

**STREAM + WETLANDS FOUNDATION
WESTERN LAKE ERIE BASIN UMBRELLA MITIGATION BANKING INSTRUMENT**

This Umbrella Mitigation Banking Instrument (UMBI), established consistent with 33 CFR §332.8(h), describes the establishment, use, operation, and maintenance of the **STREAM + WETLANDS FOUNDATION WESTERN LAKE ERIE BASIN UMBRELLA MITIGATION BANKING INSTRUMENT**. This instrument is being submitted by Stream + Wetlands Foundation (the “Sponsor”), to the U.S. Army Corps of Engineers Buffalo District (“USACE”), the Ohio Environmental Protection Agency (“Ohio EPA”), the Ohio Department 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”), collectively referred to as the Ohio Interagency Review Team (“Ohio IRT”).

USACE approval of this Instrument constitutes the regulatory approval required for the **STREAM + WETLANDS FOUNDATION WESTERN LAKE ERIE BASIN UMBRELLA MITIGATION BANKING INSTRUMENT** to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 C.F.R. 332.8(a)(1). This Instrument is not a contract between the Sponsor or Property Owner and USACE or any other agency of the federal government. Any dispute arising under this Instrument will not give rise to any claim by the Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

The first mitigation site to be covered under this instrument is the **HENRY CREEK WETLAND AND STREAM MITIGATION BANK**, and the approved mitigation plan is attached hereto as Appendix A. 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 made and entered into on the _____ day of _____, 2021 by the Sponsor, USACE, Ohio EPA, and each of the following agencies, should they choose to be a signatory to the instrument; ODNR, USEPA, FWS, and the NRCS. USACE and Ohio EPA 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 banking 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, USACE, and Ohio EPA agree that attaining the agencies’ goal of no net loss of aquatic resource area and function is the primary aim of the projects to be implemented by the Sponsor under this instrument. To assess this objective, the quantity of credits generated via establishment (creation), re-establishment, rehabilitation, enhancement, and preservation of aquatic resources undertaken by the Sponsor will be tracked. These values will be evaluated across the instrument’s service area as a whole, rather than at the level of individual mitigation sites. The Sponsor will ensure that at a program-level, the quantity of mitigation credits generated via methods that result in replacement aquatic resource area and/or function (i.e., establishment, re-establishment, rehabilitation) remain at all times greater than the quantity of credits delivered via other methods that do not result in increases in aquatic resource area or function (i.e., preservation, enhancement). In the unlikely instance where an outstanding preservation and/or enhancement project has been identified by the Sponsor that could result in a temporary deficit of credits generated via establishment, re-establishment, and/or rehabilitation under

this instrument, the Sponsor will also provide information on an additional project that aligns with the goal of no net loss that will ameliorate this shortfall.

A. SERVICE AREA

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:

For impacts to federal jurisdictional waters, the Service Area will encompass the entire Western Lake Erie 6-digit Hydrologic Unit Code (HUC 041000) watershed in Ohio.

1. For non-jurisdictional waters, the Service Area is as follows:
 - a. For impacts to isolated Category 1 wetlands of any size and isolated Category 2 wetlands authorized under a level 1 review, the service area includes the entire Ohio portion of USACE Buffalo District (ORC §6111.022).
 - b. For other impacts, the service area will encompass the entire Western Lake Erie 6-digit Hydrologic Unit Code (HUC 041000) watershed in Ohio.
2. Compensatory mitigation of wetland or stream impacts outside the Service Area can be considered by USACE 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.
3. Approved mitigation credits generated by the mitigation site(s) authorized under this instrument can be considered for use 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 USACE and/or Ohio EPA.

B. ACCOUNTING PROCEDURES

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 (e.g., stream, forested wetland, non-forested wetland) 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., USACE 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 USACE 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 USACE 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 USACE 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 USACE or members of the IRT will not provide them to the public prior to the Sponsor being afforded an opportunity to submit supporting justification why such confidential entries should not be released.

4. For each approved mitigation site 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, the status of those assurances, and their potential expiration.

C. GENERAL PROVISIONS

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 USACE 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.

D. DEFAULT AND CLOSURE PROVISIONS

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 USACE and other members of the IRT; and
 - b. It has been determined by USACE, 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 USACE. If USACE 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 USACE, 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 USACE 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. If USACE determines the Sponsor has achieved the performance standards in accordance with the Mitigation Plan and met all obligations under this instrument, the USACE shall issue a close-out letter to the Sponsor, and the Sponsor shall have no further responsibility for the mitigation site.

E. REPORTING PROTOCOLS

1. The Sponsor shall submit annual monitoring reports to USACE 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

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 (or any subsequent applicable regulations).
 - a. Implementation of the approved mitigation plan shall be initiated no later than the first full growing season after the date of the initial credit release.
 - b. The Sponsor shall monitor each bank site as described in the relevant Mitigation Plan until such time as USACE, in consultation with the IRT, determines that the performance standards described in the Mitigation Plan have been met and determined the site is stable.

- c. USACE 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 aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation projects to be implemented under this instrument will be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements or environmental covenants held by entities such as federal, state, or local resource agencies, non-profit conservation organizations, or private land managers, transfer of title to such entities, or implementation of integrated natural resources management plans on government property. The Site Protection Instrument must be in a form acceptable to the Sponsor, the holder, and USACE 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 USACE 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, private land manager, 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 advance approval by USACE 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 will comply with the 33 CFR §332.3(n).
 - a. Financial assurances shall be sufficient to assure completion and successful performance 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, USACE 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. Financial assurance documents will be provided to USACE for review and approval prior to execution. Original copies of the financial assurance documents must be provided to USACE prior to the initial release of credits.
 - c. A financial assurance must be in the form that ensures that USACE 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 USACE.
- b. The Long-Term Management Plan will include a list of anticipated annual maintenance, monitoring, adaptive management, 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 in consideration of contingencies and inflationary adjustments. 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 USACE before any action is taken to void or modify the Long-Term Management Plan, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

4. **MISCELLANEOUS:**

- a. Modification of this instrument shall be in accordance with the procedures set forth in 33 CFR §332.8.
- b. The contents of the UMBI may be updated as necessary to incorporate best available scientific and/ or regulatory practices/policies. At a minimum, the Sponsor will re-evaluate the contents of the UMBI every 10 years to determine whether revisions are necessary. However, USACE, in consultation with the Ohio IRT, may request the UMBI be re-evaluated sooner as additional mitigation sites are proposed. Each mitigation site approved under the UMBI will be linked through the life of the site to the version of the UMBI it was approved under.
- c. This instrument constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.
- d. 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. In such an event and if appropriate, the Sponsor and USACE will work collaboratively to develop replacement provisions within the instrument.
- e. This instrument shall be governed by and interpreted in accordance with the laws of the State of Ohio and the United States as appropriate.
- f. 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.
- g. USACE 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

USACE:

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 STREAM + WETLANDS FOUNDATION WESTERN LAKE ERIE BASIN UMBRELLA MITIGATION BANKING INSTRUMENT:

Stream + Wetlands Foundation

By: _____

Title: _____

Date: _____

United States Environmental Protection Agency

By: _____

Title: _____

Date: _____

U.S. Army Corps of Engineers Buffalo District

By: _____

Title: _____

Date: _____

U.S. Fish and Wildlife Service

By: _____

Title: _____

Date: _____

Ohio Environmental Protection Agency

By: _____

Title: _____

Date: _____

Natural Resources Conservation Service

By: _____

Title: _____

Date: _____

Ohio Department of Natural Resources

By: _____

Title: _____

Date: _____