



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

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February 6, 2018

Living River Restoration Trust  
Attn: Mr. David Koubsky  
475 Water Street, C103A  
Portsmouth, VA 23704

**RE: Living River Restoration Trust (formerly Elizabeth River Restoration Trust)  
In-Lieu Fee Compensatory Mitigation Program – 2018 Update**

Dear Mr. Koubsky:

The Living River Restoration Trust (LRRT), an approved in-lieu fee compensatory mitigation program, has proposed a draft 2018 Program Instrument to replace its existing 2004 Program Instrument, and bring the program up to date with current federal and state guidance and standards for in-lieu fee programs. State Water Control Law (Sections 62.1-44.15:20-23 of the Code of Virginia) and state regulations (Section 9VAC25-210-116D of the Virginia Administrative Code) set forth state laws and regulations for the establishment, use, operation and maintenance of in-lieu fee programs as an acceptable form of compensatory mitigation for impacts to state waters, including wetlands and streams. The Virginia Department of Environmental Quality (DEQ) administers these laws and regulations on behalf of the State Water Control Board (Board). DEQ has reviewed the relevant LRRT documents and reports, and has the following discussion and conclusions regarding the LRRT in-lieu fee program.

### Background

Living River Restoration Trust (formerly Elizabeth River Restoration Trust) is an approved in-lieu fee program, which has been in operation in the Commonwealth of Virginia since 2003, in accordance with a Memorandum of Understanding dated July 18, 2003 among Elizabeth River Project (ERP – the original sponsor), DEQ, and U.S. Army Corps of Engineers, Norfolk District (the Corps). ERP, DEQ, and the Corps worked collaboratively to develop the “Elizabeth River Restoration Trust Operating Agreement” dated May 19, 2004 (2004 Program Instrument), which

provided the regulatory approval needed for ERP to develop compensatory mitigation sites for impacts to aquatic resources authorized by Corps permits and/or DEQ VWP permits. On September 16, 2009, ERP, DEQ, and the Corps signed the “First Amendment to the Living River (previously Elizabeth River) Restoration Trust Operating Agreement” (2009 Amendment). The 2009 Amendment made the following revisions to the 2004 Program Instrument: 1) Officially changed the name and sponsor of the program to Living River Restoration Trust; 2) Established a new valid term and expiration date (May 4, 2019) for the Program Instrument; and 3) Incorporated the 2008 federal regulations for “Compensatory Mitigation for Losses of Aquatic Resources: Final Rule.” Since 2009, LRRT has been operating under the 2004 Program Instrument and 2009 Amendment.

According to the most recent Annual Report (dated December 20, 2016), one in-lieu fee compensatory mitigation contribution has been made to LRRT since its inception in 2003. On June 7, 2004, LRRT received \$5,310,000 as compensatory mitigation for a permit for a private port facility in the main stem of the Elizabeth River. The permit included impacts to 189 acres of river bottom (subaqueous habitat) as a result of the dredging of 10.3 million cubic yards and the filling of 2.07 acres of open water and benthic habitat.

Compensatory mitigation for these impacts is ongoing at LRRT’s Money Point mitigation site, which is a portion of the Elizabeth River immediately adjacent to a defunct creosoting facility at Money Point. The site was selected for remediation because river sediments there were at some of the highest levels of polycyclic aromatic hydrocarbon (PAH) contamination in the Chesapeake Bay. Subaqueous habitat impacts have been partially mitigated through the removal, thermal treatment, and safe disposal of PAH impacted sediment in Phase I (2009) and Phase II (2011) of Money Point. As compensation for the open water and benthic habitat impacts, a two-dimensional oyster reef was constructed in 2005. In Phase I and II of the sediment remediation, post-construction monitoring for PAH contaminants has shown significant reductions in total PAH, which has dropped below the remedial clean up goals of 45 ug/kg total PAH. Additionally, long-term monitoring at the mitigation site of tissues of mummichog (*Fundulus heteroclitus*), an indicator fish species, has revealed a significant reduction in the prevalence of cancerous and precancerous lesions that are known to be caused by PAH contaminants. Phase III of Money Point is currently being designed, and will include removing the remaining contaminated sediment from the site, bringing the total sediment remediation activities at Money Point to 35 acres. According to LRRT, additional mitigation sites will be proposed to the Interagency Review Team (IRT) after the 2018 Program Instrument is approved.

### Methods

According to state regulations, any of the following actions may be taken by DEQ, on behalf of the State Water Control Board, in order to approve an in-lieu fee compensatory mitigation program:

***The Board may approve the use of a program by issuing a VWP permit for a specific project or by taking an enforcement action and following applicable public notice and comment requirements, or by granting approval of a program after publishing a***

***notice of its intent in the Virginia Register of Regulations and accepting public comments on its approval for a minimum of 30 days.***

An in-lieu fee program shall demonstrate the following goals and objectives to be eligible as an acceptable form of compensatory mitigation in the Commonwealth of Virginia:

- a) Demonstration of a no net loss policy in terms of wetland acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for restoration, creation, enhancement, or preservation;***
- b) DEQ approval of each site for inclusion in the program;***
- c) A commitment to provide annual reports to the board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the compensatory mitigation credits contributed for each watershed of project impact;***
- d) A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland acreage and functions or stream functions and water quality benefits lost in the impacted watershed; and***
- e) Such terms and conditions as the board deems necessary to ensure a no net loss of wetland acreage and functions or stream functions and water quality benefits from permitted projects providing compensatory mitigation.***

DEQ participated in an IRT meeting on August 31, 2016, at which LRRT presented the draft 2018 Program Instrument, and DEQ reviewed and commented on the draft through the IRT review process. In addition, DEQ reviewed and analyzed the following documents to assess the LRRT's compliance with state regulations: the 2003 Memorandum of Understanding; the 2004 Program Instrument; the 2009 Amendment; and the most recent Annual Report. We appreciate the efforts that LRRT has made to provide clear and detailed reports and submittals, to give DEQ an accurate representation of LRRT's current status and proposed future goals and objectives.

### Discussion

Based on the information provided, DEQ has the following observations on the LRRT in-lieu fee program, with regard to the achievement of state regulations:

- a) Demonstration of a no net loss policy in terms of wetland acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for restoration, creation, enhancement, or preservation;***

Demonstration of a no net loss policy is provided in the 2004 Program Instrument, with the statement: "The Trust will use its resources to offset impacts that cannot be avoided, with the goal of achieving, at a minimum, no net loss, and an offset to permitted project impacts affecting the environmental health of the Elizabeth River watershed." The draft 2018 Program Instrument continues to include a no net loss policy, through the same purpose and mitigation goals stated above, and the addition of references to applicable state regulations, which outline the requirements for no net loss.

To date, LRRT has accepted liabilities associated with providing mitigation for dredging impacts to subaqueous bottom, open water, and benthic habitat, which are not subject to the requirement for no net loss of wetland acreage and functions and no net loss of stream functions and water quality benefits. Even though no quantifiable determination may be made regarding the achievement of no net loss within the LRRT program, DEQ approved this mitigation through the VWP Permit Program, and supports the contaminant reductions and associated water quality improvements that have been achieved by the LRRT program to date.

***b) DEQ approval of each site for inclusion in the program;***

LRRT is fully compliant with the requirement for consultation with and approval from DEQ for each individual mitigation site. DEQ was consulted on site selection for the Money Point mitigation site. LRRT must also obtain approval from the Corps and DEQ prior to expending mitigation funds. The draft 2018 Program Instrument will update the program to the most current standards for compensatory mitigation, including the IRT review process for mitigation site selection, review, and approval. DEQ will continue to be consulted as a member of the IRT. In addition, any environmental restoration project undertaken by the LRRT that involves impacts to surface waters will be evaluated under the VWP Permit Program.

***c) A commitment to provide annual reports to the board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the compensatory mitigation credits contributed for each watershed of project impact;***

LRRT is fully compliant with the requirement for the provision of annual reports. Currently, LRRT submits annual reports, detailing in-lieu fee contributions and status of mitigation sites for the entire program. LRRT also submits monitoring reports to demonstrate the success of individual mitigation sites compared to site-specific performance standards. The draft 2018 Program Instrument continues to require these deliverables.

***d) A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland acreage and functions or stream functions and water quality benefits lost in the impacted watershed;***

In the 2004 Program Instrument, there is no description of fee amounts or schedules for proposed mitigation activities, and there have been no mitigation liabilities accepted that are subject to the requirements of no net loss of wetland acreage and functions or stream functions and water quality benefits. In the draft 2018 Program Instrument, LRRT outlines proposed fee schedules in the Program Mitigation Fee for Advanced Credits table (Exhibit D). The proposed advance credit fees are for subaqueous restoration, subaqueous rehabilitation, oyster reef restoration, tidal wetland restoration, and upland buffer restoration, and include estimated costs for assessment, design, permitting, construction, site protection, monitoring, maintenance, long-term management, and legal and administrative fees. DEQ recommends that LRRT review the fee schedules annually, and, where necessary, revise them in consultation with the IRT.

*e) Such terms and conditions as the board deems necessary to ensure a no net loss of wetland acreage and functions or stream functions and water quality benefits from permitted projects providing compensatory mitigation.*

DEQ has no additional terms and conditions at this time.

Conclusion

DEQ has determined that the draft 2018 Program Instrument complies with the Code of Virginia (62.1-44.15:20-23) and Virginia Administrative Code (9VAC25-210-116D). Due to the specific watersheds, water resources, and mitigation types within which LRRT operates, DEQ has determined that it does not need to sign the 2018 Program Instrument to approve the use of the LRRT program. DEQ may approve the use of the LRRT in-lieu fee program as compensatory mitigation on a case-by-case basis through the VWP Permit Program. DEQ will continue to participate on the IRT for this in-lieu fee program as an advisory agency and non-signatory member, and will continue to review and comment on all LRRT mitigation proposals. DEQ recognizes the Corps as the chair for this in-lieu fee program on the IRT in the Commonwealth of Virginia.

We appreciate the opportunity to collaborate with LRRT, the Corps, and the IRT on this in-lieu fee program. We look forward to continued collaboration on existing mitigation and review of new proposed mitigation sites under the LRRT program.

Sincerely,



David L. Davis, CPWD, PWS  
Director, Office of Wetlands and Stream Protection

cc: Mr. Tom Walker - Chief, Regulatory Branch, U.S. Army Corps of Engineers  
Mr. Craig Nicol - Regional Director, DEQ Tidewater Regional Office  
IRT Members

