

**STREAM + WETLANDS FOUNDATION  
GRAND RIVER  
UMBRELLA MITIGATION BANK INSTRUMENT**

Approval of this instrument by the United States Army Corps of Engineers Buffalo District (the "Corps") constitutes the regulatory approval required for the establishment of the **STREAM + WETLANDS FOUNDATION GRAND RIVER UMBRELLA MITIGATION BANK INSTRUMENT**. This instrument is established consistent with 33 CFR 332.8(h). The first mitigation bank site to be approved under this instrument is the **TRUMBULL CREEK PHASE 3 WETLANDS MITIGATION BANK**, and the approved mitigation plan is attached hereto. Through the instrument modification process described in 33 CFR §332.8(a)(1), mitigation sites may be added to this instrument as long as it is in effect.

This instrument is not a contract between **STREAM + WETLANDS FOUNDATION** ("the Sponsor") and the Corps or any other agency of the federal or state government, but it does establish the parties' mutual expectations for the Sponsor's establishment and operation of individual mitigation sites within the Service Area (as defined herein or within the approved site-specific Mitigation Plan). Any dispute arising under this instrument regarding the establishment or operation of a mitigation site will not give rise to any claim by the Sponsor, site owner, or regulatory agency for monetary damages. This provision is controlling notwithstanding any other provision or statement in the instrument to the contrary.

This instrument is made and entered into on the \_\_\_\_\_ day of \_\_\_\_\_, 2021 by the Sponsor, the Corps, and each of the following agencies, should they choose to be a signatory to the instrument; the Ohio Environmental Protection Agency (Ohio EPA), the Ohio Division of Natural Resources (ODNR), the United States Environmental Protection Agency (USEPA), the U.S. Fish and Wildlife Service (FWS), and the Natural Resources Conservation Service (NRCS). The Corps, together with the State and Federal agencies, are hereinafter collectively referred to as the Interagency Review Team (IRT). The Corps may execute and administer this instrument regardless of whether each IRT agency approves and signs this instrument.

**WHEREAS** the purpose of this agreement is to establish an umbrella mitigation bank instrument that will allow the Sponsor to provide compensatory mitigation within the Service Area for unavoidable impacts to aquatic resources authorized by permits issued under Sections 401 and 404 Clean Water Act permits, Section 10 of the Rivers and Harbors Act, and/or isolated wetlands and ephemeral streams authorized pursuant to Ohio Revised Code (ORC) §6111.

**WHEREAS** the signatories hereto acknowledge that each mitigation site authorized under this instrument meets applicable standards for the establishment and operation of mitigation bank sites as set forth in 33 CFR §332.

**WHEREAS** the Sponsor, the Corps, and Ohio EPA agree that the agencies' goal of no net loss of aquatic resources, resulting from permitted impacts to regulated aquatic resources, will be evaluated based on an assessment of the Sponsor's establishment (creation), re-establishment, rehabilitation, enhancement, and preservation of aquatic resources within this instrument's Service Area. No net loss of aquatic resources will be evaluated across the instrument as a whole, rather than at individual mitigation bank sites, i.e., one to one replacement of aquatic resources (no net loss of function and value) will be evaluated based on compensatory mitigation in the aggregate among the Sponsor's mitigation sites covered by this instrument rather than each individual mitigation site.

**THEREFORE**, it is mutually agreed among the parties to this agreement that the following provisions are adopted and will be implemented upon signature of this instrument by the Corps and the signatory members of the IRT.

## A. SERVICE AREA

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This instrument has been drafted in accordance with the regulations for Compensatory Mitigation for Losses of Aquatic Resources effective June 9, 2008 (33 CFR §332) (the “Mitigation Rule”). The Mitigation Rule defines Service Area as the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program. The service area for this instrument shall include the following geographic areas, unless subsequently modified within an approved site-specific Mitigation Plan:

1. For impacts to jurisdictional waters, the Service Area will encompass the entire Grand River 8-digit Hydrologic Unit Code (HUC 04110004) watershed in Ohio.
2. For non-jurisdictional stream and wetland impacts (state isolated wetland or ephemeral streams), the Service Area is as follows:
  - a. For impacts to isolated Category 1 wetlands of any size and isolated Category 2 wetlands of 0.5 acre or less, the service area includes the entire Ohio portion of the Buffalo Corps District (ORC §6111.022).
  - b. For impacts to isolated Category 2 wetlands greater than 0.5 acres, isolated Category 3 wetlands of any size, or to ephemeral streams, the service area will encompass the entire Grand River 8-digit Hydrologic Unit Code (HUC 04110004) watershed in Ohio.
3. Compensatory mitigation of wetland or stream impacts outside the Service Area can be considered by the Corps and/or Ohio EPA, as applicable, on a case-by-case basis consistent with applicable state and federal regulations and laws, including but not limited to 33 CFR §332, ORC §6111, and Ohio Administrative Code (OAC) §3745-1-54.
4. Approved mitigation credits generated by the mitigation site(s) authorized under this instrument can be purchased and used by in-lieu fee program sponsors to fulfill mitigation obligations for impacts located within the Service Area, and outside of the Service Area, on a case-by-case basis as approved by the Corps and/or Ohio EPA.

## B. ACCOUNTING PROCEDURES

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1. The Sponsor shall develop accounting procedures consistent with the Mitigation Rule for maintaining accurate records of debits made from each mitigation site established under this instrument. The accounting procedures shall include the generation of a ledger, which will confirm the final sale of credits at the time they are debited. Ledger reports shall identify the type of credits debited and the number and type of credits remaining at sites operated under this instrument. The ledgers shall also include, to the extent practicable, permit identification information associated with the debited credits (e.g. Corps ORM ID number, Ohio EPA SWMM ID), and data on the impacted aquatic resources that the credits are compensating for (e.g. impacted acreage, dominant vegetation community).
2. The Sponsor may prepare a reservation letter for a permit applicant to include with the Corps and/or Ohio EPA permit application(s). The letter will confirm that the necessary number and type of credits needed by the applicant from a site or sites authorized by this instrument are available and specify the period of time (if any) that those credits will be held for that applicant (with an expiration date set forth in the letter of availability).
3. Each time an approved credit transaction occurs, the Sponsor shall provide email notification to the Corps and Ohio EPA within 30 calendar days of the transaction. The notification shall include confirmation of full payment, applicable agency permit identification numbers (when available), as well as details regarding the amount and type of resource impacted and the mitigation required to be purchased. The Sponsor shall prepare an annual ledger report showing all credits sold, any changes in credit availability (e.g. additional credits released, credit sales, suspended credits, etc.), and the beginning and ending balance of remaining credits. The Sponsor shall submit the annual report to the Corps electronically as a PDF. The

annual ledger report will be submitted by the Sponsor each year until all the credits have been utilized for each site covered by this instrument. Ledger entries that are labeled as “CONFIDENTIAL” contain privileged information, and the Corps or members of the IRT will not provide them to the public without the prior express written consent of the Sponsor.

4. The Sponsor shall prepare an annual financial assurance and long-term management funding report showing the beginning and ending balances, including deposits into and any withdrawals from, the accounts providing funds for financial assurances and long-term management activities. This report will also include information on the amount of currently required financial assurances for each project, the status of those assurances, and their potential expiration.

## C. GENERAL PROVISIONS

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1. The Sponsor will generally provide mitigation through the sale of mitigation credits, defined in 33 CFR §332.2, to permit applicants. Consistent with 33 CFR 328.8(D)(6)(ii)(C), upon full payment of the mitigation credits, the Sponsor’s receipt of the permit or other authorization issued to the applicant to impact regulated aquatic resources, and the Sponsor’s written acknowledgement to the Corps and /or Ohio EPA, the Sponsor will assume the legal responsibility for providing the compensatory mitigation represented by the credit.
2. The Sponsor is responsible for the successful establishment (creation), re-establishment, rehabilitation, enhancement, and preservation activities at each mitigation site covered by this instrument, including the overall operation and management of each site consistent with the Mitigation Plan. The Sponsor shall establish (create), re-establish, rehabilitate, enhance, and preserve aquatic resources, upland habitat, and buffers, as appropriate, at each mitigation site consistent with the Mitigation Plan, resulting in compensatory mitigation credits that can be used to offset impacts to aquatic resources.
3. The use of credits generated at sites subject to this instrument are expected to be approved for use as compensatory mitigation under Section 404 and 401 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and ORC §6111, in addition to such other regulatory programs approved on a case-by-case basis by the appropriate regulatory agencies.
4. In accordance with the Mitigation Rule, the IRT shall be chaired by the Corps or their designee. The Sponsor shall provide the Corps with a Mitigation Plan prospectus compliant with 33 CFR §332.8 so that the Corps can distribute the prospectus to current members of the IRT. The Corps will establish a schedule for the IRT’s review of and comment on the prospectus consistent with the requirements of 33 CFR §332.4. The IRT shall review and provide comments to the Corps consistent with the review periods established in the Mitigation Rule. The Sponsor shall have a reasonable opportunity to review and respond to the comments. The Sponsor shall prepare a final Mitigation Plan, and once it is approved by the Corps, in consultation with the IRT, consistent with the schedule of 33 CFR §332.8, the Corps shall approve each site to be authorized under this instrument through the instrument modification process set forth in 33 CFR §332.8. The IRT will work diligently to reach consensus and comply with the review timelines provided in the Mitigation Rule. When consensus cannot be achieved between the Sponsor and the IRT, the Corps will work, to the extent practicable, with the IRT and the Sponsor to achieve compromises in a timely manner; however, the Corps retains the authority to approve mitigation bank sites, including the approval of the release of mitigation credits, without full IRT approval.

## D. DEFAULT AND CLOSURE PROVISIONS

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1. The Sponsor agrees to establish and maintain the mitigation site(s) until:
  - a. Credits have been exhausted or banking activity is voluntarily terminated with written notice by the Sponsor to the Corps and other members of the IRT; and

- b. It has been determined by the Corps, in consultation with the IRT, that the debited mitigation site has satisfied all the conditions herein and in the Mitigation Plan, or as the conditions are modified with approval by the Corps. If the Corps determines that the mitigation site is not meeting performance standards or the Sponsor is not complying with the terms of this instrument or the Mitigation Plan, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, or terminating the instrument.
2. Any delay or failure of the Sponsor shall not constitute a default hereunder if and to the extent that such delay or failure is primarily caused by any act, event or conditions beyond the Sponsor's reasonable control that significantly affects its ability to perform its obligations hereunder, including:
  - a. Force Majeure: Defined as any act beyond the control of the Sponsor including fires, diseases, earthquakes, pandemics, tornados, hurricanes, landslide, regional pest infestations, acts of war, interference by third parties, drastic changes in climate from current hydrologic conditions averaged over the past 50 years, floods, droughts, or any natural catastrophe;
  - b. Condemnation or other taking by any governmental body;
  - c. A deliberate and unlawful act by a 3rd party that is not the Sponsor or site owner;
  - d. Change in applicable law, regulation, rule, ordinance or permit condition, or the interpretation or enforcement thereof;
  - e. Any order, judgment, action or determination of any federal, state or local court, administrative agency or government body; or
  - f. The suspension or interruption of any permit, license, consent, authorization or approval.

If the performance of the mitigation site(s) is affected by any such event(s), the Sponsor shall give written notice to the IRT as soon as is reasonably possible. If the Corps, in consultation with the Sponsor and the IRT, determines that the event(s) was beyond the control of the Sponsor, site owner, their agents, contractors, or consultants to prevent or mitigate, the Sponsor may request changes to the construction, operation, project milestones, or performance standards. The consequences of any force majeure event shall not affect the status of previously released credits which have been sold or otherwise transferred consistent with this instrument.

3. The Sponsor may request that the Corps confirm closure of a mitigation site authorized under this instrument upon satisfaction of the performance standards and submittal of an appropriate credit sale ledger confirming all credits have been debited. In its request, the Sponsor shall confirm that the long-term management plan is in place and implemented, that the long-term stewardship fund has been fully funded, that the real estate protection measures are in place, and that all applicable requirements of this instrument and the Mitigation Plan have been satisfied. The Corps, in consultation with the IRT, shall use best efforts to review and respond to the request within 60 days of such submittal. If the Corps determines the Sponsor has achieved the performance standards in accordance with the Mitigation Plan and met all obligations under this instrument, the Corps shall issue a close-out letter to the Sponsor, and the Sponsor shall have no further responsibility for the mitigation site.

## **E. REPORTING PROTOCOLS**

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1. The Sponsor shall submit annual monitoring reports to the Corps for each mitigation site in PDF format for distribution to each member of the IRT. The data and analysis required for the monitoring reports shall be described in the Mitigation Plan for each site.
2. As part of each annual monitoring report, the Sponsor shall provide a ledger that documents credit transactions as described in Section B of this instrument. Confidential information (e.g. client personal

information, financial details of credit transactions, etc.) is not required to be provided in the annual monitoring report submittals

## F. OTHER INFORMATION

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1. **MITIGATION PLAN:** For each site to be authorized under this instrument, the Sponsor shall prepare a Mitigation Plan consistent with 33 CFR §332.4(c)(2) through §332.4(c)(14) of the Mitigation Rule.
  - a. Implementation of the approved mitigation plan shall be initiated no later than the first full growing season after the date of the first credit transaction.
  - b. The Sponsor shall monitor each bank site as described in the relevant Mitigation Plan until such time as the Corps determines that the performance standards described in the Mitigation Plan have been met or the Corps, in consultation with the IRT, has determined the site is stable and on a trajectory to meeting the goals within a reasonable period of time.
  - c. The Corps and members of the IRT will be allowed reasonable access to each site for the purposes of inspection and compliance monitoring of the Mitigation Plan.
2. **SITE PROTECTION:** The Site Protection Instrument must be in a form acceptable to the Sponsor, the holder, and the Corps and must cover a period of time that is sufficient to ensure that the resource has fully recovered and will be adequately protected. The Site Protection Instrument will comply with 33 CFR §332.7(a).
  - a. The Site Protection Instrument should protect and preserve natural areas and prohibit uses of the property that are inconsistent with the Mitigation Plan. Additionally, the Site Protection Instrument must allow for the implementation of the Mitigation Plan, as well as ongoing maintenance, adaptive management, and implementation of a remedial action plan, if necessary, to meet the established performance goals for the site. The Sponsor shall provide a draft copy of the Site Protection Instrument with the Mitigation Plan for each site, which will be reviewed by the Corps and Ohio EPA prior to execution.
  - b. Subsequent to the recording of the Site Protection Instrument, the Sponsor may convey the site either in fee or by granting an easement to a qualified land trust, state agency, park district or other natural resource conservation non-governmental organization, provided that the Sponsor retains the responsibility to meet the requirements of the Mitigation Plan for the site, including performance goals, financial assurance, site protection, and long-term stewardship. The terms and conditions of any conveyance shall not conflict with the intent and provisions of the Site Protection Instrument, nor shall such conveyance enlarge or modify the uses specified in the easement. The Site Protection Instrument must contain a provision requiring 60-day advance notification to the Corps before any transfer of an interest in a mitigation site or any action is taken to void or modify the Site Protection Instrument.
3. **FINANCIAL ASSURANCE:** Financial assurances for each site covered by this instrument will be detailed in the Mitigation Plan and comply with the 33 CFR §332.3(n).
  - a. Financial assurances shall be sufficient to assure completion of all mitigation work, required reporting and monitoring, and remedial work pursuant to the Mitigation Plan. No financial assurances will be required for credits generated by preservation unless there are specific activities required by the Mitigation Plan. In such cases, sufficient financial assurances may be required to cover the appropriate amount of risk. In accordance with the Mitigation Rule, the Corps shall consider the Sponsor's track record, the likelihood of success of the mitigation project, and other relevant factors in establishing the required amount and type of financial assurance.

- b. The form and amount of financial assurances must be stated in the Mitigation Plan in order for it to be approved. Original copies of the financial assurance documents must be provided to the Corps prior to the initial release of credits.
  - c. A financial assurance must be in the form that ensures that the Corps receives notification a minimum of 120 days in advance of any termination or revocation.
4. **LONG-TERM MANAGEMENT:** The Sponsor shall implement the Long-Term Management Plan as described in the Mitigation Plan and consistent with each project's goals.
- a. Each Mitigation Plan will identify the party responsible for long-term management. In the event that the land stewardship entity has not been identified at the time of approval of an instrument modification to incorporate a new site covered by this instrument, the Sponsor shall assume long-term management responsibilities until such time that a long-term management partner is identified and approved by the Corps.
  - b. The Long-Term Management Plan will include a list of anticipated annual maintenance, monitoring, and/or repair activities for the mitigation site(s), the associated annual cost for each activity, and the total amount necessary to provide for long-term site management. The Long-Term Management Plan will explain how long-term management funds established by the Sponsor will be managed by the long-term stewardship provider to ensure, to the extent practicable, that there will be adequate funds available to conduct stewardship activities. The Long-Term Management Plan will include a contingency section that addresses how the responsibility and funding for the long-term site management will be passed on to a new manager in the event that the selected long-term management entity is no longer able to provide management of the site. This contingency section will require that 60-day advance notification be provided to the Corps before any action is taken to void or modify the site protection instrument and/or Long-Term Management Plan, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.
5. **MISCELLANEOUS:**
- a. Modification of this instrument shall be in accordance with the procedures set forth in 33 CFR §332.8.
  - b. This instrument constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.
  - c. In the event any one or more of the provisions contained in this instrument are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provisions hereof, and this instrument shall be construed as if such a provision had not been contained herein.
  - d. This instrument shall be governed by and interpreted in accordance with the laws of the State of Ohio and the United States as appropriate.
  - e. This instrument may be executed by the parties in any combination, in one or more counterparts, all of which together shall constitute one and the same instrument.
  - f. The terms and conditions of this instrument shall be binding upon and inure to the benefit of the parties hereto and their respective successors.
  - g. The Corps or Ohio EPA approval of purchase or transfer of credits from this instrument does not signify the Sponsor's acceptance or confirmation of the Sponsor's offer to sell or transfer credits. The Sponsor reserves the right to refuse to sell or transfer credits from this instrument at its sole discretion.
  - h. All notices and required reports shall be sent by regular mail to each of the parties at their respective addresses, provided below.

**Sponsor:**

Stream + Wetlands Foundation  
Attn: President  
123 S. Broad Street, Suite 238  
PO Box 369  
Lancaster, Ohio 43130

**The Corps:**

USACE Buffalo District  
Attn: District Engineer or Designee  
1776 Niagara Street  
Buffalo, New York, 14207-3199

**Ohio EPA:**

Ohio Environmental Protection Agency  
Division of Surface Water, 401 Unit  
50 W. Town Street, Suite 700  
PO Box 1049  
Columbus, Ohio 43216-1049

**ODNR:**

Ohio Department of Natural Resources  
Office of Real Estate,  
Environmental Review Services Section  
2045 Morse Road, Building E2  
Columbus, Ohio 43229

**USEPA:**

United States Environmental Protection Agency  
Region 5, Water Division  
77 W. Jackson Boulevard  
Chicago, Illinois 60604

**USFWS:**

United States Fish and Wildlife Service  
Ecological Services  
4625 Morse Road, Suite 104  
Columbus, Ohio 43230

**NRCS:**

USDA Natural Resources Conservation Service  
Attn: State Biologist  
200 N. High Street, Room 522  
Columbus, Ohio 43215

**IN WITNESS WHEREOF, the parties hereto have executed this Agreement entitled "Agreement to Establish Stream and Wetlands Foundation Grand River Umbrella Mitigation Bank" in the Grand River Basin within the State of Ohio:**

**Stream + Wetlands Foundation:**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**United States EPA:**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**United States Army Corps of Engineers:**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**Ohio EPA**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**United States Fish and Wildlife Service:**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**Ohio Department of Natural Resources**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**USDA Natural Resources Conservation Service**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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