HOOD CANAL COORDINATING COUNCIL
IN-LIEU FEE PROGRAM INSTRUMENT

Basic Agreement – Final

Submitted by:
Hood Canal Coordinating Council
With Technical Assistance from:
Environmental Science Associates

June 15, 2012
Agreement
Hood Canal Coordinating Council
In-Lieu Fee Program

AN AGREEMENT REGARDING THE OPERATION OF THE HOOD CANAL COORDINATING COUNCIL 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, Hood Canal Coordinating Council (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 Hood Canal Coordinating Council In-Lieu Fee Program Instrument (hereinafter, "Instrument") is to set forth the agreed upon terms specifying responsibilities for the establishment, use, operation, and management of the Sponsor's In-Lieu Fee Program ("HCC ILF Program"). This Instrument consists of two sets of documents: the 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 HCC ILF Program, including the Compensation Planning Framework, mitigation planning requirements, and standards and procedural requirements applicable to the HCC ILF 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 HCC ILF Program will provide compensatory mitigation for unavoidable adverse impacts to waters of the United States and/or waters of the State of Washington and/or waters of tribal reservations, including wetlands, aquatic areas, and their buffers as defined by Appendix B that result from activities authorized by Federal, State, tribal and local authorities. Use of the HCC ILF 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 HCC ILF Program may also be used as a remedy to mitigate unauthorized activities when such use of the HCC ILF Program is approved by appropriate regulatory agencies and all onsite remedies have been imposed on the offending individual or firm.

B. Hood Canal Coordinating Council In-Lieu Fee Program Goals: The primary goal of the HCC ILF Program is to provide an additional mechanism for compensatory mitigation for impacts to aquatic resources and their buffers authorized by the Clean Water Act (33 U.S.C. § 1251 et seq.) and/or other federal, state, tribal or local regulations while maximizing the benefit
to the Hood Canal ecosystem and accomplishing the conservation and stewardship goals of the HCCC. The HCCC ILF Program is intended to uphold the goal of no net loss of aquatic functions and values through the preservation, enhancement, establishment, and restoration of ecological functions within target watersheds through the establishment and management of mitigation sites. It is the intent of the parties that this HCCC ILF Program be operated in a collaborative manner, including collaboration of the Interagency Review Team (IRT) members, as further described below, in the decision making process. Additional goals of the HCCC ILF Program include:

1. Provide a viable option to ensure the availability of high-quality mitigation for unavoidable, site-specific impacts to freshwater wetlands, streams, lakes, buffers, and marine/nearshore aquatic resources in the Hood Canal watershed to ensure at a minimum no net loss of aquatic functions and values in Hood Canal.


3. Develop, in cooperation with environmental regulatory and tribal partners, an ecologically based site selection process and associated tools to identify the most appropriate freshwater and marine/nearshore mitigation options (e.g. aquatic resource type, amount, location, and mitigation strategy) that result in greater ecological benefit to the Hood Canal watershed than could be achieved through permitee-responsible mitigation.

4. Utilize scale efficiencies by combining the impacts from individual projects within a service area into mitigation at larger sites.

5. Meet federal, state, tribal, and local regulatory requirements by creating an efficient mechanism for fulfilling compensatory mitigation requirements.

6. Select the best mitigation receiving sites for the HCCC ILF Program through a rigorous analysis by a group of professional resource managers and local experts, drawing from local knowledge and best available science and analyses for a particular basin, watershed, or marine area.

7. Develop a self-sustaining HCCC ILF Program that identifies, prioritizes, and completes mitigation projects that collectively produce “no net loss” of aquatic functions and values at appropriate scales (e.g. drift cell, assessment and mitigation unit (AMU), sub-basin, watershed, and service areas) over time, and strives for “net resource gains”.

8. Provide an effective and transparent accounting structure for collecting in-lieu fees, disbursing project funds, and compliance reporting, as required under 33 CFR § 332.8.

9. Work in an efficient and transparent manner with the IRT, co-chaired by the Corps and Ecology, to review, analyze, and implement mitigation projects and enact amendments to the HCCC ILF Program Instrument.

10. Ensure “difficult-to-replace” habitats are conserved and restored by working with the IRT and with regulatory agencies at local, state, federal, and tribal levels.
C. **Hood Canal Coordinating Council In-Lieu Fee Program Interagency Review Team:**

The HCCC ILF Program Interagency Review Team ("IRT") is the group of representatives from
federal, state, tribal and local regulatory and resource agencies that have reviewed this
Instrument and will advise the Corps and Ecology regarding the establishment and
management of the HCCC ILF Program pursuant to the provisions of this Instrument. The IRT
consists of:

1. **Co-Chair:** District Engineer, U.S. Army Corps of Engineers, Seattle District
   (District Engineer) or his designee
2. **Co-Chair:** Washington Department of Ecology
3. National Oceanic and Atmospheric Administration
4. U.S. Fish and Wildlife Service
5. U.S. Environmental Protection Agency
6. Jamestown S'Klallam Tribe
7. Lower Elwha Klallam Tribe
8. Port Gamble S'Klallam Tribe
9. Skokomish Tribe
10. Suquamish Tribe
11. Jefferson County
12. Kitsap County
13. Mason County
14. Washington Department of Fish and Wildlife
15. Washington Department of Natural Resources
16. Puget Sound Partnership

D. **The Role of the IRT:** The primary role of the IRT is to assist the Corps and Ecology,
in their role as co-chairs of the IRT, in the review of monitoring reports, the evaluation of
mitigation plans, the recommendation of remedial measures, the approval of credit releases,
and the approval of modifications to this Instrument. The IRT’s role and responsibilities are
more fully set forth in Section 332.8 of the Federal Mitigation Rule (33 CFR Part 332 and 40 CFR
Part 230), and Appendices A and K of this Instrument. Members of the IRT may also sign the
instrument, if they so choose. By signing the instrument, the IRT members indicate their
agreement with the terms of the instrument. As an alternative, a member of the IRT may
submit a letter expressing concurrence with the instrument. Signing this Instrument does not
override or nullify the independent permitting authority of a federal, state, tribal, or local
permitting entity to enforce their permit requirements at mitigation sites.

1. The IRT will work to reach consensus in its actions. This consensus also includes
giving the Sponsor the opportunity to provide information and input for the
IRT members during IRT decision making processes. The IRT will seek to reach
such a consensus within a reasonable period of time and with minimal delays; and
2. The members of the IRT will review such documents and mitigation sites as each considers necessary to provide meaningful input to the co-chairs and will express any recommendations, concerns, or potential improvements concerning the implementation of the HCCC ILF Program to the Sponsor.

**BASIC TERMS OF AGREEMENT**

**I. TRANSFER OF PERMIT MITIGATION RESPONSIBILITY**

A. Transfer of Permit Mitigation Responsibility: The Sponsor agrees to accept full legal responsibility for satisfying the compensatory mitigation requirements for Corps, State, tribal, and local permits for which mitigation fees from a permittee have been accepted under the terms of this Instrument. This responsibility includes compliance with 33 CFR Part 332, 40 CFR Part 230, and any other applicable federal, state, tribal, and local jurisdiction laws. In satisfaction of the compensatory mitigation requirements, the Sponsor shall provide compensatory mitigation of the type and in the amount necessary to meet applicable federal, state, tribal, and local regulation requirements. Any transfer of mitigation responsibility is contingent upon the prior approval of this Instrument by the Sponsor, the Corps and Ecology.

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

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

**II. LEGAL AUTHORITIES**

The establishment, use, operation, and management of the HCCC ILF Program shall be carried out in accordance with the following principal authorities. Additional tribal and local authorities also apply.

A. Federal:

1. Clean Water Act (33 USC §§ 1251 et seq.)
2. Rivers and Harbors Act of 1899 (33 USC § 403)
3. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-332)

5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404(b)(1) Guidelines (February 6, 1990)


8. National Environmental Policy Act (42 USC §§ 4321 et seq.)

9. Council on Environmental Quality Procedures for Implementing the National Environmental Policy Act (40 CFR Parts 1500-1508)

10. Executive Order 11990 (Protection of Wetlands)

11. Executive Order 11988 (Floodplains Management)

12. Executive Order 13112 (Invasive Species)

13. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.)


15. Endangered Species Act (16 USC §§ 1531 et seq.)

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

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

18. Coastal Zone Management Act (16 USC § 1451 et seq.)

B. State of Washington:

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

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

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

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

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

6. Salmon Recovery Act (Chapter 75.46 RCW)

7. Aquatic Resources Mitigation Act (Chapter 90.74 RCW)

8. Aquatic Lands (Chapters 79.105 - 79.140 RCW)

10. Governor’s Executive Order No. 89-10, Protection of Wetlands (December 1989)

C. Tribal:
   1. Port Gamble S’Klallam Tribe Water Quality Standards for Surface Waters (Resolution No. 02-A-088)
   2. Port Gamble S’Klallam Tribe Environmental Code (Title 24)
   3. Skokomish Tribe Environmental Protection Act

III. FUNDING PROVISIONS

A. Fee Collection: Upon permit approval from appropriate regulatory agencies, mitigation fees will be collected from permittees and deposited into the HCCC ILF Program Account.

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

   1. Administrative Costs: Upon receipt of payment from a permittee for an impact site, the Corps and Ecology hereby authorize the Sponsor to use funds from the HCCC ILF Program Administrative Account in the percentage amount specified in Appendix F.

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

      i. Statement of current account balances for the Service Area

      ii. Statement of anticipated mitigation site project cost

      iii. Allocation of percentages for project operation

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

C. Mitigation Fees: Mitigation Fees will comprise two fees: a Credit Fee and a Land Fee. The Credit Fee price will reflect average costs for implementing all components of a mitigation project, based on cost analyses of recent projects. Credit Fees will be used to implement all aspects of mitigation projects undertaken by the HCCC ILF Program as described in Appendix F.

The Land Fee prices will be based on an analysis of average cost of recent lands acquisitions within different areas and zoning categories. Land Fees will be used for acquisition of lands and/or land interests as described in Appendix F.
The Mitigation Fee prices will be formulated to reflect full-cost accounting for establishment and management of mitigation sites, which includes: costs associated with site selection, permitting and design, construction, monitoring and maintenance, long-term management, HCCC ILF Program administration, contingencies, and property rights acquisition. Mitigation Fees are further discussed in Appendix F.

D. **HCCC ILF Program Account:** Mitigation fees, once collected, will be allocated under HCCC’s ILF Program Fund. The HCCC ILF Program Fund will be established within an institution who is a member of the Federal Deposit Insurance Corporation. Upon the sale of the first advance credit the following accounts below will be established under the HCCC ILF Program Fund: Land Fee Account, HCCC ILF Program Administration Account, Contingency Fee Account, Long Term Management Account, and Individual Mitigation Project Accounts. The allocation of percentages for each account will be determined by the Sponsor, Corps, and Ecology in accordance with the process outlined in Appendix F. The Sponsor must allocate and deposit funds to the appropriate accounts within 30 days of the receipt of mitigation funds from a permittee. Collectively, the following accounts constitute the HCCC ILF Program Fund:

1. **Land Fee Account:** A Land Fee Account will contain 100 percent of the Land Fee portion of the Mitigation Fees collected in the service area. These funds will be used for payment of land or land interest acquisition costs. These payments will be for the acquisition of property to include as potential mitigation sites or used to secure Preservation Credits (see Appendix H). In the event an account in the Service Area is insufficient to meet the needs of the required action, moneys in the Land Fee Account may be used as Financial Assurances, provided such use does not violate any legal requirements of the funding source utilized for the acquisition of the lands serving as mitigation sites.

2. **HCCC ILF Program Administration Account:** The Administrative Accounts will be funded by a percentage of Credit Fees collected in the Service Area. These funds will pay for HCCC ILF Program administration duties, including but not limited to:
   a. Site selection and concept design,
   b. Fee and Credit accounting,
   c. Legal services,
   d. Data management (see Appendix G),
   e. Reporting,
   f. Correspondence and meetings with the IRT and other regulatory agencies,
   g. HCCC ILF Program development, and
   h. Other HCCC ILF Program administration duties as necessary.

3. **Contingency Fee Account:** Each Service Area will have a Contingency Fee Account. The Contingency Fee Account is funded by deposits of a percentage of Credit Fees collected in the Service Area. Moneys in the Contingency
Accounts will be held in reserve to fund adaptive management during the establishment phase for mitigation sites. These funds are to be used only for contingencies prior to a site entering Long Term Management, e.g., contingencies related to project implementation and implementation of adaptive management plans (see Appendix O). When a site enters Long Term Management, the remaining portion of the Contingency Fee Account related to that site will be rolled into the Long Term Management Fund for that service area and/or used for Financial Assurances (see Appendix F).

4. **Long Term Management Fund:** This account will be funded by a percentage of the Credit Fees collected in the Service Area. The account is to be funded when Credit Fees are collected. Moneys in the Long Term Management Accounts will be held in reserve to fund long-term management, including adaptive management and remediation, at mitigation sites after completion of the establishment phase and the project enters the Long Term Management phase. Additionally, when a project enters the long-term management phase, its portion of the Contingency Fee Account will be rolled into the Long Term Management Fund. Moneys in the Long Term Management Fund will be available solely for use in long term management (i.e. for implementing long-term management plans included in IRT-approved Mitigation Plans; see Appendix F and Appendix P) and/or for Financial Assurances. Long Term Management funds are not available for use on a project until the project enters the Long Term Management phase (i.e., after the establishment phase is complete, and all credit associated with a project is released.) (See Appendix F Appendix P).

5. **Individual Mitigation Project Accounts:** These accounts will be funded by an allocation of the remainder of Credit Fees that are not allocated to the other accounts, i.e., Contingency Account, HCCC ILF Program Administration Account, and Long Term Management Fund. The fees in this account are used for development of mitigation plans, mitigation project implementation, and establishment period monitoring and maintenance activities.

6. **Accrual of interest earnings:** Interest earnings from the entire HCCC ILF Program Account will be directed to Contingency Accounts and Long Term Management Accounts (see Appendix F).

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

The Corps and/or Ecology shall direct the use of funds through the issuance of a signed Directive Letter to the Sponsor (see Appendix R). The letter will specify what financial and responsive action the Sponsor must take. The letter will also specify a timeframe in which the Sponsor must complete the actions. By signing this Instrument the Sponsor has agreed to abide by the direction of the Corps and Ecology in authorization, release, and use of HCCC ILF Program funds. The Sponsor acknowledges that failure to abide by the Spending Agreement or Directive Letters, as provided for herein, of the Corps and/or Ecology may constitute a violation of the HCCC ILF Program Instrument and may result in penalties including, in the most severe case, HCCC ILF Program termination.

F. Financial Assurance Requirements: The Sponsor intends to satisfy its obligations under this Instrument by obtaining sufficient funding to carry out all design, development, monitoring, remediation and site management responsibilities. Financial Assurances are provided for the work described in this Instrument. Funding for all responsibilities and obligations arising under this Instrument has been included in the credit price estimation calculations, and mitigation fees collected are based on full cost accounting (see Appendix F). Project approval by the IRT, Corps, and Ecology is contingent upon each project being fully funded at the time of its approval to cover the Sponsor’s obligations under this Instrument.

In the event an account in a Service Area is insufficient to meet the needs of the required action, moneys in the Land Fee, Contingency Fee, and Long Term Management Accounts, as well as interest accrued, may be used as Financial Assurances.

The HCCC will use any available discretionary funds (i.e. not contractually obligated) in its non-ILF accounts to address outstanding mitigation obligations. In the event these discretionary funds are insufficient to cover mitigation obligations, the HCCC Program Manager will, in good faith, brief the HCCC member governments and request input, in-kind support or financial support to meet outstanding mitigation obligations. The sponsor confirms its commitments as described above in a Letter of Commitment, dated June 6, 2012, which is attached as an exhibit.

Given these assurances incorporated into design of the HCCC ILF Program, the Corps and Ecology do not require additional financial assurances at this time. The Corps and Ecology retain the right to reassess the need for additional financial assurances.

IV. OPERATION OF THE HCCC ILF PROGRAM

The HCCC ILF Program is approved to provide compensatory mitigation for impacts to the waters of the United States, waters of the State of Washington and/or waters of tribal reservations, including wetlands, aquatic areas, marine waters and their buffers as defined in Appendix B. Mitigation credits will be sold to impact site permittees. The funds received from permittees will be consolidated and used to implement various Mitigation Projects. Once a Mitigation Project successfully achieves Performance Standards, additional mitigation credits will be released to the Sponsor to sell.

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A. **Service Areas:** To accomplish the goal of watershed focused mitigation, the Sponsor has proposed the watershed Service Areas described in Appendix I. The fees for various impacts in the Service Areas will be collected and combined to fund mitigation projects in that relevant Service Area. In exceptional situations, the HCCC ILF Program may be used to compensate for an impact that occurs outside of the Service Area if specifically approved by the Corps and/or Ecology, in consultation with the IRT, pursuant to the procedures and criteria prescribed in Appendices H, I, and K. If the Corps and Ecology determine that the Sponsor has sold, used, or transferred credits at any time to provide compensatory mitigation for loss of aquatic resources outside of the Service Area where the impact occurred without prior approval under the terms of this instrument, the Corps and Ecology, in consultation with the IRT, may direct that the sale, use, or other transfer of credits immediately cease. The Corps and Ecology will determine, in consultation with the IRT, the Sponsor and the appropriate regulatory authority, what remedial actions are necessary to correct the situation and will direct the Sponsor’s performance prior to the award of any additional mitigation credits. Notwithstanding the fact that ceasing sale, use, or other transfer of credits may have been required, unless this Instrument is terminated pursuant to Article VI.C., the Sponsor shall remain responsible for the timely and effective achievement of all the objectives and Performance Standards mandated in Appendix M.

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

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

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

E. **Permittee Use of HCCC ILF Program:** An applicant seeking to use the HCCC ILF Program must meet the requirements in Appendix C and receive a permit approval from the appropriate permitting authority. Permit approval should require the permittee to calculate, and Sponsor to validate, the amount of impacts (debits) to the aquatic resource and the credits required to mitigate for the impacts. The permitting authority will determine whether use of...
the HCCC ILF Program is acceptable mitigation for the proposed impact and whether the correct
amount of mitigation credits have been required. If the permitting authority and Sponsor agrees
to the use of the HCCC ILF Program by the permittee, the Sponsor shall collect fees for the
mitigation credits required by the applicable permitting agencies to mitigate for the impact
activity. The Sponsor must receive a copy of the permit approval prior to collecting mitigation
fees from a permittee. Upon the Sponsor’s receipt of mitigation fees from a permittee the
Sponsor shall sign and issue to the permittee a copy of the Statement of Sale. The permittee
shall be responsible for providing copies of the signed Statement of Sale to the applicable
permitting agencies. The permittee may transfer or sell its credits to a third party provided that
such action is approved by the Corps and Ecology (in consultation with the IRT) and other
applicable regulatory agencies, and reflected in a transfer agreement.

F. Approval of Mitigation Sites: By the end of the third full growing season after
the first advanced credit in that Service Area is secured by a permittee, the Sponsor agrees to
complete land acquisition and initial physical and biological improvements at a Mitigation Site
using mitigation fees collected from the sale of mitigation credits in that Service Area, unless
the District Engineer determines that more or less time is needed to plan and implement an in-
lieu fee project. To establish a Mitigation Site, the Sponsor agrees to follow the requirements of
Appendices H, I and K. The Sponsor shall submit for Corps and Ecology approval, in consultation
with the IRT, a proposed Mitigation Site, including a preliminary concept plan for mitigation at
the site, as described in Appendix K. The Sponsor will also submit a proposed Spending
Agreement for approval and signature by the Corps and Ecology. Upon approval of a Mitigation
Site by the IRT, and the Sponsor’s receipt of a signed corresponding Spending Agreement, the
Sponsor shall prepare and submit a Mitigation Plan as described in Appendix K. Upon the
approval by the IRT of a Mitigation Plan, the sponsor will proceed to implement the mitigation
project in accordance with the terms of the approved Mitigation Plan and approved Spending
Agreement (see Article III, Funding Provisions). For each approved Mitigation Plan, Appendix X
will be amended in this Instrument to reflect the Mitigation Site and the Site’s Mitigation Plan.

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

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

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

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

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

b. All available credits for that phase have been awarded, or the Corps has approved the Sponsor’s request to permanently cease HCCC ILF Program activities;

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

d. The Sponsor has either: (1) assumed responsibilities for accomplishing the Long Term Management Plan, in which case the Sponsor will fulfill the role of Long Term Steward, or (2) has assigned those responsibilities to another Long-Term Steward pursuant to Article VI.D;

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

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

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

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

J. Credit Release Schedule: Subject to the documentation and scheduling provisions of Appendix K, the Sponsor shall submit to the IRT written evidence that particular performance standards have been achieved. If the co-chairs, after consulting with the IRT and the Sponsor, concur that the required performance standards have been achieved in full, they will notify the IRT and respond in writing to the Sponsor that the credits associated with those performance standards are released. Mitigation credits will be released to the Sponsor in accordance with the procedures and schedules prescribed in the Appendices; see especially Appendices K, M, and Q.
K. **Modification of Credits:** If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with an approved mitigation plan, the Corps and Ecology must consult with the Sponsor and the IRT to consider modifications to the site mitigation plan, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold (see 33 CFR 332.8(l)(2)). Once implemented, if the Mitigation Site does not then achieve its performance-based milestones, the Corps and Ecology may modify the credit release schedule, including reducing the number of credits according to the procedures described in the federal rule (see 33 CFR 332.8(o)(8)(iii)). Any such modification to an approved mitigation plan or credit release schedule shall occur per Article VI.C. of this Basic Agreement.

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

M. **Maintenance Provisions:** Following achievement of the performance standards, the Sponsor or its approved assignee agrees to perform all necessary work to maintain and/or steward those standards as prescribed in Appendices L and P.

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

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

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

1. The evaluation of the damage caused by a force majeure and the resulting changes to mitigation requirements will necessarily involve communication among the Parties and the IRT. If the Sponsor asserts a mitigation site has sustained significant adverse impacts due to an event or act which may be determined to be a force majeure, the Sponsor shall give written notice to the Corps and Ecology as soon as is reasonably practicable. After receiving written notice, the Corps and Ecology, in consultation with the Sponsor and the IRT, shall evaluate whether the event qualifies as force majeure. The Corps and Ecology, in consultation with the Sponsor and the IRT, will then evaluate whether significant adverse impacts have occurred to the site. If a force majeure event is determined to have occurred and significant adverse impacts are found to have occurred to the site, the Corps and Ecology, in consultation with the IRT and the Sponsor, will evaluate whether and to what extent changes to the mitigation site will be in the best interest of the site and the aquatic environment, and may approve such changes as detailed in paragraph P above. The Corps and Ecology retain sole discretion over the final determination of whether an act or event constitutes force majeure, whether significant adverse impacts to a mitigation site have occurred, and to what extent changes to a mitigation site will be permitted.

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

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

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

   c. Examples of a deliberate and unlawful act include, but are not limited to, substantial damage resulting from the dumping of a hazardous or toxic substance as well as significant acts of vandalism or arson.
Q. **Noncompliance:** Noncompliance not rising to the level of default is categorized for Mitigation Site, Service Area, and the HCCC ILF Program. This noncompliance includes performance failure and delinquency (see Appendix S). Before a Mitigation Site, Service Area or the HCCC ILF Program is found to be in default (see Article IV.R. below), the Corps and Ecology, in consultation with the IRT and the Sponsor, shall seek to address the causes of noncompliance following the steps outlined in Appendix S, which describes the categories of non-compliance.

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

1. Suspending credit sales in one or more service areas;
2. Decreasing available credits at a site or in one or more service areas;
3. Directing the Sponsor to utilize Financial Assurances to correct identified deficiencies (i.e. access Contingency Funds, Long-term Management Funds, or Land Fees. See Appendix R and Appendix S);
4. Directing the Sponsor to use the HCCC ILF Program Fund to secure necessary mitigation credits (see Article III.E and Appendix S);
5. Terminating the HCCC ILF Program Instrument (see Article IV.X, IV.Y and IV.Z., and Appendix S); or
6. Referring the non-compliance with the terms of this Instrument to the Department of Justice.

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

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

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

V. **Site Closure**: If the Sponsor, the Corps, Ecology, or any member of the IRT determines that a Mitigation Site will not be able to meet performance standards specified in an approved Mitigation Plan, or that for any reason continued mitigation actions at a Mitigation Site are impracticable, the Sponsor, the Corps, Ecology, or any member of the IRT may recommend closure of the affected Site. Following a recommendation of closure, the Corps and Ecology, after consultation with the Sponsor and the IRT, shall have the option of closing a Mitigation Site. The Sponsor, Corps, Ecology, and members of the IRT shall seek consensus on Site closure decisions. If consensus cannot be reached, the Corps’ and Ecology’s determination shall be final. If Site closure occurs, the Sponsor shall comply with the Closure Provisions under IV.Y and IV.Z of this agreement and Appendix S.

W. **Service Area and AMU Closure**: Any member of the IRT may recommend Service Area or Assessment and Mitigation Unit (AMU) closure to the Corps and Ecology. The Sponsor or the Corps or Ecology may terminate this Instrument in cases where the Sponsor fails to abide by the terms of this Instrument in ways that fundamentally prevent the overall successful operation of the HCCC ILF Program as described in Appendix S. Additionally, at the Sponsor’s discretion, the Sponsor may terminate this Instrument as to a specific Service Area or AMU within 60 days of written notification to the other parties. Closing a AMU does not automatically trigger Service Area closure. Closing a Service Area does not automatically trigger HCCC ILF Program Closure. If Service Area or AMU closure occurs, the Sponsor shall comply with the Closure Provisions under IV.Y and IV.Z of this agreement and Appendix S.

X. **HCCC ILF Program Closure**: The Sponsor, the Corps, and/or Ecology, acting independently or in concert may terminate this Instrument within 60 days of written notification to the other parties and to the IRT members. In the event that such termination action is commenced, the Sponsor is responsible for providing to the Corps and Ecology reports detailing credit and fee ledger balances as well as status reports for all mitigation projects. If Program closure occurs, the Sponsor shall comply with the Closure Provisions under IV.X, IV.Y, and IV.Z of this agreement and Appendix S.

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

Z. **Closure Provisions Regarding Funding**: Funds remaining in the HCCC ILF Program accounts after all obligations are satisfied must continue to be used for the restoration,
establishment, enhancement, and/or preservation of wetlands, nearshore areas, aquatic resources, and/or their buffers. Any expenditure of these remaining funds requires IRT review and Corps and Ecology approval. If the Sponsor has outstanding mitigation obligations at the time of closure which it is unable to fulfill, the Corps and Ecology in consultation with the IRT, shall direct the Sponsor to use remaining funds to secure credits from a third party source of mitigation as described in Appendix S.

AA. Mitigation Site Protections: All real property to be included in the Program will be either (1) owned in fee simple by the Sponsor, a public agency, a tribe, or a land trust that has adopted the Land Trust Alliance Standards & Practices and subject to a conservation easement, restrictive covenant, or integrated natural resource management plan (together referred to as site protection mechanisms) limiting use to mitigation; or (2) subject to a conservation easement granted to a public agency, tribe, or a land trust that has adopted the Land Trust Alliance Standards & Practices that restricts use to mitigation consistent with the HCCC ILF Program. The Program will pursue site protection mechanisms in the following order of preference: conservation easements, restrictive covenants, or integrated natural resource management plans. All restrictive covenants or conservation easements shall be perpetual in duration, must be approved by the Corps and Ecology in consultation with the IRT, and must be recorded as a part of the permanent land record with the County Auditor’s Office in the county within which the property is located prior to the release of any mitigation site credits. If land interests are to be owned by a tribe in tribal trust status, it must be recorded through the Bureau of Indian Affairs Title Plant. If an integrated natural resource management plan, or something similar, is the preferred option, it also must be approved by the Corps and Ecology in consultation with the IRT.

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

1. The Sponsor has granted additional easements, rights of way, or any other property interests in the project areas without the written approval of the Corps, in consultation with the IRT.

2. The Sponsor has used or authorized use of any areas of mitigation sites within the HCCC ILF Program for any purpose that Corps and Ecology, in consultation with the IRT, concludes is contrary to the provisions of this Instrument or the site protection mechanisms, or that interferes with the conservation purposes of the HCCC ILF Program.

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

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

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

Upon execution of a long-term management assignment agreement and the transfer of monies from the Long-Term Management Account and upon satisfaction of the remaining requirements for termination of the establishment phase of the HCCC ILF Program under Article IV.H., the Sponsor shall be relieved of all further long-term management responsibilities under this Instrument which are associated with the site for which responsibilities have been transferred.

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

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

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

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

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

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

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

VI. GENERAL PROVISIONS

A. Effect of the HCCC ILF Program on Federal, State, Tribal, and Local Permitting Requirements: Decisions on the use of the HCCC ILF Program to provide compensatory mitigation will be made by the applicable permitting agencies during the permitting process for each permit, including federal, state, tribal, and local permitting authorities. The parties to this Instrument recognize that permit decisions regarding the need for, type, quantity, and appropriateness of compensatory mitigation are to be made by the appropriate permit reviewers for the applicable permitting agencies. The Corps and Ecology each have independent authority for permitting actions under their respective jurisdictions. The Corps holds the responsibility and authority under Section 404 of the Clean Water Act and Ecology holds independent responsibility and authority under Section 401 of the Clean Water Act and Chapter 90.48 RCW. This independent authority applies to both impact sites and mitigation receiving sites. The Environmental Protection Agency is responsible for jointly interpreting and implementing the 2008 Federal Mitigation Rule along with the Corps, as well as Section 401 of the Clean Water Act on Tribal lands where Tribes do not have that authority. Nothing in this Instrument shall be construed to override the permitting authority of the Corps, Ecology, or any Tribal, federal, state, or local permitting entity to regulate applicable permit requirements on either impact or mitigation sites.
Nothing in the HCCC ILF Program relieves or displaces government to government consultation obligations between the federal government and affected tribal governments within all service areas of the HCCC ILF Program.

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

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

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

1. This Instrument, consisting of both this Basic Agreement and the Appendices, will enter into effect upon the signature by authorized representatives of the Sponsor, Corps, and Ecology as of the date of the last of these signatures.

2. This Basic Agreement portion of this Instrument may be amended or modified only with the written approval of the Sponsor, the Seattle District Engineer on behalf of the Corps, Ecology, or their designees, following consultation with the IRT, and following the modification procedures outlined in 33 CFR 332.8(g).

3. Amendment of the provisions of the Appendices, including amendments to include Mitigation Plans or to modify existing Mitigation Plans must be accomplished according to the procedures outlined in 33 CFR 332.8(g).

4. This Instrument may be terminated by the mutual agreement of the Sponsor, the Corps, and Ecology following consultation with the IRT, or may be terminated under the terms of Article IV.R., X., and Y. of this Instrument in the case of default by the Sponsor. In the event any termination action is commenced, the Sponsor agrees to fulfill its pre-existing obligations to perform all establishment, monitoring, management, maintenance, and remediation responsibilities that arise directly from credits that have already been awarded, sold, used, or transferred at the time of termination.

5. Upon termination of the HCCC ILF Program pursuant to Article IV.Y. this Instrument shall terminate without further action by any Party. Thereafter, the Long-Term Management Plans developed, approved, and instituted in accordance with Article IV.H.2. shall govern the continuing obligations of the Sponsor, or its assignee as applicable.
D. Assignment of Obligations under this Instrument: The Sponsor may be permitted to assign its obligations, responsibilities, and entitlements under this Instrument to a third party provided that such assignment is consistent with the federal rule and approved by the Corps and Ecology. The Corps and Ecology, following consultation with the IRT, must approve the identity of the assignee in order for any assignment to effectively relieve the Sponsor of those obligations. In evaluating a prospective assignee, the Corps and Ecology may consider characteristics such as environmental mitigation expertise, wetlands mitigation project or analogous experience, and financial strength and stability. Approval of the identity of the assignee will not be unreasonably withheld. The Sponsor must amend this Instrument accordingly to reflect third party assignments pursuant to the terms of Article VI.C. In this case applicable financial assurances must be approved by the Corps and Ecology. The physical ownership of a mitigation site real property and the obligations, responsibilities, and entitlements under this Instrument are separate and distinct; thus, ownership of the HCCC ILF Program interest may be transferred independently with the approval of the Corps and Ecology and pursuant to the provisions of Article IV.D.D. Once assignment has been properly accomplished, the Sponsor will be relieved of all its obligations and responsibilities under this Instrument associated with the mitigation site(s) for which third party assignments are made. Specific additional provisions pertaining to the assignment of long-term management obligations are described at Article IV.EE.

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

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

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

Washington State Department of Ecology
Wetland Manager/ Co-chair of the IRT
Shorelands and Environmental Assistance Program

HCCC ILF Program - Basic Agreement – June 15, 2012
G. **Entire Agreement:** This Instrument and its appendices constitute the entire agreement between the parties concerning the subject matter hereof.

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

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

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

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

L. **Headings and Captions:** Any paragraph heading or caption contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provision of this Instrument.
M. Counterparts: This Instrument may be executed by the Parties in any combination, in one or more counterparts, all of which together shall constitute one and the same Instrument.

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

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

SPONSOR:

______________________________  ______________________
SCOTT BREWER                   Date
Executive Director
Hood Canal Coordinating Council

UNITED STATES ARMY CORPS OF ENGINEERS:

______________________________  ______________________
BRUCE A. ESTOK                   Date
Colonel, Corps of Engineers
District Commander

WASHINGTON STATE DEPARTMENT OF ECOLOGY:

______________________________  ______________________
GORDON WHITE                    Date
Program Manager for Shorelands and Environmental Assistance Program
Washington State Department of Ecology
THE INTERAGENCY REVIEW TEAM MEMBERS EXPRESSING AGREEMENT WITH THE TERMS OF THIS INSTRUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

______________________________  ____________________
KATE KELLY                           Date
Director, Office of Ecosystems, Tribal, and Public Affairs
US Environmental Protection Agency

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