



The following documentation is an electronically-submitted vendor response to an advertised solicitation from the *West Virginia Purchasing Bulletin* within the Vendor Self-Service portal at ***wvOASIS.gov***. As part of the State of West Virginia's procurement process, and to maintain the transparency of the bid-opening process, this documentation submitted online is publicly posted by the West Virginia Purchasing Division at ***WVPurchasing.gov*** with any other vendor responses to this solicitation submitted to the Purchasing Division in hard copy format.

Header 5

List View

General Information | Contact | Default Values | Discount | Document Information | Clarification Request

Procurement Folder: 1412853

Procurement Type: Central Master Agreement

Vendor ID: VS0000042195

Legal Name: CONFLUENCE MITIGATION PARTNERS LLC

Alias/DBA:

Total Bid: \$591.00

Response Date: 05/16/2024

Response Time: 12:17

Responded By User ID: conflumitpart

First Name: Adam

Last Name: Riggsbee

Email: adam@riverbankconserva

Phone: 5129703062

SO Doc Code: CRFQ

SO Dept: 0313

SO Doc ID: DEP2400000037

Published Date: 5/13/24

Close Date: 5/16/24

Close Time: 13:30

Status: Closed

Solicitation Description: Mitigation Credits

Total of Header Attachments: 5

Total of All Attachments: 5



Department of Administration
Purchasing Division
2019 Washington Street East
Post Office Box 50130
Charleston, WV 25305-0130

State of West Virginia
Solicitation Response

Proc Folder: 1412853
Solicitation Description: Mitigation Credits
Proc Type: Central Master Agreement

Solicitation Closes	Solicitation Response	Version
2024-05-16 13:30	SR 0313 ESR05162400000007122	1

VENDOR
VS0000042195
CONFLUENCE MITIGATION PARTNERS LLC

Solicitation Number: CRFQ 0313 DEP2400000037
Total Bid: 591
Response Date: 2024-05-16
Response Time: 12:17:02
Comments:

FOR INFORMATION CONTACT THE BUYER
Joseph E Hager III
(304) 558-2306
joseph.e.hageriii@wv.gov

Vendor Signature X	FEIN#	DATE
-----------------------	-------	------

All offers subject to all terms and conditions contained in this solicitation

Line	Comm Ln Desc	Qty	Unit Issue	Unit Price	Ln Total Or Contract Amount
1	Stream Credits Per the Attached Exhibit A Pricing Page	1.00000	EA	591.000000	591.00

Comm Code	Manufacturer	Specification	Model #
94131501			

Commodity Line Comments: Our bid is contingent on selling our initial credit release in its entirety--2761 Stream Credits.

Extended Description:

Mitigation Credits / DWWM as outlined on the attached specifications



16 May 2024

West Virginia Department of Administration
Purchasing Division
2019 Washington Street E
Charleston, WV 25305

RE: SOLICITATION NUMBER CRFQ 0313 DEP2400000037

To Whom It May Concern:

Confluence Mitigation Partners, LLC ("CMP")—a small business owned and operated by RiverBank Conservation, LLC—is pleased to submit this quote for stream mitigation credits from our Sunny Bank Farms Mitigation Site ("Sunny Bank"; LRH-2019-00483-LKR) in the WVDEP ILF's SSA1 (located in the Little Kanawha watershed). Sunny Bank is fully approved by the Huntington District, and CMP is moving forward expeditiously to secure the initial credit release of 2,761 stream credits.

The solicitation referenced above is seeking ~3,800 stream credits. Sunny Bank's initial release cannot fully satisfy the advertised need. However, we are proposing the sale of the initial release in its entirety. Given regulatory requirements regarding the initiation of construction following a mitigation bank's first credit sale and CMP's investment terms, we are ONLY interested in selling our full release at this time. Following construction, CMP will not have restrictions regarding credit volume with future transactions. Therefore, our bid represents an offer to sale 2,761 credits for a total purchase price of \$1,631,751 (\$591/credit). Our offer is unfortunately not valid for a lower credit quantity.

Thank you for your consideration of our bid.

Sincerely,

J. Adam Riggsbee
President



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HUNTINGTON DISTRICT, CORPS OF ENGINEERS
502 EIGHTH STREET
HUNTINGTON, WEST VIRGINIA 25701-2070

May 15, 2024

Regulatory Division
Energy Resource Branch
LRH-2019-00483-LKR-Lick Fork

**UMBRELLA MITIGATION BANKING INSTRUMENT APPROVAL, MITIGATION
BANK SITE APPROVAL, AND NATIONWIDE PERMIT 27 VERIFICATION**

Adam Riggsbee
Confluence Mitigation Partners, LLC (Confluence)
3616 Far West Blvd., Suite 117-361
Austin, TX 78731

Dear Adam Riggsbee:

I refer to the submittals requesting: a) the approval of an Umbrella Mitigation Banking Instrument (UMBI), b) approval for the Sunny Bank Farm Mitigation Bank (MB), and c) Nationwide Permit 27 verification. An initial submittal was received in this office on May 8, 2019, and a final UMBI and mitigation site plan was provided on February 6, 2024. A pre-construction notification (PCN) was submitted on April 5, 2024, by Confluence requesting a Department of the Army (DA) authorization for the Sunny Bank Farm Mitigation Bank (MB). The establishment of the proposed UMBI includes the construction, operation and maintenance of the Sunny Bank Farm MB. The Sunny Bank Farm MB is located on an approximately 68-acre tract southwest of Spencer, in Roane County, West Virginia, along Lick Fork and unnamed tributaries as well as the adjacent floodplains and upland corridors. Lick Fork, which is an indirect tributary of the Little Kanawha River, a traditional navigable water of the United States. All of the referenced submittals are associated with the existing DA File No: LRH-2019-00483-LKR-Lick Fork. Please include this file number on all future correspondence related to this project.

The U.S. Army Corps of Engineers' (Corps) authority to regulate waters of the U.S. is based on the definitions and limits of jurisdiction contained in 33 CFR Part 328 and 33 CFR Part 329 including the amendment to 33 CFR Part 328.3 (88 Federal Register 3004). Section 404 of the Clean Water Act (Section 404) requires that a DA permit be obtained prior to discharging dredged or fill material into waters of the U.S., including wetlands. Section 10 of the Rivers and Harbors Act of 1899 (Section 10) requires that a DA permit be obtained for any work in, on, over or under a navigable water.

The submitted UMBI is proposed to be used for multiple mitigation banks, which would involve restoration, enhancement and/or preservation of ephemeral, intermittent and perennial streams and/or wetlands within the state of West Virginia. In conjunction with the UMBI, you

have proposed the Sunny Bank Farm MB, which would involve the restoration, enhancement and preservation of 29,218 lf of ephemeral, intermittent and perennial streams (along with adjacent riparian and upland buffers) within the Lick Fork watershed. Proposed work includes 10,589 linear feet of Level I stream restoration, 239 linear feet of level III stream restoration, 3,817 linear feet of stream enhancement, and 14,573 linear feet of stream preservation. The project also includes 2.04 ac of wetland enhancement and 0.08 ac of wetland preservation. A conservation easement will encompass all streams, including 25-foot buffer along each bank. The primary Geographic Service Area (GSA) would be the Little Kanawha watershed as defined by the 8-digit Hydrologic Unit Code (HUC) No. 05030203. The secondary GSA's includes Middle Ohio North watershed (05030201); Middle Ohio South watershed (05030202), Upper Ohio South (05030106), and Upper Ohio North (05030101). In accordance with 33 CFR 332.8 (d), the UMBI is approved and signed by the appropriate parties as contained in Appendix A of this letter (the UMBI meets the requirements contained in 33 CFR 332.8 (h)). Appendix B of this letter contains the approved site plan for the Sunny Bank Farm MB.

The Sunny Bank Farm MB would generate approximately 10,349 stream credits and 1.1 wetland credits for the purpose of providing compensatory mitigation for regulated impacts authorized by DA permits, violations of the 404 program per 40 CFR 230.93(g), Environmental Protection Agency Administrative Orders and Supplemental Environmental Projects, and any mitigation which may be required by local agencies such as the West Virginia Department of Environmental Protection (WVDEP) or other agencies per 33 CFR 332.3(j). The credit release schedule for the bank will include the following: 20 % pre-construction release; 20% upon completion of construction and planting; up to 20% after Year 1 monitoring; up to 20% after Year 3 monitoring; and up to 20% after Year 5 monitoring/closeout. All releases are based on performance standards being successfully met. The preservation credit release schedule for the bank is to release 100% of the credits pre-construction (once the appropriate protective real estate instruments is provided).

The Sunny Bank Farm MB preconstruction notification has been reviewed in accordance with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Under Section 404, the Corps regulates the discharge of dredged and fill material into waters of the United States, including wetlands. Our responsibility under Section 10 is to regulate any work in, or affecting, navigable waters of the United States. Based on your description of the proposed work, and other information available to us, it has been determined that this project will involve activities subject to the requirements of Section 404 only. Therefore, the proposed activities require DA authorization.

In order to implement the Sunny Bank Farm MB, you have requested DA authorization from this office for the discharge of dredge and/or fill material into streams and wetlands. Specifically, the project would involve the discharge of dredge and/or fill material into 7,065 linear feet (2.12 acres) of stream and 0.342 acre of wetland to complete the ecological restoration. Impacts would be associated with restoration activities involving natural channel

design techniques, channel cross section and pattern alterations, bank stabilization and bioengineering techniques, grade control and in-stream structures, reconnection of contributing streams to the main channel, and establishment of forested riparian buffers.

Based on the provided information, it has been determined the proposed project meets the criteria for Nationwide Permit (NWP) No. 27, Aquatic Habitat Restoration, Enhancement, and Establishment Activities, (enclosed) under the December 27, 2021, Federal Register (FR), Reissuance and Modification of NWPs (86 FR 73522) provided you comply with all terms and conditions of the enclosed material, the enclosed special conditions, and the 401 Water Quality Certification issued by the WVDEP. Please be aware that this letter does not excuse you from the obligation to obtain any other Federal, state and/or local authorization, if required. As part of this NWP verification, the Sunny Bank Farm MB is hereby approved.

This verification is valid until the expiration date of the NWPs, unless the NWP authorization is modified, suspended, or revoked. The verification will remain valid if the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. All of the existing NWPs are scheduled to be modified, reissued, or revoked on March 14, 2026. Prior to this date, it is not necessary to contact this office for re-verification of your project unless the plans for the proposed activity are modified. Furthermore, if you commence or under contract to commence this activity before March 14, 2026, you will have twelve (12) months from the date of the modification or revocation of the NWP to complete the activity under the present terms and conditions of this NWP. Enclosed is a copy of the NWP to be kept at the project site during construction. Upon completion of the project, the enclosed certification must be signed and returned to this office.

Discharges of dredged or fill material in association with implementation of the Sunny Bank Farm MB are authorized, subject to the terms and conditions of the enclosed material and attached special conditions. Upon completion of the project, the attached certification must be signed and returned to this office. A copy of this letter has been provided to the individuals noted below under the recipient list. If you have any questions, please contact Mr. Brian L. Bridgewater by phone at 304-761-6804 or by email at Brian.L.Bridgewater2@usace.army.mil.

Sincerely,

Lee A. Robinette

Michael E. Hatten *for*
Chief, Regulatory Division

Enclosure(s)
Recipient List:

Matt Gilbert, U.S. Army Corps of Engineers, Pittsburgh District (via email)
Patrick Boos, U.S. Environmental Protection Agency, Region 3 (via email)
U.S. Fish and Wildlife Service, West Virginia Field Office (via email)
Nancy Dixon, West Virginia Department of Environmental Protection (via email)
Danny Bennett, West Virginia Division of Natural Resources (via email)

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 1 of 8**

General

1. All work will take place in accordance with the Department of the Army permit application, the Confluence Mitigation Partners, LLC - Umbrella Mitigation Banking Instrument (Department of the Army File No. LRH-2019-00483-LKR), and the Final Site Mitigation Plan; Sunny Bank Farm Mitigation Bank; LRH-2019-00483-LKR; February 2024.
2. A copy of the nationwide permit verification, special conditions, and the above-referenced construction plans must be kept at the site during construction.
3. Upon completion of the activity authorized by this permit, the enclosed certification must be signed and returned to this office.
4. Should new information regarding the scope and/or impacts of the project become available that was not submitted to this office during our review of the proposal, the permittee must submit written information concerning proposed modification(s) to this office for review and evaluation, as soon as practicable.

Site Protection

5. The sponsor will record with the Roane County clerk's office and submit a completed copy to this office of the conservation easement (or similar acceptable real estate instrument) for any streams, their riparian buffer areas, wetlands, and their upland buffer areas associated with the Sunny Bank Farm Mitigation Bank. All instruments will run with the land in perpetuity. The release of stream credits shall not occur without receipt of the recorded real estate instrument.

Financial Assurance

6. The Sunny Bank Farm Mitigation Bank involves the establishment, restoration, enhancement and preservation of streams and wetlands. In accordance with the approved UMBI, a financial assurance, as detailed in the Final Site Mitigation Plan; Sunny Bank Farm Mitigation Bank; LRH-2019-00483-LKR; February 2024, is required to be established as a contingency to guarantee the success of the mitigation bank site. The financial assurance will remain in place at its full value and shall not be reduced until this office affirms that the project is performing acceptably and accepts the reported findings in writing.

Long-term Steward and Management

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 2 of 8**

7. The sponsor will retain the duties of the long-term land steward until such time as the management responsibilities have been assigned to a third party (e.g. non-profit organization or similar third party) acceptable to the Corps.
 - a. An endowment for long-term management will be fully funded within five (5) years after completion of construction and will be deposited into a non-wasting account. This account will be transferred, as part of the agreement, to a third party long-term steward (to monitor and perform maintenance in perpetuity). The endowment will position the long-term steward to complete responsibilities (outlined in the next condition) with the interest earned from the funded account.
 - b. It will be the responsibility of the long-term steward to field review the entire mitigation site annually in order to document encroachments, conservation easement signage vandalism and/or replacement, and deviations or compliance with the as-built report. A report documenting these findings will be submitted to this office by July 15th each year as defined by the approved instrument. In addition, this report will identify any proposed adaptive measures to resolve encroachments, vandalism and/or deviations from the as-built report. All adaptive measures will be coordinated and approved by this office in advance of performing such measures.

Best Management Practices

8. Best management practices (BMPs) must be implemented during construction. BMPs include but are not limited to the utilization of silt fences, straw bales, check dams; limiting vegetation removal and bank shaping to the maximum extent practicable; mulching and seeding; and the prohibition of the use or storage of toxic or hazardous materials within the construction areas. Construction activities will be performed during low water conditions to the greatest extent practicable. All disturbed areas will be seeded and mulched to minimize erosion and sedimentation. Appropriate bank protection measures will be installed in channels or on barren areas requiring erosion control including, but are not limited to, native grasses and forbs, vegetation, and other acceptable clean non-contaminated material.
9. All stream restoration work will be constructed in a manner to provide stable stream channels with in-stream structures while restoring aquatic habitat for future aquatic diversity.

As-built Submittal

10. As-built surveys will be conducted to document the location, dimension, pattern, and profile of the mitigation areas. Permanent cross-sections will be established for the

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 3 of 8**

as built and future monitoring surveys. At a minimum, two (2) permanent cross-sections will be established in each stream reach. The as-built surveys will include photographic documentation at cross-sections and structures, a plan view diagram, and vegetation information.

Performance Standards

11. In accordance with the West Virginia Stream and Wetland Valuation Metric (SWVM) version 2.1 and the Hydrogeomorphic approach (HGM), as applicable, data forms have been provided to this office. This office will routinely evaluate the mitigation (see Special Condition 15 for Monitoring) to ensure it is on a trajectory to meet the performance standards and success criteria projected for the 5-year, 10-year, and Maturity levels. In the event the proposed mitigation does not demonstrate the ability to achieve and sustain the projected performance and success levels, credits may be withheld or additional compensatory mitigation equating to the amount necessary to offset any deficit plus any additional temporal loss shall be proposed by the sponsor.
12. The sponsor will provide documentation to, and receive verification from the Corps, that areas within the mitigation area meet the performance standards stated in the UMBI and the final mitigation plan for the Sunny Bank Farm Mitigation Bank as well as the following performance standards:
13.
 - a. The restored, mitigated waters are functioning as the intended type and at an acceptable level of ecological performance, and buffer and riparian zones and other areas integral to the enhancement of the aquatic ecosystem are functioning as the intended type of ecosystem component and at an acceptable level of ecological performance.
 - i. All mitigation must ensure the individual stream segments develop into an equal or better habitat than existed prior to implementation of the ecological restoration measures.
 - ii. Re-established/restored streams must develop and maintain a definable bed and bank with an ordinary high water mark. Streams should remain with the planned morphology dimensions as determined through reference data
 - iii. Each mitigation stream will exhibit a surface water connection to a tributary system of the U.S.
 - iv. The riparian zone must have a cumulative succession rate of at least 200 stems/acre (tree and shrub stems) after the initial planting as well as throughout the monitoring period, where practicable.
 - v. No planted woody species will be greater than 25%, of the total woody riparian buffer species in revegetation crediting areas.

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 4 of 8**

- vi. Based upon the WV SWVM, the mitigation sites will provide predicted credits as documented in the final mitigation plan.

- 14. Invasive plant species are prohibited from use in the buffer zones along stream channels and wetland mitigation sites. On February 3, 1999, Executive Order 13112 was issued to discourage the introduction of invasive species and provide for their control to minimize the economic, ecological, and human health impacts that invasive species cause. Preventative measures will be taken to inhibit invasive species from establishing in the vegetated buffer zones along the mitigation areas.

At Year 3, Level 1 and Level 2 invasive vegetation will not exceed twenty percent (20%) of the total vegetative coverage and Level 3 invasive vegetation will not exceed thirty percent (30%) of the total vegetative coverage in the conservation easement area. At Year 10 and/or completion of monitoring, Level 1 invasive vegetation will not exceed ten percent (10%) of the total vegetative coverage, Level 2 invasive vegetation will not exceed 20% of the total vegetative coverage, and Level 3 invasive vegetation will not exceed 30% of the total vegetative coverage in the conservation easement area. Throughout monitoring and at release there shall be cumulatively no more than a total of 30% invasive species coverage per the WV Invasives Species Strategic Plan. Upon discovery of invasive species, the permittee will coordinate removal efforts with the Corps to determine and implement appropriate eradication techniques for the cumulative population within the tree, shrub, and herb layer.

Invasive species threat levels are identified within the 2014 WV Invasive Species Strategic Plan developed by the WVDNR.

Monitoring

- 15. An annual status report will be submitted to the Corps by December 31st of each year following authorization of the project. This report will provide a status of all completed work in waters of the United States and a timeline for completing all remaining mitigation items.
- 16. Each mitigation site will be monitored annually for a minimum of 10 years following completion of mitigation construction. The monitoring period may be extended past the minimum based upon the success of the mitigation. Annual monitoring reports will be submitted to this office no later than December 31st of the year following completion of the mitigation measures. Failure to submit monitoring reports would constitute permit non-compliance. Annual monitoring reports will include details sufficient to determine compliance with performance standards and to identify any required remedial actions. The reports must include the information

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 5 of 8**

outlined in the enclosed Corps Regulatory Guidance Letter No. 08-03 and titled Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Creation, Restoration, and/or Enhancement of Aquatic Resources.

- a. Corps Permit Number
- b. Name and contact information of permittee and consultant
- c. Name of party responsible for conducting the monitoring and the date(s) the inspection was conducted.
- d. A restatement of the mitigation site plan goals, objectives, and performance standards (i.e. a summary paragraph defining the purpose of the approved project, a description of how the sites are progressing, a comparison of the baseline conditions, and projected 5 year, 10 year and Maturity level benchmarks).
- e. Written description on the location and any identifiable landmarks of the mitigation project including information to locate the site perimeter(s).
- f. Directions to the mitigation site(s).
- g. Dates each form of mitigation commenced and was completed.
- h. A description of monitoring methods must be provided. If using sampling methods, include sample size, statistical justification for sampling regime and data analyses performed. If appropriate, include assessment of natural population growth by target species.
- i. Any structural failures or external disturbances on the site, and describe any management activities and/or corrective measures that were implemented during the previous year. A description of all differences between the approved mitigation plan and the as-built mitigation site and rationale for variance from the approved mitigation plan.
- j. A list of the monitoring requirements and performance standards, as specified in the approved mitigation plan and special conditions of the permit, and an evaluation of whether the mitigation sites are successfully achieving the approved performance standards or trending toward success. A table is one (1) option for comparing the performance standards to the conditions and status of the developing mitigation sites.
- k. Summary data to substantiate the success and/or potential challenges associated with the mitigation project. Photo documentation (displayed on 8 ½" x 11" paper, dated, correlating to a topographic map or drawing, and clearly labeled with the direction from which the photo was taken) may be provided to support the findings and recommendation referenced in the monitoring report and to assist the Corps project manager in assessing whether the mitigation project is successful for the monitoring period. A site map must be provided showing the mitigation site perimeter, location of data collection and photo documentation.
- l. A description of the conditions of the mitigation site and associated buffers, an assessment of the presence and level of occurrence of invasive species and the degree to which performance standards are being met must be included. A

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 6 of 8**

description of the status of all erosion control measures on the mitigation site(s) and a discussion of their functioning status and details on the need for their continued use.

- m. All reports will provide a status of the enhanced and restored stream segments, including photographs from established stations for consistency and narrative descriptions of channel development.
- n. All applicable physical, chemical, and biological water quality data will be submitted with Year(s) 1, 3, 5, 7, and 10 monitoring report. In order to provide a comparison of stream development throughout the years of required monitoring, it would be helpful to provide physical, chemical, and biological water quality data with each submitted monitoring report.

Remedial Actions

- 17. If an annual performance criterion is not met for all or any portion of the mitigation project in any year or if the final success criteria are not met, the permittee shall provide an analysis of the cause(s) of failure, a brief explanation of the difficulties and potential remedial actions proposed by the permittee, including a timetable. The District Engineer, in coordination with the IRT, will ultimately determine if the mitigation site is successful for a given monitoring period.
- 18. The permittee is reminded that remedial measures must be implemented accordingly if it is determined they are necessary to achieve or maintain achievement of the success criteria and anticipated functional lift of the mitigation site(s).
- 19. Any remedial actions taken during the monitoring period will be described. These actions may include, but are not limited to, removing debris, replanting, controlling invasive species, regrading of the site, applying additional topsoil or soil amendments, adjusting site hydrology, etc.

Monitoring Inspections

- 20. The permittee will arrange an on-site meeting with the Corps and the IRT during the growing season after Year(s) 1, 3, 5, 7 and 10 monitoring reports are submitted. The purpose of the meeting is to determine if the mitigation sites have been constructed in accordance with the mitigation plan and are functioning as expected.
- 21. Problems, if any, within the mitigation area will be addressed and potential solutions must be incorporated into actions the permittee would take to allow the mitigation areas to reach their projected functional status. The permittee is responsible for implementing reasonable corrective measures approved or recommended by the Corps.

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 7 of 8**

22. Following receipt of the final monitoring report, an on-site meeting will be arranged to determine if all success criteria have been met. A current jurisdictional determination report documenting the presence and condition of all waters of the United States on the site shall be provided. If the overall success criteria have been adequately met, the applicant may be released from future monitoring requirements (as described below under “Release”). However, if success criteria have not been adequately met, the permittee/sponsor may be required to implement contingency measure(s), including additional mitigation. Monitoring may be extended for a longer period if completed mitigation does not achieve the full extent of the anticipated aquatic functional improvement.

Release

23. It is the sponsor’s responsibility to complete the mitigation as set forth in the previous special conditions. These obligations will not be considered fulfilled until it has been demonstrated the completed mitigation has reached or exceeded the anticipated aquatic functional improvement, it is sustainable for the long-term and written verification of mitigation success and a release from further monitoring has been approved by the Corps.

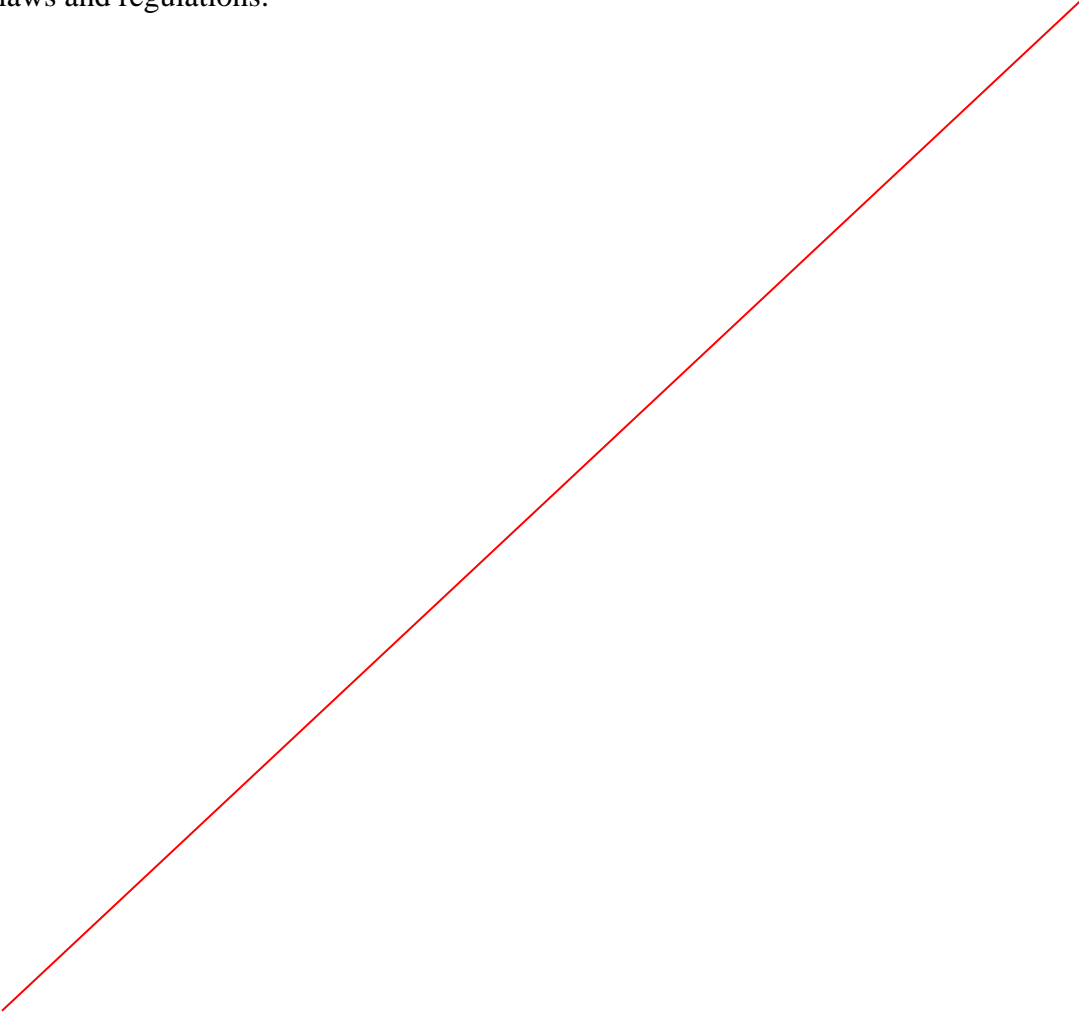
Endangered and Threatened Species

24. The project site lies within the range of the Indiana bat (*Myotis sodalis*) and northern long-eared bat (*Myotis septentrionalis*) which are federally listed endangered species. Several factors have contributed to the species decline, including habitat loss, fragmentation of habitat and the disease White Nose Syndrome. During winter, the bat species hibernate in caves and abandoned mines. Suitable summer habitat for the bats consists of a wide variety of forested/wooded habitats where they roost, forage, and travel and may also include some adjacent and interspersed non-forested habitats such as emergent wetlands and adjacent edges of agricultural fields, old fields and pastures. This includes forests and woodlots containing potential roosts (i.e., live trees and/or snags ≥ 3 inches diameter at breast height (dbh) that have any exfoliating bark, cracks, crevices, hollows and/or cavities), as well as linear features such as fencerows, riparian forests, and other wooded corridors. These wooded areas may be dense or loose aggregates of trees with variable amounts of canopy closure. Individual trees may be considered suitable habitat when they exhibit the characteristics of a potential roost tree and are located within 1,000 feet (305 meters) of other forested/wooded habitat.
- a. The permittee shall preserve wooded/forested habitats exhibiting any of the characteristics listed above wherever possible. Should suitable habitat be present that cannot be saved during construction activities, any trees ≥ 3 inches dbh shall only be cut between November 14-March 31.

**Special Conditions for the
Nationwide Permit 27 Verification for the
Confluence – Sunny Bank Farm Mitigation Bank Project
Roane County, West Virginia
LRH-2019-00483-LKR
Page 8 of 8**

25. Section 7 obligations under the Federal Endangered Species Act must be reconsidered if new information revealing impacts of the proposed project that may affect federally listed species or critical habitat in a manner not previously considered, the project is subsequently modified to include actions which were not considered during Section 7 consultation with the USFWS or new species are listed or critical habitat designated might be affected by the proposed project.

Historic Properties

26. In the event any previously unknown historic or archaeological sites or human remains are uncovered while accomplishing the activity authorized by this nationwide permit authorization, the permittee must cease all work in waters of the United States immediately and contact local, state and county law enforcement offices (only contact law enforcement on findings of human remains), the Corps at 304-399-5610 and West Virginia State Historic Preservation Office at 304-558-0220. The Corps will initiate the Federal, state, and tribal coordination required to comply with the National Historic Preservation Act and applicable state and local laws and regulations.
- 

RD-E

BRIDGEWATER/5274

Permit Number: LRH-2019-00483-LKR-Lick Fork

Name of Permittee: Adam Riggsbee
Confluence Mitigation Partners, LLC (Confluence)
3616 Far West Blvd., Suite 117-361
Austin, TX 78731

Upon completion of the activity authorized by this permit, sign this certification and return it to the following address:

Huntington District
U.S. Army Corps of Engineers
502 8th Street
Huntington, West Virginia 25701-2070
Attn: RD-E

Please note that your permitted activity is subject to a compliance inspection by a United States Army Corps of Engineers representative. If you fail to comply with this permit you are subject to permit suspension, modification, or revocation.

I hereby certify that the work authorized by the above referenced permit has been completed in accordance with the terms and conditions of the said permit.

Signature of Permittee

Date

NATIONWIDE PERMITS FOR THE STATE OF WEST VIRGINIA

U.S. ARMY CORPS OF ENGINEERS (CORPS) REGULATORY PROGRAM REISSUANCE AND ISSUANCE OF NATIONWIDE PERMITS WITH WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION (WV DEP) SECTION 401 WATER QUALITY CERTIFICATION

NATIONWIDE PERMIT (NWP) 27

NWP 27. Aquatic Habitat Restoration, Enhancement, and Establishment

Activities. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of nontidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas of the same type that exist in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to the removal of accumulated sediments; releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; coral restoration or relocation activities; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; reestablishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge of dredged or fill material occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity, the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource

functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

- (1) Activities conducted on non- Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;
- (2) Activities conducted in accordance with the terms and conditions of a binding coral restoration or relocation agreement between the project proponent and the NMFS or any of its designated state cooperating agencies;
- (3) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or
- (4) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency. However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Authorities: Sections 10 and 404).

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for a NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR §§ 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR § 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.*

- (a) No activity may cause more than a minimal adverse effect on navigation.
- (b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.
- (c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his or her authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. Shellfish Beds. No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. Suitable Material. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. Water Supply Intakes. No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. Adverse Effects From Impoundments. If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. Management of Water Flows. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. Fills Within 100-Year Floodplains. The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. Equipment. Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. Removal of Temporary Structures and Fills. Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP

general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.*

(a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.*

(a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWP.

(e) Authorization of an activity by an NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or [http:// www.fws.gov/ipac](http://www.fws.gov/ipac) and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.*

(a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic

properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre- construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties.

Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)).

When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non- Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the

assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/ THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre- construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre- construction notification, the district engineer may determine on a case-by- case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre- construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre- construction notification, the district engineer may determine on a case-by- case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult- to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWP, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory

mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee- responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee- responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. Safety of Impoundment Structures. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality.

(a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this

nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

- (a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- (b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and
- (c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. Activities Affecting Structures or Works Built by the United States. If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. Pre-Construction Notification.

(a) Timing. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30

calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer;

or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Pre-Construction Notification: The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other

appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or

threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the “study river” (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) Form of Pre-Construction Notification: The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) Agency Coordination:

(1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative

effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the

applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which

remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term “discharge” means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

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

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

High Tide Line: The line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance

to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters or wetlands for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character

of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has surface water flowing continuously year-round during a typical year.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

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 aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

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

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

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

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems,

through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term “single and complete project” is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized jurisdictional stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWP, a waterbody is a "water of the United States." If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)).

Nationwide Permits Regional General Conditions for the State of West Virginia

1. **Threatened and Endangered Species:** Section 7(a)(2) of the Endangered Species Act (ESA) states that each federal agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the continued existence of any federally or proposed federally listed species. Consistent with NWP General Condition 18, information for federally threatened and endangered species must be provided in the PCN to determine the proposed

activity's compliance with NWP General Condition 18 and to facilitate project-specific coordination with the USFWS. All relevant information obtained from the USFWS must be submitted with the PCN.

2. All regulated activities located in high-quality waterways listed below require PCN in accordance with NWP General Condition 32:

- New River, which includes all river miles contained in the boundaries of the New River Gorge National Park and Preserve;
- Bluestone River from the upstream boundary of Pipestem Park to Bluestone Reservoir;
- Meadow River from an area near the US 19 Bridge to its junction with the Gauley River;
- All streams within the Monongahela National Forest designated as National Wild and Scenic Study Rivers;
- All streams and other bodies of water in State and National Forests and Recreation Areas (included are streams and bodies of water located within the Spruce Knob, Seneca Rocks and Gauley River National Recreation Areas); and
- Streams and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries, including but not limited to: Cranberry River, Red Creek, Laurel Fork and Otter Creek.

The Corps will consult, as necessary, with the National Park Service and/or the U.S. Forest Service upon receipt of the PCN.

3. Due to the ecological significance of the following waterways protection under the Natural Streams Preservation Act (WV Code Chapter 22 Article 13), all regulated activities located in these waterways require PCN in accordance with NWP General Condition 32:

- Greenbrier River from its confluence with Knapps Creek to its confluence with the New River;
- Anthony Creek from its headwaters to its confluence with the Greenbrier River;
- Cranberry River from its headwaters to its confluence with the Gauley River;
- Birch River from Cora Brown Bridge in Nicholas County to its confluence with the Elk River; and
- New River from its confluence with the Greenbrier River to its confluence with the Gauley River, which includes the length of the New River contained in the boundaries of the New River Gorge National Park and Preserve.

The Corps will consult, as necessary, with the National Park Service and/or the U.S. Forest Service upon receipt of the PCN.

4. **Historic Properties:** Under the National Historic Preservation Act (NHPA), the Corps must ensure no federal undertaking, including a Corps permit action, which may affect historic resources, is commenced before the impacts of such action are considered and the Advisory Council on Historic Preservation and the State Historic Preservation Office (SHPO) are provided an opportunity to comment as required by the NHPA, 36 CFR 800, and 33 CFR 325, Appendix C. Consistent with NWP General Condition 20, historic properties information must be provided in the PCN if the proposed undertaking might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. All relevant information obtained from the SHPO must be submitted with the PCN.

HELPFUL INFORMATION FOR COMPLIANCE WITH THE 2021 NWP GENERAL CONDITIONS

DISCLAIMER: The below information is intended to provide helpful contact information and other submittal recommendations. Contact the appropriate local, state, or federal agency for the most updated links to ensure compliance with the NWP General Conditions.

General Condition 1 (Navigation)

List of Section 10 Navigable Waters of the United States:

Huntington District –

<https://www.lrh.usace.army.mil/Missions/Regulatory/Section-10-Streams/>

Pittsburgh District –

<https://www.lrp.usace.army.mil/Portals/72/docs/regulatory/RegulatoryBoundaries/PN12-2.pdf>

Navigation Charts:

Huntington District –

<https://www.lrh.usace.army.mil/Missions/Civil-Works/Navigation/>

Pittsburgh District –

<https://www.lrp.usace.army.mil/Missions/Navigation/Navigation-Charts/>

Locks and Dams:

Huntington District

<https://www.lrh.usace.army.mil/Missions/Civil-Works/Locks-and-Dams/>

Pittsburgh District

<https://www.lrp.usace.army.mil/Missions/Navigation/Locks-and-Dams/#:~:text=Locks%20and%20Dams%20%20%20Allegheny%20River%20,Locks%20%26%20Dam%20%205%20more%20rows%20>

Notice to Navigation Interests Request Sheets:

Huntington District

<https://www.lrh.usace.army.mil/Portals/38/docs/navigation/Notice%20Info%20sheet.pdf>

Pittsburgh District

<https://www.lrp.usace.army.mil/Portals/72/docs/regulatory/NavNoticeRequestForm.pdf>

General Condition 3 (Spawning Areas)

In stream work in designated warm water streams and their adjacent tributaries during the fish spawning season, April - June and trout waters and their adjacent tributaries during the trout water fish spawning season September 15 to March 31 requires a spawning season waiver from the West Virginia Division of Natural Resources Coordination Unit, at (304) 637-0245. For information about specific stream designations contact West Virginia Department of Environmental Protection, Water Quality Standards Section at (304) 926-0495.

General Condition 5 (Shellfish Beds)

Shellfish beds in West Virginia include concentrations of freshwater mussels. All mussels are protected in the State of West Virginia pursuant to West Virginia §20-2-4 and CSR 58-605.11. In addition, nine (9) federally endangered freshwater mussel species are known to occur in the state. These species are protected by the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.). All streams that contain mussels or potential mussel habitat must be surveyed prior to any proposed streambed disturbance. Please contact the West Virginia Department of Natural Resources (WVDNR) and/or the USFWS for assistance in determining if a mussel survey is or is not required. The WVDNR contact information can be found at: <http://www.wvdnr.gov/contact.shtm>. Currently accepted protocol and supporting materials can be found at the WVDNRs' website: <http://www.wvdnr.gov/Mussels/Main.shtm>

General Condition 7 (Water Supply Intakes)

Locations of public water supply intakes can be found at the following link:

<http://gis.wvinfrastructure.com/>

General Condition 10 (Fills Within 100-year Floodplains)

The following website provides a statewide listing of Floodplain Managers in West Virginia: <http://www.dhsem.wv.gov/MitigationRecovery/Pages/Floodplain-Management.aspx>

General Condition 16 (Wild and Scenic Rivers)

The following website provides information on wild and scenic rivers within West Virginia:

<https://www.rivers.gov/west-virginia.php>

General Condition 18 (Endangered Species)

To obtain the most up to date information on federally threatened and endangered species applicants are encouraged to utilize the U.S. Fish and Wildlife Service's (USFWS) Information for Planning and Consultation System (IPaC) found at <https://ecos.fws.gov/ipac/>

Prior to the submittal of a PCN, applicants may also contact the USFWS, West Virginia Field Office, Ecological Services at:

Address: 6263 Appalachian Highway
Davis, West Virginia 26260

Email: fw5_wvfo@fws.gov

The West Virginia Mussel Survey Protocol may be found at the following link:

<http://www.wvdnr.gov/Mussels/Main.shtm>

General Condition 4 (Migratory Bird Breeding Areas) and General Condition 19 (Migratory Birds and Bald and Golden Eagles)

Prior to the submittal of a PCN, information to assist in complying with NWP General Conditions 4 and 19 may be obtained from the USFWS, West Virginia Field Office, Ecological Services at:

Address: 6263 Appalachian Highway
Davis, West Virginia 26260

Email: fw5_wvfo@fws.gov

The West Virginia Division of Natural Resources Coordination Unit may be contacted at (304) 637-0245.

General Condition 20 (Historic Properties)

The West Virginia National Register of Historic Places can be found at the following link: <https://wvculture.org/research/national-register-of-historical-places/>

The West Virginia State Historic Preservation Office (SHPO) Interactive Map Viewer can be found at the following link: <https://mapwv.gov/shpo/>

When reviewing a PCN, the Corps will scope appropriate historic property identification efforts and if applicable work with the applicant to take into account the effect of the proposed activity on historic properties. In these instances, information and coordination may include:

- Requesting comments directly from the West Virginia Division of Culture and History SHPO on the effect the proposed regulated activity may have on historic properties. The West Virginia Division of Culture and History SHPO may be contacted at:

Address: 1900 Kanawha Blvd E
Charleston, West Virginia 25305
Phone: (304) 558-0220

- To identify potential historic properties that may be affected by a proposed project, the following historic properties information may be reviewed and/or provided with the PCN when applicable:
 - A detailed description of the project site in its current condition (i.e. prior to construction activities) including information on the terrain and topography of the site, the acreage of the site, the proximity of the site to major waterways, and any known disturbances within the site.
 - A detailed description of past land uses in the project site.
 - Photographs and mapping showing the site conditions and all buildings or structures within the project site and on adjacent parcels are useful. Photographs and maps supporting past land uses should be provided as available.
 - Information regarding any past cultural resource studies or coordination pertinent to the project area, if available.
 - U.S. Geological Survey (USGS) 7.5' series topographic maps;
 - West Virginia Division of Culture and history files including:
 - Historic Property Inventory Form;
 - Archaeological Site Forms;
 - Cemetery Inventory Forms;
 - National Register of Historic Places nomination forms including Historic Districts; and
 - County atlases, histories and historic USGS 15' series topographic map(s).
- When needed to evaluate effects to historic properties, the applicant is encouraged to consult with professionals meeting the Professional Qualification Standards as set forth in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716) during this data gathering process. These professionals can assist with compiling the project information discussed above and should provide recommendations as to whether the proposal has the potential to affect historic properties and if further effort is needed to identify or assess potential effects to historic properties. These professionals can also compile preliminary review information to submit to the district engineer as part of the PCN.

General Condition 23 (Mitigation)

Information pertaining to mitigation can be found at the following link:

<https://www.lrh.usace.army.mil/Missions/Regulatory/Mitigation.aspx>

General Condition 25 (Water Quality)

The West Virginia Department of Environmental Protection may be contacted at:

Address: 601 57th Street
Charleston, West Virginia 25304

Phone: (304) 926-0440

Information pertaining to the West Virginia Department of Environmental Protection water quality certification (WQC) program, including the Section 401 Clean Water Act WQC application form, can be obtained at the following link:

<https://dep.wv.gov/WWE/Programs/Pages/401Certification.aspx>

General Condition 32 (Pre-Construction Notification)

The nationwide permit pre-construction notification form (Form ENG 6082) may be obtained at the following link:

https://www.publications.usace.army.mil/Portals/76/Eng_Form_6082_2019Oct.pdf?ver=2019-10-22-081550-710/

A checklist of information that must be provided in a pre-construction notification can be obtained at the following link:

<https://www.lrh.usace.army.mil/Missions/Regulatory/How-to-Apply-for-a-Permit/Nationwide-Permits/>

Electronic Submittal:

- PCNs should be saved as a PDF document, and then submitted as an attachment in an email to the appropriate Regulatory Office:

Huntington District – LRH.permits@usace.army.mil
Pittsburgh District – Regulatory.Permits@usace.army.mil
- Electronic documents must have sufficient resolution to show project details. The PCN and supporting documents submitted electronically must not exceed 10 megabytes (10MB) per email. Multiple emails may be required to transmit documents to ensure the 10MB limit is not exceeded. Alternatively, use of the Department of Defense Secure Access File Exchange (DoD SAFE) service to transfer large files may be requested in your email.
- For tracking and processing purposes, the email should include the following:
 - Email Subject Line: include the name of the applicant, type of NWP request, and location (County and State). Example: RE: Doe, John, NWP (or Pre-Construction Notification) and Section 401 WQC

Request, Cabell County, West Virginia;

- Email Body: 1) Brief description of the proposed project, 2) contact information (phone number, mailing address, and email address) for the applicant and/or their agent, and 3) the project location: Address and Latitude/Longitude in decimal degrees (e.g. 42.92788°, -88.36257°).

- If you do not have internet access, information may be submitted through the U.S. Postal Service to the appropriate Regulatory Office:

U.S. Army Corps of Engineers, Huntington District
ATTN: Regulatory Division
502 Eighth Street
Huntington, West Virginia 25701-2070
Phone: (304) 399-5610
Fax: (304) 399-5805

U.S. Army Corps of Engineers, Pittsburgh District
ATTN: Regulatory Division
William S. Moorhead Federal Building
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222-4186
Phone: (412) 395-7155
Fax: (412) 644-4211

Standard Conditions of State 401 Water Quality Certification Applicable to the 2021 Nationwide Permits

1. To ensure project compliance with state water quality requirements applicable to these Nationwide Permits, notification is to be provided prior to construction to West Virginia Department of Environmental Protection (WV DEP) for any permitted activity for which the U.S. Army Corps of Engineers (USACE) requires pre-construction notification (PCN), in accordance with Nationwide Permit General Condition 32. This condition is required through authority provided in State Certification of Activities Requiring a Federal License or Permit, 40 C.F.R §121.3 (2020) and WV Water Pollution Control Act, W.Va. Code §22-11-1, et seq. (2014).
2. To compensate for unavoidable impacts to aquatic resources as a result of the discharge of dredge or fill material, the applicant must provide proof of compensatory mitigation (as outlined in Standard Condition 16 below) to WV DEP prior to construction, for an activity resulting in cumulative permanent impacts to streams greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This condition is required in accordance with the following; Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-6 (2014), Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1 et seq. (2016).

3. To protect the biological integrity of the aquatic ecosystem, culverted crossings shall be sized and installed in a manner to allow the passage of aquatic life and freely pass bankfull flows. Exceptions to this requirement would be when culvert placement is on bedrock, or when stream gradient is equal to or greater than 4%, or when bankfull elevation is greater than final surface elevation. This condition is required in accordance with Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
4. To protect the designated uses of waters of the state, the permittee shall investigate for the presence of water supply intakes or other activities within 1/2 mile downstream of the activity, which may be affected by increased suspended solids and turbidity, caused by work in the watercourse. The permittee shall give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-7.2.a.2 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
5. To ensure that temporary stream and wetland crossings have no significant adverse impact to aquatic resources, the following procedures and requirements shall be followed and met in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008). At each stream crossing, substrate in the channel will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the stream channel, which is to be completed within 72 hours or as soon as practicable after completion of the crossing. Upon final stream bed restoration, the stream must have similar physical characteristics to include substrate, pattern, profile, dimension and embeddedness of the original stream channel. At each wetland crossing, any excavated material from the top 12 inches of soil will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the wetlands temporarily impacted by the open cut crossing and restoration must be completed within 72 hours or as soon as practicable after completion of the crossing. Stream crossings will be conducted as close to a right angle to the watercourse as practicable and the area of in stream activity will be limited to reduce disturbance.
6. Spoil materials from the watercourse or onshore operations, including sludge deposits, shall not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface waters of the state consistent with the requirements set forth in WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
7. To protect aquatic resources from unauthorized discharge of pollutants, storage and refueling areas shall not be located within any surface water body. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and

Oil Spills, 1-800-642-3074. This condition is required in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014).

8. To reduce sedimentation of aquatic resources and increased turbidity, it is required that proper stabilization of all disturbances below the ordinary high-water mark of waters shall be installed within 24 hours or as soon as practicable to prevent erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to riprap. If riprap is utilized, it must be of such weight and size that bank stress or slump conditions shall not be created due to its placement. Fill must be clean, nonhazardous and of such composition that it shall not adversely affect the biological, chemical or physical properties of the receiving waters. Unsuitable materials include but are not limited to: copper chromium arsenate (CCA) and creosote treated lumber, car bodies, tires, large household appliances, and asphalt. To reduce potential slope failure and/or erosion behind the material, fill containing concrete must be of such weight and size that promotes stability during expected high flows. Loose large slab placement of concrete sections from demolition projects greater than thirty-six (36) inches in its longest dimension are prohibited. Rebar or wire in concrete shall not protrude further than one (1) inch. All activities require the use of clean and coarse non-erodible materials with 15% or less of like fines that is properly sized to withstand expected high flows. This condition is required in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-8 (2014) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
9. To protect the water quality of aquatic resources, runoff from any storage areas or spills shall not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. Discharges from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System permit program of the WV DEP. This condition is required in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016).
10. To protect aquatic resources from discharge associated with land disturbance activities, which are one (1) acre or greater in total area, the project proponent must comply with the National Pollutant Discharge Elimination System or other state stormwater permit requirements as established by the WV DEP, if applicable. Any land disturbances are required to use Best Management Practices for Sediment and Erosion Control, as described in the latest West Virginia Department of Environmental Protection's Erosion and Sediment Control Best Management Practice Manual, or similar documents prepared by the West Virginia Division of Highways. These handbooks are available from the respective agency offices. This condition is required in accordance with; WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016).

11. To protect aquatic resources from unpermitted discharges consistent with the requirements of WV Water Pollution Control Act, W.Va. Code §22-11-4.a.16 (2014) and Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), concrete shall not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved by the WV DEP.
12. To maintain the biological integrity of the state's fisheries, a spawning waiver is required for in-stream work in designated warm water streams and their adjacent tributaries during the fish spawning season of April to June and for trout waters and their adjacent tributaries during the trout water fish spawning season of September 15 to March 31. Fish spawning waivers may be requested from West Virginia Division of Natural Resources (WV DNR) Coordination Unit, at (304) 637-0245. For information about specific stream designations contact West Virginia Department of Environmental Protection, Water Quality Standards Section at (304) 926-0440. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3.2 (2016) and Wildlife Resources Declaration of Policy, W.Va. Code §20-2-4 (2017).
13. To protect stream stability and avoid unnecessary degradation of aquatic resources, the project proponent should avoid removal of riparian vegetation to the greatest extent practicable. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
14. To protect aquatic life and reduce turbidity and disturbance to aquatic resources, the operation of equipment in-stream shall be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment outside the immediate work area requires prior approval of the WV DNR Office of Land and Stream. This condition is required in accordance with; Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016) and Wildlife Resources Declaration of Policy, W.Va. Code §20-2-4 (2017).
15. To ensure the protection of West Virginia's high quality and special aquatic resources, notification must be provided to the WV DEP 60-days prior to construction describing the project purpose, location, and impacts for use of any Nationwide Permit(s) resulting in work in streams set forth in Sections A, B, and C below. The WV DEP will provide applicant coordination within 15 days of receipt of a complete notification.
 - A. Tier 3 Protection is provided for aquatic resources in accordance with West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Antidegradation Policy, Title 47, Series 2, Section 4 for Outstanding National Resource Waters to include, but are not limited to, all streams and rivers within the boundaries of Wilderness Areas designated by The Wilderness Act (16 U.S.C. §1131, et seq.) within the state, all federally designated rivers under the Wild and Scenic Rivers Act, 16 U.S.C. §1271, et

seq.; all streams and other bodies of water in state parks which are high quality waters or naturally reproducing trout streams; waters in national parks and forests which are high quality waters or naturally reproducing trout streams; waters designated under the National Parks and Recreation Act of 1978, as amended; and pursuant to W.Va. C.S.R. §§60-5-6, 7 (2008) those waters whose unique character, ecological or recreational value, or pristine nature constitutes a valuable national or state resource. This condition is required in accordance with Tier 3 Protection Review Procedures, W.Va. C.S.R. §§60-5-6, 7 (2008). The listing of Tier 3 streams is located at: https://dep.wv.gov/WWE/Programs/wqs/Documents/Tier%203%20Info/WVTier3_Nov2013_web.xlt

- B. Naturally-Reproducing Trout Streams are protected to ensure the continued propagation and maintenance of naturally-reproducing trout. For information about specific streams contact WV DEP, Water Quality Standards, at 304-926-0440. This condition is required in accordance with Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016) and Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008).
 - C. West Virginia Natural Stream Preservation Act identifies the following streams or rivers as protected from activities that would impound, divert or flood the body of water: Greenbrier River from its confluence with Knapps Creek to its confluence with the New River, Anthony Creek from its headwaters to its confluence with the Greenbrier River, Cranberry River from its headwaters to its confluence with the Gauley River, Birch River from Cora Brown Bridge in Nicholas County to the confluence of the river with the Elk River, and New River from its confluence with the Greenbrier River to its confluence with the Gauley River. This condition is required consistent with the authority and requirements of the Natural Streams Preservation Act, W.Va. Code §22-13-1, et seq. (2011).
16. The following mitigation guidelines are established to ensure no significant adverse impact to the chemical, physical, hydrologic, or biological integrity of wetlands and streams without compensating for the aquatic resource functions that will be lost as a result of the permitted activity. The discharge of dredged or fill material into a stream or wetland is authorized based upon the following criteria:
- A. Greater than one-tenth (1/10) acre of cumulative permanent impact to wetland(s) (including wetland type conversion) requires prior notification describing the project location, impacts, and plan for mitigation to be submitted to the WV DEP.
 - B. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/10 acre.
 - C. Cumulative permanent impacts to stream(s) greater than 300 linear feet requires prior notification describing the project location, impacts, and plan for mitigation to be submitted to the WV DEP. The West Virginia Stream Wetland

Valuation Metric (SWVM) is the preferred assessment methodology to assist with the determination of required mitigation. The metric is available at the Huntington and Pittsburgh USACE web sites.

In all instances, mitigation for all impacts incurred through use of these Nationwide Permits must first be directed to elimination of the impacts, then minimization of the impacts and lastly through compensatory mitigation. In many cases, the environmentally preferable compensatory mitigation may be provided through an approved mitigation bank or the West Virginia In-Lieu Fee Program. Permittee responsible compensatory mitigation may be performed using the methods of; restoration, enhancement, establishment, and in certain circumstances, preservation. In general, the required compensatory mitigation should be located in the same watershed as the impact site and located where it is most likely to successfully replace lost functions and services as the impacted site. However, the use of mitigation banks or in-lieu fee for in-kind replacement is not restricted to the same watershed in which the impact has occurred until such time as mitigation banks or in-lieu projects are developed in each major watershed.

Wetlands. When permittee responsible in-kind replacement mitigation is used, it is to be accomplished at the following ratios until such time an approved functional assessment methodology is established for the state of West Virginia.

Permanent impacts to open water wetlands are to be one (1) acre replaced for one (1) acre impacted.

Permanent impacts to wet meadow/emergent wetlands are to be two (2) acres replaced for one (1) acre impacted.

Permanent impacts to scrub-shrub and forested wetlands are to be three (3) acres replaced for one (1) acre impacted.

In instances where compensatory in-kind mitigation is completed 12 months prior to the impact of the aquatic resource, the replacement ratio may be reduced to as low as one (1) acre created/restored to every one (1) acre impacted.

NOTE: The ratio of created/restored wetlands to impacted wetlands not only ensures no net loss but assures the adequate replacement of the impacted wetlands functions and values at the level existing prior to the impact. For many of the more complicated type wetlands, such as scrub-shrub and forested, the values and functions cannot readily be replaced through creation. Furthermore, not all wetland creation is successful.

In certain instances, the WV DEP DWWM may consider the acquisition of existing wetlands. Acquisition ratios include the following:

Five (5) to one (1) for open water wetlands;

Ten (10) to one (1) for wet meadow/emergent wetlands; and

Fifteen (15) to one (1) for scrub-shrub and forested wetlands.

Under extenuating circumstances, the Secretary may accept lower ratios for high quality wetlands under significant threat of development.

All wetlands acquired, using the acquisition method of mitigation, shall either be deeded to the WVDNR Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee. Third party oversight of the conservation easement by a non-profit conservation organization is preferred.

Streams. When proposing permittee responsible compensatory mitigation, projects shall attempt to replace lost functions for permanent stream impacts. Mitigation shall be determined on a case-by-case basis based on the pre- and post- condition stream quality and complexity of the mitigation project preferably utilizing the most current version of the SWVM worksheets. Compensatory mitigation may require protection through deed restrictions or conservation easements by the permittee or their designee.

These requirements are established in accordance with; Antidegradation Implementation Procedures, W.Va. C.S.R. §60-5-1, et seq. (2008), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-3 (2016), WV Water Pollution Control Act, W.Va. Code §22-11-1, et seq. (2014), Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-6 (2014), and Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 33 C.F.R. §332 (2008).

17. To protect mussel populations in accordance with state and federal requirements, should native freshwater mussels be encountered during the use of any Nationwide Permit, all activity reasonably expected to jeopardize the population is to cease immediately and the WV DNR Wildlife Resources Section, Wildlife Diversity Program is to be contacted (304-637-0245) to determine significance of the mussel population and the action to be taken. This condition is required in accordance with; Rules for Individual State Certification of Activities Requiring a Federal Permit, W.Va. C.S.R. §47-5A-3.1 (2014), Requirements Governing Water Quality Standards, W.Va. C.S.R. §47-2-1, et seq. (2016), Possession of Wildlife, W.Va. Code §20-2-4 (2017) and Fishing Regulations W.Va. C.S.R. §58-60-5.11 (2020).

AGREEMENT FOR CREDIT PURCHASE AND SALE

THIS Agreement (“Agreement”) is entered into as of this ____ day of _____, 20__ (the “Execution Date”) by and between CONFLUENCE MITIGATION PARTNERS, LLC, a Delaware limited liability company (the “Seller”), and the WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, a department of the State of West Virginia (the “Buyer”). Seller and Buyer are collectively referred to as the “Parties” and individually as a “Party.”

RECITALS

- A. WHEREAS, Seller has permitted an approximately 78-acre parcel of real property located in Roane County, West Virginia, known as Sunny Bank Farm Mitigation Site (the “Mitigation Site”), to provide mitigation for impacts to jurisdictional aquatic resources, which have been permitted following the rules promulgated under Section 404 of the Clean Water Act: 33 CFR, Parts 325 – 322 and 40 CFR, Part 230. The Mitigation Site’s U.S. Army Corps Permit Number is LRH-2019-00483-LKR, which designation and permit number assignment is made under Section 404 of the Clean Water Act as part of Seller’s Confluence Stream and Wetland Umbrella Mitigation Bank;
- B. WHEREAS, Buyer operates the West Virginia In Lieu Fee Stream and Wetland Mitigation Program (the “ILF Program”). Buyer is seeking to purchase compensatory mitigation credits using a solicitation process (the “Solicitation”). The Solicitation Number is DEP2400000037 and is intended to cover, in part, its obligations under its ILF Program instrument, as authorized by the United States Army Corps of Engineers Huntington District (the “Corps”) under Section 404 of the Clean Water Act (the “ILF Program Instrument”);
- C. WHEREAS, the Corps has imposed, as a requirement for the ILF Program Instrument, that the Buyer shall provide certain compensatory mitigation to satisfy the conditions of the ILF Program Instrument and offset associated impacts to Corps jurisdictional aquatic resources;
- D. WHEREAS, Buyer seeks to satisfy the conditions of the ILF Program Instrument by purchasing from Seller two thousand seven hundred and sixty-one (2,761) stream credits (the “Credits”);
- E. WHEREAS, Seller intends to provide the Credits from the Mitigation Site to offset impacts to jurisdictional aquatic resources associated with the ILF Program, pursuant to the terms of this Agreement; and
- F. WHEREAS, Buyer has determined that the Credits are suitable to meet Buyer’s needs for the ILF Program, and Buyer wishes to purchase the Credits for the ILF Program from Seller.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants contained in this Agreement, the Seller and Buyer agree as follows:

AGREEMENT

- 1. **Purchase and Sale of the Credits.** Seller hereby agrees to sell and tender to Buyer the Credits referenced in this Agreement and pursuant to the terms set forth herein including the Purchase Price set forth in Paragraph 2, below.
- 2. **Purchase Price.** The total price which Buyer shall pay to Seller for two thousand seven hundred and sixty-one (2,761) stream credits is one million six hundred thirty-one thousand

seven hundred fifty-one dollars (\$1,631,751) (the "Purchase Price").

3. **Terms of Reservation and Purchase.**

- a) Immediately following the execution of this Agreement by both Parties, Seller shall place the Credits in reserve until the purchase is complete or this Agreement is terminated.
- b) All payments made to Seller under this Agreement shall be paid in wired funds by Buyer via wiring instructions attached hereto as **Exhibit A** (the "Wiring Instructions").

4. **Closing.** The closing of the transaction contemplated by this Agreement (the "Closing") shall occur as follows:

- a) Within ten (10) business days after execution of this Agreement, Seller shall convey all right, title and interest in and to the Credits to Buyer (the "Credit Transfer") and send a letter in substantially the same form attached hereto as **Exhibit B** to the Corps project manager and to Buyer (the "Credit Transfer Letter").
- b) Within ten (10) business days of the Credit Transfer, Seller shall provide the DEP ILF with an invoice for the Purchase Price and DEP ILF shall remit Purchase Price payment in accordance with Paragraph 3(b) of this Agreement and the payment procedures of the State of West Virginia, a copy of which are attached hereto as **Exhibit C**. In the event Buyer fails to tender to Seller the Purchase Price within ____ days of the Seller's placement of the Credits in reserve, this Agreement shall terminate in its entirety.

5. **Successors and Assigns.** This Agreement shall be binding and enforceable upon, and inure to the benefit of the Parties and their respective successors and assigns. Neither party may assign this Agreement without the prior written consent of the other Party.

6. **Notices.** Any notice required hereunder by either party to the other shall be given or delivered sufficiently if they are in writing and are delivered personally or dispatched by registered or certified mail, postage pre-paid, addressed or delivered to the parties hereto at the following addresses:

BUYER: West Virginia Department of Environmental
Protection
601 57th Street SE
Charleston, WV 25304

SELLER: Confluence Mitigation Partners, LLC
c/o Adam Riggsbee
3616 Far West Blvd., Suite 117-361
512-970-3062
adam@riverbankconservation.com

7. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which so executed shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.

8. **Partial Invalidity.** Should any part of this Agreement be rendered void, invalid or unenforceable by any court of law for any reason, such a determination shall not render void, invalid or unenforceable any other part of this Agreement, provided, however, that the Parties have

received the full consideration bargained for hereunder, including receipt of the Purchase Price and Credits.

9. **Interpretation.** The paragraph headings are inserted for convenience and reference only and shall be given no legal effect whatsoever. If any time period under this Agreement ends on a legal, federal or State of West Virginia holiday in which national banks are closed, then the time period shall be extended until the next day. Time is of the essence to both Seller and Buyer in the performance of this Agreement, and strict compliance by both Parties is required as to any date set forth or referenced in this Agreement.
10. **Amendments.** This Agreement may not be amended except by written agreement executed by all of the Parties hereto.
11. **Other Agreements.** This Agreement represents the entire Agreement of the Parties with respect to the subject matter hereto. No agreements or representations, unless incorporated in this Agreement, shall be binding upon the Parties.
12. **Relationship.** Seller does not have any ownership interest in Buyer's business relationships or operations and Buyer does not have any interest in Seller's business relationships or operations, nor is any such ownership interest created by this Agreement. The relationship between Seller and Buyer is not in any manner whatsoever a joint venture or partnership and neither party shall be the agent of the other for any purpose, unless specifically granted in writing after the execution of this Agreement. Neither party shall hold itself out as an agent, partner or joint venturer with the other and each party shall defend and indemnify the other against any claim of liability arising out of an asserted agency, partnership, or joint venture by the other party contrary to the express provisions of this Paragraph.
13. **No Rights Acquired.** The Parties acknowledge that, under this Agreement, Buyer is not acquiring, and under no circumstances shall be deemed to have acquired, any interest in the Mitigation Site or in any other parcel or tract of land owned or controlled by Seller or any of its affiliates, subsidiaries, or holding companies. Furthermore, the parties further acknowledge that Buyer is not acquiring any right to use or conduct activities of any kind on the Mitigation Site.
14. **Representations and Warranties.** As of the Execution Date, each Party represents and warrants to the other Party that it has the power and authority to enter into and consummate the transaction contemplated by this Agreement and the other documents to be executed and delivered by it pursuant to this Agreement, and that there is no agreement to which it is a party that is in conflict with this Agreement.
15. **Representations.**
 - a) **Representations of Seller.** Seller represents and warrants to Buyer the following:
 - (i) Seller is the sole owner of the Credits, which are free and clear of all liens, pledges, security interests or other encumbrances other than those imposed by the mitigation banking instrument that governs the Mitigation Site or those that will be released at Closing; and
 - (ii) Seller has duly taken all action necessary to authorize its execution and delivery of this Agreement and to authorize the consummation and performance of the transactions contemplated by this Agreement.
 - (iii) This Agreement, and all other agreements executed in connection with this instrument, are the legal, valid and binding obligations of Seller, enforceable in

accordance with their terms except as such enforcement may be limited by bankruptcy, insolvency or similar laws of general application relating to the enforcement of creditors' rights.

b) **Representations of Buyer.** Buyer represents and warrants to Seller the following:

(i) Buyer has duly taken all actions necessary to authorize its execution and delivery of this Agreement and to authorize the consummation and performance of the transactions contemplated by this Agreement; and

(ii) This Agreement, and all other agreements executed in connection with this instrument, are the legal, valid and binding obligations of Buyer, enforceable in accordance with their terms except as such enforcement may be limited by bankruptcy, insolvency or similar laws of general application relating to the enforcement of creditors' rights.

16. **Governing Law.** This Agreement shall be governed by the laws of the State of West Virginia, without giving effect to principles of conflicts of law. Venue for any action between the Parties relating to this Agreement shall be in Kanawha County, West Virginia.
17. **Waiver of Jury Trial.** The parties hereby waive their rights to a trial by jury in any action arising out of or related to this Agreement after having had the opportunity to consult with an attorney.
18. **SELLER DISCLAIMERS.** EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES IN THIS AGREEMENT WHICH SHALL SURVIVE CLOSING, SELLER FOR ITSELF, ITS SUCCESSORS, ASSIGNS, AFFILIATES, SUBSIDIARIES, PARENT COMPANIES, ANY PERSON WHO HOLDS A DIRECT OR INDIRECT OWNERSHIP INTEREST IN SELLER OR ANY OF THE FOREGOING AND THEIR RESPECTIVE PARTNERS, SHAREHOLDERS, MEMBERS, BENEFICIARIES, INVESTORS, OFFICERS, DIRECTORS, TRUSTEES, AGENTS AND EMPLOYEES OF EACH SUCH PARTY OR ANY PARTY WHO HOLDS A DIRECT OR INDIRECT OWNERSHIP INTEREST IN ANY SUCH PARTY (COLLECTIVELY, THE "RELEASED PARTIES") SPECIFICALLY DISCLAIMS AND BUYER RELEASES AND WAIVES ANY CLAIMS RELATING TO ANY AND ALL WARRANTIES OR REPRESENTATIONS OF ANY KIND OR CHARACTER, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE (INCLUDING WARRANTIES FOR THE PURPOSE INTENDED BY BUYER) WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT, THE CREDITS, ANY MITIGATION, OR ANY MATTERS RELATING TO THE FOREGOING, INCLUDING, WITHOUT LIMITATION, THAT (A) THE CREDITS WILL BE ADEQUATE TO OFFSET ANY IMPACTS OR OTHERWISE SERVE THE PROJECT OR (B) BUYER WILL BE SUCCESSFUL IN OBTAINING THE CORPS' APPROVAL FOR THE USE OF THE CREDITS OR ANY OTHER APPLICATION OR APPROVAL RELATING TO THE ILF PROGRAM. BUYER ACKNOWLEDGES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES MADE BY SELLER IN THIS AGREEMENT, BUYER HAS NOT RELIED UPON AND WILL NOT RELY UPON, EITHER DIRECTLY OR INDIRECTLY, ANY STATEMENT OF SELLER, ANY RELEASED PARTY OR ANY OFFICER, SHAREHOLDER, DIRECTOR, TRUSTEE, AGENT, EMPLOYEE OR OTHER PERSON ACTING OR PURPORTING TO ACT ON BEHALF OF SELLER OR ANY RELEASED PARTY.
19. **Limitation of Damages and Waiver of Special Damages.** If Buyer is not in default under this Agreement and Seller does not convey all of the Credits required by this Agreement because Seller conveyed the Credits to a third-party in violation of this Agreement or Seller has the Credits to convey to Buyer, but Seller refuses to convey all of the Credits to Buyer required by this Agreement, then Buyer may recover its actual damages in securing alternative mitigation for its Project that would have been supplied by the missing Credits. In all other events, Seller's liability to Buyer arising under this Agreement shall not exceed one hundred and ten percent

(110%) of such sums as Buyer has then paid to Seller under this Agreement. To the extent not prohibited by applicable law, the Parties shall not assert, and hereby waive, any claim against any other party for special, indirect, consequential, exemplary, or punitive damages arising from or related in any manner to this Agreement. Seller's obligations under this Agreement shall be extended as necessary to account for any event or circumstance which is beyond the reasonable control of, without the fault or negligence of, and should not, in the exercise of reasonable caution, have been foreseen and avoided or mitigated by, Seller, and which delays or prevents Seller from timely performing any obligation hereunder, including: (i) acts of God, earthquakes, fire, weather, drought, (ii) orders, actions, or inactions of any federal, state, or local governmental authority, court, agency, subdivision, or quasi-governmental authority; (iii) any change in local, state, or federal law, rule, regulation, or statute. However, the foregoing shall not include any actions or circumstances with the reasonable control of Seller.

20. **Confidentiality.** To the extent allowed under applicable law, including without limitation open records laws of the State of West Virginia the parties and their agents, employees and representatives shall maintain as confidential the terms of this Agreement. If Buyer is required by law, order or decree to disclose the this actual Agreement, or the existence or any terms set forth herein, Buyer shall take all required measures to protect all business terms and/or trade secrets, including without limitation price and economic data by redaction or other means prior to any disclosure. Nothing herein is intended to limit or prohibit the disclosure of this Agreement to the Corps or any governmental authority having appropriate jurisdiction without prior consent. "Permitted Disclosures" means disclosures (a) to a party's employees, current and prospective investors and lenders, consultants, accountants, attorneys, officers; (b) as required by law, including any such disclosure required by any federal, state or local governmental agency or court of competent jurisdiction or by securities laws; (c) which is reasonably necessary to protect any such party's interest in any action, suit or proceeding brought by or against such party, (d) in connection with the approval of the Corps Permit or issuance of the Credit Transfer Letter, or (e) to any prospective purchaser of any of the Mitigation Site or all or substantially all of the then remaining credits available from the Mitigation Site.
21. **LIABILITY FOR COMPENSATORY MITIGATION:** In consideration for receiving the Purchase Price, Seller shall assume all liability for providing compensatory mitigation relative to the Permit referenced herein.

[signature page to follow]

IN WITNESS WHEREOF, the Parties execute this Agreement as of the Execution Date.

SELLER:

CONFLUENCE MITIGATION PARTNERS, LLC

By: _____

J. Adam Riggsbee
Member-Manager, Confluence Mitigation Partners, LLC

BUYER:

By: _____

(Name)

(Title), West Virginia Department of Environmental Protection

EXHIBIT A
WIRING INSTRUCTIONS

Bank Name:

Bank of America

Routing Number:

To Be Updated Prior to Agreement Execution

Address:

607 West 3rd Street
Suite 2760
Austin, TX 78701

Telephone Bank:

512-397-2535

Account / Beneficiary Name:

Confluence Mitigation Partners, LLC

Account Number:

To Be Updated Prior to Agreement Execution

Beneficiary Address:

3616 Far West Blvd Ste 117-361
Austin, TX 78731

Telephone:

512-970-3062

EXHIBIT B
CREDIT TRANSFER LETTER

XX June, 2024

[CORPS PM NAME]
U.S. Army Corps of Engineers
Huntington District,
Regulatory Branch
502 8th Street
Huntington, WV 25701

**RE: NOTIFICATION OF STREAM CREDIT TRANSFER FROM SUNNY BANK TO WEST VIRGINIA
DEP ILF**

Dear [Mr./Ms. LAST NAME]:

Per our Confluence Umbrella Stream & Wetland Mitigation Bank Instrument, we are reporting the above referenced transaction from our Sunny Bank Farm Mitigation Site (LRH-2019-00483-LKR). This letter serves as a notice that a transaction was concluded on [DATE] to cover a portion of the West Virginia DEP ILF's mitigation requirements under [PERMIT NUMBER]. The Sunny Bank RIBITS Ledger will be debited appropriately within 30 days from the date of this transaction.

The number of credits purchased by the Buyer was:

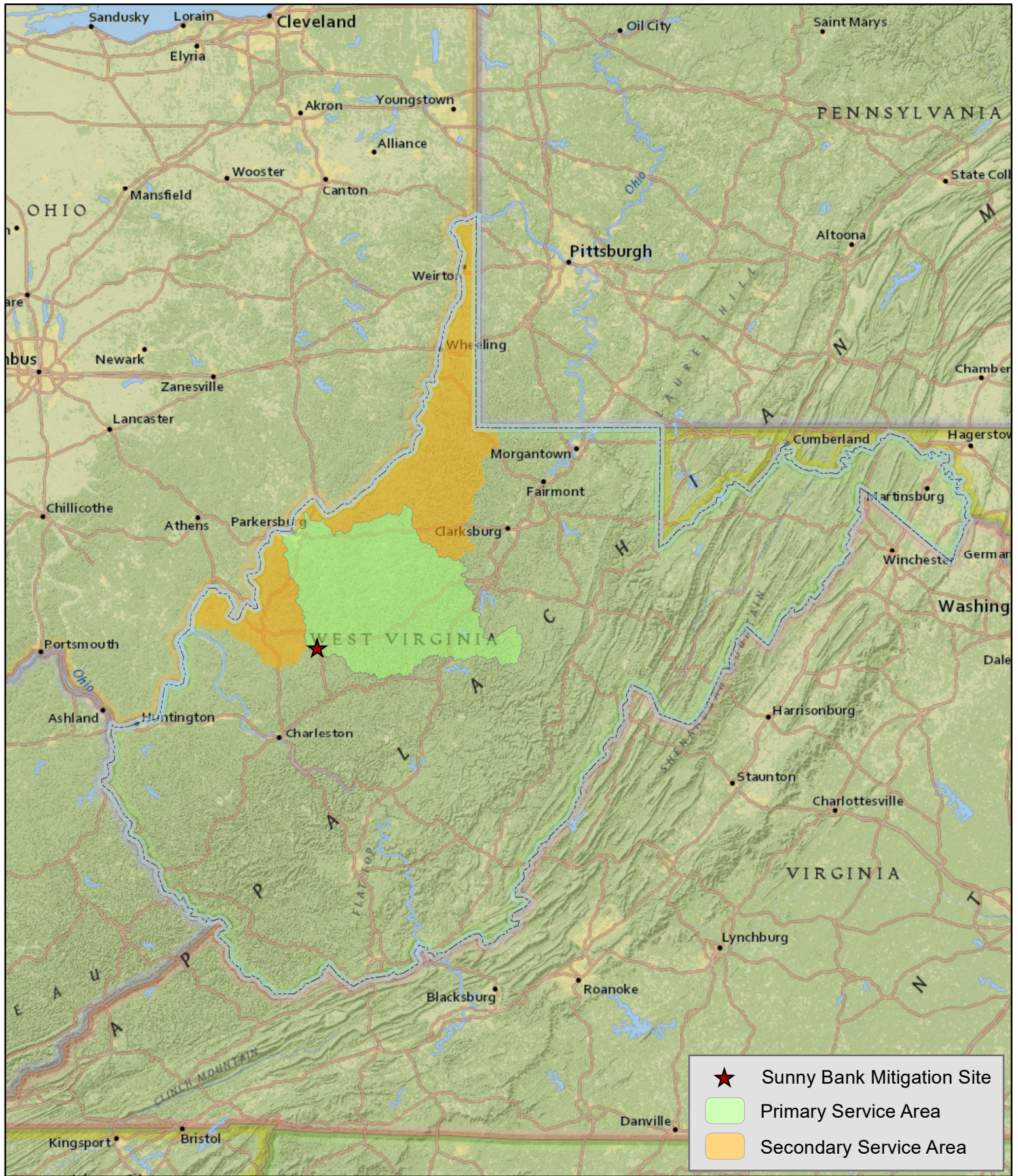
- 2,761 Stream Credits to be debited from the following portions of Sunny Bank:
 - [NUMBER]Preservation Credits from Middle Lick Fork
 - [NUMBER]Restoration / Enhancement Credits from Middle Lick Fork
 - [NUMBER]Preservation Credits from North West Lick Fork
 - [NUMBER]Restoration / Enhancement Credits from North West Lick Fork
 - [NUMBER]Preservation Credits from North East Lick Fork
 - [NUMBER]Restoration / Enhancement Credits from North East Lick Fork
 - [NUMBER]Preservation Credits from Lower Lick Fork
 - [NUMBER]Restoration / Enhancement Credits from Lower Lick Fork

Sincerely,

J. Adam Riggsbee
Member-Manager
Confluence Mitigation Partners, LLC

CC: [CUSTOMER POC NAME AND TITLE]

EXHIBIT C
PAYMENT PROCESSES





Department of Administration
Purchasing Division
2019 Washington Street East
Post Office Box 50130
Charleston, WV 25305-0130

State of West Virginia
Centralized Request for Quote
Service - Prof

Proc Folder: 1412853			Reason for Modification:
Doc Description: Mitigation Credits			
Proc Type: Central Master Agreement			
Date Issued	Solicitation Closes	Solicitation No	Version
2024-05-02	2024-05-16 13:30	CRFQ 0313 DEP2400000037	1

BID RECEIVING LOCATION

BID CLERK
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION
2019 WASHINGTON ST E
CHARLESTON WV 25305
US

VENDOR

Vendor Customer Code:

Vendor Name : Confluence Mitigation Partners, LLC

Address : 3616

Street : Far West Blvd., Suite 117-361

City : Austin

State : Texas **Country :** USA **Zip :** 78731

Principal Contact : J. Adam Riggsbee

Vendor Contact Phone: 512.970.3062 **Extension:**

FOR INFORMATION CONTACT THE BUYER

Joseph E Hager III
(304) 558-2306
joseph.e.hageriii@wv.gov

Vendor Signature X *J. Adam Riggsbee* **FEIN#** 84-4590417 **DATE** May 15, 2024

All offers subject to all terms and conditions contained in this solicitation

ADDITIONAL INFORMATION
The West Virginia Purchasing Division is soliciting bids on behalf of the Department of Environmental Protection to establish an open-end contract for the purchase of released mitigation credits from U.S. Army Corps of Engineers approved mitigation bank(s) in various secondary service areas (SSAs) of the State per the attached specifications and terms and conditions.

INVOICE TO	SHIP TO
ENVIRONMENTAL PROTECTION DIV OF WASTE AND WATER MGT 601 57TH ST SE CHARLESTON WV US	ENVIRONMENTAL PROTECTION DIVISION OF WATER AND WASTE MGT 601 57TH ST SE CHARLESTON WV US

Line	Comm Ln Desc	Qty	Unit Issue	Unit Price	Total Price
1	Stream Credits Per the Attached Exhibit A Pricing Page	1.00000	EA		

Comm Code	Manufacturer	Specification	Model #
94131501			

Extended Description:
Mitigation Credits / DWWM as outlined on the attached specifications

SCHEDULE OF EVENTS		
<u>Line</u>	<u>Event</u>	<u>Event Date</u>

INSTRUCTIONS TO VENDORS SUBMITTING BIDS

1. REVIEW DOCUMENTS THOROUGHLY: The attached documents contain a solicitation for bids. Please read these instructions and all documents attached in their entirety. These instructions provide critical information about requirements that if overlooked could lead to disqualification of a Vendor's bid. All bids must be submitted in accordance with the provisions contained in these instructions and the Solicitation. Failure to do so may result in disqualification of Vendor's bid.

2. MANDATORY TERMS: The Solicitation may contain mandatory provisions identified by the use of the words "must," "will," and "shall." Failure to comply with a mandatory term in the Solicitation will result in bid disqualification.

3. PREBID MEETING: The item identified below shall apply to this Solicitation.

☐ A pre-bid meeting will not be held prior to bid opening

☐ A **MANDATORY PRE-BID** meeting will be held at the following place and time:

All Vendors submitting a bid must attend the mandatory pre-bid meeting. Failure to attend the mandatory pre-bid meeting shall result in disqualification of the Vendor's bid. No one individual is permitted to represent more than one vendor at the pre-bid meeting. Any individual that does attempt to represent two or more vendors will be required to select one vendor to which the individual's attendance will be attributed. The vendors not selected will be deemed to have not attended the pre-bid meeting unless another individual attended on their behalf.

An attendance sheet provided at the pre-bid meeting shall serve as the official document verifying attendance. Any person attending the pre-bid meeting on behalf of a Vendor must list on the attendance sheet his or her name and the name of the Vendor he or she is representing.

Additionally, the person attending the pre-bid meeting should include the Vendor's E-Mail address, phone number, and Fax number on the attendance sheet. It is the Vendor's responsibility to locate the attendance sheet and provide the required information. Failure to complete the attendance sheet as required may result in disqualification of Vendor's bid.

All Vendors should arrive prior to the starting time for the pre-bid. Vendors who arrive after the starting time but prior to the end of the pre-bid will be permitted to sign in but are charged with knowing all matters discussed at the pre-bid.

Questions submitted at least five business days prior to a scheduled pre-bid will be discussed at the pre-bid meeting if possible. Any discussions or answers to questions at the pre-bid meeting are preliminary in nature and are non-binding. Official and binding answers to questions will be published in a written addendum to the Solicitation prior to bid opening.

4. VENDOR QUESTION DEADLINE: Vendors may submit questions relating to this Solicitation to the Purchasing Division. Questions must be submitted in writing. All questions must be submitted on or before the date listed below and to the address listed below to be considered. A written response will be published in a Solicitation addendum if a response is possible and appropriate. Non-written discussions, conversations, or questions and answers regarding this Solicitation are preliminary in nature and are nonbinding.

Submitted emails should have the solicitation number in the subject line.

Question Submission Deadline:

Submit Questions to:
2019 Washington Street, East
Charleston, WV 25305
Fax: (304) 558-3970
Email:

5. VERBAL COMMUNICATION: Any verbal communication between the Vendor and any State personnel is not binding, including verbal communication at the mandatory pre-bid conference. Only information issued in writing and added to the Solicitation by an official written addendum by the Purchasing Division is binding.

6. BID SUBMISSION: All bids must be submitted on or before the date and time of the bid opening listed in section 7 below. Vendors can submit bids electronically through *wvOASIS*, in paper form delivered to the Purchasing Division at the address listed below either in person or by courier, or in facsimile form by faxing to the Purchasing Division at the number listed below. Notwithstanding the foregoing, the Purchasing Division may prohibit the submission of bids electronically through *wvOASIS* at its sole discretion. Such a prohibition will be contained and communicated in the *wvOASIS* system resulting in the Vendor's inability to submit bids through *wvOASIS*. The Purchasing Division will not accept bids, modification of bids, or addendum acknowledgment forms via email. Bids submitted in paper or facsimile form must contain a signature. Bids submitted in *wvOASIS* are deemed to be electronically signed.

Any bid received by the Purchasing Division staff is considered to be in the possession of the Purchasing Division and will not be returned for any reason.

For Request for Proposal ("RFP") Responses Only: Submission of a response to a Request for Proposal is not permitted in *wvOASIS*. In the event that Vendor is responding to a request for proposal, the Vendor shall submit one original technical and one original cost proposal prior to the bid opening date and time identified in Section 7 below, plus _____convenience copies of each to the Purchasing Division at the address shown below. Additionally, the Vendor should clearly identify and segregate the cost proposal from the technical proposal in a separately sealed envelope.

Bid Delivery Address and Fax Number:

Department of Administration, Purchasing Division
2019 Washington Street East
Charleston, WV 25305-0130
Fax: 304-558-3970

A bid submitted in paper or facsimile form should contain the information listed below on the face of the submission envelope or fax cover sheet. Otherwise, the bid may be rejected by the Purchasing Division.

VENDOR NAME:

BUYER:

SOLICITATION NO.:

BID OPENING DATE:

BID OPENING TIME:

FAX NUMBER:

7. BID OPENING: Bids submitted in response to this Solicitation will be opened at the location identified below on the date and time listed below. Delivery of a bid after the bid opening date and time will result in bid disqualification. For purposes of this Solicitation, a bid is considered delivered when confirmation of delivery is provided by wvOASIS (in the case of electronic submission) or when the bid is time stamped by the official Purchasing Division time clock (in the case of hand delivery).

Bid Opening Date and Time:

Bid Opening Location: Department of Administration, Purchasing Division
2019 Washington Street East
Charleston, WV 25305-0130

8. ADDENDUM ACKNOWLEDGEMENT: Changes or revisions to this Solicitation will be made by an official written addendum issued by the Purchasing Division. Vendor should acknowledge receipt of all addenda issued with this Solicitation by completing an Addendum Acknowledgment Form, a copy of which is included herewith. Failure to acknowledge addenda may result in bid disqualification. The addendum acknowledgement should be submitted with the bid to expedite document processing.

9. BID FORMATTING: Vendor should type or electronically enter the information onto its bid to prevent errors in the evaluation. Failure to type or electronically enter the information may result in bid disqualification.

10. ALTERNATE MODEL OR BRAND: Unless the box below is checked, any model, brand, or specification listed in this Solicitation establishes the acceptable level of quality only and is not intended to reflect a preference for, or in any way favor, a particular brand or vendor. Vendors may bid alternates to a listed model or brand provided that the alternate is at least equal to the model or brand and complies with the required specifications. The equality of any alternate being bid shall be determined by the State at its sole discretion. Any Vendor bidding an alternate model or brand should clearly identify the alternate items in its bid and should include manufacturer's specifications, industry literature, and/or any other relevant documentation demonstrating the equality of the alternate items. Failure to provide information for alternate items may be grounds for rejection of a Vendor's bid.

[] This Solicitation is based upon a standardized commodity established under W. Va. Code § 5A-3-61. Vendors are expected to bid the standardized commodity identified. Failure to bid the standardized commodity will result in your firm's bid being rejected.

11. EXCEPTIONS AND CLARIFICATIONS: The Solicitation contains the specifications that shall form the basis of a contractual agreement. Vendor shall clearly mark any exceptions, clarifications, or other proposed modifications in its bid. Exceptions to, clarifications of, or modifications of a requirement or term and condition of the Solicitation may result in bid disqualification.

12. COMMUNICATION LIMITATIONS: In accordance with West Virginia Code of State Rules §148-1-6.6, communication with the State of West Virginia or any of its employees regarding this Solicitation during the solicitation, bid, evaluation or award periods, except through the Purchasing Division, is strictly prohibited without prior Purchasing Division approval. Purchasing Division approval for such communication is implied for all agency delegated and exempt purchases.

13. REGISTRATION: Prior to Contract award, the apparent successful Vendor must be properly registered with the West Virginia Purchasing Division and must have paid the \$125 fee, if applicable.

14. UNIT PRICE: Unit prices shall prevail in cases of a discrepancy in the Vendor's bid.

15. PREFERENCE: Vendor Preference may be requested in purchases of motor vehicles or construction and maintenance equipment and machinery used in highway and other infrastructure projects. Any request for preference must be submitted in writing with the bid, must specifically identify the preference requested with reference to the applicable subsection of West Virginia Code § 5A-3-37, and must include with the bid any information necessary to evaluate and confirm the applicability of the requested preference. A request form to help facilitate the request can be found at: www.state.wv.us/admin/purchase/vrc/Venpref.pdf.

15A. RECIPROCAL PREFERENCE: The State of West Virginia applies a reciprocal preference to all solicitations for commodities and printing in accordance with W. Va. Code § 5A-3-37(b). In effect, non-resident vendors receiving a preference in their home states, will see that same preference granted to West Virginia resident vendors bidding against them in West Virginia. Any request for reciprocal preference must include with the bid any information necessary to evaluate and confirm the applicability of the preference. A request form to help facilitate the request can be found at: www.state.wv.us/admin/purchase/vrc/Venpref.pdf.

16. SMALL, WOMEN-OWNED, OR MINORITY-OWNED BUSINESSES: For any solicitations publicly advertised for bid, in accordance with West Virginia Code §5A-3-37 and W. Va. CSR § 148-22-9, any non-resident vendor certified as a small, women- owned, or minority-owned business under W. Va. CSR § 148-22-9 shall be provided the same preference made available to any resident vendor. Any non-resident small, women-owned, or minority-owned business must identify itself as such in writing, must submit that writing to the Purchasing Division with its bid, and must be properly certified under W. Va. CSR § 148-22-9 prior to contract award to receive the preferences made available to resident vendors. Preference for a non-resident small, women-owned, or minority owned business shall be applied in accordance with W. Va. CSR § 148-22-9.

17. WAIVER OF MINOR IRREGULARITIES: The Director reserves the right to waive minor irregularities in bids or specifications in accordance with West Virginia Code of State Rules § 148-1-4.6.

18. ELECTRONIC FILE ACCESS RESTRICTIONS: Vendor must ensure that its submission in wvOASIS can be accessed and viewed by the Purchasing Division staff immediately upon bid opening. The Purchasing Division will consider any file that cannot be immediately accessed and viewed at the time of the bid opening (such as, encrypted files, password protected files, or incompatible files) to be blank or incomplete as context requires and are therefore unacceptable. A vendor will not be permitted to unencrypt files, remove password protections, or resubmit documents after bid opening to make a file viewable if those documents are required with the bid. A Vendor may be required to provide document passwords or remove access restrictions to allow the Purchasing Division to print or electronically save documents provided that those documents are viewable by the Purchasing Division prior to obtaining the password or removing the access restriction.

19. NON-RESPONSIBLE: The Purchasing Division Director reserves the right to reject the bid of any vendor as Non-Responsible in accordance with W. Va. Code of State Rules § 148-1-5.3, when the Director determines that the vendor submitting the bid does not have the capability to fully perform or lacks the integrity and reliability to assure good-faith performance.”

20. ACCEPTANCE/REJECTION: The State may accept or reject any bid in whole, or in part in accordance with W. Va. Code of State Rules § 148-1-4.5. and § 148-1-6.4.b.”

21. YOUR SUBMISSION IS A PUBLIC DOCUMENT: Vendor's entire response to the Solicitation and the resulting Contract are public documents. As public documents, they will be disclosed to the public following the bid/proposal opening or award of the contract, as required by the competitive bidding laws of West Virginia Code §§ 5A-3-1 et seq., 5-22-1 et seq., and 5G-1-1 et seq. and the Freedom of Information Act West Virginia Code §§ 29B-1-1 et seq.

DO NOT SUBMIT MATERIAL YOU CONSIDER TO BE CONFIDENTIAL, A TRADE SECRET, OR OTHERWISE NOT SUBJECT TO PUBLIC DISCLOSURE.

Submission of any bid, proposal, or other document to the Purchasing Division constitutes your explicit consent to the subsequent public disclosure of the bid, proposal, or document. The Purchasing Division will disclose any document labeled "confidential," "proprietary," "trade secret," "private," or labeled with any other claim against public disclosure of the documents, to include any "trade secrets" as defined by West Virginia Code § 47-22-1 et seq. All submissions are subject to public disclosure without notice.

22. WITH THE BID REQUIREMENTS: In instances where these specifications require documentation or other information with the bid, and a vendor fails to provide it with the bid, the Director of the Purchasing Division reserves the right to request those items after bid opening and prior to contract award pursuant to the authority to waive minor irregularities in bids or specifications under W. Va. CSR § 148-1-4.6. This authority does not apply to instances where state law mandates receipt with the bid.

23. EMAIL NOTIFICATION OF AWARD: The Purchasing Division will attempt to provide bidders with e-mail notification of contract award when a solicitation that the bidder participated in has been awarded. For notification purposes, bidders must provide the Purchasing Division with a valid email address in the bid response. Bidders may also monitor WV OASIS or the Purchasing Division's website to determine when a contract has been awarded.

24. ISRAEL BOYCOTT CERTIFICATION: Vendor's act of submitting a bid in response to this solicitation shall be deemed a certification from bidder to the State that bidder is not currently engaged in, and will not for the duration of the contract, engage in a boycott of Israel. This certification is required by W. Va. Code § 5A-3-63.

GENERAL TERMS AND CONDITIONS:

1. CONTRACTUAL AGREEMENT: Issuance of an Award Document signed by the Purchasing Division Director, or his designee, and approved as to form by the Attorney General's office constitutes acceptance by the State of this Contract made by and between the State of West Virginia and the Vendor. Vendor's signature on its bid, or on the Contract if the Contract is not the result of a bid solicitation, signifies Vendor's agreement to be bound by and accept the terms and conditions contained in this Contract.

2. DEFINITIONS: As used in this Solicitation/Contract, the following terms shall have the meanings attributed to them below. Additional definitions may be found in the specifications included with this Solicitation/Contract.

2.1. "Agency" or "Agencies" means the agency, board, commission, or other entity of the State of West Virginia that is identified on the first page of the Solicitation or any other public entity seeking to procure goods or services under this Contract.

2.2. "Bid" or "Proposal" means the vendors submitted response to this solicitation.

2.3. "Contract" means the binding agreement that is entered into between the State and the Vendor to provide the goods or services requested in the Solicitation.

2.4. "Director" means the Director of the West Virginia Department of Administration, Purchasing Division.

2.5. "Purchasing Division" means the West Virginia Department of Administration, Purchasing Division.

2.6. "Award Document" means the document signed by the Agency and the Purchasing Division, and approved as to form by the Attorney General, that identifies the Vendor as the contract holder.

2.7. "Solicitation" means the official notice of an opportunity to supply the State with goods or services that is published by the Purchasing Division.

2.8. "State" means the State of West Virginia and/or any of its agencies, commissions, boards, etc. as context requires.

2.9. "Vendor" or "Vendors" means any entity submitting a bid in response to the Solicitation, the entity that has been selected as the lowest responsible bidder, or the entity that has been awarded the Contract as context requires.

3. CONTRACT TERM; RENEWAL; EXTENSION: The term of this Contract shall be determined in accordance with the category that has been identified as applicable to this Contract below:

☐ **Term Contract**

Initial Contract Term: The Initial Contract Term will be for a period of _____. The Initial Contract Term becomes effective on the effective start date listed on the first page of this Contract, identified as the State of West Virginia contract cover page containing the signatures of the Purchasing Division, Attorney General, and Encumbrance clerk (or another page identified as _____), and the Initial Contract Term ends on the effective end date also shown on the first page of this Contract.

Renewal Term: This Contract may be renewed upon the mutual written consent of the Agency, and the Vendor, with approval of the Purchasing Division and the Attorney General's office (Attorney General approval is as to form only). Any request for renewal should be delivered to the Agency and then submitted to the Purchasing Division thirty (30) days prior to the expiration date of the initial contract term or appropriate renewal term. A Contract renewal shall be in accordance with the terms and conditions of the original contract. Unless otherwise specified below, renewal of this Contract is limited to _____ successive one (1) year periods or multiple renewal periods of less than one year, provided that the multiple renewal periods do not exceed the total number of months available in all renewal years combined. Automatic renewal of this Contract is prohibited. Renewals must be approved by the Vendor, Agency, Purchasing Division and Attorney General's office (Attorney General approval is as to form only)

☐ **Alternate Renewal Term** – This contract may be renewed for _____ successive _____ year periods or shorter periods provided that they do not exceed the total number of months contained in all available renewals. Automatic renewal of this Contract is prohibited. Renewals must be approved by the Vendor, Agency, Purchasing Division and Attorney General's office (Attorney General approval is as to form only)

Delivery Order Limitations: In the event that this contract permits delivery orders, a delivery order may only be issued during the time this Contract is in effect. Any delivery order issued within one year of the expiration of this Contract shall be effective for one year from the date the delivery order is issued. No delivery order may be extended beyond one year after this Contract has expired.

☐ **Fixed Period Contract:** This Contract becomes effective upon Vendor's receipt of the notice to proceed and must be completed within _____ days.

☐ **Fixed Period Contract with Renewals:** This Contract becomes effective upon Vendor's receipt of the notice to proceed and part of the Contract more fully described in the attached specifications must be completed within _____ days. Upon completion of the work covered by the preceding sentence, the vendor agrees that:

☐ the contract will continue for _____ years;

☐ the contract may be renewed for _____ successive _____ year periods or shorter periods provided that they do not exceed the total number of months contained in all available renewals. Automatic renewal of this Contract is prohibited. Renewals must be approved by the Vendor, Agency, Purchasing Division and Attorney General's Office (Attorney General approval is as to form only).

☐ **One-Time Purchase:** The term of this Contract shall run from the issuance of the Award Document until all of the goods contracted for have been delivered, but in no event will this Contract extend for more than one fiscal year.

☐ **Construction/Project Oversight:** This Contract becomes effective on the effective start date listed on the first page of this Contract, identified as the State of West Virginia contract cover page containing the signatures of the Purchasing Division, Attorney General, and Encumbrance clerk (or another page identified as _____), and continues until the project for which the vendor is providing oversight is complete.

☐ **Other:** Contract Term specified in _____

4. AUTHORITY TO PROCEED: Vendor is authorized to begin performance of this contract on the date of encumbrance listed on the front page of the Award Document unless either the box for "Fixed Period Contract" or "Fixed Period Contract with Renewals" has been checked in Section 3 above. If either "Fixed Period Contract" or "Fixed Period Contract with Renewals" has been checked, Vendor must not begin work until it receives a separate notice to proceed from the State. The notice to proceed will then be incorporated into the Contract via change order to memorialize the official date that work commenced.

5. QUANTITIES: The quantities required under this Contract shall be determined in accordance with the category that has been identified as applicable to this Contract below.

☐ **Open End Contract:** Quantities listed in this Solicitation/Award Document are approximations only, based on estimates supplied by the Agency. It is understood and agreed that the Contract shall cover the quantities actually ordered for delivery during the term of the Contract, whether more or less than the quantities shown.

☐ **Service:** The scope of the service to be provided will be more clearly defined in the specifications included herewith.

☐ **Combined Service and Goods:** The scope of the service and deliverable goods to be provided will be more clearly defined in the specifications included herewith.

☐ **One-Time Purchase:** This Contract is for the purchase of a set quantity of goods that are identified in the specifications included herewith. Once those items have been delivered, no additional goods may be procured under this Contract without an appropriate change order approved by the Vendor, Agency, Purchasing Division, and Attorney General's office.

☐ **Construction:** This Contract is for construction activity more fully defined in the specifications.

6. EMERGENCY PURCHASES: The Purchasing Division Director may authorize the Agency to purchase goods or services in the open market that Vendor would otherwise provide under this Contract if those goods or services are for immediate or expedited delivery in an emergency. Emergencies shall include, but are not limited to, delays in transportation or an unanticipated increase in the volume of work. An emergency purchase in the open market, approved by the Purchasing Division Director, shall not constitute a breach of this Contract and shall not entitle the Vendor to any form of compensation or damages. This provision does not excuse the State from fulfilling its obligations under a One-Time Purchase contract.

7. REQUIRED DOCUMENTS: All of the items checked in this section must be provided to the Purchasing Division by the Vendor as specified:

☐ **LICENSE(S) / CERTIFICATIONS / PERMITS:** In addition to anything required under the Section of the General Terms and Conditions entitled Licensing, the apparent successful Vendor shall furnish proof of the following licenses, certifications, and/or permits upon request and in a form acceptable to the State. The request may be prior to or after contract award at the State's sole discretion.

☐

☐

☐

☐

The apparent successful Vendor shall also furnish proof of any additional licenses or certifications contained in the specifications regardless of whether or not that requirement is listed above.

8. INSURANCE: The apparent successful Vendor shall furnish proof of the insurance identified by a checkmark below prior to Contract award. The insurance coverages identified below must be maintained throughout the life of this contract. Thirty (30) days prior to the expiration of the insurance policies, Vendor shall provide the Agency with proof that the insurance mandated herein has been continued. Vendor must also provide Agency with immediate notice of any changes in its insurance policies, including but not limited to, policy cancelation, policy reduction, or change in insurers. The apparent successful Vendor shall also furnish proof of any additional insurance requirements contained in the specifications prior to Contract award regardless of whether that insurance requirement is listed in this section.

Vendor must maintain:

☐ **Commercial General Liability Insurance** in at least an amount of: _____ per occurrence.

☐ **Automobile Liability Insurance** in at least an amount of: _____ per occurrence.

☐ **Professional/Malpractice/Errors and Omission Insurance** in at least an amount of: _____ per occurrence. Notwithstanding the forgoing, Vendor's are not required to list the State as an additional insured for this type of policy.

☐ **Commercial Crime and Third Party Fidelity Insurance** in an amount of: _____ per occurrence.

☐ **Cyber Liability Insurance** in an amount of: _____ per occurrence.

☐ **Builders Risk Insurance** in an amount equal to 100% of the amount of the Contract.

☐ **Pollution Insurance** in an amount of: _____ per occurrence.

☐ **Aircraft Liability** in an amount of: _____ per occurrence.

☐

☐

☐

☐

9. WORKERS' COMPENSATION INSURANCE: Vendor shall comply with laws relating to workers compensation, shall maintain workers' compensation insurance when required, and shall furnish proof of workers' compensation insurance upon request.

10. VENUE: All legal actions for damages brought by Vendor against the State shall be brought in the West Virginia Claims Commission. Other causes of action must be brought in the West Virginia court authorized by statute to exercise jurisdiction over it.

11. LIQUIDATED DAMAGES: This clause shall in no way be considered exclusive and shall not limit the State or Agency's right to pursue any other available remedy. Vendor shall pay liquidated damages in the amount specified below or as described in the specifications:

☐ _____ for _____.

☐ Liquidated Damages Contained in the Specifications.

☐ Liquidated Damages Are Not Included in this Contract.

12. ACCEPTANCE: Vendor's signature on its bid, or on the certification and signature page, constitutes an offer to the State that cannot be unilaterally withdrawn, signifies that the product or service proposed by vendor meets the mandatory requirements contained in the Solicitation for that product or service, unless otherwise indicated, and signifies acceptance of the terms and conditions contained in the Solicitation unless otherwise indicated.

13. PRICING: The pricing set forth herein is firm for the life of the Contract, unless specified elsewhere within this Solicitation/Contract by the State. A Vendor's inclusion of price adjustment provisions in its bid, without an express authorization from the State in the Solicitation to do so, may result in bid disqualification. Notwithstanding the foregoing, Vendor must extend any publicly advertised sale price to the State and invoice at the lower of the contract price or the publicly advertised sale price.

14. PAYMENT IN ARREARS: Payments for goods/services will be made in arrears only upon receipt of a proper invoice, detailing the goods/services provided or receipt of the goods/services, whichever is later. Notwithstanding the foregoing, payments for software maintenance, licenses, or subscriptions may be paid annually in advance.

15. PAYMENT METHODS: Vendor must accept payment by electronic funds transfer and P-Card. (The State of West Virginia's Purchasing Card program, administered under contract by a banking institution, processes payment for goods and services through state designated credit cards.)

16. TAXES: The Vendor shall pay any applicable sales, use, personal property or any other taxes arising out of this Contract and the transactions contemplated thereby. The State of West Virginia is exempt from federal and state taxes and will not pay or reimburse such taxes.

17. ADDITIONAL FEES: Vendor is not permitted to charge additional fees or assess additional charges that were not either expressly provided for in the solicitation published by the State of West Virginia, included in the Contract, or included in the unit price or lump sum bid amount that Vendor is required by the solicitation to provide. Including such fees or charges as notes to the solicitation may result in rejection of vendor's bid. Requesting such fees or charges be paid after the contract has been awarded may result in cancellation of the contract.

18. FUNDING: This Contract shall continue for the term stated herein, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise made available, this Contract becomes void and of no effect beginning on July 1 of the fiscal year for which funding has not been appropriated or otherwise made available. If that occurs, the State may notify the Vendor that an alternative source of funding has been obtained and thereby avoid the automatic termination. Non-appropriation or non-funding shall not be considered an event of default.

19. CANCELLATION: The Purchasing Division Director reserves the right to cancel this Contract immediately upon written notice to the vendor if the materials or workmanship supplied do not conform to the specifications contained in the Contract. The Purchasing Division Director may also cancel any purchase or Contract upon 30 days written notice to the Vendor in accordance with West Virginia Code of State Rules § 148-1-5.2.b.

20. TIME: Time is of the essence regarding all matters of time and performance in this Contract.

21. APPLICABLE LAW: This Contract is governed by and interpreted under West Virginia law without giving effect to its choice of law principles. Any information provided in specification manuals, or any other source, verbal or written, which contradicts or violates the West Virginia Constitution, West Virginia Code, or West Virginia Code of State Rules is void and of no effect.

22. COMPLIANCE WITH LAWS: Vendor shall comply with all applicable federal, state, and local laws, regulations and ordinances. By submitting a bid, Vendor acknowledges that it has reviewed, understands, and will comply with all applicable laws, regulations, and ordinances.

SUBCONTRACTOR COMPLIANCE: Vendor shall notify all subcontractors providing commodities or services related to this Contract that as subcontractors, they too are required to comply with all applicable laws, regulations, and ordinances. Notification under this provision must occur prior to the performance of any work under the contract by the subcontractor.

23. ARBITRATION: Any references made to arbitration contained in this Contract, Vendor's bid, or in any American Institute of Architects documents pertaining to this Contract are hereby deleted, void, and of no effect.

24. MODIFICATIONS: This writing is the parties' final expression of intent. Notwithstanding anything contained in this Contract to the contrary no modification of this Contract shall be binding without mutual written consent of the Agency, and the Vendor, with approval of the Purchasing Division and the Attorney General's office (Attorney General approval is as to form only). Any change to existing contracts that adds work or changes contract cost, and were not included in the original contract, must be approved by the Purchasing Division and the Attorney General's Office (as to form) prior to the implementation of the change or commencement of work affected by the change.

25. WAIVER: The failure of either party to insist upon a strict performance of any of the terms or provision of this Contract, or to exercise any option, right, or remedy herein contained, shall not be construed as a waiver or a relinquishment for the future of such term, provision, option, right, or remedy, but the same shall continue in full force and effect. Any waiver must be expressly stated in writing and signed by the waiving party.

26. SUBSEQUENT FORMS: The terms and conditions contained in this Contract shall supersede any and all subsequent terms and conditions which may appear on any form documents submitted by Vendor to the Agency or Purchasing Division such as price lists, order forms, invoices, sales agreements, or maintenance agreements, and includes internet websites or other electronic documents. Acceptance or use of Vendor's forms does not constitute acceptance of the terms and conditions contained thereon.

27. ASSIGNMENT: Neither this Contract nor any monies due, or to become due hereunder, may be assigned by the Vendor without the express written consent of the Agency, the Purchasing Division, the Attorney General's office (as to form only), and any other government agency or office that may be required to approve such assignments.

28. WARRANTY: The Vendor expressly warrants that the goods and/or services covered by this Contract will: (a) conform to the specifications, drawings, samples, or other description furnished or specified by the Agency; (b) be merchantable and fit for the purpose intended; and (c) be free from defect in material and workmanship.

29. STATE EMPLOYEES: State employees are not permitted to utilize this Contract for personal use and the Vendor is prohibited from permitting or facilitating the same.

30. PRIVACY, SECURITY, AND CONFIDENTIALITY: The Vendor agrees that it will not disclose to anyone, directly or indirectly, any such personally identifiable information or other confidential information gained from the Agency, unless the individual who is the subject of the information consents to the disclosure in writing or the disclosure is made pursuant to the Agency's policies, procedures, and rules. Vendor further agrees to comply with the Confidentiality Policies and Information Security Accountability Requirements, set forth in www.state.wv.us/admin/purchase/privacy.

31. YOUR SUBMISSION IS A PUBLIC DOCUMENT: Vendor's entire response to the Solicitation and the resulting Contract are public documents. As public documents, they will be disclosed to the public following the bid/proposal opening or award of the contract, as required by the competitive bidding laws of West Virginia Code §§ 5A-3-1 et seq., 5-22-1 et seq., and 5G-1-1 et seq. and the Freedom of Information Act West Virginia Code §§ 29B-1-1 et seq.

DO NOT SUBMIT MATERIAL YOU CONSIDER TO BE CONFIDENTIAL, A TRADE SECRET, OR OTHERWISE NOT SUBJECT TO PUBLIC DISCLOSURE.

Submission of any bid, proposal, or other document to the Purchasing Division constitutes your explicit consent to the subsequent public disclosure of the bid, proposal, or document. The Purchasing Division will disclose any document labeled "confidential," "proprietary," "trade secret," "private," or labeled with any other claim against public disclosure of the documents, to include any "trade secrets" as defined by West Virginia Code § 47-22-1 et seq. All submissions are subject to public disclosure without notice.

32. LICENSING: In accordance with West Virginia Code of State Rules § 148-1-6.1.e, Vendor must be licensed and in good standing in accordance with any and all state and local laws and requirements by any state or local agency of West Virginia, including, but not limited to, the West Virginia Secretary of State's Office, the West Virginia Tax Department, West Virginia Insurance Commission, or any other state agency or political subdivision. Obligations related to political subdivisions may include, but are not limited to, business licensing, business and occupation taxes, inspection compliance, permitting, etc. Upon request, the Vendor must provide all necessary releases to obtain information to enable the Purchasing Division Director or the Agency to verify that the Vendor is licensed and in good standing with the above entities.

SUBCONTRACTOR COMPLIANCE: Vendor shall notify all subcontractors providing commodities or services related to this Contract that as subcontractors, they too are required to be licensed, in good standing, and up-to-date on all state and local obligations as described in this section. Obligations related to political subdivisions may include, but are not limited to, business licensing, business and occupation taxes, inspection compliance, permitting, etc. Notification under this provision must occur prior to the performance of any work under the contract by the subcontractor.

33. ANTITRUST: In submitting a bid to, signing a contract with, or accepting a Award Document from any agency of the State of West Virginia, the Vendor agrees to convey, sell, assign, or transfer to the State of West Virginia all rights, title, and interest in and to all causes of action it may now or hereafter acquire under the antitrust laws of the United States and the State of West Virginia for price fixing and/or unreasonable restraints of trade relating to the particular commodities or services purchased or acquired by the State of West Virginia. Such assignment shall be made and become effective at the time the purchasing agency tenders the initial payment to Vendor.

34. VENDOR NON-CONFLICT: Neither Vendor nor its representatives are permitted to have any interest, nor shall they acquire any interest, direct or indirect, which would compromise the performance of its services hereunder. Any such interests shall be promptly presented in detail to the Agency.

35. VENDOR RELATIONSHIP: The relationship of the Vendor to the State shall be that of an independent contractor and no principal-agent relationship or employer-employee relationship is contemplated or created by this Contract. The Vendor as an independent contractor is solely liable for the acts and omissions of its employees and agents. Vendor shall be responsible for selecting, supervising, and compensating any and all individuals employed pursuant to the terms of this Solicitation and resulting contract. Neither the Vendor, nor any employees or subcontractors of the Vendor, shall be deemed to be employees of the State for any purpose whatsoever. Vendor shall be exclusively responsible for payment of employees and contractors for all wages and salaries, taxes, withholding payments, penalties, fees, fringe benefits, professional liability insurance premiums, contributions to insurance and pension, or other deferred compensation plans, including but not limited to, Workers' Compensation and Social Security obligations, licensing fees, etc. and the filing of all necessary documents, forms, and returns pertinent to all of the foregoing.

Vendor shall hold harmless the State, and shall provide the State and Agency with a defense against any and all claims including, but not limited to, the foregoing payments, withholdings, contributions, taxes, Social Security taxes, and employer income tax returns.

36. INDEMNIFICATION: The Vendor agrees to indemnify, defend, and hold harmless the State and the Agency, their officers, and employees from and against: (1) Any claims or losses for services rendered by any subcontractor, person, or firm performing or supplying services, materials, or supplies in connection with the performance of the Contract; (2) Any claims or losses resulting to any person or entity injured or damaged by the Vendor, its officers, employees, or subcontractors by the publication, translation, reproduction, delivery, performance, use, or disposition of any data used under the Contract in a manner not authorized by the Contract, or by Federal or State statutes or regulations; and (3) Any failure of the Vendor, its officers, employees, or subcontractors to observe State and Federal laws including, but not limited to, labor and wage and hour laws.

37. NO DEBT CERTIFICATION: In accordance with West Virginia Code §§ 5A-3-10a and 5-22-1(i), the State is prohibited from awarding a contract to any bidder that owes a debt to the State or a political subdivision of the State. By submitting a bid, or entering into a contract with the State, Vendor is affirming that (1) for construction contracts, the Vendor is not in default on any monetary obligation owed to the state or a political subdivision of the state, and (2) for all other contracts, neither the Vendor nor any related party owe a debt as defined above, and neither the Vendor nor any related party are in employer default as defined in the statute cited above unless the debt or employer default is permitted under the statute.

38. CONFLICT OF INTEREST: Vendor, its officers or members or employees, shall not presently have or acquire an interest, direct or indirect, which would conflict with or compromise the performance of its obligations hereunder. Vendor shall periodically inquire of its officers, members and employees to ensure that a conflict of interest does not arise. Any conflict of interest discovered shall be promptly presented in detail to the Agency.

39. REPORTS: Vendor shall provide the Agency and/or the Purchasing Division with the following reports identified by a checked box below:

[] Such reports as the Agency and/or the Purchasing Division may request. Requested reports may include, but are not limited to, quantities purchased, agencies utilizing the contract, total contract expenditures by agency, etc.

[] Quarterly reports detailing the total quantity of purchases in units and dollars, along with a listing of purchases by agency. Quarterly reports should be delivered to the Purchasing Division via email at purchasing.division@wv.gov.

40. BACKGROUND CHECK: In accordance with W. Va. Code § 15-2D-3, the State reserves the right to prohibit a service provider's employees from accessing sensitive or critical information or to be present at the Capitol complex based upon results addressed from a criminal background check. Service providers should contact the West Virginia Division of Protective Services by phone at (304) 558-9911 for more information.

41. PREFERENCE FOR USE OF DOMESTIC STEEL PRODUCTS: Except when authorized by the Director of the Purchasing Division pursuant to W. Va. Code § 5A-3-56, no contractor may use or supply steel products for a State Contract Project other than those steel products made in the United States. A contractor who uses steel products in violation of this section may be subject to civil penalties pursuant to W. Va. Code § 5A-3-56. As used in this section:

- a. "State Contract Project" means any erection or construction of, or any addition to, alteration of or other improvement to any building or structure, including, but not limited to, roads or highways, or the installation of any heating or cooling or ventilating plants or other equipment, or the supply of and materials for such projects, pursuant to a contract with the State of West Virginia for which bids were solicited on or after June 6, 2001.
- b. "Steel Products" means products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more or such operations, from steel made by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process.
- c. The Purchasing Division Director may, in writing, authorize the use of foreign steel products if:
 1. The cost for each contract item used does not exceed one tenth of one percent (.1%) of the total contract cost or two thousand five hundred dollars (\$2,500.00), whichever is greater. For the purposes of this section, the cost is the value of the steel product as delivered to the project; or
 2. The Director of the Purchasing Division determines that specified steel materials are not produced in the United States in sufficient quantity or otherwise are not reasonably available to meet contract requirements.

42. PREFERENCE FOR USE OF DOMESTIC ALUMINUM, GLASS, AND STEEL: In Accordance with W. Va. Code § 5-19-1 et seq., and W. Va. CSR § 148-10-1 et seq., for every contract or subcontract, subject to the limitations contained herein, for the construction, reconstruction, alteration, repair, improvement or maintenance of public works or for the purchase of any item of machinery or equipment to be used at sites of public works, only domestic aluminum, glass or steel products shall be supplied unless the spending officer determines, in writing, after the receipt of offers or bids, (1) that the cost of domestic aluminum, glass or steel products is unreasonable or inconsistent with the public interest of the State of West Virginia, (2) that domestic aluminum, glass or steel products are not produced in sufficient quantities to meet the contract requirements, or (3) the available domestic aluminum, glass, or steel do not meet the contract specifications. This provision only applies to public works contracts awarded in an amount more than fifty thousand dollars (\$50,000) or public works contracts that require more than ten thousand pounds of steel products.

The cost of domestic aluminum, glass, or steel products may be unreasonable if the cost is more than twenty percent (20%) of the bid or offered price for foreign made aluminum, glass, or steel products. If the domestic aluminum, glass or steel products to be supplied or produced in a “substantial labor surplus area”, as defined by the United States Department of Labor, the cost of domestic aluminum, glass, or steel products may be unreasonable if the cost is more than thirty percent (30%) of the bid or offered price for foreign made aluminum, glass, or steel products. This preference shall be applied to an item of machinery or equipment, as indicated above, when the item is a single unit of equipment or machinery manufactured primarily of aluminum, glass or steel, is part of a public works contract and has the sole purpose or of being a permanent part of a single public works project. This provision does not apply to equipment or machinery purchased by a spending unit for use by that spending unit and not as part of a single public works project.

All bids and offers including domestic aluminum, glass or steel products that exceed bid or offer prices including foreign aluminum, glass or steel products after application of the preferences provided in this provision may be reduced to a price equal to or lower than the lowest bid or offer price for foreign aluminum, glass or steel products plus the applicable preference. If the reduced bid or offer prices are made in writing and supersede the prior bid or offer prices, all bids or offers, including the reduced bid or offer prices, will be reevaluated in accordance with this rule.

43. INTERESTED PARTY SUPPLEMENTAL DISCLOSURE: W. Va. Code § 6D-1-2 requires that for contracts with an actual or estimated value of at least \$1 million, the Vendor must submit to the Agency a disclosure of interested parties prior to beginning work under this Contract. Additionally, the Vendor must submit a supplemental disclosure of interested parties reflecting any new or differing interested parties to the contract, which were not included in the original pre-work interested party disclosure, within 30 days following the completion or termination of the contract. A copy of that form is included with this solicitation or can be obtained from the WV Ethics Commission. This requirement does not apply to publicly traded companies listed on a national or international stock exchange. A more detailed definition of interested parties can be obtained from the form referenced above.

44. PROHIBITION AGAINST USED OR REFURBISHED: Unless expressly permitted in the solicitation published by the State, Vendor must provide new, unused commodities, and is prohibited from supplying used or refurbished commodities, in fulfilling its responsibilities under this Contract.

45. VOID CONTRACT CLAUSES: This Contract is subject to the provisions of West Virginia Code § 5A-3-62, which automatically voids certain contract clauses that violate State law.

46. ISRAEL BOYCOTT: Bidder understands and agrees that, pursuant to W. Va. Code § 5A-3-63, it is prohibited from engaging in a boycott of Israel during the term of this contract.

DESIGNATED CONTACT: Vendor appoints the individual identified in this Section as the Contract Administrator and the initial point of contact for matters relating to this Contract.

(Printed Name and Title) J. Adam Riggsbee, Member-Manager

(Address) 3616 Far West Blvd., Suite 117-361 Austin, TX 78731

(Phone Number) / (Fax Number) 512.970.3062

(email address) adam@riverbankconservation.com

CERTIFICATION AND SIGNATURE: By signing below, or submitting documentation through wvOASIS, I certify that: I have reviewed this Solicitation/Contract in its entirety; that I understand the requirements, terms and conditions, and other information contained herein; that this bid, offer or proposal constitutes an offer to the State that cannot be unilaterally withdrawn; that the product or service proposed meets the mandatory requirements contained in the Solicitation/Contract for that product or service, unless otherwise stated herein; that the Vendor accepts the terms and conditions contained in the Solicitation, unless otherwise stated herein; that I am submitting this bid, offer or proposal for review and consideration; that this bid or offer was made without prior understanding, agreement, or connection with any entity submitting a bid or offer for the same material, supplies, equipment or services; that this bid or offer is in all respects fair and without collusion or fraud; that this Contract is accepted or entered into without any prior understanding, agreement, or connection to any other entity that could be considered a violation of law; that I am authorized by the Vendor to execute and submit this bid, offer, or proposal, or any documents related thereto on Vendor's behalf; that I am authorized to bind the vendor in a contractual relationship; and that to the best of my knowledge, the vendor has properly registered with any State agency that may require registration.

By signing below, I further certify that I understand this Contract is subject to the provisions of West Virginia Code § 5A-3-62, which automatically voids certain contract clauses that violate State law; and that pursuant to W. Va. Code 5A-3-63, the entity entering into this contract is prohibited from engaging in a boycott against Israel.

Confluence Mitigation Partners, LLC

(Company)

J. Adam Riggsbee

(Signature of Authorized Representative)

J. Adam Riggsbee, Member-Manager

(Printed Name and Title of Authorized Representative) (Date)

512.970.3062

(Phone Number) (Fax Number)

adam@riverbankconservation.com

(Email Address)

ADDENDUM ACKNOWLEDGEMENT FORM
SOLICITATION NO.:

Instructions: Please acknowledge receipt of all addenda issued with this solicitation by completing this addendum acknowledgment form. Check the box next to each addendum received and sign below. Failure to acknowledge addenda may result in bid disqualification.

Acknowledgment: I hereby acknowledge receipt of the following addenda and have made the necessary revisions to my proposal, plans and/or specification, etc.

Addendum Numbers Received:

(Check the box next to each addendum received)

- | | |
|--|--|
| <input checked="" type="checkbox"/> Addendum No. 1 | <input type="checkbox"/> Addendum No. 6 |
| <input type="checkbox"/> Addendum No. 2 | <input type="checkbox"/> Addendum No. 7 |
| <input type="checkbox"/> Addendum No. 3 | <input type="checkbox"/> Addendum No. 8 |
| <input type="checkbox"/> Addendum No. 4 | <input type="checkbox"/> Addendum No. 9 |
| <input type="checkbox"/> Addendum No. 5 | <input type="checkbox"/> Addendum No. 10 |

I understand that failure to confirm the receipt of addenda may be cause for rejection of this bid. I further understand that any verbal representation made or assumed to be made during any oral discussion held between Vendor's representatives and any state personnel is not binding. Only the information issued in writing and added to the specifications by an official addendum is binding.

Confluence Mitigation Partners, LLC

Company

J. Adam Riggsbee

Authorized Signature

May 15, 2024

Date

NOTE: This addendum acknowledgment should be submitted with the bid to expedite document processing.

REQUEST FOR QUOTATION
Mitigation Credits

SPECIFICATIONS

1. **PURPOSE AND SCOPE:** The West Virginia Purchasing Division is soliciting bids on behalf of the Department of Environmental Protection to establish an open-end contract for the purchase of released mitigation credits from U.S. Army Corps of Engineers approved mitigation bank(s) in various secondary service areas (SSAs) of the State.
2. **DEFINITIONS:** The terms listed below shall have the meanings assigned to them below. Additional definitions can be found in section 2 of the General Terms and Conditions.
 - 2.1 **“Agreement for Credit Purchase and Sale”** means a binding contract between the listed parties for the purchase of released stream and/or wetland credits from an approved Mitigation Bank.
 - 2.2 **“Contract Item” or “Contract Items”** means the list of items identified in Section 3.1 below and on the Pricing Pages.
 - 2.3 **“DEP ILF”** is the West Virginia Department of Environmental Protection’s In Lieu Fee Program.
 - 2.4 **“IRT”** is the Interagency Review Team which is an interagency team comprised of representatives from U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, US Fish and Wildlife Service, WV Department of Environmental Protection, WV Division of Natural Resources and other federal, state and local agencies as appropriate.
 - 2.5 **“Mitigation Banking”** is the restoration, creation, enhancement, or preservation of a wetland, stream, or other habitat area undertaken expressly for the purpose of compensating for unavoidable resource losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial.
 - 2.6 **“A mitigation bank”** is a site developed for mitigation banking. The person or entity undertaking such restoration work is referred to as a mitigation banker.
 - 2.7 **“Mitigation Credits”** are units of exchange defined as the ecological value associated with the accrual or attainment of aquatic resource function, condition, or other performance measure at a mitigation site. Mitigation credits are determined based on the West Virginia Stream and Wetland Valuation Metric. The Interagency Review Team periodically releases bank credits as the bank meets certain performance milestones. This happens over the course of the "establishment period", which lasts around 10 to 12 years. When the IRT releases potential bank

REQUEST FOR QUOTATION
Mitigation Credits

credits, they become available credits meaning they can be purchased for ecological offset.

2.8 “Released Mitigation Credits” are those credits available for sale to offset impacts. Credits are based on meeting performance standards and approved by the IRT.

2.9 “Pricing Pages” means the schedule of prices, estimated order quantity, and totals contained in wvOASIS or attached hereto as Exhibit A and used to evaluate the Solicitation responses.

2.10 “RIBITS” (Regulatory In lieu fee and Bank Information Tracking System) is a website created by the US Army Corps of Engineers (USACE) with information on mitigation and conservation banks and in-lieu fee (ILF) program sites. It houses information about all mitigation and ILF sites including site documents, mitigation credit availability, and service areas as well as tracks all credit transactions.

2.11 “Solicitation” means the official notice of an opportunity to supply the State with goods or services that is published by the Purchasing Division.

2.12 “SSA” means Secondary Service Area as identified in the WV In Lieu Fee Stream and Wetland Mitigation Program Instrument.

3. GENERAL REQUIREMENTS:

3.1 Contract Items and Mandatory Requirements: Vendor shall provide Agency with the Contract Items listed below on an open-end and continuing basis. This contract will be awarded to multiple Vendors based on the need to have access to mitigation credits statewide. Contract Items must meet or exceed the mandatory requirements as shown below.

3.1.1 Released Credits from a U.S. Army Corps of Engineers approved mitigation bank in SSA 1 (Estimated Quantities 3800 stream credits and 1 wetland credit)

3.1.2 Released Credits from a U.S. Army Corps of Engineers approved mitigation bank in SSA 2 (Estimated Quantities 1 stream credit and 1 wetland credit)

3.1.3 Released Credits from a U.S. Army Corps of Engineers approved mitigation bank in SSA 3 (Estimated Quantities 1 stream credit and 1 wetland credit)

REQUEST FOR QUOTATION
Mitigation Credits

- 3.1.4** Released Credits from a U.S. Army Corps of Engineers approved mitigation bank SSA 4 (Estimated Quantities 1 stream credits and 1 wetland credit)
- 3.1.5** Released Credits from a U.S. Army Corps of Engineers approved mitigation bank in SSA 5 (Estimated Quantities 1 stream credit and 1 wetland credit)

4. BIDDER'S MINIMUM QUALIFICATIONS

- 4.1** Bidders shall be the owner or authorized representative of a stream and/or wetland mitigation bank that is approved by the USACE. The mitigation bank shall be active and operating in compliance with applicable federal and state permits, laws and regulations and be in good regulatory standing.
- 4.2** A copy of the bank's geographic service area map or equivalent must be provided with the bid submission.
- 4.3** The mitigation bank shall include with its bid submission the Bank's typical Agreement for Credit Purchase and Sale.
- 4.4** The mitigation bank shall have the number and type of credits released by the IRT and available for sale upon signing of the Agreement for Credit Purchase and Sale.
- 4.5** Any authorizations or approvals required by the USACE, IRT or other regulatory organizations regarding the use or availability of mitigation credits must be completed prior to the date of the Agreement for Credit Purchase and Sale.

5. CONTRACT AWARD:

- 5.1 Contract Award:** The Contract is intended to provide the DEP ILF with a purchase price on all Contract Items. The Contract shall be awarded to Vendors that provide the Contract Items meeting the required specifications for the lowest overall total cost as shown on the Pricing Pages.
- 5.2 Pricing Pages:** Vendor should complete the Pricing Pages by providing a unit cost and multiplying by the estimated quantity to calculate the extended cost. Vendor should complete the Pricing Pages in their entirety as failure to do so may result in Vendor's bids being disqualified.

The Pricing Pages contain a list of the Contract Items and estimated purchase volume. The estimated purchase volume for each item represents

REQUEST FOR QUOTATION

Mitigation Credits

the approximate volume of anticipated purchases only. No future use of the Contract or any individual item is guaranteed or implied.

Vendor should type or electronically enter the information into the pricing page to prevent errors in the evaluation.

Vendor's who wish to respond to a centralized Request for Quotation (CRFQ) online may submit information through the state's wvOASIS Vendor self-service (VSS). If unable to respond online, Vendor must submit their pricing page with their submitted bid prior to the scheduled bid opening date.

Vendor should electronically enter the information into the Pricing Pages through wvOASIS, if available, or as an electronic document. Vendor can download the electronic copy of the Pricing Pages from the wvOASIS Vendor Self-Service (VSS) website. If responding with a paper bid, Vendors should download and/or print the assembled CRFQ document (with the highest version number) from wvOASIS and insert their unit price and extended cost for each line item.

6. ORDERING AND PAYMENT:

6.1 Ordering: Vendor shall accept orders through wvOASIS, regular mail, facsimile, e-mail, or any other written form of communication. Vendor may, but is not required to, accept on-line orders through a secure internet ordering portal/website. If Vendor has the ability to accept on-line orders, it should include in its response a brief description of how Agencies may utilize the on-line ordering system. Vendor shall ensure that its on-line ordering system is properly secured prior to processing Agency orders on-line.

6.1.1 Agency will issue an Agency Delivery Order (ADO) for purchase of mitigation credits. Agency must use the lowest bid Vendor unless it is determined that the Vendor does not have mitigation credits available for purchase at the time of request.

6.1.2 If lowest bid Vendor has credits available but not enough to complete the requested amount, then the DEP will procure the credits available from the lowest bid Vendor and then contact the next lowest bid Vendor to obtain the requested amount of mitigation credits and so on until the total amount is obtained.

6.1.3 If there is a tie among the lowest bid Vendors, the DEP may request another quote to procure the mitigation credits or procure mitigation

REQUEST FOR QUOTATION
Mitigation Credits

credits from the Vendor that has mitigation bank credits closest to where the DEP ILF funds were taken in.

6.1.4 Once the Agreement for Credit Purchase and Sale is signed, the Vendor shall place those credits in reserve until the purchase is complete.

6.2 Payment: Within ten (10) business days of the Credit Transfer into the DEP ILF RIBITS stream credit ledger, Vendor shall provide the DEP ILF with an invoice for the Purchase Price (“*Invoice*”) and DEP ILF shall remit Purchase Price payment in accordance with the payment procedures of the State of West Virginia.

7. DELIVERY AND RETURN:

7.1 Delivery Time: Within ten (10) business days of signing the Agreement for Credit Purchase and Sale for the released credits the Vendor shall transfer the purchased number of Stream Credits to the DEP ILF Program by notifying the Corps to debit Vendor’s online Corps-maintained RIBITS Stream Credit ledger in the amount of the purchased Stream Credits (“*Credit Transfer*”).

7.2 Late Delivery: The Agency placing the order under this Contract must be notified in writing if orders will be delayed for any reason. Any delay in delivery that could cause harm to an Agency will be grounds for cancellation of the delayed order, and/or obtaining the items ordered from a third party.

Any Agency seeking to obtain items from a third party under this provision must first obtain approval of the Purchasing Division.

7.3 Return of Unacceptable Items: If the Agency deems the Contract Items to be unacceptable, the Contract Items shall be returned to Vendor at Vendor’s expense and with no restocking charge. Vendor shall either make arrangements for the return within five (5) days of being notified that items are unacceptable or permit the Agency to arrange for the return and reimburse Agency for delivery expenses. The returned product shall either be replaced, or the Agency shall receive a full credit or refund for the purchase price, at the Agency’s discretion.

7.4 Return Due to Agency Error: Items ordered in error by the Agency will be returned for credit within 30 days of receipt.

REQUEST FOR QUOTATION
Mitigation Credits

8. VENDOR DEFAULT:

8.1 The following shall be considered a Vendor default under this Contract.

- 8.1.1** Failure to provide Contract Items in accordance with the requirements contained herein.
- 8.1.2** Failure to comply with other specifications and requirements contained herein.
- 8.1.3** Failure to comply with any laws, rules, and ordinances applicable to the Contract Services provided under this Contract.
- 8.1.4** Failure to remedy deficient performance upon request.

8.2 The following remedies shall be available to Agency upon default.

- 8.2.1** Immediate cancellation of the Contract.
- 8.2.2** Immediate cancellation of one or more release orders issued under this Contract.
- 8.2.3** Any other remedies available in law or equity.

9. MISCELLANEOUS:

- 9.1 No Substitutions:** Vendor shall supply only Contract Items submitted in response to the Solicitation unless a contract modification is approved in accordance with the provisions contained in this Contract.
- 9.2 Vendor Supply:** Vendor must carry sufficient inventory of the Contract Items being offered to fulfill any Agreement for Credit Purchase and Sale signed under this Contract. By signing the Agreement for Credit Purchase and Sale, Vendor certifies that it can supply the Contract Items needed at that time.

REQUEST FOR QUOTATION
Mitigation Credits

- 9.3 Reports:** Vendor shall provide reports, upon request, showing the items purchased during the term of this Contract, the quantity purchased for each of those items, and the total value of purchases for each of those items. Failure to supply such reports may be grounds for cancellation of this Contract.
- 9.4 Contract Manager:** During its performance of this Contract, Vendor must designate and maintain a primary contract manager responsible for overseeing Vendor's responsibilities under this Contract. The Contract manager must be available during normal business hours to address any customer service or other issues related to this Contract. Vendor should list its Contract manager and his or her contact information below.

Contract Manager: Adam Riggsbee
Telephone Number: 512.970.3062
Fax Number: _____
Email Address: adam@riverbankconservation.com

EXHIBIT A
PURCHASE OF STREAM AND/OR WETLAND MITIGATION CREDITS
BY WV DEP IN LIEU FEE PROGRAM
PRICING PAGE

The following shall be provided according to the contract terms and conditions contained herein. Price may be provided for any of the following in whole or in part. A price must be provided for each item listed below in order for the vendor to be eligible to sell within that SSA (Secondary Service Area) to the ILF Program for the duration of this contract.

Item	Description	Estimated Quantity	Unit Price	Total Cost/Extended Price
1.	stream credits in ILF SSA 1	2,761	\$ <u>\$591</u>	\$ <u>\$1,631,751</u>
2.	wetland credit in ILF SSA 1	1	\$ <u></u>	\$ <u></u>
3.	stream credit in ILF SSA 2	1	\$ <u></u>	\$ <u></u>
4.	wetland credits in ILF SSA 2	1	\$ <u></u>	\$ <u></u>
5.	stream credit in ILF SSA 4	1	\$ <u></u>	\$ <u></u>
6.	wetland credit in ILF SSA 4	1	\$ <u></u>	\$ <u></u>
7.	stream credit in ILF SSA 5	1	\$ <u></u>	\$ <u></u>
8.	wetland credit in ILF SSA 5	1	\$ <u></u>	\$ <u></u>

Mitigation Bank Information

The following is required as part of the bid.

Bank Name: Sunny Bank Farm Mitigation Site (part of Confluence Mitigation Partners UMBI)

Physical Address: Lick Fork Rd. Spencer, WV 25276

Bank Owner Name: Confluence Mitigation Partners, LLC

Bank Owner Address: 3616 Far West Blvd., Suite 117-361 Austin, TX 78731

Contact Name: J. Adam Riggsbee

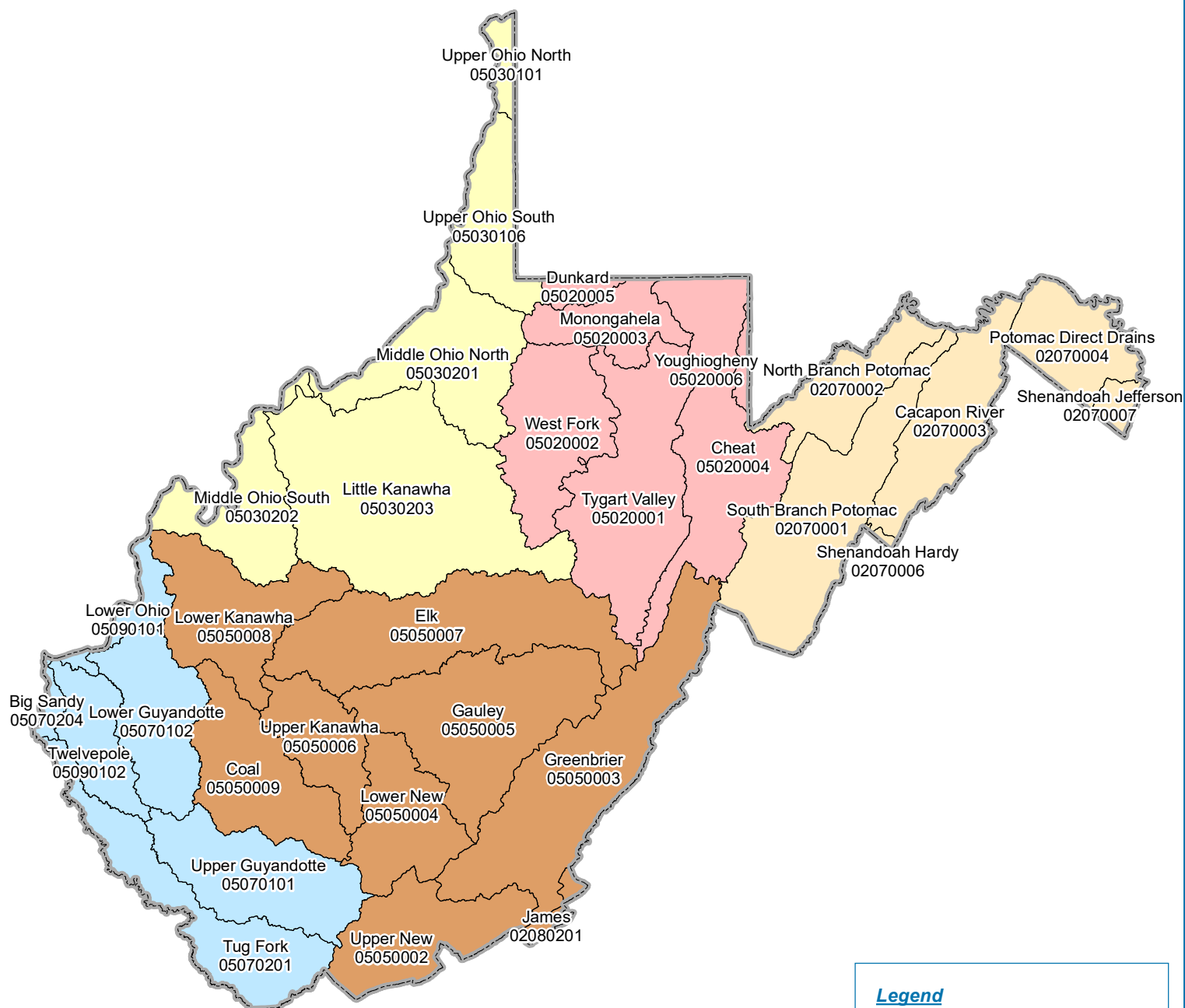
Contact Email: adam@riverbankconservation.com

Service Area (HUCs): Primary: 05030203; Secondary: 05030201, 05030202, 05030101, 05030106

Required Items: Return the following with your bid.

Bank geographic service area map or equivalent

Bank's Agreement for Credit Purchase and Sale

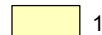


Legend

8 Digit HUC Watershed



ILF Secondary Service Area



1



2



3



4



5

