

ILF Instrument Development and Execution

The North Carolina Experience

September 15, 2010



Presentation Overview

- EEP Background
- Instrument Development Process
- Content of Agreement
- Q&A (but feel free to interject questions at any time)

History

- NC Wetlands Restoration Program established in NC in 1996
 - Watershed planning focus
 - Aided regulated community
- NC Ecosystem Enhancement Program formed in 2003 through Tri-Party Agreement
 - Advanced, watershed planning based mitigation
 - Streamlined transportation delivery process

Major Program Components

- Mitigation for NCDOT – in advance of impacts based on forecasts of mitigation need
- Mitigation (Stream and Wetland) for others through In-lieu Fee
- Nutrient offset program in Neuse and Tar-Pamlico River Basins
- Buffer mitigation in particular river basins

Strategic Delivery of Mitigation

- Comprehensive evaluation of program needs
- Assessment of program assets and activities in relation to needs
- Determination of actions to provide watershed-based restoration to meet program requirements

Project ID through Watershed Planning

- Concentration of projects in focused areas with demonstrated environmental need
- Improved environmental outcomes through focused investments

Program Evolution since Establishment of EEP

Category	EEP Inception (2003)	EEP Today (2010)	Change
Total Projects	~75	~580	505
Total Stream Feet	308,249	3,031,248	2,722,999.00
Total Wetland Acres	1,036.8	29,360.31	28,323.51
Stream Compliance	70.71%	99.05%	28.34%
Wetland Compliance	85.66%	99.07%	13.41%

Instrument Development Process



Engaged Appropriate Parties

- Began meeting with USACE in August 2008
 - Approached them with issues of importance and baseline questions
 - Lack of clarity on interpretation of new rule
- Convened a workgroup and set monthly meetings for 13 month period
- USACE, EPA, NCDWQ, NCDOT (other IRT members e.g. NCDCM, NCWRC)
- Developed list of priority discussion items

Issues Debated

- Advance credits
 - Whether to apply
 - How much to apply
 - Geographic scale of application
- Prospectus step
- Public notice process for new projects
- How much detail to include in document

Will elaborate on key items of interest
during review of document contents

Advance Opportunities for Input

- IRT kept in the loop all along – given opportunity to participate and review drafts
- Met with interested parties to provide a status in July 2009
 - USACE a co-presenter
 - Consulting firms, mitigation bankers, NGOs, other state and federal agencies
- Webinar conducted for interested parties prior to formal public input process – December 2009
 - Over 100 registrants

USACE Formal Comment Solicitation

- Three comments received
 - Southern Environmental Law Center
 - Restoration Systems
 - US Fish and Wildlife Service
- EEP provided written response to claims made
- USACE needed to thoroughly document decision to execute document

Content of Instrument

North Carolina Department of Environment and Natural Resources' Ecosystem Enhancement Program In-Lieu Fee Instrument

AGREEMENT TO CONTINUE THE OPERATION OF NORTH CAROLINA'S IN-LIEU FEE PROGRAMS OPERATED BY THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES' ECOSYSTEM ENHANCEMENT PROGRAM PURSUANT TO 33 CFR PARTS 325 AND 332 AS REVISED EFFECTIVE JUNE 9, 2008 (FEDERAL MITIGATION RULE)

This agreement to continue the In-Lieu Fee (ILF) operations of the North Carolina Department of Environment and Natural Resources' (NCDENR) Ecosystem Enhancement Program (NCEEP) is entered into this 28 day of July, 2010, by and between the NCEEP ("Sponsor"), the U.S. Army Corps of Engineers (USACE), the U.S. Environmental Protection Agency (USEPA), the U.S. Fish and Wildlife Service (USFWS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Division of Water Quality (NCDWQ), the North Carolina Division of Coastal Management (NCDCM), and the National Marine Fisheries Service (NMFS).

This agreement supersedes the following agreements governing NCEEP operations:

- Memorandum of Agreement (MOA) Among the U.S. Army Corps of Engineers, N.C. Department of Transportation and N.C. Department of Environment and Natural Resources signed in 2003 and all successive amendments
- Memorandum of Understanding (MOU) between the U.S. Army Corps of Engineers and the N.C. Department of Environment and Natural Resources on In-Lieu Fee Compensatory Mitigation signed in 1998 and all successive amendments

Upon execution of this agreement, the MOA and MOU, as referenced above become null and void and any requirements contained therein are no longer applicable. The signatories to this instrument recognize that cooperation between the USACE, NCDENR, and NCDOT is critical to the continued development of advanced, high-quality mitigation, and are committed to continue efforts that have been on-going since the establishment of the NCEEP.

I. General Provisions

A. Purpose and Mission of the Ecosystem Enhancement Program

The purpose of the NCEEP is to provide a comprehensive, natural resource enhancement program that identifies ecosystem needs at the local watershed level and preserves, enhances, and restores ecological functions within target watersheds while addressing impacts from anticipated NCDOT transportation projects and permitted impacts from other development projects. All ecological enhancement activities are to be undertaken by the NCEEP with participation by State and Federal agencies and

Intro and General Provisions

- Instrument replaces two existing agreements
 - NCDOT-DENR-USACE (Tri-Party)
 - DENR-USACE (Two-party governing traditional ILF operations)
- Purpose - fashioned after language from existing agreements
- Two triggers for liability transfer
 - Traditional ILF - upon payment from customers
 - NCDOT - upon permit issuance
- Role of Interagency Review Team
- Authorities

Funding Provisions

- Describes two major sources of funding for EEP mitigation
 - Traditional ILF - payments from customers
 - NCDOT - references agreement between NCDOT and DENR regarding business operations
- Describes (in general terms) how fees set using all cost data
 - Recommend a future conference call dedicated to fee/rate setting
- Includes language consistent with rule regarding how funds can be used

Operational Provisions

- Geographic Service Area
 - 8-digit CU
 - Exceptions allowed with IRT approval (like Catawba 03)
- Compensation Planning Framework
 - Captures existing watershed planning processes – describes how they fit with federal rule
 - EEP will continue to target watersheds within 8-digit CUs and develop LWPs

EEP develops River Basin Restoration Priority (RBRP) plans for each river basin and Local Watershed Plans (LWPs) in areas of high program activity

- RBRPs identify watersheds with a balance of assets, problems and opportunities
- Identified watersheds become Targeted Local Watersheds (TLWs)
- EEP focuses resources for detailed planning (Local Watershed Planning) and project implementation in TLWs

Data Broken out by 14-digit Hydrologic Units

Problems

% Impervious
% Agriculture
% Non-Forested/Disturbed Buffer
% Impaired
Animal Operations
Projected Pop Change
Shellfish Closures

Asset

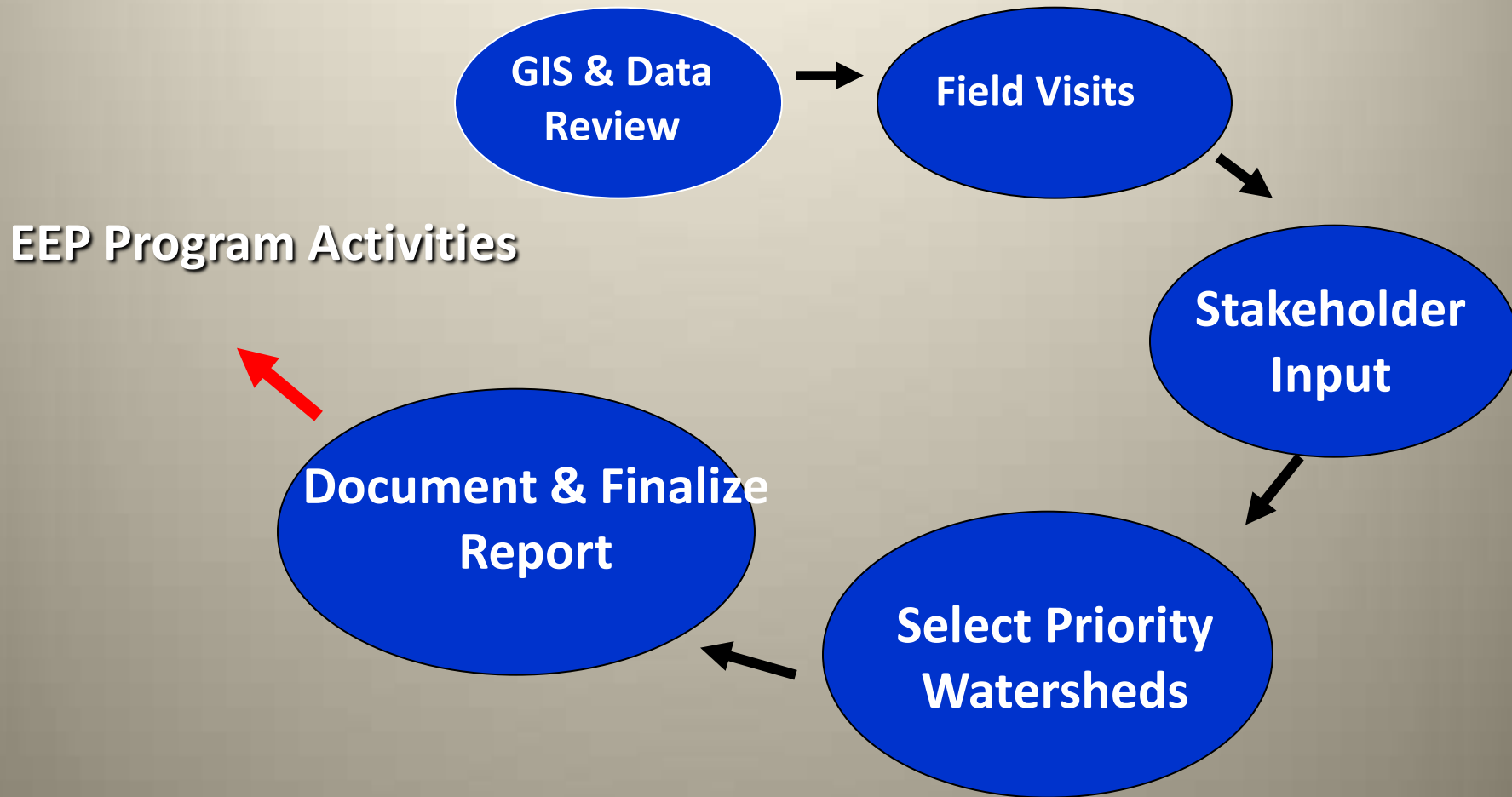
% Forest & Wetland
% Conserved
% Significant Natural Heritage Areas
Water Supply Watersheds
High Quality Waters
Outstanding Resource Waters
Trout waters
Federal and state rare, threatened and endangered species

Opportunities

Transportation Improvement Projects
% Hydric A soils
EEP Projects
NC Clean Water Management Trust Fund
319 Projects
% Wildlife Resource Comm. Priority Areas
% Phase II Stormwater Area
Ag BMPs
Mitigation Banks
Land Trust Conservation Properties
Dams



Targeted Local Watersheds



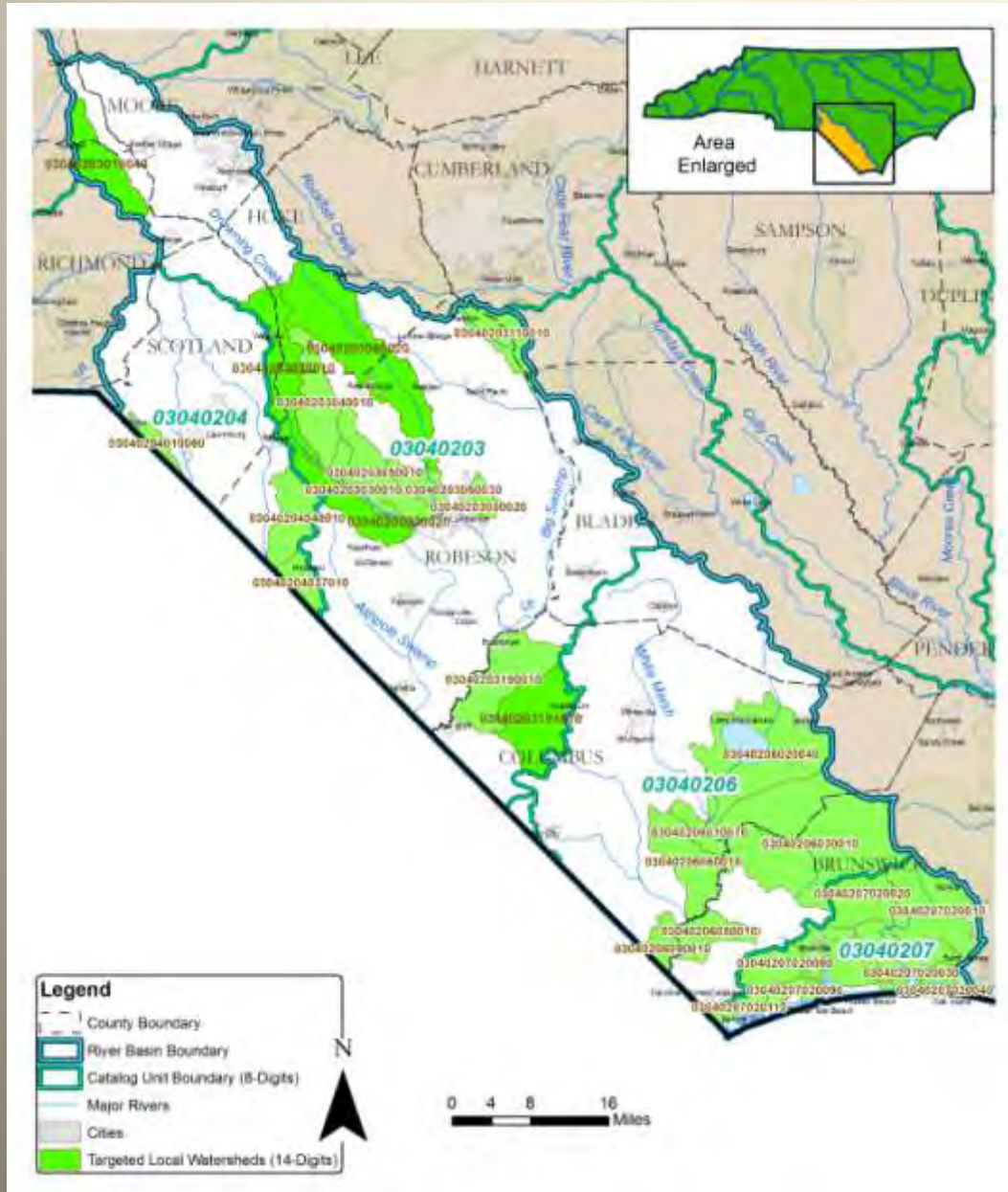


**Lumber
River Basin Restoration
Priorities 2008**



Operational Provisions –
Compensation Planning

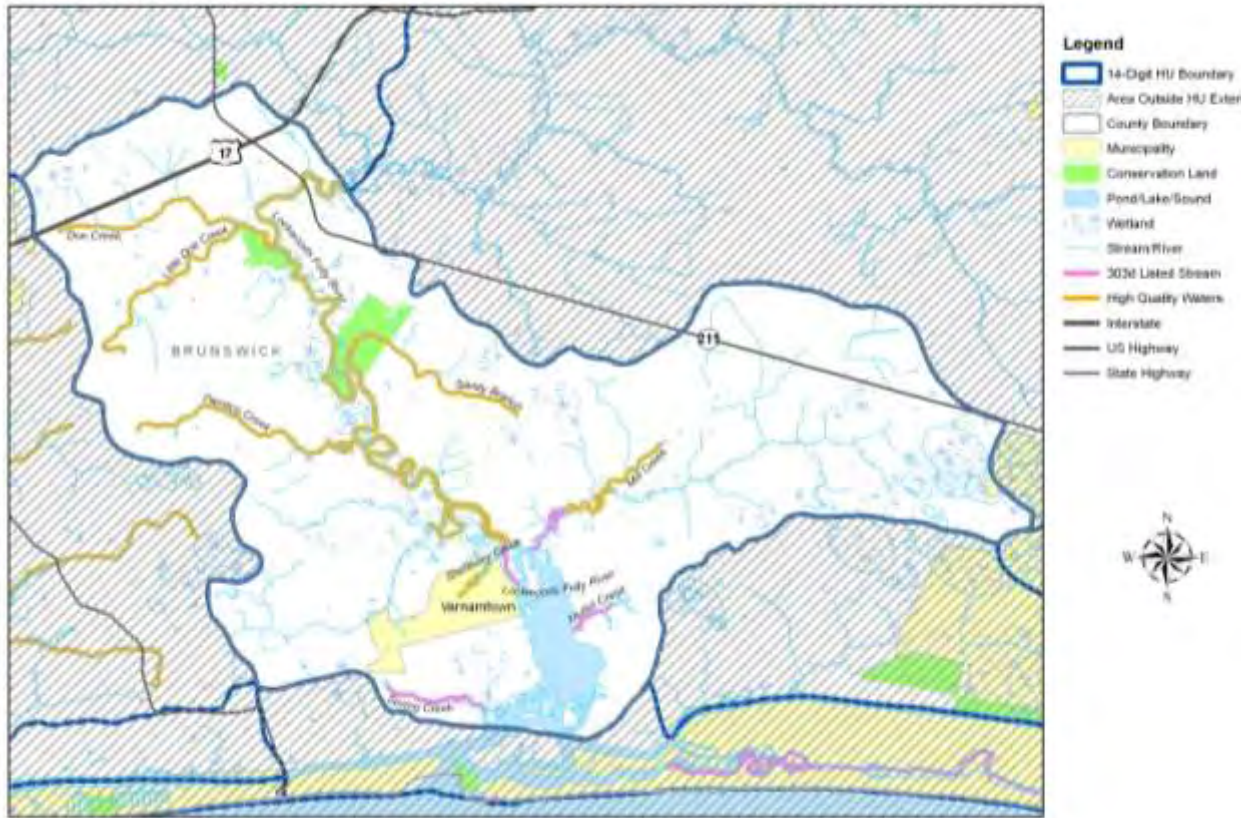
Targeted Local Watersheds



Operational Provisions –
Compensation Planning

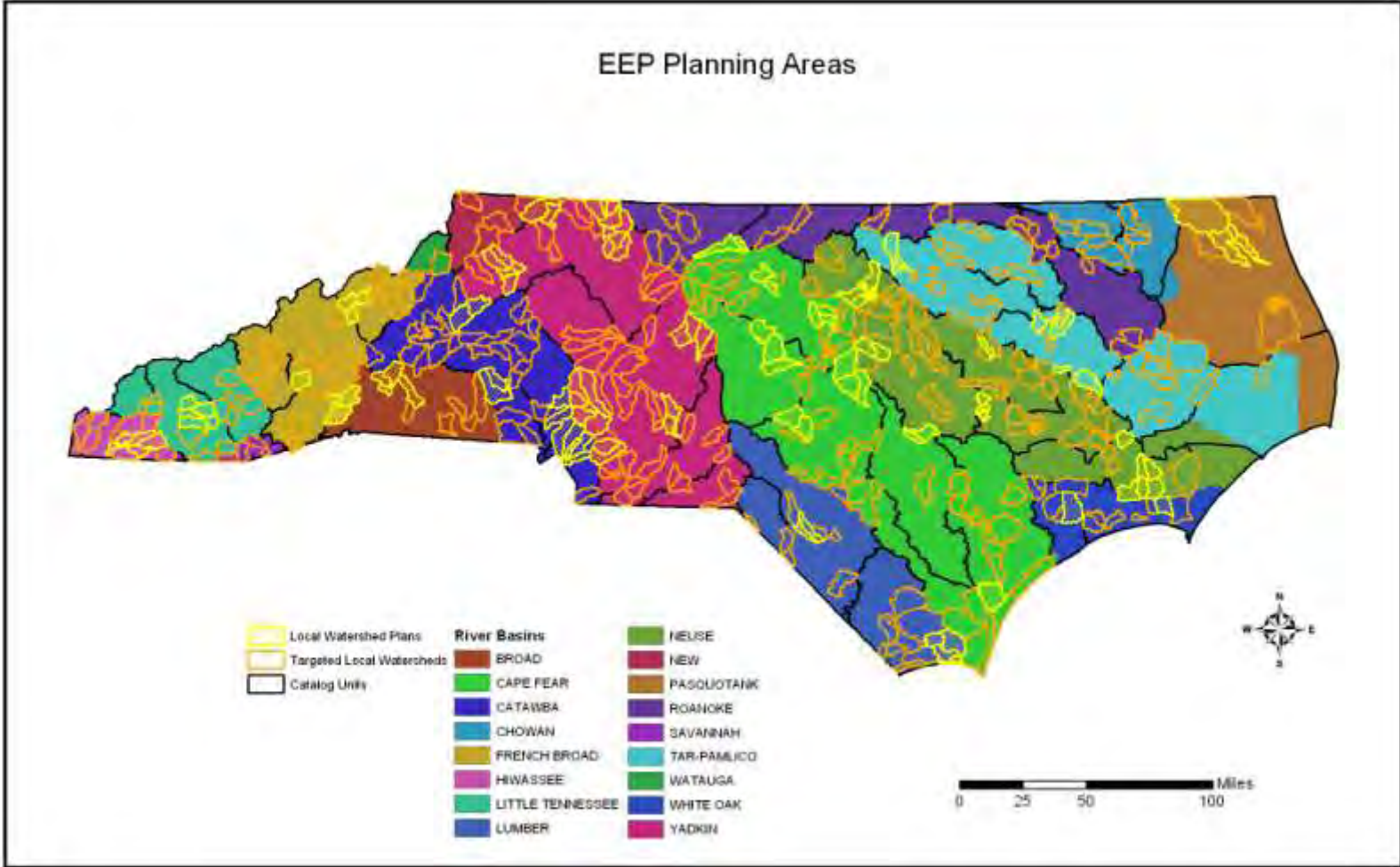
Targeted Local Watersheds

Operational Provisions – Compensation Planning



Impaired for fecal coliform, low pH and DO. Streams are in good shape but high nutrient and fecal loads. Development impacts expected in future.

Operational Provisions – Compensation Planning



Operational Provisions

- Permit Decisions
 - USACE
 - Describes existing procedures
 - Describes what will be included in permit conditions
 - NCDENR
 - Recognizes DWQ and DCM permitting authorities

Operational Provisions

- Advance Credits
 - Allocated allowance to accept new mitigation requirements
 - Tracked and reported for total program by 8-digit CU and broad mitigation type
 - Instrument includes initial allocation that can be updated by the IRT over time
 - Numbers derived based on anticipated NCDOT mitigation needs and historical ILF data

Calculation of Advance Credits

- Based on EEP projected mitigation needs for next 5 years
 - Calculated by River Basin
 - NCDOT:
 - 5 Year NCDOT Forecast of Mitigation Need
 - MOU ILF:
 - Calculated Annual Average of Payments over 7 years * 5 Years
 - Calculations rounded up to nearest 5000 or 5 acre wetland
 - Minimum 4,000 stream & 5 wetland credits per year per basin - originally

$$\text{AdvancedCredits} = \text{NCDOTForecast}_{5Yr} + (\text{ILFAvg} * 5Yr)$$

Example Calculation for the Cape Fear River Basin

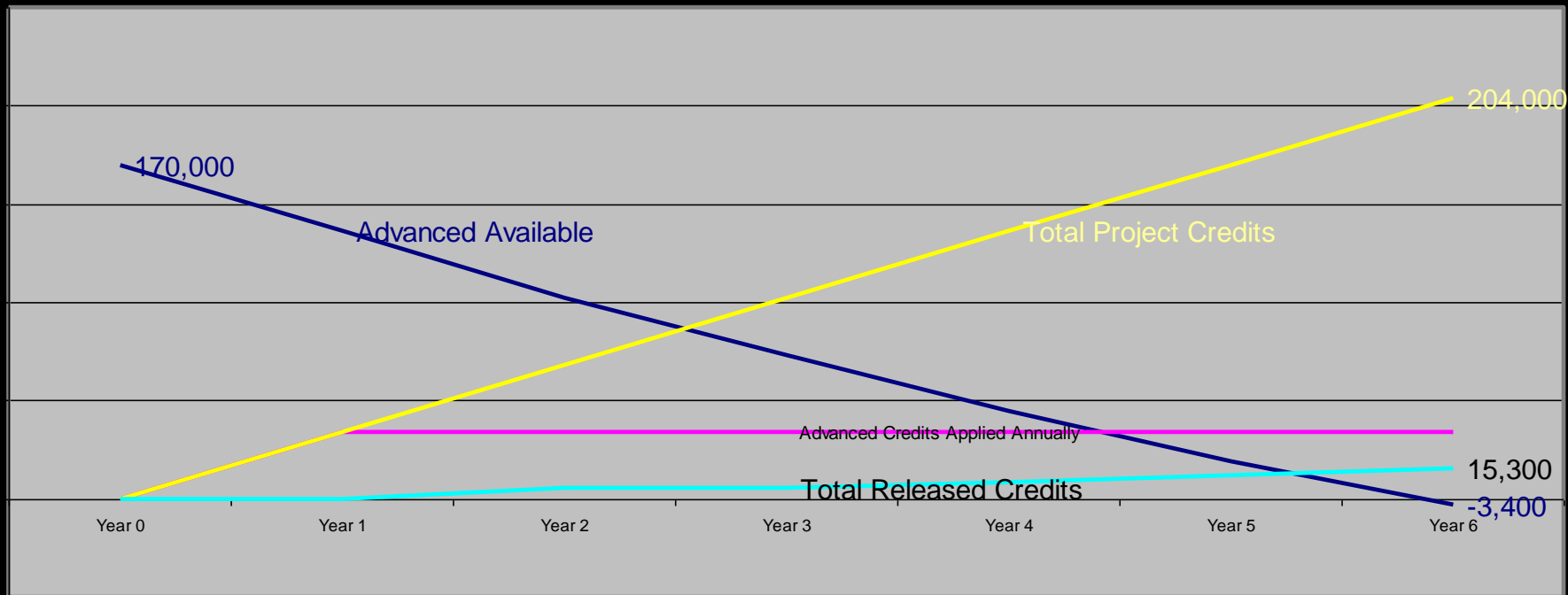
NCDOT 5 Yr Forecast	101,062
<u>MOU ILF Avg * 5 yrs</u>	<u>64,835</u>
Subtotal	165,897

Rounded to nearest 5000

Grand Total Cape Fear Basin 170,000

Model Analysis

— Advanced Available — Advanced Credits Applied Annually — Total Project Credits — Total Released Credits



Evolution of Advance Credit Approach

- Argument for exemption
- Allocations at river basin scale
- Allocations at 8 digit CU scale with allowance to move them between CUs in same river basin without approval
 - Maintained original river basin allocation and split between CUs
- Allocations at 8-digit CU scale – pre-approval required for any movement
 - No change in allocation even though some CUs set at 0

Operational Provisions

- Small Impacts
 - Provides mechanism for request to IRT in situations where cumulative requirements in a service area < 1,000 linear feet of stream or < 3 acres of wetlands
- Project Delivery
 - Mitigation Sites
 - Provides for project implementation, mitigation plan development, annual monitoring reports, preservation project descriptions
 - Requires maintenance of existing Web site for sharing project information

Operational Provisions

- Project Delivery continued
 - Review of New Projects
 - Cites rule requirements
 - Allows the expenditure of some funds prior to formal approval
 - Relies on permit process for formal approval
 - Timing of Project Delivery
 - Maintains advancement level currently in place for NCDOT mitigation
 - Incorporates requirement from mitigation rule regarding minimum time to construction

Operational Provisions

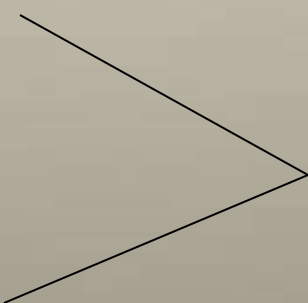
- Project Delivery continued
 - Perpetual Protection/Real Estate Provisions
 - Standard protocols for long-term disposition of mitigation properties
 - Specifies EEP use of NCDENR Stewardship Program
 - Financial Assurance Procedures
 - DENR to provide letter that will be an appendix to document
 - Consistent with 33 CFR Part 332.3(n)

Operational Provisions

- Project Delivery continued
 - Project Establishment and Operation
 - Credit generation
 - Relies on district guidance
 - Requires specification in mitigation plan
 - Credit release schedules
 - Specified in mitigation plan
 - Will mirror what is prescribed for banks
 - Credit release approval
 - Initial allocation triggered by construction and permit authorization

Operational Provisions

- Project Delivery continued
 - Project Establishment and Operation continued
 - Mitigation Types
 - Streams - cool, cold, warm
 - Wetlands - Riparian Riverine, Riparian Nonriverine, Nonriparian, Coastal
 - Monitoring
 - Project Closure
 - Maintenance
 - Contingency



Consistent with Standard
Protocols

Operational Provisions

- Program Reporting Protocols
 - Annual Report
 - Financial
 - Permit related
 - Advance and released credits
 - Debit ledger
 - Relates mitigation sites to permit requirements
 - Compliance status report
 - Case-by-case requests

Operational Provisions

- Program Review
 - By DE and IRT
 - Expectation that recommended course corrections will be made
- Default and Closure
- Grandfathering
 - Provisions such as credit releases only apply to new projects
- Miscellaneous

Appendices

- Compensation Planning Framework
- 12 Elements of Mitigation Plans
- Financial Assurances Letter – from
NCDENR Secretary to USACE Wilmington
District Commander

Questions?
Suzanne Klimek
828-329-0871
suzanne.klimek@ncdenr.gov

