody>
</table>

Table 3. IN SMWP Credits

5. Fulfillment and Reallocation

Mitigation credits will be fulfilled and identified by the following in accordance with 33 CFR 332.8(n):

Released Credits are credits associated with an approved mitigation plan for IN SWMP mitigation projects that are available for sale upon achievement of certain performance measures and milestones.

Advance Credits are any credits made available prior to being fulfilled by released credits from an IN SWMP mitigation project.

Credits will be accounted for by service area. Any credits sold for isolated wetland impacts authorized by an IDEM permit will be accounted for within each service area. Additionally, the service area funds (project funds) from credits sold for isolated wetland impacts will be placed in a separate sub-account from those sold for Section 10 and Section 404/401 impacts. Additional details can be found in Appendix A.

Released Credits will first be used to fulfill any Advance Credits that have already been sold to permittees within the service area before any remaining Released Credits can be sold or transferred to permittees.

Once previously provided Advanced Credits have been fulfilled, an equal number of Advance Credits will be re-allocated for sale to fulfill new mitigation requirements consistent with this Instrument.

D. COMPENSATORY MITIGATION PROJECT CREDITS

1. Determination of Credits

Mitigation credits generated by IN SWMP mitigation projects will be determined as part of the mitigation plan approval and credit release process for IN SWMP mitigation
projects. Mitigation credits will be determined in accordance with 33 C.F.R. §332.8(o). In order to generate released mitigation credits, all IN SWMP mitigation projects must have an approved Mitigation Plan.

In general credits generated by IN SWMP mitigation projects will be calculated according to the following schedule:

- Restoration (Re-establishment) – 1 to 1
- Restoration (Rehabilitation) – 0.6 to 1 thru 1 to 1
- Establishment – 1 to 1 (at the time all ecological performance standards are met)
- Enhancement – 0.1 to 1 thru 0.6 to 1
- Riparian Habitat Enhancement – up to 0.2 to 1
- Preservation – 0.1 to 1

The Corps and/or IDEM in consultation with the IRT may approve variances from the above ratio for specific IN SWMP projects.

2. Schedule for Credit Release

The Mitigation Plan for each IN SWMP Mitigation project will contain a credit release schedule tied to ecological performance-based milestones. The credit release schedule and mitigation success criteria will require approval from the Corps on a per mitigation project basis to be consistent with the current Corps Mitigation Plan Template. IN SWMP mitigation projects, other than preservation, will utilize the following credit release schedule:

- 15% mitigation credit release after site protection and approved Section 404 permit;
- 5% additional mitigation credit release (20% cumulative) upon DE acceptance of “As Built” Report;
- 60% additional mitigation credit release (80% cumulative), divided equally for each year monitoring performance standards are met, not including final year of monitoring.
- 20% additional mitigation credit release (100% cumulative) once the final performance standards have been met and when long term management plan and funding is in place and the DE has provided written release from monitoring to the Sponsor.

In the case of preservation, 100% of the mitigation credits will be released upon securing the site, implementing the site protection, and finalizing the long term management plan and funding.

Deviations from the above release schedules may be approved by the Corps on a case-by-case basis after consultation with the IRT and shall be included in the approved
Project Mitigation Plan for the compensatory mitigation project. Approval of deviations from the above release schedule shall be based on past and current performance, specific site characteristics or factors that would affect risk, or other considerations as determined by the Corps.

3. Credit Release

The IDNR shall submit documentation to the Corps demonstrating that the ecological performance-based milestones have been achieved and shall request release of the mitigation credits.

The Corps, in consultation with the IRT, shall approve the release of mitigation credits for a compensatory mitigation site per 33 CFR §332.8(o)(9).

E. CREDIT/DEBIT ACCOUNTING AND REPORTING

The IDNR shall establish and maintain appropriate ledgers and provide an annual report in accordance with 33 CFR §332.8(i)(3) & (c)(1).

Individual ledgers for each service area shall track:

1. Credit Accounting - including allocated advance credits, advance credits sold, advance credits fulfilled, released credits, released credits sold, and current balance of credits available; and

2. Credit Transactions - the permit authorizing the associated impact and its date of issuance, project name, permittee name, impact location, acres and/or linear feet impacted, aquatic resource impacted, functional units lost and required for mitigation, amount paid to the IN SWMP and the date the funds were received.

Each IN SWMP mitigation project shall have a separate ledger that tracks the total credits expected to be generated by the project and the actual Released Credits for that site that have been approved by the Corps and IRT.

Credit ledgers and annual reports shall be provided to the Corps and IRT by February 28 of each year for the previous calendar (January through December) year. The Corps may consider granting an extension of this deadline upon request by the IDNR.

F. IN SWMP COMPENSATORY MITIGATION PROJECTS

1. Mitigation Plan

The IDNR will submit a Project Mitigation Plan for each IN SWMP mitigation project to the Corps. The Project Mitigation Plan must include the information required in 33 CFR
§332.8(j) and shall be supported by the Compensation Planning Framework (CPF). IN SWMP will utilize any/all current Corps mitigation templates, guidance, and/or SOPs as necessary when proposing IN SWMP mitigation projects.

2. General Considerations

The general considerations for compensatory mitigation set forth in 33 CFR §332.3 shall be the basis for evaluating IN SWMP mitigation projects submitted by the IDNR to the Corps for approval.

IN SWMP projects shall only involve the restoration, establishment, enhancement and/or preservation of Indiana’s aquatic resources. IN SWMP mitigation projects shall not include sanitary sewer projects or other municipal infrastructure projects, even when gains to aquatic resource functions are derived from such projects. IN SWMP funds/projects cannot be used to fulfill any obligations except those required under Sections 404, 10 and 401 of the Clean Water Act and Indiana’s isolated wetlands law.

3. Approval

The Corps must approve all IN SWMP mitigation projects as modifications to this Instrument. IN SWMP mitigation projects will be reviewed and approved in accordance with 33 CFR §332.8. Projects requiring Corps authorization will be approved following current Corps procedure. Upon approval of an IN SWMP mitigation project, each project will be entered into the table contained in Appendix D with the Corps ID number for tracking purposes.

4. Implementation

The IDNR is responsible for the implementation, long-term management, and any required remediation of IN SWMP mitigation projects, even if those activities are conducted by other parties.

5. Monitoring

The IDNR is responsible for monitoring IN SWMP mitigation projects. Monitoring shall be in accordance with the approved Mitigation Plan for each IN SWMP mitigation project to ensure performance based milestones are achieved.

Monitoring reports shall be submitted in accordance with the approved Mitigation Plan.

6. Long Term Management

IDNR shall be responsible for developing and implementing a long-term protection and management plan for each IN SWMP mitigation project.
Projects shall be designed, to the maximum extent practicable, to require minimal long-term management once ecological performance standards have been achieved.

The long-term management plan for each project will be approved by the Corps. The approved plan shall identify the party responsible for both the long-term protection and management of the project site.

The long-term management responsibilities may be transferred from the IDNR to another party after review and approval of the Corps. The long-term management plan developed for each project will include a description of anticipated management needs with an annual cost estimate and an identified funding mechanism to cover the annual cost estimate. The funding mechanism shall be in place and fully funded prior to the final release of credits. If long-term management obligations will be fulfilled by a party other than the Sponsor, sufficient funds to implement the long-term management plan activities can also be transferred to the party fulfilling the long-term management obligations with the Corps approval.

7. Site Closure

IDNR shall request closure of each IN SWMP mitigation project when the ecological performance standards have been met, all monitoring has been completed and reporting accepted.

Upon establishment of any agreements or arrangements required by the long term management plan and/or site protection, IDNR may request closure of the compensatory mitigation project.

The Corps shall, after consulting with the IRT, issue written notice of closure if all requirements are met.

Upon closure, any remaining released credits would no longer be available to sell, transfer or fulfill advanced credits.

G. ACCEPTANCE OF COMPENSATORY MITIGATION RESPONSIBILITIES

1. The permittee shall retain responsibility for providing the compensatory mitigation until the Corps and/or IDEM has received the appropriate documentation that confirms the IDNR has accepted the permit mitigation responsibilities and received payment.

2. The IDNR assumes responsibility for the mitigation requirements of permittees who are issued Corps and/or IDEM permits for which mitigation credits are purchased from the IDNR as compensatory mitigation for impacts authorized by the Corps and/or IDEM by a permit.
3. The IDNR shall provide the Corps and/or IDEM with documentation confirming the IDNR has accepted responsibility for providing the required compensatory mitigation for a Corps and/or IDEM permit.

This documentation will consist of a letter to the permittee, signed by the IDNR, identifying the permit number(s) and stating the number and type of mitigation credits that have been secured from the IDNR. The IDNR shall also provide a copy of this letter to the Corps and/or IDEM.

4. The IDNR shall retain the right to refuse to sell credits, temporarily shut down a service area, or suspend credit sales at their discretion. IDNR shall provide notice to the Corps and IDEM 24 hours prior to any such decision.

5. The IDNR, in consultation with the DE and IRT, may purchase mitigation credits from a Corps-approved mitigation bank to fulfill advance credits that have been sold. In these cases, the instrument governing the mitigation bank shall apply, including the transfer of mitigation liability from the IDNR to the bank once the mitigation credits have been purchased.

H. COMPENSATION PLANNING FRAMEWORK (CPF)

1. The CPF for the IN SWMP is attached as Appendix B and will be used to direct the selection and implementation of mitigation projects, and describes the geographic service areas for the IN SWMP and their basis.

2. Modification of the CPF is considered a significant modification to this Instrument and will be made following the procedures in 33 CFR §332.8(d).

I. TIMING OF COMPENSATORY MITIGATION PROJECTS

1. In general, implementation of IN SWMP mitigation projects will occur after sufficient funds are available in a service area to undertake a project. Unless the Corps determines more time is needed to plan and implement an IN SWMP project (33 CFR §332.8(n)(4)), all Advanced Credits sold within a calendar year in each respective SA will accumulate, and the delivery of permanent protection and initial physical and/or biological improvements for the sum of those credit sales shall be due three (3) years from the end of the given calendar year. An approved ILF mitigation project may satisfy credits sold in subsequent calendar years if the specific mitigation project has released credits available.

Alternative compensatory mitigation, including the purchase of mitigation credits from a Corps-approved mitigation bank, shall be provided when the IDNR does not provide mitigation within three growing seasons after the first Advance Credit is sold in a service area unless the IDNR proposes and the Corps agrees that more time is needed.
2. The IDNR may identify, design, and/or implement IN SWMP mitigation projects in advance of impacts.

IV. PERMANENT PROTECTION

A. Each IN SWMP mitigation project site (the aquatic habitats, riparian areas, buffers and upland areas that comprise the overall compensatory mitigation project) will be protected with a real estate instrument or other mechanism, as appropriate, per 33 CFR §332.7.

B. The approved mitigation plan for each IN SWMP mitigation project will include the required site protection.

C. Unless approved by the Corps, the IDNR shall not implement mitigation on sites where oil, gas, mineral, timber, quarrying (limestone, sand, etc.) or other land use rights or interests are severed from fee ownership or where those rights have been leased to a third party where such rights could threaten the long term success and ecological value of the IN SWMP mitigation project site.

D. Mitigation protection shall maintain the aquatic resources and associated habitats that are preserved, restored, enhanced or created for each IN SWMP mitigation project site. The protection shall be bound on all assigns and successors.

E. Any activity which is inconsistent with the purposes of an IN SWMP mitigation project shall be prohibited on the IN SWMP project site, this includes:
   a. subdivision of the site into two or more parcels, with the exception of any future dedication of all or part of the site as a nature preserve or other such classification;
   b. any residential, commercial, agricultural or industrial use or activity on the site;
   c. the maintenance of any new man-made modifications such as buildings, structures, boat ramps, or other improvements, unless part of the approved mitigation plan;
   d. mining, exploration for, or extraction of oil, gas, or other minerals, hydrocarbons, soils or other materials that disturbs the surface or aquatic resources of the site;
   e. the dumping or storage or disposal of trash, garbage, sewage, debris, or other refuse of any nature;
   f. the cutting or harvesting of trees or wood products, unless approved as part of the approved mitigation plan and/or long term management plan;
   g. earth moving, grading, dredging or filling, unless approved as part of the approved mitigation plan;
   h. the construction, maintenance, or erection of any commercial advertisement, sign or billboard, except for posting of signs depicting the project site, including boundary, interpretive or directional signs;
   i. the construction or extension of roads or utility systems, outside of existing easements or right-of-ways, unless court ordered;
j. use of horses, ponies, bicycles or motorized vehicles, such as cars, trucks, snowmobiles, dune buggies, ATVs or motorcycles, except the use of vehicles necessary to complete the construction or maintenance of improvements in the approved mitigation plan;
k. other activities, actions, or uses that would be detrimental or adverse to soil and water conservation values.

F. The following activities shall be allowed on IN SWMP mitigation project sites:
a. natural resources inventories or monitoring of species of plants and animals;
b. installation of signs relating to the mitigation project, depicting designations or classifications, including interpretive signs or directional signs;
c. non-commercial, non-developed recreational activities including, hunting, fishing, hiking, nature viewing and photography, and other low impact, non-extractive uses not inconsistent with the mitigation project that will not be detrimental to the mitigation project achieving its required ecological performance standards;
d. installation and maintenance of trails to provide access to the site, as approved in the mitigation plan;
e. management of the site to restore and/or enhance native plant and animal communities, including control of invasive plant and animal species, considered noxious under state law or considered detrimental to the conservation values on the site according to the approved mitigation plan, invasive plant species control and removal may be by manual or mechanical methods, by the use of herbicides or bio-controls and/or prescribed burning, invasive animal species control may be by trapping or hunting pursuant to applicable laws and regulations;
f. management of the site to restore and/or enhance aquatic resources and to alter the vegetation and hydrology, including diverting or affecting the natural flow of surface or underground water into, within, or out of the site, or dredging, channeling, filling, pumping, diking, impounding, or other related activities according to the approved mitigation plan;
g. entry and use, and all other activities not expressly prohibited by the approved mitigation plan or the Instrument that are consistent with the conservation value of the property.

G. No human activities shall occur on an IN SWMP project site that require a Corps and/or IDEM permit for impacts to aquatic resources, except those authorized to implement the mitigation work plan and long term management plan.

If the Corps and/or IDEM authorize impacts to aquatic resources on an IN SWMP project site, the permit shall require compensatory mitigation by the permittee for the direct loss of the aquatic resource, past impacts being mitigated for by the aquatic resources, and all associated temporal losses.
V. FINANCIAL ASSURANCES

A. The approved mitigation plan for each IN SWMP mitigation project will specify the amount of the IN SWMP Program Account’s reserve funds that will provide the required financial assurances for that project site.

B. The long term management funding mechanism for each IN SWMP mitigation project may be transferred to a third party upon written approval from the Corps and/or IDEM.

C. If sufficient reserve funds are not available in the IN SWMP Program Account to provide the required financial assurances for a specific IN SWMP mitigation project, IDNR shall provide acceptable financial assurances in a form according to 33 CFR §332.3(n)(1)-(2).

D. The approved mitigation plan for each IN SWMP mitigation project will have an identified schedule to release the financial assurances as the project site meets its approved ecological performance standards.

E. Appendix A—IN SWMP FINANCIAL ACCOUNTING provides additional financial details for the program.

VI. MODIFICATION OF THIS INSTRUMENT

A. Modification of this Instrument shall follow the procedures set forth in 33 CFR §332.8(g).

In the event that any items that require modification would fall into the authority of the Sponsor and DE to utilize the streamlined review process, those items for modification, as determined by the DE, and the streamlined process, will follow the procedures set forth in 33 C.F.R. §332.8(g)(2).

B. The Compensation Planning Framework (Appendix B) utilizes various sources of external information/data in its mitigation approach and prioritization. These sources of information/data are expected to be updated or modified over time by the external entities responsible for maintaining these sources of information. The IDNR’s use of updated or modified information from these external sources in the application of its CPF is not considered a modification of the CPF or this Instrument.

C. The addition of new projects will follow an approved Mitigation Letter of Permission (LOP) for new mitigation projects associated with approved compensatory mitigation banking and in-lieu fee instruments within the state of Indiana.
VII.  DEFAULT, SUSPENSION, AND TERMINATION

A.  When the Corps determines that the Indiana Stream and Wetland Program (IN SWMP) is not meeting or complying with the terms of this Instrument, the Corps will take appropriate action. Such actions may include, but are not limited to: suspending IN SWMP credit sales, decreasing the allocation of Advance Credits, requiring adaptive management actions, suspending approval of new mitigation projects, directing funds to alternative mitigation, terminating this Instrument, or other actions as approved by the Corps.

B.  Termination

1.  Either the Corps or IDNR may terminate this Instrument. Termination procedures shall be commenced upon written notice of either party’s intent to terminate this Instrument.

2.  Within 90 days of the written notice to terminate, the IDNR shall provide the following:

   a.  An accounting of all monies and outstanding obligations by service area and for each mitigation project;

   b.  The status of all approved mitigation projects, including the number of credits released, the remaining projected credits to be generated by each project, the extent to which each project is meeting the performance standards and measures that will be taken to ensure the performance standards are met;

   c.  The status of the long term management plans and funding, and the measures that will be taken to ensure that the plans can be implemented.

3.  The Corps, after consulting with the IRT, will determine if the measures proposed by IDNR are adequate and determine the final closure plan for the IN SWMP.

4.  If no released credits from a mitigation project have been generated and subsequently used to fulfill advance credits or otherwise transferred, the site protection instrument may be vacated with written approval of the Corps.

C.  Remaining Funds

1.  In the case of default or termination by either party, any remaining IN SWMP funds after fulfilling all obligations shall be used as directed by the DE.
VIII. FORC MAJEURE

A. Responsibility for Repair and Remediation: The Sponsor shall be responsible for repair and remediation of compensatory mitigation projects except under the following circumstances:
1. A project is released from monitoring by the DE and IRT; and
2. Damages to the compensatory mitigation project are the result of a human-caused or natural disaster, or a deliberate and unlawful act.

B. The DE, in consultation with the IRT, will determine whether a Force Majeure event has occurred and the Sponsor shall bear the burden of demonstrating to the satisfaction of the DE:
1. That the disaster was caused by circumstances beyond the control of the Sponsor, and/or any entity controlled by the Sponsor, including its contractors and consultants;
2. That neither the Sponsor, nor any entity controlled by the Sponsor, including its contractors and consultants, could have reasonably foreseen and prevented such an event or damages from such event; and
3. The damage was caused by such event.
IX. POINTS OF CONTACT

The points of contact for written communication among the parties are as follows or as otherwise specified in the future by written notice to all parties:

**Corps of Engineers**
U.S. Army Corps of Engineers  
Chief, Regulatory Division  
(currently Mr. Michael Ricketts)  
U.S. Army Engineer District  
Louisville District Corps of Engineers  
OP-FN, Room 752  
P.O. Box 59  
Louisville, KY 40201-0059  
PHONE: (502) 315-6685  
FAX: (502) 315-6677

U.S. Army Corps of Engineers  
Chief, Regulatory Branch  
(currently Mr. Keith L. Wozniak)  
Technical Services Division  
Chicago District Corps of Engineers  
231 South LaSalle Street, Suite 1500  
Chicago, IL 60604  
PHONE: (312) 846-5530  
FAX: (312) 353-4110

**Sponsor**
Indiana Department of Natural Resources  
Division of Land Acquisition  
Carl Wodrich  
Director of Ecological Services  
402 W. Washington Street, W261  
Indianapolis, IN 46204  
317-232-1291  
CWodrich@dnr.IN.gov

**Sponsor's Fiscal Agent**
Indiana Natural Resources Foundation  
Jody Kress, Executive Director  
402 W. Washington Street, W256  
Indianapolis, IN 46204  
317-234-5447  
JKress@dnr.IN.gov

IN SWAMP Mitigation Specialists:  
Brad Baldwin  
David Carr  
bbaldwin@dnr.IN.gov / 317-234-9702  
dcarr@dnr.IN.gov / 317-234-9703
IRT Members

IDEM, Office of Water Quality
Marty Maupin
100 North Senate Avenue
Indianapolis, Indiana 46204
317-233-2471

USEPA, Region 5, WW-16J
Melanie Burdick
77 West Jackson Boulevard
Chicago, Illinois 60604
312-886-6833

USFWS, Bloomington Indiana Field Office
Marissa Reed
620 South Walker Street
Bloomington, Indiana 47403-2121
812-334-4261

USDA-NRCS
Albert Tinsley
6013 Lakeside Boulevard
Indianapolis, IN 46278-2933
317-295-5856

X. EFFECTIVE DATE:

This agreement shall become effective when signed by the Louisville, Chicago, and Detroit Districts of the U.S. Army Corps of Engineers, IDEM, and the IDNR. IRT members are invited to sign this Instrument as an indication of their agreement to the terms of this Instrument. The decision of an IRT Member not to sign this Instrument does not negate the effectiveness of this Instrument. The Corps retains the final authority for approval of this Instrument.
XI. CORPS OF ENGINEERS AND INDIANA DEPARTMENT OF NATURAL RESOURCES SIGNATURES

Michael S. Ricketts
Chief, Regulatory Division
Louisville District

Keith L. Wozniak
Chief, Regulatory Branch
Chicago District

Charles M. Simon
Regulatory Office
Detroit District

Cameron F. Clark
Director
Indiana Department of Natural Resources

Indiana Stream and Wetland Mitigation Program Instrument
XII. INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT SIGNATURE

Bruno L. Pigott
Commissioner
Indiana Department of Environmental Management

April 12, 2018
XIII. INTERAGENCY REVIEW TEAM SIGNATURES

Scott E. Pruitt                          Date
Bloomington Field Office Director
U.S. Fish & Wildlife Service

Wendy L. Melgin, Chief                 4/13/2018
Wetlands Section
U.S. Environmental Protection Agency, Region 5

Jill Reinhart                          Date
Acting Indiana State Conservationist
U.S. Department of Agriculture Natural Resource Conservation Service
XIII. INTERAGENCY REVIEW TEAM SIGNATURES

Scott E. Pruitt
Bloomington Field Office Director
U.S. Fish & Wildlife Service

Wendy L. Melgin, Chief
Wetlands Section
U.S. Environmental Protection Agency, Region 5

Jill Reinhardt
Acting Indiana State Conservationist
U.S. Department of Agriculture Natural Resource Conservation Service
XIV. IN SWMP APPENDICES

APPENDIX A. IN SWMP FINANCIAL ACCOUNTING

A.1 FISCAL AGENT

The Indiana Natural Resources Foundation (INRF) will serve as fiscal agent for the Indiana Stream and Wetland Program (IN SWMP). The INRF will receive and safeguard all IN SWMP funds. The INRF will disburse IN SWMP funds only according to the terms of this Instrument. The INRF will maintain all financial records relating to the IN SWMP for a minimum of five years after the termination of the program. The INRF will follow the IDNR’s records retention policy.

A.2 FINANCIAL ACCOUNTS

A.2.1 IN SWMP Account

The INRF will establish the IN SWMP Account at an FDIC member financial institution upon approval of the IN SWMP and prior to the sale of any advance credits.

All mitigation payments shall be deposited into the IN SWMP Account held by the INRF and segregated and accounted for in the separate subaccounts noted below. The IN SWMP Account is to be used solely for the purposes and benefit of Indiana stream and wetland mitigation projects. All monies that may be generated from the sale or disposal of property, equipment, materials or other items purchased using in-lieu fee funds shall be reimbursed and deposited in the IN SWMP Account for the sole use and benefit of the IN SWMP and shall not be diverted for other uses. The IN SWMP Account will be used for in-lieu fee mitigation activities, including: land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, remediation and adaptive management activities, long term management, administration, or other costs necessary to complete mitigation projects. The pricing of credits will be set at an amount sufficient to fund all costs associated with operation of the IN SWMP and implementation of mitigation projects.

As stated in Paragraph VII.A., if the DE determines that the Indiana Stream and Wetland Mitigation Program (IN SWMP) is not meeting or complying with the terms of the Instrument, the DE, in consultation with the IRT, may direct IN SWMP Account funds to alternative mitigation or other actions.

Interest and earnings shall remain in the IN SWMP Account for use solely by and for the purposes of the IN SWMP and providing compensatory mitigation for Corps and/or IDEM permits. Funds in the IN SWMP Account will remain in the account at the end of the INRF’s and state’s fiscal year and will not revert to any other funds.
The IN SWMP Account shall have four sub-accounts that will be tracked and accounted for separately:

(a) Administrative Funds
(b) Service Area Funds (in-lieu fee project funds for Section 10, 404, and 401 permitted impacts)
(c) Service Area Funds (from credits sold for IDEM-permitted isolated wetland impacts)
(d) Reserve Funds

A.2.2 Administrative Funds

The credit costs include an amount to fund the administration of the IN SWMP. Up to fifteen (15) percent of each credit sold shall be used to fund administrative tasks including, but not limited to, tasks completed by IDNR staff, INRF staff, and/or professional services required to carry out operation of the IN SWMP program.

IDNR may withdraw Administrative funds at their discretion without the approval of the Corps or IRT.

Administrative funds shall be tracked separately from the Service Area funds and the Reserve funds.

A.2.3 Service Area Funds

Funds to implement IN SWMP mitigation projects shall be deposited into the IN SWMP Account and tracked by Service Area. Funds from credits sold for isolated impacts will be deposited into a separate account from credits sold for Section 10, 404 and 401 impacts. When funds are moved from the NFF to the IDNR/state accounts, these funds will be co-mingled but will be tracked separately using appropriate, identifying chartfield information to distinguish these funds from one another easily when the state’s accounting system is queried for reports to be generated for the program and to fulfill reporting requirements to the DE, IDEM and the IRT.

These funds will be used to implement compensatory mitigation projects including locating and identifying, planning, acquisition, site protection, design, construction, performance monitoring, adaptive management, financial assurances, long term management funding mechanisms, anticipated contingencies and/or other activities. Each individual mitigation project’s finances will be tracked within each service area.
The Service Areas are listed below and discussed in detail in Appendix B.

(a) Calumet-Dunes
(b) Kankakee
(c) St. Joseph River (Lake Michigan)
(d) Maumee
(e) Upper Wabash
(f) Middle Wabash
(g) Upper White
(h) Whitewater-East Fork White
(i) Lower White
(j) Upper Ohio
(k) Ohio-Wabash Lowlands

Upon approval of an IN SWMP mitigation project, expenses shall be tracked for each project both in the INRF and the IDNR/State of Indiana accounting system.

Disbursements from the IN SWMP Account may only be made per the approved IN SWMP mitigation project plans and only upon receipt of written authorization from the DE, after IRT consultation. Disbursements made to the IDNR that are deposited into IDNR accounts will be tracked by project and any other identified financial coding in the state accounting system as necessary and/or required by the DE.

IDNR may request written authorization from the DE, in consultation with the IRT, to withdraw funds for locating, identifying, planning and gaining approval of IN SWMP mitigation projects prior to approval of a mitigation plan for said project sites.

A.2.4 RESERVE FUNDS

A “Reserve” will be established in the IN SWMP Accounts. The Reserve will be maintained by the interest that has accrued to the IN SWMP Account and from a percentage of each credit sold.

The Reserve shall be used for contingency actions, to provide program and project-specific financial assurances, long-term management, permanent protection activities (legal fees, encroachment repairs, boundary signage, etc.), and extra mitigation as may be necessary based upon the interest accrued on funds set aside for financial assurances. As financial assurances for IN SWMP projects are released, those funds will remain in the Reserve Fund.

The use of Reserve funds shall be subject to the approval of the DE in consultation with the Sponsor and IRT except for minor actions that do not require a permit, such as long-term