Memorandum of Understanding
Between
NH Department of Environmental Services
US Army Corps of Engineers, New England District

I. **Purpose**: The purpose of this Memorandum Of Understanding (MOU) is to establish the procedures and guidelines for coordinating compensatory mitigation requirements for permits issued by the U.S. Army Corps of Engineers, New England District (Corps) in the State of New Hampshire under Section 404 of the Clean Water Act (33 USC 1344) and Section 10 of the Rivers and Harbors Act (33 USC 403) with the New Hampshire Department of Environmental Services (DES). This MOU is intended to provide more effective mitigation for authorized impacts to aquatic resources in the service area consisting of the entire State of New Hampshire by allowing permit applicants to provide payment to the Aquatic Resource Mitigation (ARM) Fund as required compensatory mitigation in circumstances considered appropriate by the Corps, in consultation with Federal and State review agencies. This MOU is an agreement between the Corps and DES, and it is not intended, nor can it be relied upon, to create any rights or a cause of action for third parties against the United States or the State of New Hampshire. The payments into the ARM Fund are for projects that meet the criteria for a New Hampshire Programmatic General Permit (NH PGP) and will fill less than one acre of wetland or are public roadway or public utility projects that will impact up to three acres. The ARM Fund may also be used in the resolution of unauthorized activities or other cases as agreed upon by the DES and Corps.

II. **Authority**:

a. The Clean Water Act (33 USC 1344) provides that Section 404 is administered by the Secretary of the Army. The Secretary has delegated the authority to administer this permitting program to the Corps. The NH PGP issued by the Corps has been adopted to minimize duplication between New Hampshire's regulatory program governing work within coastal and inland waters and wetlands and the Corps' regulatory program under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, while maintaining the environmental protections guaranteed by those Acts. Subject to certain exclusions and conditions, the NH PGP eliminates the need for applying for separate approval from the Corps for most minor, non-controversial work in New Hampshire when that work is authorized by the New Hampshire Wetlands Bureau DES. Similarly, the Federal Guidance on the Use of In Lieu Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act recognizes in-lieu fee arrangements and states in pertinent parts that the Corps "may find circumstances where such arrangements are appropriate so long as they meet the requirements that would otherwise apply to an off-site, prospective mitigation effort and provides adequate assurances of success and timely implementation."

b. DES has required compensatory mitigation to be provided for impacts to jurisdictional areas since 1990 and adopted specific rules in 2004 detailing mitigation thresholds and requirements. The New Hampshire legislature passed a law in 2006 establishing the ARM Fund. The statute now describes the operation of the program and the mechanism that allows DES to receive funds for wetland impacts and disburse deposits in a fashion to maximize environmental benefits from the pooled funds. Administrative rules were adopted

in June 2007 for the program to operate within the context of the regulatory statutory requirements. The use of the ARM Fund for compensatory mitigation may occur only after the relevant permitted activity has complied with DES and Corps regulations and policies regarding wetland avoidance and minimization of impacts to wetlands and surface waters.

III. New Hampshire Department of Environmental Services, Aquatic Resource Mitigation (ARM) Fund Program:

a. The ARM Fund was established by an act of the NH Legislature and signed into law in 2006 (RSA 482-A:28 through :33). The ARM Fund is a non-regulatory program with a statutory mandate to protect and improve water quality, flood prevention, fisheries, wildlife, and plant habitats, through the restoration, creation and preservation of aquatic resources. The primary function of the Fund is to restore and preserve as many aquatic resources, buffers, and other beneficial lands in their natural condition as possible with the funds available. The primary emphasis of the ARM Fund is on aquatic resource restoration and protection, to include buffers and the preservation of aquatic resources and their adjacent uplands. The use of this ARM Fund for compensatory mitigation shall occur only after the relevant permitted activity has complied with DES and Corps regulations and policies regarding avoidance and minimization of impacts. The in-lieu fee option for wetland mitigation is only allowed after permittee-responsible mitigation options are considered and are deemed infeasible or less environmentally beneficial in the effort to address the loss of the wetland functions and values. DES accepts the legal responsibility for ensuring the mitigation terms are fully satisfied when an ARM payment is received.

b. To offset impacts to aquatic resources that resulted in payments into the ARM Fund, the DES shall be responsible for implementation and disbursal of funds. Mitigation resources shall consist of funds paid as mitigation by permit applicants to compensate for losses to aquatic resources in connection with issuance or verification of DES or Corps permits, resolution of unauthorized activities, or other cases as agreed upon by the DES and Corps as specified in sections above. The accounts for the ARM Fund shall be organized according to the Hydrologic Unit Code (HUC) 8 watershed level. Said funds shall be delivered to the DES, to be held in the ARM Fund according to the appropriate HUC 8 watershed, and used solely to accomplish mitigation projects as described herein within the watershed that generated the funds. The DES hereby agrees to receive and expend said funds in the manner and with the limitations described herein.

c. ARM Fund applications may request funding approval for costs associated with construction and/or preservation of mitigation projects including, but not limited to:

- labor,
- land acquisition,
- appraisals,
- surveys,
- project design,
- project management,
- monitoring,
- stewardship,
- legal,

- closing,
- equipment, and
- materials necessary to accomplish mitigation and monitoring.

Primary considerations in all mitigation project proposals and approval decisions shall be the benefit to the aquatic resources of New Hampshire and the most cost effective approach to accomplishment of mitigation projects. All funds shall be solely for the accomplishment of compensatory mitigation as described herein, and no funds may be expended except as provided for in this MOU.

IV. Goals:

a. The primary function of the ARM Fund is to restore and preserve in their natural condition as many aquatic resources, buffers, and other beneficial lands in or to their natural condition as possible with the funds collected. With the added flexibility incorporated into the DES compensatory mitigation program, proper placement of mitigation projects can be made within the landscape context, which can start helping to address the ecological needs of the state's watersheds and take into consideration cumulative effects.

b. An applicant may only pay money into the mitigation fund in lieu of actual mitigation when it has been sufficiently demonstrated that no feasible local opportunities for in-kind mitigation are available and there is no other acceptable mitigation bank with in-kind wetland types available. DES will contact the local Conservation Commission to obtain their recommendation regarding mitigation options. The goal of this MOU is to provide an additional compensatory mitigation alternative for permit actions that are required to submit a compensatory mitigation proposal in accordance with the DES Administrative Rules, Chapter Env-Wt 100-800. The funds generated by this mitigation option will be deposited according to the Hydrologic Unit Code (HUC) 8 watershed level. A total of 16 accounts will be established within DES for mitigation deposits corresponding to each of the 16 HUC 8 watersheds in New Hampshire. See Appendix A for a map of the HUC 8 watersheds. (A hydrologic unit code is an eight-digit number, determined by the U.S. Geological Survey, that identifies each of the watersheds into which the country has been divided for the purpose of water-resources planning and data management. The code uniquely identifies each of the four levels of hydrologic classification within four two-digit fields: region, subregion, accounting unit, and cataloging unit.) Funds will be disbursed according to the HUC 8 watershed.

c. DES will use funds accepted from a number of permitted projects collectively so as to maximize the size and/or quality of mitigation sites available for restoration, preservation or creation. This is to attempt to provide favorable mitigation ratios for aquatic resource impacts and to provide greater assurance of permanent protection of high quality natural areas in a broader landscape context. DES will maintain a running total of impacted and mitigated aquatic resources, by type and watershed, for which the ARM Fund was used as the form of mitigation for those impacts.

d. The ARM Fund will be spent on projects that provide the greatest potential to replace or protect specific wetland functions and values lost by the impacts that generated the funds paid into the HUC 8 watershed accounts. Where Fund project applications are similar,

preference shall be given to projects that provide the longer term, more beneficial protection mechanism for the project area and its buffer. A review of the overall environmental significance the project provides will be taken into consideration as well as its proximity and connectivity to lands protected in perpetuity. Other characteristics that will be considered include:

- provides a connection between lands that are currently unconnected and which are protected in perpetuity;
- protects linkages or over-land connections among and between one or more aquatic resource areas;
- protects lands within a large unfragmented block of land, relative to the HUC 8 watershed; and
- is located within the same sub-watershed as the impact area(s).

In addition, the overall mitigation potential for the project will be considered and the cost-effectiveness of the project and partnership potential will be reviewed.

V. Program Operation:

a. The operation of the program is described in RSA 482:-A:-28 through :33 and the DES administrative rules, Env-Wt 100-800. DES will generally determine the amount of an ARM Fund payment required from permittees. The payment is calculated by summing the following items:

(1) The cost that would have been incurred if a wetland of the same type was constructed at the ratios listed in Table 800-1 (Appendix B) in the DES administrative rules Env-Wt 100-800, based on a price of $65,000 per acre of wetland created, adjusted according to the annual simple rate of interest on judgments established by RSA 336:1, II;
(2) The area of wetlands that would need to be constructed, at the ratios listed in Table 800-1, times the cost of land where the impact is occurring as calculated by the assessed land values derived from the NH department of revenue administration equalization survey which are divided by the number of acres in each municipality to yield a per acre equalized land value; and
(3) An administrative cost that equals 5% of the sum of (1) and (2), above.

The calculation can be accessed at the DES web site at www.des.state.nh.gov. Occasionally the Corps may deem it appropriate to require additional payment to adequately compensate for direct and indirect impacts of a project.

b. Payments will need to be paid in full within 120 days of the DES approval of the project or the application will be denied. Payment into the Fund must occur prior to permit issuance to ensure mitigation obligations are fulfilled prior to start of construction. DES will deposit the ARM Fund monies into the appropriate individual, interest bearing accounts to be established for each of the 16 HUC 8 watersheds. Once a deposit is received, the permit authorizing the work to be performed will be issued. A summary of the projects and deposits made into the ARM Fund will be updated upon receipt of a deposit and will be available on the DES mitigation web page for public review.

c. DES shall oversee an application process for use of funds collected. An announcement for proposals shall be broadly circulated to all Conservation Commissions in the particular watershed, as well as to state agencies, land conservation organizations, watershed groups, and private consultants. Potential applications need to be in the HUC 8 watershed in which the impacts occurred that generated the funds. Once applications are submitted, an initial evaluation of the applications will be carried out by DES to determine eligibility. The evaluation of the application must take into consideration the impacts to aquatic resources mitigated via the ARM Fund, site suitability, baseline condition of the sites, the maximum return on expended funds, benefits to rare and endangered natural resources, the location and status of other mitigation projects, and an acceptable plan and budget.

d. A project-specific narrative for the ARM Fund proposals should include, if applicable, a description of the proposed project and site-specific plan including the location, baseline conditions, what kind of compensation can be provided, a schedule for conducting the project, monitoring and maintenance provisions, provisions for protection in perpetuity with real estate arrangements, and performance standards for determining ecological success of mitigation sites. For projects receiving funds from the ARM Fund, long-term preservation will be required through conservation easements or transfer of ownership to the respective town, State, natural resource agency, or qualified land conservation organization. In addition, funds will be withheld for remedial measures until DES deems the wetland construction site successful as defined in the project proposal. A performance bond will be required to ensure the construction is completed as proposed until DES deems the wetland construction site successful. The ARM Fund application and forms will be obtained from the DES.

e. Pursuant to RSA 482-A:32, an ARM Fund Site Selection Committee (Committee) has been established for the purpose of identifying projects to be funded. The Committee consists of the following members: A single representative from the Department of Environmental Services, Fish and Game Department, the Office of Energy and Planning, and the Department of Resources and Economic Development will be appointed by the respective Commissioner or Director of each such department or office. Four members of the public, appointed by the Governor and Executive Council for a term of three years will also serve on the Committee. These members represent each of the following organizations: the New Hampshire Association of Conservation Commissions, the New Hampshire Association of Natural Resource Scientists, The Nature Conservancy, and the Society for the Protection of New Hampshire Forests.

f. The ARM Fund shall operate separately from DES and Corps regulatory actions except as specified in this MOU. The following process for disbursements of ARM funds will be followed:

1. DES will issue a Request for Proposals (RFP) when the ARM Fund Site Selection Committee agrees a watershed fund has accumulated sufficiently or when no more than 2 years has passed from the date of the first deposit. The RFP shall allow a minimum of 30 business days for applications to be submitted.
2. DES will notify the NH Wetland Council and the Corps about the RFP, provide an impact ledger for the watershed account that is ready for disbursal, and request to be on a future Wetlands Council agenda to discuss Committee recommendations.

3. DES will conduct a preliminary review of the proposals to determine completeness and suitability for funding. DES will provide a summary to the Committee and the Corps of the reasons for qualifying or disqualifying proposals. Proposals that do not qualify will receive a letter from DES.
4. If DES determines a site visit is necessary, the Committee and the Corps will be provided the date(s) for the visit(s) and opportunity to attend.
5. Committee members will review proposals prior to Committee meetings and develop preliminary scores for each project for discussion at the scoring meeting.
6. The Committee will convene to review, evaluate and rank projects to receive ARM funds.
7. Committee recommendations will be presented to the Corps for approval. The Corps will review all projects involving restoration, creation, and/or enhancement using the current Federal guidance.
8. Those projects approved by the Corps will then be presented by DES to the Council for disbursal of funds.
9. DES will submit pertinent information to the Governor and Executive Council for authorization to release funds.
10. DES will oversee the completion of the funded projects and timing of payments for work described in a contract between DES and the party awarded the funds.

g. For ARM projects involving construction, the recipient of the ARM Fund monies shall continue to be responsible for construction, monitoring, and remediation until the NHDES and Corps determine the project has been satisfactorily completed. This shall be documented by both agencies in writing to the recipient of ARM funds.

VI. **Use of ARM Fund as Compensatory Mitigation by Corps**: This MOU acknowledges that Corps permittees can propose to make payments into the ARM Fund as an alternative to permittee-responsible compensatory mitigation when the Corps determines, taking into account input from the Federal resource agencies, that it is more ecologically beneficial. The permittee is required to provide the ARM Fund payment within 120 days of the DES approval, when the payment is also required by the DES. In situations where the DES permit functions as the Corps PGP authorization, any ARM fee will be considered compensatory mitigation under the Corps program as well. In situations where there is a separate Corps authorization, the required payments will be included in a mitigation special condition of the authorization letter. When the Corps requires mitigation and the DES does not, and the applicant requests to use the ARM Fund, the Corps will review the proposal, in consultation with the other federal resource agencies. If it is determined that use of the ARM Fund is appropriate, the permittee is required to provide the ARM Fund payment within 30 days of Corps authorization and before construction begins or the authorization is void.

VII. **Financial Controls:** The DES shall hold any funds collected pursuant to this MOU in an interest-bearing account in an investment instrument or banking institution so as to earn interest while maximizing the safety and preservation of the funds in the account. The DES shall account for the funds held, in accordance with generally accepted accounting principles, and the account shall be subject to audit. Interest earned by the ARM Fund shall remain with the ARM Fund.

VIII. **Administrative Overhead and Interest:** The DES shall receive an overhead fee amounting to 5% of the funds when the funds are deposited. The fee will come from the ARM Fund and is deemed to represent and reimburse reasonable overhead and related administrative costs of administrating the fund to accomplish the mitigation projects.

IX. **Time Constraints:** All funds from the ARM Fund accounts shall be allocated to specific projects within two years of the date the funds are received with exception of the 5% for administrating the ARM Fund. If more than two years pass from the date of receipt of funds and the funds have not been allocated, or no proposals for the funds meet the eligibility criteria, the DES, with concurrence of the Corps, may extend the disbursal date for another two years. Funds that remain in an account after the ARM Fund applications have been selected for funding shall be carried over in that watershed account for the next application cycle.

X. **Good Faith:** The parties hereto agree that both shall exercise their rights and obligations in good faith as contained in this MOU.

XI. **Reports**: The goal of the ARM Fund, from the perspective of the Corps, is to play an important role in meeting the national goal of No Net Loss of aquatic functions and values. The Corps will review data provided by the ARM Fund to ensure aquatic resource impacts are matched with sufficient compensatory mitigation in the form of restoration and creation to meet national standards. DES will report to the Corps on a yearly basis with the location of impacts within a specific watershed, amount of impacts permitted within a specific watershed, Cowardin classification of the impacted areas, and information on the functions lost through the permitted impact. The ARM Fund will provide a calendar year annual report to the Corps and include information on the following:

1. The permitted aquatic resource impacts that provided payment into the ARM Fund to complete their mitigation requirements. The information will be reported according to HUC 8 watersheds and include:
   - permit number (DES and Corps permit authorization numbers);
   - date permit/authorization issued;
   - acreage by aquatic resource type(s), functions and values lost by the project;
   - location/town; and
   - date of payment amount deposited into the ARM Fund.

2. The description of projects receiving ARM funds with the following details:
   - a description of each project funded and information on the progress or completion of those projects;
   - acreage and type(s) of aquatic resources restored, created, or otherwise protected in each HUC 8 watershed;
   - the success of the project based on performance standards developed by DES for the specific project;
   - mitigation type(s);
   - location;
   - costs;
   - fee and/or easement holder;

- date acquired; and
- date construction completed (if applicable);
- status of monitoring;
- status of financial assurances.

The reports will be made available to the public through the issuance by the Corps of a Public Notice and posting on the Corps website (www.nae.usace.army.mil).

XII. Amendment and Termination: Either party may terminate this MOU by giving ninety (90) days written notice to the other party. Amendments require written approval by both the DES and the Corps. Prior to termination, DES shall provide an accounting of funds and shall complete payment on contracts for projects approved by the DES and any expenses incurred on behalf of the account. Upon termination, after payment of all outstanding obligations as provided in Section 8 above, the remaining funds shall be disbursed as determined by the DES.

This MOU is acknowledged this 14th day of March, 2008.

U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT

Curtis L. Thalken
Colonel, Corps of Engineers
Commander, New England District

14 March 08
DATE

NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

Thomas S. Burack
Commissioner, New Hampshire Department of Environmental Services

March 14, 2008
DATE

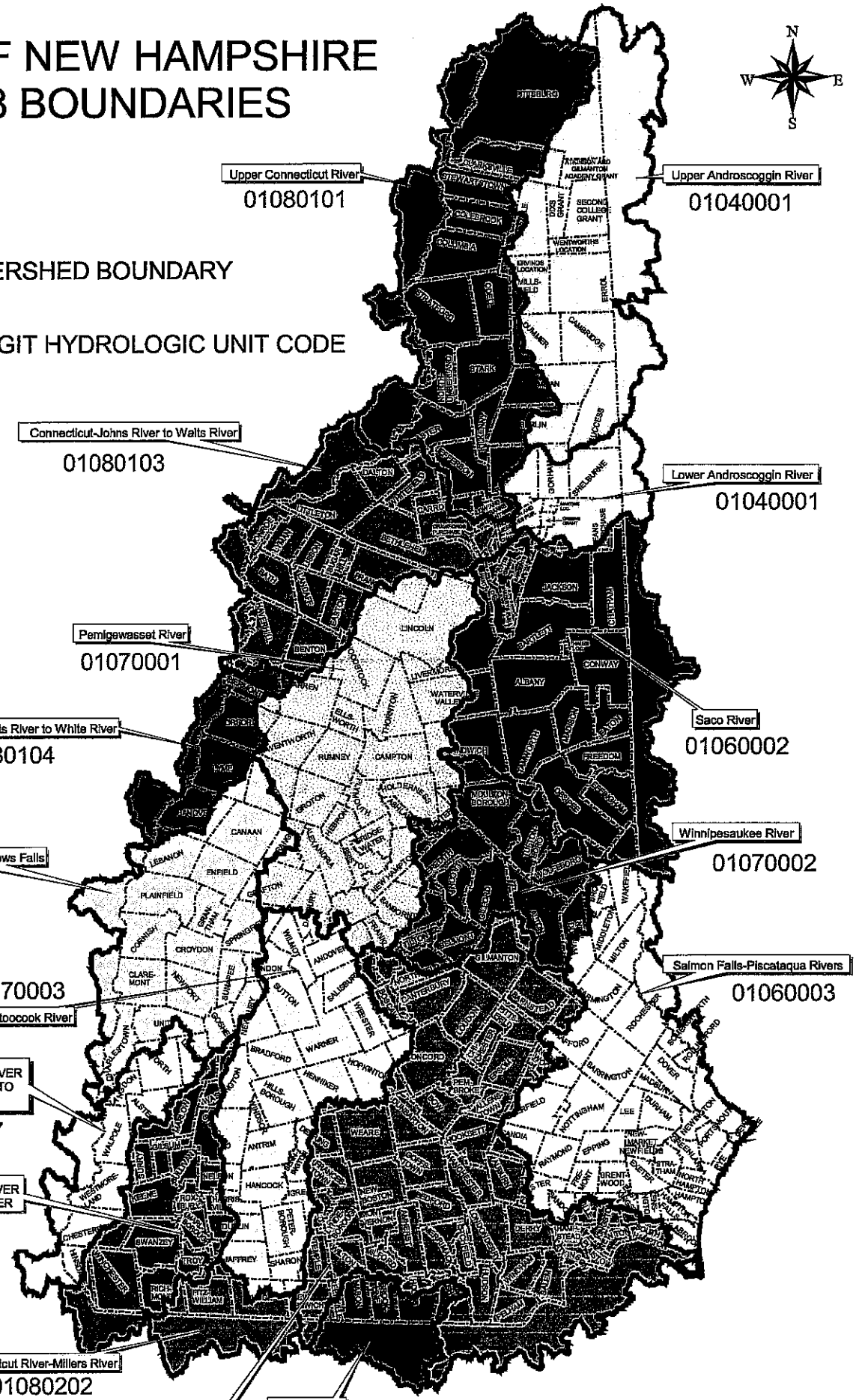
APPENDIX A

HUC 8 WATERSHEDS IN NEW HAMPSHIRE

STATE OF NEW HAMPSHIRE
HUC8 BOUNDARIES

= WATERSHED BOUNDARY

XXXXXXXX = 8 DIGIT HYDROLOGIC UNIT CODE



APPENDIX B

TABLE 800-1
FROM CHAPTER Env-Wt 800 OF THE
NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

TABLE 800-1 Minimum Compensatory Mitigation Ratios

Resource Type	Creation	Restoration	Preservation of Upland Buffer
Bog	N/A	2:1	15:1
Tidal Wetlands	3:1	2:1	15:1
Forested	1.5:1	1.5:1	10:1
Undeveloped Tidal Buffer Zone	N/A	2:1	3:1
All Other Jurisdictional Areas	1.5:1	1:1	10:1