

July 28, 2025

Commander
U.S. Army Corps of Engineers
Norfolk District
Attention: Taylor Bell, CENAO-WRR
803 Front Street
Norfolk, VA 23510-1011

Dear Mr. Bell:

Thank you for the opportunity to provide comments on the Wetland and Stream Replacement Fund (WSR Fund) In-Lieu Fee Program Prospectus that was public noticed on June 26, 2025.

The Nature Conservancy (TNC or Conservancy) is a 74-year-old non-profit conservation organization whose mission is to conserve the lands and waters on which all life depends. The Conservancy employs a science-based approach to offer solutions to conservation and development challenges. We have helped conserve nearly 17 million acres of land in the United States and Canada and more than 119 million acres with local partner organizations globally. In addition, we have considerable expertise in the field of wetland and stream compensatory mitigation. We operate wetland and stream mitigation banks in a number of different states, operate two statewide in-lieu fee programs in Virginia and Ohio and expect to secure approval for another statewide program in South Carolina. In addition, we administer a statewide program in Maine. Finally, we have participated in the development and implementation of a significant number of permittee-responsible mitigation projects. Many of these programs and projects are models for compensatory mitigation nationwide.

As you know, the Conservancy-sponsored in-lieu fee (ILF) program in Virginia – the Virginia Aquatic Resources Trust Fund (VARTF) – has been successfully operating since 1995. We believe that in-lieu fee programs serve an important role in helping to satisfy the mitigation needs of the regulated community and serve a valuable public benefit.

Our primary concern regarding the proposed WSR Fund is that it does not, as proposed, comply with the requirements of the regulation adopted in 2008 by the Army Corps and EPA regarding Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR Parts 325 and 332 (2008 Rule).

When it was promulgated, the two main purposes of the 2008 Rule were: 1) to apply equivalent standards to all forms of compensatory mitigation to the maximum extent practicable and 2) to restructure in-lieu fee programs, bringing existing or new programs up to the high standards of mitigation banks (Preamble p. 19594). All ILF programs – those that operated prior to the rule and those that have been proposed since – must fully adhere to the meaning and intent of the 2008 rule.

In our judgment, the WSR Fund does not qualify as an approved compensation method under the 2008 Rule. Although the prospectus refers to it as an ILF program, the WSR Fund is not structured as an ILF,

but rather a holding fund that would accumulate funds that can be used to finance mitigation bank establishment. ILF programs, by contrast, fund compensatory mitigation projects directly (see Compensation Planning Framework (CPF) Elements 6-10, §332.8 (c)(2)).

As proposed, the WSR Fund would violate the location requirements of §332.3(b) of the 2008 Rule by allowing for the purchase of credits outside of the primary or secondary service area of the permitted impact. This is also in direct conflict with state law that only allows primary and secondary service areas to be used (Virginia Code § 62.1-44.15:23).

Another way that the 2008 Rule sought to minimize the risk of compensatory mitigation projects is by requiring banks and in-lieu fee programs to initiate projects in a timely manner. These timelines are explicitly stated for bank (§332.8(m)) and for in-lieu fee programs (§332.8(n)(4)). As proposed, the WSR Fund program would not meet these timelines, as the WSR Fund would allow funds to accumulate for up to three years before they are allocated on *initiating* a compensatory mitigation project.

The 2008 Rule acknowledges that ILF programs carry with them some risks over banks and balance this additional risk through specific requirement for ILF programs including requiring a Compensatory Mitigation Framework, establishing a cap on advance credits, and by limiting sponsorship of the programs to governmental or non-profit natural resource management entities (Preamble p. 19600). Page 19614 of the Preamble also outlines the reasons that sponsorship of ILF programs is limited to entities “that operate explicitly in the public interest, rather than to serve the needs of investors.” By allowing funds collected by the WSR Fund to be used to finance private mitigation banks, the WSR Fund appears to be circumventing the word and intent of the rule. The Corps’ decision regarding the prospectus should explicitly address this question.

We are concerned about conflicts of interest resulting in a lack of oversight and the assurance of a full and equivalent review of activities undertaken by WSR Fund.

With DEQ as a current co-chair on the IRT and lead on all reviews of all monitoring activities, the prospectus states that DEQ will recuse itself from any approvals or aspects related to WSR Fund projects. Removal of the DEQ from the review process will remove experts within the mitigation field and reduce the level and quality of oversight of the proposed program instrument and mitigation activities. Given the importance and use of precedent to set mitigation standards, this could have a negative effect on the quality of mitigation projects funded by WSR Fund and mitigation standards in Virginia. The Corps should require DEQ to address this concern in any future iteration of the prospectus.

In considering this proposal, the Corps should be mindful of unintended consequences on the mitigation banking market.

We are concerned that creating this alternative process for mitigation bank establishment would weaken the equivalency of requirements that must apply to all forms of mitigation, as well as the transparency of banking procedures in the Commonwealth.

In an effort to reduce competition with mitigation providers, the WSR Fund proposes to set prices three times higher than the VARTF ILF cost per credit. The Conservancy is concerned that this approach may have the opposite effect and instead increase the use of the WSR Fund far beyond the “backstop” intended. It is possible that bank sponsors may choose to delay creation of new banks so as to be able to take advantage of the higher price per credit that will be paid by the WSR Fund.

The WSR Fund prospectus is not complete.

A significant number of elements that are required to be included in any ILF draft prospectus are missing from the prospectus made available for public review and comment.

- *Advanced Credits: 33 CFR 332.8(d)(6)(iv)*. One of the main elements of federal rule pertaining to ILFs is the establishment of a limit on Advance Credits. Each ILF program is to set a cap on the number of credits available for sale upon program approval, by service area. This is designed to prevent unlimited impacts without designated offsets. The proposed program has not provided this information, nor addressed any aspects where there is a limit on Advance Credits.
- *The Compensation Planning Framework CFR 332.8(c)(2)*. As described in the 2008 federal mitigation rule, page 19600, the framework is essentially a watershed plan designed to support resource restoration and must include an analysis of historic aquatic resource losses and current conditions, a description of the general amounts, types and locations of aquatic resources the program will seek to provide and a prioritization strategy for selecting and implementing compensatory mitigation activities. The compensation planning framework included in the WSR Fund prospectus contains few details and focuses on the needs for credits and prioritization on where credits will be purchased rather than selecting and implementing compensatory mitigation activities. It does not include the required analytical approach or information on how site selection and mitigation activities will adhere to the watershed approach or a prioritization strategy within the watersheds after year three when a request for proposals is issued.
- *Need and technical feasibility (§332.8(d)(2)(iv))*. The prospectus has not successfully demonstrated the need for this program. Existing ILF data and distribution should be factored into this section, including existing project sites, credits generated and available advance credits. The determination of available credits should not exclude reserved credits. The need for the WSR Fund should be predicated on the lack of availability of either appropriate mitigation bank credits or an operational ILF program that can accept the liability for the type and amount of impacts for which the permittee has a compensatory mitigation obligation.
 - The prospectus should identify the HUCs with the highest projected need for mitigation that are currently not served by mitigation banks and ILFs in order to demonstrate the need for additional ILF opportunities. The volume of permits mitigated by HUC through permittee-responsible mitigation may also be relevant to the analysis of the need for additional mitigation opportunities. The prospectus should identify areas of low credit supply, the duration of these shortages, the planning for future offsets by mitigation bankers

or other ILF

providers, the use of PRM options, and the expected amount of credits that will be used by the WSR Fund annually.

- If the Corps approves this program, it should only be permitted to operate in those areas where it can be demonstrated that there are insufficient bank or ILF program opportunities available.
- The prospectus should further detail the challenges faced by the economic development and infrastructure projects that prevented those applicants from implementing PRM projects to offset their unavoidable impacts. Considering the loss of these projects is a main factor in describing the need for this new ILF, the data to support these statements should be provided. It should further be explained why other mitigation providers are expected to be able to overcome those challenges.
- *How the program will be established and operated (§332.8(d)(2)(ii))* The Department is relying on Request for Proposals (RFPs) for projects as a last resort but does not provide any data to predict the likelihood of successful response rates to such requests. The prospectus does not outline a reliable plan for addressing these offsets in a timely manner. There is no analysis of where mitigation sponsors are planning future projects and therefore service areas where WSR Fund may expect to obtain future credits. This information greatly influences the potential ability of WSR Fund to offset any impacts utilizing this proposed program, however that information has not been provided.

In consideration of the concerns expressed above, TNC recommends that the Corps require DEQ to revise the program prospectus to include:

- An appropriate operations plan that can ensure implementation of equivalent, high standard mitigation projects by the sponsor.
- An acceptable plan to ensure that acceptable mitigation sites are established within the required three-year timeline for ILFs.
- Assurance that mitigation projects and credit offsets will occur only within the standard geographic service areas that are utilized by all mitigation providers in Virginia.
- An appropriate cap on advance credits from the WSR Fund as required by the 2008 Rule 33 CFR 332.8(d)(6)(iv).
- Details within the Compensation Planning Framework on how mitigation projects funded by WSR Fund will be prioritized, based on an analytical approach as required in 33 CFR 332.8(c)(2).
- An adequate analysis of need, addressing the missing or incomplete information stated above.

Additional recommendations

- Any Fund Manager designated by DEQ should be a government or non-profit organization. The rule limits sponsorship of in-lieu fee programs specifically to governmental or non-profit natural

resource management

entities (§ 332.2 [§ 230.92]). The same standard should apply to any other representative filling an administrative role for the program.

- Within the CPF evaluation and reporting details, it is stated that DEQ will not be creating project-specific reports. As a sponsor, and to ensure transparency and equivalent standards, DEQ must ensure that reports on all funded projects are available and accessible to the public.

Given the fact that prospectus is not complete and fails to provide sufficient information to allow for adequate public review, the Corps should both (1) require DEQ to submit a revised, complete prospectus and allow the public to review and comment upon the complete prospectus and (2) provide an opportunity for public comment on any draft instrument for this program. This precedent was set by the Norfolk District when it provided a public comment opportunity for the ILF program instrument proposed by The Nature Conservancy.

The Conservancy appreciates the opportunity to provide comments. If you have any questions about these comments or would like to discuss them, please feel free to contact me at (804) 314-9234.

Sincerely,



Nicole M. Rovner
Associate State Director

cc: Michael S. Rolband, Director, Virginia Department of Environmental Quality