

# King County Mitigation Reserves Program In-Lieu Fee Instrument

AN AGREEMENT REGARDING THE OPERATION OF THE KING COUNTY IN-LIEU FEE PROGRAM PURSUANT TO 33 CFR PARTS 325 AND 332 AS REVISED EFFECTIVE JUNE 9, 2008 (FEDERAL MITIGATION RULE)

In consideration of the mutual promises and covenants contained herein, King County a political subdivision of the state of Washington (the "Sponsor"), the U.S. Army Corps of Engineers ("Corps"), and the Washington State Department of Ecology ("Ecology") as Parties to this Instrument hereby agree as follows:

## INTRODUCTION

A. Purpose: The purpose of this Mitigation Reserves Program In-Lieu Fee Instrument (hereinafter, "Instrument") is to set forth the agreed upon terms specifying responsibilities for the establishment, use, operation, and management of the Sponsor's Mitigation Reserves In-Lieu Fee Program ("Mitigation Reserves Program" or sometimes "MRP"). The King County Department of Natural Resources and Parks is the King County agency responsible for meeting these responsibilities on behalf of the Sponsor. This Instrument consists of two sets of documents: the instant document setting forth the general terms of agreement and establishing the central obligations assumed and consideration provided by each party ("Basic Agreement"), and the Appendices and Exhibits ("Appendices") that establish detailed provisions for operation of the Mitigation Reserves Program, including the Compensation Planning Framework, mitigation planning requirements, and standards and procedural requirements applicable to the Mitigation Reserves Program pursuant to 33 CFR 332. The terms and provisions of the Appendices are hereby incorporated into this Instrument and made a part hereof.

The Mitigation Reserves Program will provide compensatory mitigation for unavoidable adverse impacts to waters of the United States and waters of the State, including wetlands, aquatic areas and aquatic resources as defined by Appendix B that result from activities authorized by Federal, State, and local authorities. Use of the Mitigation Reserves Program as a means of satisfying mitigation obligations associated with unavoidable impacts must be specifically approved by the permit reviewers from the applicable regulatory agencies for each permitted impact project. This program may also be used as a remedy to mitigate for unauthorized activities when such use of the program is approved by appropriate regulatory agencies.

B. Mitigation Reserves Program Mission and Objectives: The primary mission of the Mitigation Reserves Program is to provide a comprehensive natural resource program that addresses ecosystem needs at the local watershed level, and that provides mitigation for

1 degradation or destruction to aquatic resources as a result of unavoidable activities conducted in  
2 compliance with Federal, State or local regulations. The program is intended to uphold the goal  
3 of no net loss through the preservation, enhancement, establishment, and restoration of  
4 ecological functions within target watersheds through the establishment and management of  
5 mitigation sites. It is the intent of the parties that this program be operated in a collaborative  
6 manner, including collaboration of the IRT members, as further described below, in the decision  
7 making process. The specific objectives of the Mitigation Reserves Program include:

- 8 1. Provide high quality, successful long term mitigation for unavoidable impacts to  
9 aquatic resources and to procedurally decouple permitted development projects  
10 from mitigation projects.
- 11 2. Utilize scale efficiencies by combining the required mitigation for impacts from  
12 individual smaller projects within a service area into collective mitigation at  
13 larger sites with greater ecological value.
- 14 3. Efficiently meet regulatory requirements by streamlining the compensatory  
15 mitigation process, thereby reducing conflict between conservation objectives  
16 and development interests and putting more funds into ecological restoration  
17 and less into administrative processes.
- 18 4. Utilize a watershed approach as defined in 33 CFR 332 to identify the most  
19 appropriate off-site mitigation options available, thereby obtaining greater  
20 ecological benefits than would otherwise be achieved through on-site mitigation  
21 options that are impracticable or of low ecological value.
- 22 5. Operate in a financially self-sustaining manner: collect sufficient mitigation fees  
23 to complete mitigation projects and meet "no net loss" requirements over the  
24 long term operation of the Mitigation Reserves Program.
- 25 6. Provide public benefit by applying mitigation resources toward the  
26 improvement of ecologically-impaired publicly-owned natural areas and of  
27 privately-owned lands that have important ecological value to the watershed.

28 C. Mitigation Reserves Program Interagency Review Team: The Mitigation  
29 Reserves Program Interagency Review Team ("IRT") is the group of representatives from  
30 Federal, State, tribal and local regulatory and resource agencies that have reviewed this  
31 Instrument and will advise the Corps and Ecology, regarding the establishment and management  
32 of the Mitigation Reserves Program pursuant to the provisions of this Instrument. The IRT  
33 consists of:

- 34 1. Co-Chair: District Engineer, U.S. Army Corps of Engineers, Seattle District  
35 (District Engineer) or his designee,
- 36 2. Co-Chair: Washington Department of Ecology,
- 37 3. U.S. Environmental Protection Agency, Region 10,
- 38 4. National Oceanographic and Atmospheric Administration, National Marine  
39 Fisheries Service,
- 40 5. United States Fish and Wildlife Service,
- 41 6. Washington Department of Fish and Wildlife,
- 42 7. Muckleshoot Indian Tribe,

- 1 8. Tulalip Tribes,
- 2 9. Snoqualmie Indian Tribe,
- 3 10. Other pertinent interested parties as invited by the Co-Chairs.

4 D. The Role of the IRT: The primary role of the IRT is to assist the Corps and  
5 Ecology, in their role as co-chairs of the IRT, in the review of monitoring reports, the evaluation  
6 of mitigation plans, the recommendation of remedial measures, the approval of credit releases,  
7 and the approval of modifications to this Instrument. The IRT's role and responsibilities are  
8 more fully set forth in Section 332.8 of the Federal Mitigation Rule (33 CFR Part 332), and  
9 Appendices A and K of this Instrument. IRT members are invited to sign, but need not sign, this  
10 Instrument as an expression of their agreement with its terms. IRT members do not become a  
11 Party to this Instrument by signing and expressing such agreement. Signing this Instrument does  
12 not override or nullify the independent permitting authority of a Federal, State or local permitting  
13 entity to enforce their permit requirements at Mitigation Sites.

- 14 1. The IRT will work to reach consensus in its actions. This consensus also  
15 includes giving the Sponsor the opportunity to provide information and input for  
16 the IRT members during IRT decision making processes. The IRT will seek to  
17 reach such a consensus within a reasonable period of time and with minimal  
18 delays; and
- 19 2. The members of the IRT will review such documents and mitigation sites as  
20 each considers necessary to provide meaningful input to the Co-Chairs, and  
21 express any recommendations, concerns, or potential improvements concerning  
22 the implementation of the Mitigation Reserves Program to The Sponsor.

## 23 **BASIC TERMS OF AGREEMENT**

### 24 **I. TRANSFER OF PERMIT MITIGATION RESPONSIBILITY**

25 A. Transfer of Permit Mitigation Responsibility: The Sponsor agrees to accept full  
26 legal responsibility for satisfying the mitigation requirements for all Corps, State, and local  
27 permits for which mitigation fees from a permittee have been accepted under the terms of this  
28 Instrument. This responsibility includes compliance with 33 CFR Part 332, 40 CFR Part 230,  
29 Chapter 90.48 RCW, King County Code Chapter 21A.24, and any other applicable federal, state  
30 and local jurisdiction laws. In satisfaction of the compensatory mitigation requirements, the  
31 Sponsor shall provide compensatory mitigation of the type and in the amount necessary to meet  
32 applicable Federal, State, and local regulation requirements. Any transfer of mitigation  
33 responsibility is contingent upon the prior approval of this Instrument by the Sponsor, the Corps  
34 and Ecology.

- 35 1. Mitigation responsibility includes, but is not limited to: the identification and  
36 selection of mitigation sites, property rights acquisition, water rights acquisition,  
37 mitigation plan design and development, construction, monitoring, preservation,  
38 and long term management of the required mitigation.

- 1                   2. The transfer of mitigation responsibility from the permittee to the Sponsor for  
2 each impact site shall be effective upon (a) the permittee purchasing from the  
3 Sponsor the appropriate number and resource type of credits, and (b) the Corps'  
4 and Ecology's receipt of the Statement of Sale found in Exhibit 17, which  
5 expressly specifies that the Sponsor, and its successors and assigns, assume  
6 responsibility for accomplishment and maintenance of the transferee's  
7 compensatory mitigation requirements associated with the impacting project, as  
8 required by the permit conditions, upon completion of the credit sale.

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11 **II.     LEGAL AUTHORITIES**

12           The establishment, use, operation, and management of the Mitigation Reserves Program  
13 shall be carried out in accordance with the following principal authorities.

14       A.     Federal:

- 15           1. Clean Water Act (33 USC §§ 1251 et seq.)  
16           2. Rivers and Harbors Act of 1899 (33 USC § 403)  
17           3. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-  
18           332)  
19           4. Memorandum of Agreement between the Environmental Protection Agency and  
20           the Department of the Army concerning the Determination of Mitigation Under  
21           the Clean Water Act, Section 404(b)(1) Guidelines (February 6, 1990)  
22           5. U.S. Army Corps of Engineers Regulatory Guidance Letter 05-1, Guidance on  
23           Use of Financial Assurances, and Suggested Language for Special Conditions  
24           for Department of the Army Permits Requiring Performance Bonds, U.S. Army  
25           Corps of Engineers, February 14, 2005  
26           6. Guidelines for the Specification of Disposal Sites for Dredged and Fill Material  
27           (40 CFR Part 230, Section 404(b)(1))  
28           7. National Environmental Policy Act (42 USC §§ 4321 et seq.)  
29           8. Council on Environmental Quality Procedures for Implementing the National  
30           Environmental Policy Act (40 CFR Parts 1500-1508)  
31           9. Executive Order 11990 (Protection of Wetlands)  
32           10. Executive Order 11988 (Floodplains Management)  
33           11. Executive Order 13112 (Invasive Species)  
34           12. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.)  
35           13. Fish and Wildlife Service Mitigation Policy (46 FR 7644-7663, 1981)  
36           14. Endangered Species Act (16 USC §§ 1531 et seq.)

1 15. Magnuson-Stevens Fishery Conservation and Management Act (16 USC §§  
2 1801 et seq.)

3 16. National Historic Preservation Act, as amended (16 USC § 470)

4 B. State of Washington:

5 1. Water Pollution Control Act, Chapter 90.48 RCW and Chapter 173 -225 WAC)

6 2. Environmental Policy Act (Chapter 43.21C RCW and Chapter 197-11 WAC)

7 3. Growth Management Act (Chapter 36.70A RCW and Chapter 365-195 WAC)

8 4. Construction Projects in State Waters (Chapter 77.55 RCW)

9 5. Shoreline Management Act of 1971 (Chapter 90.58 RCW and Chapter 173-20  
10 RCW)

11 6. Salmon Recovery Act (Chapter 75.46 RCW)

12 7. Aquatic Resources Mitigation Act (Chapter 90.74 RCW)

13 8. Aquatic Lands (Chapters 79.105 - 79.140 RCW)

14 9. Alternative Mitigation Policy Guidance For Aquatic Permitting Requirements  
15 from the Departments of Ecology and Fish and Wildlife, February 10, 2000.

16 C. King County Code ("KCC") and other Local Authorities:

17 1. KCC Chapter 2.16. Administrative Offices and Executive Departments

18 2. KCC Chapter 2.98. Rules of County Agencies

19 3. KCC Chapter 21A.06 Technical Terms and Land Use Definitions

20 4. KCC Chapter 21A.24 Critical Areas and Mitigation Fees and Requirements

21 5. KCC Chapter 21A.50 Enforcement

22 6. KCC Title 23. Code Compliance

23 7. Other King County Codes and codes from other local jurisdictions as  
24 applicable

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26 **III. FUNDING PROVISIONS**

27 A. Fee Collection: Upon permit approval from appropriate regulatory agencies,  
28 mitigation fees will be collected from permittees and deposited into the King County Mitigation  
29 Reserves Program Account.

30 B. Spending Authority and Disbursement: Disbursement of funds to the Sponsor for  
31 mitigation projects subject to the terms of this Instrument will be made upon authorization from  
32 the Corps and Ecology as follows:

33 1. Administrative Costs: Upon receipt of payment from a permittee for an impact  
34 site, the Corps and Ecology hereby authorize the Sponsor to use funds from the

1 Program Administrative Account in the percentage amount specified in  
2 Appendix F.

3 2. Spending Agreement: the disbursement of any additional funds shall be made  
4 only pursuant to written authorization from the Corps and Ecology after the  
5 Corps and Ecology have consulted with the IRT, pursuant to 332.8(i)(2) and  
6 pursuant to Appendix F, Section 4.0 (see also, Article III.D). Written  
7 authorization will be in the form of the Spending Agreement found in Exhibit  
8 18. The Spending Agreement shall include:

9 i. Statement of current account balances for the Service Area

10 ii. Statement of anticipated mitigation site project cost

11 iii. Allocation of percentages for project operation

12 iv. Signature of the District Engineer or his designee and of Ecology.

13 C. Mitigation Fees: Mitigation Fees will comprise two fees: a Credit Fee and a Land  
14 Fee. The Credit Fee price will reflect average costs for implementing all components of a  
15 mitigation project, based on cost analyses of recent projects completed by the King County  
16 Department of Natural Resources and Parks. Credit Fees will be used to implement all aspects of  
17 mitigation projects undertaken by the Mitigation Reserves Program.

18 The Land Fee prices will be based on an analysis of average cost of recent King County natural  
19 lands acquisitions within different areas and zoning categories. Land Fees will be used for  
20 acquisition of lands as described in Appendix J, Section 2.0.

21 The Mitigation Fee prices will be formulated to reflect full-cost accounting for establishment and  
22 management of mitigation sites, which includes: costs associated with site selection, permitting  
23 and design, construction, monitoring and maintenance, long-term management, program  
24 administration, contingencies, and property rights acquisition. Mitigation Fees are further  
25 discussed in Appendix F, Section 2.

26 D. Program Account: Mitigation fees, once collected, will be allocated under King  
27 County's Mitigation Reserves Program Fund. The Program Fund will be established within King  
28 County's Financial Accounting System, which is run through an association with U.S. Bank, a  
29 member of the Federal Deposit Insurance Corporation. Upon the sale of the first advance credit  
30 the following accounts below will be established under the Mitigation Reserves Program Fund.  
31 Land Fee Account, Program Administration Account, Contingency Fee Account, Long Term  
32 Management Account, and Individual Mitigation Project Accounts. The allocation of  
33 percentages for each account will be determined by the Sponsor, Ecology and the Corps in  
34 accordance with the process outlined in Appendix F. The Sponsor must allocate and deposit  
35 funds to the appropriate accounts within 30 days of the receipt of mitigation funds from a  
36 permittee. Collectively, the following accounts for all Service Areas constitute the Mitigation  
37 Reserves Program Fund:

- 1           1. Land Fee Account: Each service area will have a Land Fee Account containing  
2           100% of the Land Fee portion of the Mitigation Fees collected in the service  
3           area. These funds will be used for payment of land acquisition costs and for the  
4           acquisition of property to include as potential mitigation sites or used to secure  
5           Preservation Credits (see Appendix K, Section 5.0). In the event an account in  
6           the Service Area is insufficient to meet the needs of the required action, moneys  
7           in the Land Fee Account may be used as Financial Assurances, provided such  
8           use does not violate any legal requirements of the funding source utilized for the  
9           acquisition of the lands serving as mitigation sites.
  
- 10          2. Program Administration Account: Each Service Area will have a Program  
11          Administration Account fund. The Administrative Accounts will be funded by a  
12          percentage of Credit Fees collected in the Service Area. These funds will pay  
13          for program administration duties, including but not limited to:
  - 14           a. Site selection and concept design,
  - 15           b. Fee and Credit accounting,
  - 16           c. Legal services,
  - 17           d. Data management (e.g., maintaining MRP Database; see Appendix G,  
18           Section 6.0),
  - 19           e. Reporting,
  - 20           f. Correspondence and meetings with the IRT and other regulatory agencies,
  - 21           g. Program development, and
  - 22           h. Other program administration duties as necessary.
  
- 23          3. Contingency Fee Account: Each Service Area will have a Contingency Fee  
24          Account. The Contingency Fee Account is funded by deposits of a percentage  
25          of Credit Fees collected in the Service Area. Moneys in the Contingency  
26          Accounts will be held in reserve to fund adaptive management during the  
27          establishment phase for mitigation sites. These funds are to be used only in their  
28          respective Service Areas for contingencies prior to a site entering Long Term  
29          Management, e.g., contingencies related to project implementation,  
30          implementation of adaptive management plans (see Appendix O). When a site  
31          enters Long Term Management, the remaining portion of the Contingency Fee  
32          Account related to that site will be rolled into the Long Term Management  
33          Fund. (see Appendix F).
  
- 34          4. Long Term Management Fund: Each Service Area will have a Long Term  
35          Management Fund. This account will be funded by a percentage of the Credit  
36          Fees collected in the Service Area. The account is to be funded when Credit  
37          Fees are collected. Moneys in the Long Term Management Accounts will be  
38          held in reserve to fund long-term management, including adaptive management  
39          and remediation, at mitigation sites after completion of the establishment phase  
40          and the project enters the Long Term Management phase. Additionally, when a  
41          project enters the long-term management phase, its portion of the Contingency

1 Fee Account will be rolled into the Long Term Management Fund. Moneys in  
2 the Long Term Management Fund will be available solely for use in long term  
3 management (i.e. for implementing long-term management plans included in  
4 IRT-approved Mitigation Plans; see Appendix K, Section 2.0 and Appendix P).  
5 Long Term Management funds are not available for use on a project until the  
6 project enters the Long Term Management phase (i.e. after the establishment  
7 phase is complete, and all credit associated with a project is released.) (See  
8 Credit Release Schedule, Appendix K, Section 6.0 and Long Term  
9 Management, Appendix P).

- 10 5. Individual Mitigation Project Accounts: Each Mitigation Project in each Service  
11 Area will have an Individual Mitigation Project Account. These accounts will  
12 be funded by an allocation of the percentage of Credit Fees that are not  
13 allocated to the other accounts, i.e. Contingency Account, Program  
14 Administration Account, and Long Term Management Fund. The fees in this  
15 account are used for development of Mitigation Plans, mitigation project  
16 implementation, and establishment period monitoring and maintenance  
17 activities.
- 18 6. Accrual of interest earnings: Interest earnings from the entire Program Account  
19 will be directed to Contingency Accounts and Long Term Management  
20 Accounts (see Appendix F).

21 E. Ability to Direct Funds: The Corps and/or Ecology, acting independently or in  
22 concert, and after consultation with each other and the Sponsor, have the authority to direct the  
23 Sponsor to disburse funds to alternative compensatory mitigation projects in cases where the  
24 Sponsor does not provide compensatory mitigation as agreed to by the parties or in cases of  
25 default, per Appendix S. The provisions of Appendix S call for collaboration with the Sponsor  
26 including providing the Sponsor an opportunity to suggest solutions to avoid default. In cases  
27 where default is determined per Appendix S, the Corps and Ecology shall consult with each other  
28 and other members of the IRT prior to making any decisions regarding direction of disbursement  
29 of MRP Account funds. Termination of any Program Account shall only occur upon receipt of  
30 written instructions signed by the Sponsor, Ecology and the Corps; all funds shall be disbursed  
31 pursuant to the instructions of the Corps and Ecology (see Appendix R, Section 1.0).

32 The Corps and/or Ecology shall direct the use of funds through the issuance of a signed  
33 Corrective Action Directive Letter to the Sponsor. The letter will specify what financial and  
34 responsive action the Sponsor must take. The letter will also specify a timeframe in which the  
35 Sponsor must complete the actions. By signing this Instrument the Sponsor has agreed to abide  
36 by the direction of the Corps and Ecology in authorization, release, and use of MRP funds. The  
37 Sponsor acknowledges that failure to abide by the Spending Agreement or written requests, as  
38 provided for herein, of the Corps and/or Ecology may constitute a violation of the program  
39 Instrument and may result in penalties including, in the most severe case, program termination.

40 F. Financial Assurance Requirements: The Sponsor intends to satisfy its obligations  
41 under this Instrument by obtaining sufficient funding to carry out all design, development,  
42 monitoring, remediation and site management responsibilities. The following financial



1 assurances are provided for the work described in this Instrument. Funding for all responsibilities  
2 and obligations arising under this Instrument has been included in the credit price estimation  
3 calculations, and mitigation fees collected are based on full cost accounting (see Appendix F,  
4 Section 2.0). Project approval by the IRT, Ecology and the Corps is contingent upon each  
5 project being fully funded at the time of its approval to cover the Sponsor's obligations under  
6 this Instrument.

7 To the extent, if any, that these funds are insufficient to fully and timely fund the  
8 Sponsor's obligations as delineated in this Instrument, the Department of Natural Resources and  
9 Parks shall include in its budget request appropriations sufficient to cover the balance of the  
10 Sponsor's obligations under this Instrument, and will use all reasonable and lawful means to  
11 fulfill its obligations hereunder. In the event the King County Council does not appropriate  
12 funds in sufficient amounts to discharge these obligations, Department of Natural Resources and  
13 Parks shall use its best efforts to procure funding in order to satisfy its obligations under this  
14 Instrument from any other source of funds legally available for this purpose. Nothing herein  
15 shall constitute, nor be deemed to constitute, an obligation of future appropriations by the  
16 Council.

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19 **IV. OPERATION OF THE MITIGATION RESERVES PROGRAM**

20 The Mitigation Reserves Program is approved to provide compensatory mitigation for impacts to  
21 the waters of the United States and waters of the State, including wetlands, aquatic areas and  
22 aquatic resources as defined in Appendix B. Mitigation credits will be sold to impact site  
23 permittees. The funds received from permittees will be consolidated and used to implement  
24 various Mitigation Projects. Once a Mitigation Project reaches functioning capacity in the  
25 watershed, additional mitigation credits will be released to the Sponsor to sell.

26 A. Service Areas: To accomplish the goal of watershed focused mitigation, the  
27 Sponsor has proposed the watershed Service Areas described in Appendix I. The fees for various  
28 impacts in a Service Area will be collected and combined to fund mitigation projects in that  
29 Service Area. In exceptional situations, the Mitigation Reserves Program may be used to  
30 compensate for an impact that occurs outside of the Service Area if specifically approved by the  
31 Corps and/ or Ecology, pursuant to the procedures and criteria prescribed in Appendices H, I and  
32 J. If the Corps and Ecology determine that the Sponsor has sold, used, or transferred credits at  
33 any time to provide compensatory mitigation for loss of aquatic resources outside of the Service  
34 Area where the impact occurred without prior approval under the terms of this instrument, the  
35 Corps and Ecology, in consultation with other applicable members of the IRT, may direct that  
36 the sale, use, or other transfer of credits immediately cease. The Corps and Ecology will  
37 determine, in consultation with the IRT, the Sponsor and the appropriate regulatory authority,  
38 what remedial actions are necessary to correct the situation and will direct the Sponsor's  
39 performance prior to the award of any additional mitigation credits. Notwithstanding the fact  
40 that ceasing sale, use, or other transfer of credits may have been required, unless this Instrument  
41 is terminated pursuant to Article VI.C., the Sponsor shall remain responsible for the timely and  
42 effective achievement of all the Objectives and Performance Standards mandated in Appendix  
43 M.

1           B.     Advanced Credit Allocation to Sponsor: The Sponsor requests, and the Corps and  
2 Ecology agree to initially grant advance credits to be made available for sale to applicants  
3 undertaking permitted actions with unavoidable impacts. Appendices E and I detail the rationale,  
4 amount, and type of advance credits requested. The Sponsor may need to request additional  
5 advance credits, in which case approval must be granted by the Corps and Ecology, in  
6 consultation with the IRT. Requests for additional advance credit must also comply with Article  
7 VI.C.

8           C.     Credit Deficit or Fraudulent Transactions: If the Corps and/or Ecology  
9 determines at any point that the Mitigation Reserves Program is operating without prior written  
10 approval, at a deficit, or has engaged in fraudulent transactions in the sale, use, or other transfer  
11 of credits, the Corps and/or Ecology shall direct the Sponsor to immediately cease award and  
12 sale, use, or other transfer of credits, and shall determine in consultation with each other, the IRT  
13 and the Sponsor, what remedial actions are necessary to correct the situation and will direct the  
14 Sponsor's performance prior to the award of any additional mitigation credits.

15           D.     Permits: Except for the advance credits provided for in Article IV.B. above, the  
16 Sponsor shall obtain all appropriate environmental documentation, permits and other  
17 authorizations needed to establish and maintain Mitigation Sites, prior to the release of any  
18 mitigation credits to the Sponsor. Compliance with this Instrument does not fulfill the  
19 requirement, or substitute, for such authorization.

20           E.     Permittee Use of Program: an applicant seeking to use the Mitigation Reserves  
21 Program must meet the requirements in Appendix C, and receive a permit approval from the  
22 appropriate permitting authority. Permit approval should require the permittee to calculate the  
23 amount of impacts to the watershed and the credits required to mitigate for the impacts. The  
24 permitting authority will determine whether use of the Mitigation Reserves Program is  
25 acceptable mitigation for the proposed impact, and whether the correct amount of mitigation  
26 credits have been required. If the permitting authority agrees to the use of the Mitigation  
27 Reserves Program by the permittee, the Sponsor shall collect fees for the mitigation credits  
28 required by the applicable permitting agencies to mitigate for the impact activity. The Sponsor  
29 must receive a copy of the permit approval prior to collecting mitigation fees from a permittee.  
30 Upon the Sponsor's receipt of mitigation fees from a permittee the Sponsor shall sign and issue  
31 to the permittee a copy of the Statement of Sale, as found in Exhibit 17. The permittee shall be  
32 responsible for providing copies of the signed Statement of Sale to the applicable permitting  
33 agencies. The permittee may transfer or sell its credits to a third party provided that such action  
34 is approved by the IRT, applicable regulatory agencies, and reflected in a transfer agreement.

35           F.     Approval of Mitigation Sites: By the end of the third full growing season after  
36 any impact in a Service Area the Sponsor agrees to complete land acquisition and initial physical  
37 and biological improvements at a Mitigation Site using mitigation fees collected from the sale of  
38 mitigation credits in that Service Area. To establish a Mitigation Site, the Sponsor agrees to  
39 follow the requirements of Appendix K. The Sponsor shall submit for IRT approval a proposed  
40 Mitigation Site, including a preliminary concept plan for mitigation at the site, as described in  
41 Appendix J. The Sponsor will also submit a proposed Spending Agreement for approval and  
42 signature by the Corps and Ecology, using the template in Exhibit 18. Upon approval of a

1 Mitigation Site by the IRT, and the Sponsor's receipt of a signed corresponding Spending  
2 Agreement, the Sponsor shall prepare and submit a Mitigation Plan as described in Appendix K,  
3 Section 2.0. Upon the approval by the IRT of a Mitigation Plan, the sponsor will proceed to  
4 implement the mitigation project in accordance with the terms of the approved Mitigation Plan  
5 and approved Spending Agreement (see Article III, Funding Provisions). For each approved  
6 Mitigation Plan, Appendix W will be amended in this Instrument to reflect the Mitigation Site  
7 and the Site's Mitigation Plan.

8 G. Compensation Planning Framework: All mitigation projects provided by the  
9 Sponsor under the terms of this Instrument will comply with the Compensation Planning  
10 Framework presented in Appendices H through Appendix Q. The Compensation Planning  
11 Framework will be used to select, secure, and implement aquatic resource restoration,  
12 enhancement, and/or preservation activities.

13 H. Mitigation Site Operational Phases: Mitigation Sites have two operational phases:  
14 the Establishment Phase in which the Site is developed, constructed and actively managed, and  
15 the Long Term Management Phase in which the Site is sufficiently mature to require only  
16 minimal active management.

17 1. The Establishment Phase of a particular Mitigation Site will commence upon  
18 the Sponsor's receiving both the IRT-approved Mitigation Plan (see Appendix  
19 K, Section 2.0) and a copy of a recorded Site Protection Instrument pursuant to  
20 Article IV.AA. Prior to termination of the Establishment Phase of a Mitigation  
21 Site, the IRT will perform a final compliance inspection to evaluate whether all  
22 performance standards have been achieved. Upon termination of the  
23 Establishment Phase the Corps and Ecology after consultation with the IRT,  
24 shall release all available credits for the Mitigation Site to the Sponsor.  
25 Termination of the Establishment Phase is conditioned upon the Mitigation Site  
26 meeting the requirements to enter Long Term Management.

27 2. The Long Term Management Phase of a particular Mitigation Site will  
28 commence upon the Co-Chair's determining, in consultation with the other  
29 members of the IRT, and the Sponsor, that:

30 a. All applicable performance standards for the Site prescribed in the IRT-  
31 approved Mitigation Plan have been achieved;

32 b. All available credits for that phase have been awarded, or the Corps has  
33 approved the Sponsor's request to permanently cease Mitigation Reserves  
34 Program activities;

35 c. The Sponsor has prepared a Long Term Management Plan that has been  
36 approved by the Corps and Ecology in consultation with the IRT, pursuant  
37 to Appendices K and P;

38 d. The Sponsor has either: (1) assumed responsibilities for accomplishing the  
39 Long Term Management Plan, in which case the Sponsor will fulfill the role

1 of Long Term Steward, or (2) has assigned those responsibilities to another  
2 Long-Term Steward pursuant to Article VI.D;

3 e. The Long Term Management Account has been funded as described in this  
4 Instrument;

5 f. Appropriate moneys from the Long Term Management Account have been  
6 transferred to the Long Term Steward, if applicable; and

7 g. The Sponsor has complied with the terms of this Instrument.

8 I. Deviation from Mitigation Site Plans: In establishing the Mitigation Sites,  
9 deviations from the approved Mitigation Plans may only be made with the prior approval of the  
10 Corps and Ecology, following consultation with applicable members of the IRT. In the event the  
11 Sponsor determines that modifications to an approved Mitigation Plan are necessary, the Sponsor  
12 shall submit a written request for such modification to the IRT, through the Co-Chairs, for  
13 approval. Documentation of implemented modifications shall be made consistent with Article  
14 VI.C.

15 J. Credit Release Schedule: Subject to the documentation and scheduling provisions  
16 of Appendix K, Section 6.0, the Sponsor may submit to the IRT written evidence that particular  
17 performance standards have been achieved. If the Co-Chairs, after consulting with the other  
18 members of the IRT and the Sponsor, concur that the required performance standards have been  
19 achieved in full, they will notify the IRT and respond in writing to the Sponsor that the credits  
20 associated with those performance standards are released. Mitigation credits will be released to  
21 the Sponsor in accordance with the procedures and schedules prescribed in the Appendices; see  
22 especially Appendices K, M, and Q.

23 K. Modification of Credits: If the aquatic resource restoration, establishment,  
24 enhancement, and/or preservation activities cannot be implemented in accordance with an  
25 approved mitigation plan, the Corps and Ecology must consult with the Sponsor and the IRT to  
26 consider modifications to the site mitigation plan, including adaptive management, revisions to  
27 the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any  
28 credits that have already been sold (see 33 CFR 332.8(l)(2)). Once implemented, if the in-lieu  
29 fee project does not then achieve its performance-based milestones, the Corps and Ecology may  
30 modify the credit release schedule, including reducing the number of credits, according to the  
31 procedures described in the federal rule (see 33 CFR 332.8(o)(8)(iii)). Any such modification to  
32 an approved mitigation plan or credit release schedule shall occur per Article VI.C. of this Basic  
33 Agreement.

34 L. Monitoring Provisions: The Sponsor agrees to perform all necessary work,  
35 pursuant to Appendix N, to monitor the Mitigation Reserves Program during the establishment  
36 period to demonstrate compliance with the performance standards established in Appendix M.

37 M. Maintenance Provisions: Following achievement of the performance standards,  
38 the Sponsor agrees to perform all necessary work to maintain those standards as prescribed in  
39 Appendix L.

1 N. Contingency Plans/Remedial Actions: In the event the Mitigation Reserves  
2 Program fails to achieve by the specified date one or more of the performance standards  
3 identified in an IRT-approved Mitigation plan consistent with provisions in Appendix K, Section  
4 2.0, the Sponsor shall develop necessary contingency plans and implement appropriate remedial  
5 and monitoring actions for the Mitigation Reserves Program as specified in Appendix O, to  
6 attain those project objectives and performance standards. Prior to their execution, proposals for  
7 the contingency plans and remediation and monitoring activities must be approved by the Corps  
8 and Ecology, after consultation with the Sponsor, and the IRT. In the event the Sponsor fails to  
9 implement necessary remedial actions within the prescribed period, the Corps and Ecology, in  
10 their sole discretion, following consultation with the Sponsor and the IRT, will direct remedial,  
11 corrective, and/or sanctioning action in accordance with the procedures specified in Appendix S.  
12 In cases of default as described in Article IV.R and Appendix S, the Corps and/or Ecology may  
13 accomplish such remedial action directly, acting through a third party designee, by directing use  
14 of the financial assurance instrument pursuant to Articles III.E and III.F.

15 O. Availability of Credits in the Event Contingencies or Financial Assurances are  
16 Accessed: In the event the Corps and/or Ecology, acting pursuant to Articles IV.N or IV.Q,  
17 directs the use of the Financial Assurances established pursuant to Article III.E and III.F. and the  
18 use of any Financial Assurances accomplishes any objectives, performance standards, or features  
19 of a Mitigation Site implemented by the Mitigation Reserves Program, the Corps and Ecology, in  
20 consultation with the other members of the IRT, may award credits for sale, use, or transfer by  
21 the Sponsor, in a quantity reflecting the objectives and performance standards achieved as a  
22 result of such remedial action.

23 P. Force Majeure: The Sponsor may request, pursuant to Article VI.C., and the  
24 Corps and Ecology may approve changes to the construction, operation, project objectives,  
25 performance standards, timelines or crediting formula of the Mitigation Reserves Program,  
26 pursuant to the standards and procedures specified in applicable Appendices if all of the  
27 following occur: an act or event causes substantial damage such that it is determined to be a  
28 force majeure; such act or event has a significant adverse impact on the quality of the aquatic  
29 functions, native vegetation, or soils of the mitigation site; and such act or event was beyond the  
30 reasonable control of the Sponsor, its agents, contractors, or consultants to prevent or mitigate.

- 31 1. The evaluation of the damage caused by a force majeure and the resulting  
32 changes to mitigation requirements will necessarily involve communication  
33 among the Parties and the IRT. If the Sponsor asserts a mitigation site has  
34 sustained significant adverse impacts due to an event or act which may be  
35 determined to be a force majeure, the Sponsor shall give written notice to the  
36 Corps, Ecology and the IRT as soon as is reasonably practicable. After  
37 receiving written notice, the Corps and Ecology, in consultation with the  
38 Sponsor and the IRT, shall evaluate whether the event qualifies as force  
39 majeure. The Corps and Ecology, in consultation with the Sponsor and the IRT,  
40 will then evaluate whether significant adverse impacts have occurred to the site.  
41 If a force majeure event is determined to have occurred and significant adverse  
42 impacts are found to have occurred to the site, the Corps and Ecology, in  
43 consultation with the IRT and the Sponsor, will evaluate whether and to what

1 extent changes to the mitigation site will be in the best interest of the site and  
2 the aquatic environment, and may approve such changes as detailed in  
3 paragraph P above. The Corps and Ecology retain sole discretion over the final  
4 determination of whether an act or event constitutes force majeure, whether  
5 significant adverse impacts to a mitigation site have occurred, and to what  
6 extent changes to a mitigation site will be permitted.

7 2. Force majeure events include natural or human-caused catastrophic events or  
8 deliberate and unlawful acts by third parties.

9 a. Examples of a natural catastrophic event include, but are not limited to: a  
10 flood equal to or greater in magnitude than the 100-year flood event; an  
11 earthquake of a force projected from an earthquake with a return period of  
12 475 years; drought that is significantly longer than the periodic multi-year  
13 drought cycles that are typical of weather patterns in the Pacific Northwest;  
14 as well as events of the following type when they reach a substantially  
15 damaging nature: disease, wildfire, depredation, regional pest infestation, or  
16 significant fluviogeomorphic change.

17 b. Examples of a human-caused catastrophic event include, but are not limited  
18 to substantial damage resulting from the following: war, insurrection, riot or  
19 other civil disorders, spill of a hazardous or toxic substance, or fire.

20 c. Examples of a deliberate and unlawful act include, but are not limited to  
21 substantial damage resulting from the following: the dumping of a  
22 hazardous or toxic substance, as well as significant acts of vandalism or  
23 arson.

24 Q. Noncompliance: Noncompliance not rising to the level of default is categorized  
25 for Mitigation Site, Service Area, and the Mitigation Reserves Program. This noncompliance  
26 includes performance failure, and delinquency (see Appendix S). Before a Mitigation Site,  
27 Service Area or the program is found to be in default (see Article IV.R. below), the Corps and  
28 Ecology, in consultation with the IRT and the Sponsor, shall seek to address the causes of  
29 noncompliance following the steps outlined in Appendix S, which describes the categories of  
30 non-compliance.

31 R. Default: Three levels of default exist: Mitigation Site default, Service Area  
32 default, and programmatic default which may result from administrative failures or other actions  
33 or inactions specified in Appendix S (see Appendix S). Should the Corps and Ecology, in  
34 consultation with the IRT, determine that the Sponsor is in Mitigation Site, Service Area, or  
35 programmatic default as defined in Appendix S, the Corps and Ecology may take the measures  
36 as further prescribed in Appendix S. Remedies available in the case of default include:

- 37 1. Suspending credit sales in one or more service areas;
- 38 2. Decreasing available credits at a site or in one or more service areas;
- 39 3. Directing the Sponsor to utilize Financial Assurances to correct identified  
40 deficiencies (i.e. access contingency funds, Long-term Management funds, or  
41 Land Fees. See Appendix R, and Appendix S, Section 4.0);

- 1 4. Directing The Sponsor to use the Mitigation Reserves Program Fund to secure  
2 necessary mitigation credits (see Article III.E and Appendix S);
- 3 5. Terminating the program Instrument (see Article IV.Y and IV.Z., and Appendix  
4 S, Section 5.0); or
- 5 6. Referring the non-compliance with the terms of this Instrument to the  
6 Department of Justice.

7 S. Notification of Credit Suspension or Program Suspension: In the event of default  
8 the Corps and Ecology may suspend credit sales or suspend use of the program (see Appendix  
9 S). Upon written notification by the Corps and Ecology of credit and/or program suspension, the  
10 Sponsor agrees to immediately cease any pending sale or transfer of credit transactions not yet  
11 finally completed and to cease any use of credits as compensatory mitigation for activities within  
12 the affected site or service area deemed to be in noncompliance until informed by the Corps and  
13 Ecology that release, sale, use, or transfer of credits may be resumed.

14 T. Sponsor's Failure to Correct Default: Should the Sponsor fail to correct the  
15 reasons for default according to and within the time period specified in the default notification  
16 letter per Appendix S, the Corps and, Ecology, following consultation with the IRT, may  
17 terminate this Instrument and any subsequent Mitigation Reserves Program operations pursuant  
18 to the closure provisions in Article IV.Y. below.

19 U. Unavoidable Delays: The Sponsor shall not be deemed to be in noncompliance or  
20 default when delays to implementation or action are due to the IRT decision making process  
21 including review and approval of mitigation actions, or to events categorized under the Force  
22 Majeure provision above.

23 V. Site Closure: If the Sponsor or any member of the IRT determines that a  
24 mitigation Site will not be able to meet performance standards specified in an IRT-approved  
25 Mitigation Plan, or that for any reason continued mitigation actions at a Site are impracticable,  
26 the Sponsor, the Corps, Ecology, or any member of the IRT may recommend closure of the  
27 affected Site. Following a recommendation of closure, the Corps and Ecology, after consultation  
28 with the Sponsor and the IRT, shall have the option of closing a Site. The Sponsor, Corps,  
29 Ecology, and members of the IRT shall seek consensus on Site closure decisions. If consensus  
30 cannot be reached, the Corps' and Ecology's determination shall be final.

31 W. Service Area Closure. The Sponsor, or the Corps and Ecology may terminate this  
32 Instrument as to a specific Service Area in cases where the Sponsor fails to abide by the terms of  
33 this Instrument in ways that fundamentally prevent the overall successful operation of the  
34 program in that service area as described in Appendix S. Additionally, at the Sponsor's  
35 discretion, the Sponsor may terminate this Instrument as to a specific Service Area within 60  
36 days of written notification to the other parties. Closing a Service Area does not automatically  
37 trigger Program Closure.

38 X. Program Closure: The Sponsor, the Corps, and/or Ecology, acting independently  
39 or in concert, may terminate this Instrument within 60 days of written notification to the other  
40 parties and to the IRT members. In the event that such termination action is commenced, the

1 Sponsor is responsible for providing to the IRT reports detailing credit and fee ledger balances,  
2 as well as status reports for all mitigation projects.

3 Y. Closure Provisions: In cases of Site, Service Area, or Program closure the  
4 Sponsor remains responsible for fulfilling any outstanding or pre-existing project obligations  
5 including the successful completion of ongoing mitigation projects, relevant maintenance and  
6 monitoring, reporting, and long-term management requirements. The Sponsor shall remain  
7 responsible for fulfilling these obligations so that the obligations are satisfied or the long-term  
8 management and maintenance of all mitigation lands has been transferred to a third party  
9 approved by the Corps and Ecology. In cases of closure, the Corps and Ecology, after  
10 consultation with the Sponsor, and other members of the IRT, will determine the amount of  
11 credits the sponsor must recover through alternative mitigation (see Appendix S).

12 Z. Closure Provisions Regarding Funding: Funds remaining in the Mitigation  
13 Reserves Program accounts after all obligations are satisfied must continue to be used for the  
14 restoration, establishment, enhancement, and /or preservation of wetland areas and resources.  
15 Any expenditure of these remaining funds requires IRT review and approval. If the Sponsor has  
16 outstanding mitigation obligations at the time of closure which it is unable to fulfill, the Corps  
17 and Ecology in consultation with other members of the IRT, shall direct the Sponsor to use  
18 remaining funds to secure credits from a third party source of mitigation as described in  
19 Appendix S.

20 AA. Mitigation Site Protections: All real property to be included in the Roster of  
21 available sites, now or in the future, will be either (1) owned in fee simple by the Sponsor and  
22 subject to a restrictive covenant established by the Sponsor limiting use to wetlands mitigation,  
23 or similarly restricted by a conservation easement granted by the Sponsor to a third party; or (2)  
24 subject to a conservation easement granted to the Sponsor by a landowner that restricts use to  
25 wetlands mitigation consistent with this Program. All restrictive covenants or conservation  
26 easements shall be perpetual in duration, must be approved by the IRT, and must be recorded  
27 with the King County Recorder's Office prior to the release of any Mitigation Reserves Program  
28 credits. (See Appendix J for the existing real property roster of available sites).

29 BB. Mitigation Site Restrictions on Use: The Corps and Ecology may treat the  
30 Sponsor as being in material default of a provision of this Instrument and proceed accordingly  
31 under Article IV.R., should the Corps and Ecology, in consultation with the IRT, determine that  
32 either of the following have occurred:

- 33 1. The Sponsor has granted additional easements, rights of way, or any other  
34 property interests in the project areas without the written approval of the Corps,  
35 in consultation with the IRT.
- 36 2. The Sponsor has used or authorized use of any areas of mitigation sites within  
37 the Mitigation Reserves Program for any purpose that Corps and Ecology, in  
38 consultation with the IRT, concludes is contrary to the provisions of this  
39 Instrument or the restrictive covenant or conservation easement, or that  
40 interferes with the conservation purposes of the Mitigation Reserves Program.



1 CC. Inspection of Mitigation Reserves Program Sites: The Sponsor will allow, or  
2 otherwise provide for, access to the Mitigation Reserves Program site by members of the IRT or  
3 their agents or designees, as reasonably necessary for the purpose of inspection, compliance  
4 monitoring, and remediation consistent with the terms and conditions of this Instrument and the  
5 Appendices, including mitigation site establishment and long-term management phases. This  
6 right shall remain in place even in the event the program or a Service Area closes. Inspecting  
7 parties shall provide the Sponsor reasonable prior notice of a scheduled inspection, and shall not  
8 unreasonably disrupt or disturb activities on the property.

9 DD. Accomplishment of Sponsor Responsibilities; Transfer of Ownership of a  
10 Mitigation Site: The Sponsor shall remain responsible for complying with the provisions of this  
11 Instrument throughout the operational life of the Mitigation Reserves Program, regardless of the  
12 ownership status of the underlying real property where Mitigation Sites are located, unless those  
13 responsibilities have been assigned pursuant to the provisions of Article VI.D. The Sponsor is  
14 not required to but may transfer ownership of all or a portion of the Mitigation Sites' real  
15 property interest to another party, provided the Corps and Ecology, following consultation with  
16 the other members of the IRT expressly approve the transfer in writing. The Sponsor shall  
17 provide no less than 60 days' written notice to the IRT of any transfer of fee title or any portion  
18 of the ownership interest in the Mitigation Reserves Program real property interest to another  
19 party.

20 EE. Transfer of Long Term Management Responsibilities: The Sponsor may assign its  
21 long-term management responsibilities to a third party assignee, which will then serve as Long-  
22 Term Steward in place of the Sponsor. The identity of the assignee and the terms of the long-  
23 term management and maintenance agreement between the Sponsor and the assignee must be  
24 approved by the Corps and Ecology, following consultation with the IRT, in advance of  
25 assignment.

26 Upon execution of a long-term management assignment agreement and the transfer of the  
27 contents of the Long-Term Management Account, and upon satisfaction of the remaining  
28 requirements for termination of the establishment phase of the Mitigation Reserves Program  
29 under Article IV.H., the Sponsor shall be relieved of all further long-term management  
30 responsibilities under this Instrument which are associated with the site for which responsibilities  
31 have been transferred.

32  
33 **V. RESPONSIBILITIES OF THE CORPS AND ECOLOGY AS CO-CHAIRS OF THE IRT**

34 A. The Corps and Ecology agree to provide appropriate oversight in carrying out  
35 their responsibilities under the provisions of this Instrument.

36 B. The Corps and Ecology agree to review and provide comments on project plans,  
37 monitoring reports, contingency and remediation proposals, and similar submittals from the  
38 Sponsor in a timely manner. As Co-Chairs, the Corps and Ecology will coordinate their review  
39 with the other members of the IRT.

1 C. The Corps and Ecology agree to review requests to modify the terms of this  
2 Instrument, to transfer title or interest in any real estate subject to the Mitigation Reserves  
3 Program, to determine achievement of performance standards in order to evaluate the award of  
4 credits for each phase of the Mitigation Reserves Program, or to approve the Long-Term  
5 Management Plans. As Co-Chairs, the Corps and Ecology will coordinate review with the  
6 members of the IRT so that a decision is rendered or comments detailing deficiencies are  
7 provided in a timely manner. The Corps and Ecology agree to not unreasonably withhold or  
8 delay action on such requests.

9 D. The Corps and Ecology agree to act in good faith when rendering decisions about  
10 acceptability of financial assurances, requiring corrective or remedial actions, requiring long-  
11 term management and maintenance actions, and releasing credits. The Corps and Ecology shall  
12 exercise good judgment in accessing financial assurances, and will utilize those monies only to  
13 the extent they reasonably and in good faith conclude that such remedial or corrective actions are  
14 an effective and efficient expenditure of resources. In implementing the process delineated in  
15 Article III.E., the Corps and Ecology will act in good faith in determining the scope and nature  
16 of corrective actions to be undertaken, shall act in good faith in conducting monitoring,  
17 developing reports, and assessing compliance with performance standards; and will not  
18 unreasonably limit options available as corrective action activities or otherwise apply their  
19 discretion so as to unduly prejudice the Sponsor regarding the timing or number of credits  
20 released. Approval by the Corps and by Ecology of the identity of any assignee responsible for  
21 executing the Long Term Management Plan, and approval of the terms of any long-term  
22 management assignment agreement, will not be unreasonably withheld.

23 E. The Corps and/or Ecology will periodically inspect the Mitigation Sites as  
24 necessary to evaluate, in consultation with the other members of the IRT, the achievement of  
25 performance standards, to assess the results of any corrective measures taken, to monitor  
26 implementation of Long Term Management Plans, and, in general, to verify the Sponsor's  
27 compliance with the provisions of this Instrument.

28 F. Upon satisfaction of the requirements of Article IV.J. for any mitigation site phase  
29 under this Instrument, the Corps and Ecology will certify, following consultation with the  
30 Sponsor and the other members of the IRT, that the establishment period of a mitigation site has  
31 terminated, all credits associated with the site have been released, and that the site has entered  
32 the long-term management phase. Certification will occur upon the Sponsor's receipt of a letter  
33 issued by the Corps and Ecology to the Sponsor confirming that all credits are released.

34  
35 **VI. GENERAL PROVISIONS**

36 A. Effect of the Mitigation Reserves Program on Federal, State, and Local Permitting  
37 Requirements: Decisions on the use of the Mitigation Reserves Program to provide  
38 compensatory mitigation will be made by the applicable permitting agencies during the  
39 permitting process for each permit. The parties to this Instrument recognize that permit decision  
40 regarding the need for, type, quantity, and appropriateness of compensatory mitigation are to be  
41 made by the appropriate permit reviewers for the applicably permitting agencies. The Corps and  
42 Ecology each have independent authority for permitting actions under their respective  
43 jurisdictions. The Corps holds the responsibility and authority under Section 404 of the Clean

1 Water Act, and Ecology holds independent responsibility and authority under Section 401 of the  
2 Clean Water Act and Chapter 90.48 RCW. This independent authority applies to both impact  
3 sites and mitigation receiving sites. Nothing in this Instrument shall be construed to override the  
4 permitting authority of the Corps, Ecology, or any local permitting entity to regulate applicable  
5 permit requirements on either impact or mitigation sites.

6 B. Decision Making by Consensus: The Corps and Ecology will strive to achieve  
7 consensus regarding issues that arise pertaining to the establishment, operation, management,  
8 and maintenance of the Mitigation Reserves Program and mitigation receiving sites. As Co-  
9 Chairs, the Corps and Ecology will coordinate the review and oversight activities of the IRT so  
10 as to best facilitate opportunity to reach the desired consensus. Review and oversight decisions  
11 will take into account the views of the Sponsor to the maximum extent practicable.

- 12 1. Where consensus cannot otherwise be reached within a reasonable timeframe,  
13 following full consideration of the comments of the members of the IRT and  
14 following consultation with the Sponsor, the Corps holds the responsibility and  
15 authority under Section 404 of the Clean Water Act, and Ecology holds  
16 independent responsibility and authority under Section 401 of the Clean Water  
17 Act and RCW 90.48, to make final decisions regarding the application of the  
18 terms of this Instrument.

19 C. Entry into Effect, Modification or Amendment, and Termination of the  
20 Instrument:

- 21 1. This Instrument, consisting of both this Basic Agreement and the Appendices,  
22 will enter into effect upon the signature by authorized representatives of the  
23 Corps, the Sponsor, and Ecology as of the date of the last of these signatures.
- 24 2. This Basic Agreement portion of this Instrument may be amended or modified  
25 only with the written approval of the Sponsor, Ecology, and the Seattle District  
26 Engineer on behalf of the Corps, or their designees, following consultation with  
27 the other members of the IRT, and following the modification procedures  
28 outlined in 33 CFR 332.8(g).
- 29 3. Amendment of the provisions of the Appendices, including amendments to  
30 include Mitigation Plans or to modify existing Mitigation Plans must be  
31 accomplished according to the procedures outlined in 33 CFR 332.8(g).
- 32 4. This Instrument may be terminated by the mutual agreement of the Sponsor,  
33 Ecology and the Corps, following consultation with the IRT, or may be  
34 terminated under the terms of Article IV.R., X., and Y. of this Instrument in the  
35 case of default by the Sponsor. In the event any termination action is  
36 commenced, the Sponsor agrees to fulfill its pre-existing obligations to perform  
37 all establishment, monitoring, management, maintenance, and remediation  
38 responsibilities that arise directly from credits that have already been awarded,  
39 sold, used, or transferred at the time of termination.
- 40 5. Upon termination of the Mitigation Reserves Program pursuant to Article IV.Y,  
41 this Instrument shall terminate without further action by any Party. Thereafter,

1 the Long-Term Management Plan developed, approved, and instituted in  
2 accordance with Article IV.H.2. shall govern the continuing obligations of the  
3 Sponsor, or its assignee as applicable.  
4

5 D. Assignment of Obligations under this Instrument: The Sponsor may be permitted  
6 to assign its obligations, responsibilities, and entitlements under this Instrument to a third party  
7 provided that such assignment is consistent with the federal rule and approved by the Corps and  
8 Ecology. The Corps and Ecology following consultation with other members of the IRT must  
9 approve the identity of the assignee in order for any assignment to effectively relieve the Sponsor  
10 of those obligations. In evaluating a prospective assignee, the Corps and Ecology may consider  
11 characteristics such as environmental mitigation expertise, wetlands mitigation project or  
12 analogous experience, and financial strength and stability. Approval of the identity of the  
13 assignee will not be unreasonably withheld. The Sponsor must amend this Instrument  
14 accordingly to reflect third party assignments pursuant to the terms of Article VI.C. In this case  
15 applicable financial assurances must be approved by the Corps and Ecology. The physical  
16 ownership of a mitigation site real property and the obligations, responsibilities, and entitlements  
17 under this Instrument are separate and distinct; thus, ownership of the Mitigation Reserves  
18 Program interest may be transferred independently with the approval of the Corps and Ecology  
19 and pursuant to the provisions of Article IV.DD. Once assignment has been properly  
20 accomplished, the Sponsor will be relieved of all its obligations and responsibilities under this  
21 Instrument associated with the mitigation site(s) for which third party assignments are made.  
22 Specific additional provisions pertaining to the assignment of long-term management obligations  
23 are described at Article IV.EE.

24 E. Specific Language of this Basic Agreement Shall Be Controlling: To the extent  
25 that specific provisions of this Basic Agreement portion of the Instrument are inconsistent with  
26 any terms and conditions contained in the Appendices, or inconsistent with other program  
27 documents that are incorporated into this Instrument by reference, the specific language within  
28 this Basic Agreement shall be controlling, to the extent it is consistent with 33 CFR 332.

29 F. Notice: Any notice required or permitted hereunder shall be deemed to have been  
30 given either (i) when delivered by hand, or (ii) three (3) days following the date deposited in the  
31 United States mail, postage prepaid, by registered or certified mail, return receipt requested, or  
32 (iii) when sent by Federal Express or similar next-day nationwide delivery system, addressed as  
33 follows (or addressed in such other manner as the party being notified shall have requested by  
34 written notice to the other party):  
35

36 U.S. Army Corps of Engineers, Seattle District  
37 Mitigation Manager/Co-chair of the IRT  
38 Regulatory Branch  
39 Seattle District, Corps of Engineers  
40 4735 E. Marginal Way South  
41 P.O. Box 3755  
42 Seattle, WA 98124-3755  
43 206-764-3495

1  
2 Washington State Department of Ecology  
3 Wetland Manager/ Co-chair of the IRT  
4 Shorelands and Environmental Assistance Program  
5 P.O. Box 47600  
6 300 Desmond Drive  
7 Olympia, WA 98504-7600  
8 360-407-7045  
9

10 King County Department of Natural Resources and Parks  
11 Mitigation Reserves Program Director  
12 Water and Land Resources Division  
13 201 south Jackson Street, Suite 600  
14 Seattle, WA 98104-3855  
15 206-296-6519  
16

17 G. Entire Agreement: This Instrument, and its appendices, constitutes the entire  
18 agreement between the parties concerning the subject matter hereof.

19 H. Invalid Provisions: In the event any one or more of the provisions contained in  
20 this Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity,  
21 illegality or unenforceability will not affect any other provisions hereof, and this Instrument shall  
22 be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

23 I. Effect of Agreement: This Instrument does not in any manner affect statutory  
24 authorities and responsibilities of the signatory Parties. This Instrument is not intended, nor may  
25 it be relied upon, to create any rights in third parties enforceable in litigation with the United  
26 States or the State of Washington. This Instrument does not authorize, nor shall it be construed to  
27 permit, the establishment of any lien, encumbrance, or other claim with respect to the Mitigation  
28 Reserves Program property, with the sole exception of the right on the part of the Corps and/or  
29 Ecology to require the Sponsor to implement the provisions of this Instrument, including  
30 recording conservation easements or similarly restrictive covenants, required as a condition of the  
31 issuance of permits for discharges of dredged and fill material into waters of the United States  
32 associated with construction and operation and maintenance of a Mitigation Site.

33 J. Attorneys' Fees: If any action at law or equity, including any action for  
34 declaratory relief, is brought to enforce or interpret the provisions of this Instrument, each party  
35 to the litigation shall bear its own attorneys' fees and costs of litigation.

36 K. Availability of Funds: Implementation of this Instrument with regards to the  
37 Corps is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the  
38 availability of appropriated funds. Nothing in this Instrument may be construed to require by the  
39 Corps the obligation, appropriation, or expenditure of any money from the United States  
40 Treasury, in advance of an appropriation for that purpose.

41 L. Headings and Captions: Any paragraph heading or caption contained in this  
42 Instrument shall be for convenience of reference only and shall not affect the construction or  
43 interpretation of any provision of this Instrument.

1 M. Counterparts: This Instrument may be executed by the Parties in any  
2 combination, in one or more counterparts, all of which together shall constitute one and the same  
3 Instrument.

4 N. Binding: This Instrument, consisting of both this Basic Agreement and the  
5 Appendices, shall be immediately, automatically, and irrevocably binding upon the Sponsor and  
6 its heirs, successors, assigns and legal representatives upon execution by the Sponsor and the  
7 Corps.

8

1 IN WITNESS WHEREOF, the Parties hereto have executed this Instrument on the date herein  
2 below last written.

3  
4 SPONSOR:

5 

2-23-12

6  
7  
8 DOW CONSTANTINE  
9 King County Executive

Date

10  
11  
12  
13 UNITED STATES ARMY CORPS OF ENGINEERS:

14 

12 MAR 2012

15  
16 BRUCE A. ESTOK  
17 Colonel, Corps of Engineers  
18 District Commander

Date

19  
20  
21  
22 WASHINGTON STATE DEPARTMENT OF ECOLOGY:

23 

2/28/12

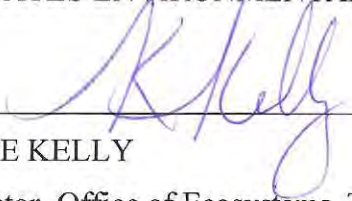
24  
25 GORDON WHITE  
26 Program Manager for Shorelands and Environmental Assistance Program  
27 Washington State Department of Ecology

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THE INTERAGENCY REVIEW TEAM MEMBERS EXPRESSING AGREEMENT WITH  
THE TERMS OF THIS INSTRUMENT

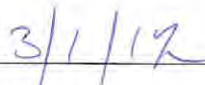
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

  
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KATE KELLY

Director, Office of Ecosystems, Tribal, and Public Affairs

US EPA

  
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Date

This instrument is not binding on or does not give rise to any affirmative obligations, express or implied, to other IRT members.