



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

1 **Agreement**
2 **Hood Canal Coordinating Council**
3 **In-Lieu Fee Program**

4
5 **AN AGREEMENT REGARDING THE OPERATION OF THE HOOD CANAL COORDINATING**
6 **COUNCIL IN-LIEU FEE PROGRAM PURSUANT TO 33 CFR PARTS 325 AND 332 AS REVISED**
7 **EFFECTIVE JUNE 9, 2008 (FEDERAL MITIGATION RULE)**
8

9 In consideration of the mutual promises and covenants contained herein, Hood Canal
10 Coordinating Council (the "Sponsor"), the U.S. Army Corps of Engineers ("Corps"), and the
11 Washington State Department of Ecology ("Ecology") as Parties to this Instrument hereby agree
12 as follows:

13 **INTRODUCTION**
14

15 A. Purpose: The purpose of this Hood Canal Coordinating Council In-Lieu Fee
16 Program Instrument (hereinafter, "Instrument") is to set forth the agreed upon terms specifying
17 responsibilities for the establishment, use, operation, and management of the Sponsor's In-Lieu
18 Fee Program ("HCCC ILF Program"). This Instrument consists of two sets of documents: the
19 document setting forth the general terms of agreement and establishing the central obligations
20 assumed and consideration provided by each party ("Basic Agreement") and the Appendices
21 and Exhibits ("Appendices") that establish detailed provisions for operation of the HCCC ILF
22 Program, including the Compensation Planning Framework, mitigation planning requirements,
23 and standards and procedural requirements applicable to the HCCC ILF Program pursuant to 33
24 CFR 332. The terms and provisions of the Appendices are hereby incorporated into this
25 Instrument and made a part hereof.

26 The HCCC ILF Program will provide compensatory mitigation for unavoidable adverse
27 impacts to waters of the United States and/or waters of the State of Washington and/or waters
28 of tribal reservations, including wetlands, aquatic areas, and their buffers as defined by
29 Appendix B that result from activities authorized by Federal, State, tribal and local authorities.
30 Use of the HCCC ILF Program as a means of satisfying mitigation obligations associated with
31 unavoidable impacts must be specifically approved by the permit reviewers from the applicable
32 regulatory agencies for each permitted impact project. This HCCC ILF Program may also be used
33 as a remedy to mitigate unauthorized activities when such use of the HCCC ILF Program is
34 approved by appropriate regulatory agencies and all onsite remedies have been imposed on
35 the offending individual or firm.

36 B. Hood Canal Coordinating Council In-Lieu Fee Program Goals: The primary goal of
37 the HCCC ILF Program is to provide an additional mechanism for compensatory mitigation for
38 impacts to aquatic resources and their buffers authorized by the Clean Water Act (33 U.S.C. §
39 1251 et seq.) and/or other federal, state, tribal or local regulations while maximizing the benefit

1 to the Hood Canal ecosystem and accomplishing the conservation and stewardship goals of the
2 HCCC. The HCCC ILF Program is intended to uphold the goal of no net loss of aquatic functions
3 and values 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 HCCC ILF Program be operated in a
6 collaborative manner, including collaboration of the Interagency Review Team (IRT) members,
7 as further described below, in the decision making process. Additional goals of the HCCC ILF
8 Program include:

- 9 1. Provide a viable option to ensure the availability of high-quality mitigation for
10 unavoidable, site-specific impacts to freshwater wetlands, streams, lakes,
11 buffers, and marine/nearshore aquatic resources in the Hood Canal watershed
12 to ensure at a minimum no net loss of aquatic functions and values in Hood
13 Canal.
- 14 2. Meet the goals and aspirations of the Hood Canal Integrated Watershed
15 Management Plan (IWMP).
- 16 3. Develop, in cooperation with environmental regulatory and tribal partners, an
17 ecologically based site selection process and associated tools to identify the
18 most appropriate freshwater and marine/nearshore mitigation options(e.g.
19 aquatic resource type, amount, location, and mitigation strategy) that result in
20 greater ecological benefit to the Hood Canal watershed than could be achieved
21 through permittee-responsible mitigation.
- 22 4. Utilize scale efficiencies by combining the impacts from individual projects
23 within a service area into mitigation at larger sites.
- 24 5. Meet federal, state, tribal, and local regulatory requirements by creating an
25 efficient mechanism for fulfilling compensatory mitigation requirements.
- 26 6. Select the best mitigation receiving sites for the HCCC ILF Program through a
27 rigorous analysis by a group of professional resource managers and local
28 experts, drawing from local knowledge and best available science and analyses
29 for a particular basin, watershed, or marine area.
- 30 7. Develop a self-sustaining HCCC ILF Program that identifies, prioritizes, and
31 completes mitigation projects that collectively produce “no net loss” of aquatic
32 functions and values at appropriate scales (e.g. drift cell, assessment and
33 mitigation unit (AMU), sub-basin, watershed, and service areas) over time, and
34 strives for “net resource gains”.
- 35 8. Provide an effective and transparent accounting structure for collecting in-lieu
36 fees, disbursing project funds, and compliance reporting, as required under 33
37 CFR § 332.8.
- 38 9. Work in an efficient and transparent manner with the IRT, co-chaired by the
39 Corps and Ecology, to review, analyze, and implement mitigation projects and
40 enact amendments to the HCCC ILF Program Instrument.
- 41 10. Ensure “difficult-to-replace” habitats are conserved and restored by working
42 with the IRT and with regulatory agencies at local, state, federal, and tribal
43 levels.

1 C. Hood Canal Coordinating Council In-Lieu Fee Program Interagency Review Team:
2 The HCCC ILF Program Interagency Review Team ("IRT") is the group of representatives from
3 federal, state, tribal and local regulatory and resource agencies that have reviewed this
4 Instrument and will advise the Corps and Ecology regarding the establishment and
5 management of the HCCC ILF Program pursuant to the provisions of this Instrument. The IRT
6 consists of:

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

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

- 36 1. The IRT will work to reach consensus in its actions. This consensus also includes
37 giving the Sponsor the opportunity to provide information and input for the
38 IRT members during IRT decision making processes. The IRT will seek to reach
39 such a consensus within a reasonable period of time and with minimal delays;
40 and

- 1 4. April 2008 Federal Rule issued by U.S. Army Corps of Engineers and U.S.
2 Environmental Protection Agency [33 CFR Part 332 and 40 CFR Part 230]
- 3 5. Memorandum of Agreement between the Environmental Protection Agency
4 and the Department of the Army concerning the Determination of Mitigation
5 Under the Clean Water Act, Section 404(b)(1) Guidelines (February 6, 1990)
- 6 6. U.S. Army Corps of Engineers Regulatory Guidance Letter 05-1, Guidance on
7 Use of Financial Assurances, and Suggested Language for Special Conditions for
8 Department of the Army Permits Requiring Performance Bonds, U.S. Army
9 Corps of Engineers, February 14, 2005
- 10 7. Guidelines for the Specification of Disposal Sites for Dredged and Fill Material
11 (40 CFR Part 230, Section 404(b)(1))
- 12 8. National Environmental Policy Act (42 USC §§ 4321 et seq.)
- 13 9. Council on Environmental Quality Procedures for Implementing the National
14 Environmental Policy Act (40 CFR Parts 1500-1508)
- 15 10. Executive Order 11990 (Protection of Wetlands)
- 16 11. Executive Order 11988 (Floodplains Management)
- 17 12. Executive Order 13112 (Invasive Species)
- 18 13. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.)
- 19 14. Fish and Wildlife Service Mitigation Policy (46 FR 7644-7663, 1981)
- 20 15. Endangered Species Act (16 USC §§ 1531 et seq.)
- 21 16. Magnuson-Stevens Fishery Conservation and Management Act (16 USC §§
22 1801 et seq.)
- 23 17. National Historic Preservation Act, as amended (16 USC § 470)
- 24 18. Coastal Zone Management Act (16 USC § 1451 et seq.)

25 B. State of Washington:

- 26 1. Water Pollution Control Act, Chapter 90.48 RCW and Chapter 173 -225 WAC)
- 27 2. Environmental Policy Act (Chapter 43.21C RCW and Chapter 197-11 WAC)
- 28 3. Growth Management Act (Chapter 36.70A RCW and Chapter 365-195 WAC)
- 29 4. Construction Projects in State Waters (Chapter 77.55 RCW)
- 30 5. Shoreline Management Act of 1971 (Chapter 90.58 RCW and Chapter 173-20
31 RCW)
- 32 6. Salmon Recovery Act (Chapter 75.46 RCW)
- 33 7. Aquatic Resources Mitigation Act (Chapter 90.74 RCW)
- 34 8. Aquatic Lands (Chapters 79.105 - 79.140 RCW)
- 35 9. Alternative Mitigation Policy Guidance for Aquatic Permitting Requirements
36 from the Departments of Ecology and Fish and Wildlife, February 10, 2000.

1 10. Governor's Executive Order No. 89-10, Protection of Wetlands (December
2 1989)

3 C. Tribal:

- 4 1. Port Gamble S'Klallam Tribe Water Quality Standards for Surface Waters (Resolution No.
5 02-A-088)
- 6 2. Port Gamble S'Klallam Tribe Environmental Code (Title 24)
- 7 3. Skokomish Tribe Environmental Protection Act

8 **III. FUNDING PROVISIONS**

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

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

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

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

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

25 ii. Statement of anticipated mitigation site project cost

26 iii. Allocation of percentages for project operation

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

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

33 The Land Fee prices will be based on an analysis of average cost of recent lands acquisitions
34 within different areas and zoning categories. Land Fees will be used for acquisition of lands
35 and/or land interests as described in Appendix F.

1 The Mitigation Fee prices will be formulated to reflect full-cost accounting for establishment
2 and management of mitigation sites, which includes: costs associated with site selection,
3 permitting and design, construction, monitoring and maintenance, long-term management,
4 HCCC ILF Program administration, contingencies, and property rights acquisition. Mitigation
5 Fees are further discussed in Appendix F.

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

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

25 2. HCCC ILF Program Administration Account: The Administrative Accounts will be
26 funded by a percentage of Credit Fees collected in the Service Area. These
27 funds will pay for HCCC ILF Program administration duties, including but not
28 limited to:

- 29 a. Site selection and concept design,
- 30 b. Fee and Credit accounting,
- 31 c. Legal services,
- 32 d. Data management (see Appendix G),
- 33 e. Reporting,
- 34 f. Correspondence and meetings with the IRT and other regulatory agencies,
- 35 g. HCCC ILF Program development, and
- 36 h. Other HCCC ILF Program administration duties as necessary.

37 3. Contingency Fee Account: Each Service Area will have a Contingency Fee
38 Account. The Contingency Fee Account is funded by deposits of a percentage
39 of Credit Fees collected in the Service Area. Moneys in the Contingency

1 Accounts will be held in reserve to fund adaptive management during the
2 establishment phase for mitigation sites. These funds are to be used only for
3 contingencies prior to a site entering Long Term Management, e.g.,
4 contingencies related to project implementation and implementation of
5 adaptive management plans (see Appendix O). When a site enters Long Term
6 Management, the remaining portion of the Contingency Fee Account related
7 to that site will be rolled into the Long Term Management Fund for that service
8 area and/or used for Financial Assurances (see Appendix F).

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

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

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

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

1 Ecology; all funds shall be disbursed pursuant to the instructions of the Corps and Ecology (see
2 Appendix R).

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

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

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

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

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

33 **IV. OPERATION OF THE HCCC ILF PROGRAM**

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

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

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

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

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

38 E. Permittee Use of HCCC ILF Program: An applicant seeking to use the HCCC ILF
39 Program must meet the requirements in Appendix C and receive a permit approval from the
40 appropriate permitting authority. Permit approval should require the permittee to calculate,
41 and Sponsor to validate, the amount of impacts (debits) to the aquatic resource and the credits
42 required to mitigate for the impacts. The permitting authority will determine whether use of

1 the HCCC ILF Program is acceptable mitigation for the proposed impact and whether the correct
2 amount of mitigation credits have been required. If the permitting authority and Sponsor agree
3 to the use of the HCCC ILF Program by the permittee, the Sponsor shall collect fees for the
4 mitigation credits required by the applicable permitting agencies to mitigate for the impact
5 activity. The Sponsor must receive a copy of the permit approval prior to collecting mitigation
6 fees from a permittee. Upon the Sponsor's receipt of mitigation fees from a permittee the
7 Sponsor shall sign and issue to the permittee a copy of the Statement of Sale. The permittee
8 shall be responsible for providing copies of the signed Statement of Sale to the applicable
9 permitting agencies. The permittee may transfer or sell its credits to a third party provided that
10 such action is approved by the Corps and Ecology (in consultation with the IRT) and other
11 applicable regulatory agencies, and reflected in a transfer agreement.

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

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

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

37 1. The Establishment Phase of a particular Mitigation Site will commence upon
38 the Sponsor's receiving both the approved Mitigation Plan (see Appendix K)
39 and a copy of a recorded Site Protection Instrument pursuant to Article IV.AA.
40 Prior to termination of the Establishment Phase of a Mitigation Site, the IRT
41 will perform a final compliance inspection to evaluate whether all performance
42 standards have been achieved. Upon termination of the Establishment Phase
43 the Corps and Ecology, after consultation with the IRT, shall release all

1 available credits for the Mitigation Site to the Sponsor. Termination of the
2 Establishment Phase is conditioned upon the Mitigation Site meeting the
3 requirements to enter Long Term Management.

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

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

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

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

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

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

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

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

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

30 J. Credit Release Schedule: Subject to the documentation and scheduling
31 provisions of Appendix K, the Sponsor shall submit to the IRT written evidence that particular
32 performance standards have been achieved. If the co-chairs, after consulting with the the IRT
33 and the Sponsor, concur that the required performance standards have been achieved in full,
34 they will notify the IRT and respond in writing to the Sponsor that the credits associated with
35 those performance standards are released. Mitigation credits will be released to the Sponsor in
36 accordance with the procedures and schedules prescribed in the Appendices; see especially
37 Appendices K, M, and Q.

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

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

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

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

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

40 P. Force Majeure: The Sponsor may request, pursuant to Article VI.C., and the
41 Corps and Ecology may approve changes to the construction, operation, project objectives,

1 performance standards, timelines, or crediting formula, pursuant to the standards and
2 procedures specified in applicable Appendices if all of the following occur: an act or event
3 causes substantial damage such that it is determined to be a force majeure; such act or event
4 has a significant adverse impact on the quality of the aquatic functions, native vegetation, or
5 soils of the mitigation site; and such act or event was beyond the reasonable control of the
6 Sponsor, its agents, contractors, or consultants to prevent or mitigate.

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

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

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

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

40 c. Examples of a deliberate and unlawful act include, but are not limited to,
41 substantial damage resulting from the dumping of a hazardous or toxic
42 substance as well as significant acts of vandalism or arson.

1 Q. Noncompliance: Noncompliance not rising to the level of default is categorized
2 for Mitigation Site, Service Area, and the HCCC ILF Program. This noncompliance includes
3 performance failure and delinquency (see Appendix S). Before a Mitigation Site, Service Area or
4 the HCCC ILF Program is found to be in default (see Article IV.R. below), the Corps and Ecology,
5 in consultation with the IRT and the Sponsor, shall seek to address the causes of noncompliance
6 following the steps outlined in Appendix S, which describes the categories of non-compliance.

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

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

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

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

37 U. Unavoidable Delays: The Sponsor shall not be deemed to be in noncompliance or
38 default when delays to implementation or action are due to the IRT decision making process

1 including review and approval of mitigation actions, or to events categorized under the Force
2 Majeure provision above.

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

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

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

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

40 Z. Closure Provisions Regarding Funding: Funds remaining in the HCCC ILF Program
41 accounts after all obligations are satisfied must continue to be used for the restoration,

1 establishment, enhancement, and /or preservation of wetlands, nearshore areas, aquatic
2 resources, and/or their buffers. Any expenditure of these remaining funds requires IRT review
3 and Corps and Ecology approval. If the Sponsor has outstanding mitigation obligations at the
4 time of closure which it is unable to fulfill, the Corps and Ecology in consultation with the IRT,
5 shall direct the Sponsor to use remaining funds to secure credits from a third party source of
6 mitigation as described in Appendix S.

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

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

- 28 1. The Sponsor has granted additional easements, rights of way, or any other
29 property interests in the project areas without the written approval of the
30 Corps, in consultation with the IRT.
- 31 2. The Sponsor has used or authorized use of any areas of mitigation sites within
32 the HCCC ILF Program for any purpose that Corps and Ecology, in consultation
33 with the IRT, concludes is contrary to the provisions of this Instrument or the
34 site protection mechanisms, or that interferes with the conservation purposes
35 of the HCCC ILF Program.

36 CC. Inspection of HCCC ILF Program Sites: The Sponsor will allow, or otherwise
37 provide for, access to the HCCC ILF Program Mitigation Sites by members of the IRT or their
38 agents or designees, as reasonably necessary for the purpose of inspection, compliance
39 monitoring, and remediation consistent with the terms and conditions of this Instrument and
40 the Appendices, including mitigation site establishment and long-term management phases.
41 This right shall remain in place even in the event the HCCC ILF Program or a Service Area closes.

1 Inspecting parties shall provide the Sponsor reasonable prior notice of a scheduled inspection,
2 and shall not unreasonably disrupt or disturb activities on the property.

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

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

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

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

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

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

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

39 D. The Corps and Ecology agree to act in good faith when rendering decisions about
40 acceptability of financial assurances, requiring corrective or remedial actions, requiring long-

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

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

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

24 VI. GENERAL PROVISIONS

25 A. Effect of the HCCC ILF Program on Federal, State, Tribal, and Local Permitting
26 Requirements: Decisions on the use of the HCCC ILF Program to provide compensatory
27 mitigation will be made by the applicable permitting agencies during the permitting process for
28 each permit, including federal, state, tribal, and local permitting authorities. The parties to this
29 Instrument recognize that permit decisions regarding the need for, type, quantity, and
30 appropriateness of compensatory mitigation are to be made by the appropriate permit
31 reviewers for the applicable permitting agencies. The Corps and Ecology each have
32 independent authority for permitting actions under their respective jurisdictions. The Corps
33 holds the responsibility and authority under Section 404 of the Clean Water Act and Ecology
34 holds independent responsibility and authority under Section 401 of the Clean Water Act and
35 Chapter 90.48 RCW. This independent authority applies to both impact sites and mitigation
36 receiving sites. The Environmental Protection Agency is responsible for jointly interpreting and
37 implementing the 2008 Federal Mitigation Rule along with the Corps, as well as Section 401 of
38 the Clean Water Act on Tribal lands where Tribes do not have that authority. Nothing in this
39 Instrument shall be construed to override the permitting authority of the Corps, Ecology, or any
40 Tribal, federal, state, or local permitting entity to regulate applicable permit requirements on
41 either impact or mitigation sites.

1 Nothing in the HCCC ILF Program relieves or displaces government to government consultation
2 obligations between the federal government and affected tribal governments within all service
3 areas of the HCCC ILF Program.

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

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

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

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

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

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

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

32

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

41

42

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

1 P.O. Box 47600
2 300 Desmond Drive
3 Olympia, WA 98504-7600
4 360-407-7045
5

6 Hood Canal Coordinating Council
7 Mitigation Manager
8 11791 Fjord Drive NE, Suite 122/124
9 Poulsbo, WA 98370-8481
10 360-394-7999
11

12 G. Entire Agreement: This Instrument and its appendices constitute the entire
13 agreement between the parties concerning the subject matter hereof.

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

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

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

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

38 L. Headings and Captions: Any paragraph heading or caption contained in this
39 Instrument shall be for convenience of reference only and shall not affect the construction or
40 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
3 same 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 IN WITNESS WHEREOF, the Parties hereto have executed this Instrument on the date herein
9 below last written.

10 SPONSOR:

11
12 _____
13 SCOTT BREWER Date
14 Executive Director
15 Hood Canal Coordinating Council
16

17 UNITED STATES ARMY CORPS OF ENGINEERS:

18
19 _____
20 BRUCE A. ESTOK Date
21 Colonel, Corps of Engineers
22 District Commander
23

24 WASHINGTON STATE DEPARTMENT OF ECOLOGY:

25
26 _____
27 GORDON WHITE Date
28 Program Manager for Shorelands and Environmental Assistance Program
29 Washington State Department of Ecology
30
31
32
33

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

3

4 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

5

6

7

KATE KELLY

Date

8

Director, Office of Ecosystems, Tribal, and Public Affairs

9

US Environmental Protection Agency

10

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

13