***[IN-LIEU FEE PROGRAM INSTRUMENT TEMPLATE]***

***[Text in brackets is provided for explanatory purposes. Please delete before submitting draft Instrument.]***

# *[Insert Sponsor Name]*

# In-Lieu Fee Instrument

**AN AGREEMENT REGARDING THE OPERATION OF THE** ***[INSERT* *SPONSOR NAME]* 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      ***[insert Sponsor name and affiliation (e.g., King County, a political subdivision of the State of Washington)]*** (hereinafter, the "Sponsor"), the U.S. Army Corps of Engineers (hereinafter, the “Corps”), and the Washington State Department of Ecology (hereinafter, “Ecology”) ***[insert local government name here, if they want to be a Party to the agreement]*** (hereinafter, collectively, as “Parties”) hereby agree as follows to this In-Lieu Fee Instrument (hereinafter, the "Instrument"):

***[Only actual Parties to the agreement should be listed above. An entity may sign the Instrument without being a Party to the agreement. See Article I.D., the Role of the IRT, and signature page for further explanation.]***

1. **INTRODUCTION**
2. **Purpose**: The purpose of this In-Lieu Fee Instrument is to set forth the agreed upon terms specifying responsibilities for the establishment, use, operation, and management of the       ***[insert Sponsor name]***In-Lieu Fee Program (hereinafter, the “ILF Program”)**.** ***[If the Sponsor is a specific department within an agency or organization, indicate whether there will be an ILF Program Administrator different from the Sponsor]*.** The Instrument consists of two documents: this document which sets forth the general terms of agreement and establishes the central obligations assumed and consideration provided by each Party (hereinafter the "Basic Agreement"), and the Appendices and Exhibits (hereinafter the "Appendices") that establish detailed provisions for operation of the ILF Program, including the standards and procedural requirements applicable to the In-lieu Fee Program pursuant to 33 CFR Parts 325 and 332; 40 CFR Part 230. The terms and provisions of the Appendices are hereby incorporated into this Instrument and made a part hereof.

The ILF Program will provide compensatory mitigation for unavoidable adverse impacts to waters of the United States and waters of the State, ***[insert Tribal waters if applicable]*** including wetlands, aquatic areas and aquatic resources ***[insert and their buffers if applicable]*** as defined by Appendix B that result from activities authorized by Federal, State, ***[insert Tribal if applicable]***and local authorities. Use of the 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 program may also be used as a remedy to mitigate for unauthorized activities when such use of the program is approved by appropriate regulatory agencies.

1. **ILF Program Goals**: The primary goal of the ILF Program is to provide a comprehensive natural resource program that addresses ecosystem needs at the local watershed level, and that provides an additional mechanism for compensatory mitigation for unavoidable impacts to aquatic resources ***[insert and their buffers if applicable]*** authorized by the Clean Water Act (33 U.S.C. § 1251 et seq.) and/or other Federal, State, ***[insert Tribal if applicable]***or local regulations while maximizing the benefit to the ***[insert watershed where ILF Program will operate]***. The ILF Program is intended to uphold the goal of no net loss 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 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 ILF Program include:
2. Provide high quality, successful long term mitigation for unavoidable impacts to aquatic resources ***[insert and their buffers if applicable]***.
3. Utilize scale efficiencies by combining the required mitigation for impacts from individual smaller projects within a service area into collective mitigation at larger sites with greater ecological value.
4. Efficiently meet regulatory requirements by streamlining the compensatory mitigation process.
5. Utilize a watershed approach as defined in 33 CFR Part 332 to identify the most appropriate off-site mitigation options available, thereby obtaining greater ecological benefits than would otherwise be achieved through on-site mitigation options that are impracticable or of low ecological value.
6. Operate in a financially self-sustaining manner: collect sufficient mitigation fees to complete mitigation projects and meet “no net loss” requirements over the long term operation of the ILF Program.
7. Provide public benefit by applying mitigation resources toward the improvement of ecologically-impaired publicly-owned natural areas and of privately-owned lands that have important ecological value to the watershed. ***[Adjust language as necessary to fit specific ILF Program]***
8. ***[Add other specific objectives relevant to ILF Program]***
9. **Interagency Review Team**: Whereas, in consideration of the establishment and maintenance of the ILF Program, the Corps and Ecology, in consultation with the Interagency Review Team, is willing to award ILF credits in accordance with the procedures outlined in this Instrument. These ILF credits will be made available to serve as compensatory mitigation pursuant to applicable Federal and Washington State laws and regulations. The Corps and Ecology serve as Co-Chairs of the IRT ***[revise Co-Chairs if necessary]***. The IRT is the group of Federal, State, Tribal, and local agencies that has reviewed, and will advise the Co-Chairs regarding, the establishment and management of the ILF Program pursuant to the provisions of the Instrument. The IRT consists of ***[edit the below list as applicable]***:
10. Co-Chair: District Engineer, U.S. Army Corps of Engineers, Seattle District (District Engineer) or his designee.
11. Co-Chair: Washington State Department of Ecology.
12. U.S. Environmental Protection Agency, Region 10.
13. National Oceanographic and Atmospheric Administration, National Marine Fisheries Service.
14. United States Fish and Wildlife Service.
15. Washington Department of Natural Resources.
16. Washington Department of Fish and Wildlife.
17. Interested Tribes.
18. Other pertinent interested parties as invited by the Co-Chairs.

**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 ILF Program Instruments, monitoring reports, the evaluation of mitigation plans, the recommendation of remedial measures, the approval of ILF mitigation site 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 Appendices      , Program Overview and      , Credit Fulfillment, of this Instrument. IRT members are invited to sign, but need not sign, this Instrument as an expression of their agreement with its terms. IRT members do not become a Party to this Instrument by signing and expressing such agreement. Signing this Instrument does not override or nullify the independent permitting authority of a Federal, State, ***[insert Tribal if applicable]*** or local permitting entity to enforce their permit requirements at impact and/or mitigation sites.

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 this process. The IRT will seek to reach such a consensus within a reasonable period of time and with minimal delays.

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 express any recommendations, concerns, or potential improvements concerning the implementation of the ILF Program to the Sponsor.

**BASIC TERMS OF AGREEMENT**

**II. TRANSFER OF PERMIT MITIGATION RESPONSIBILITY**

**A**. **Transfer of Permit Mitigation Responsibility**: The Sponsor agrees to accept full legal responsibility for satisfying the mitigation requirements for all Corps, State, ***[insert Tribal if applicable]*** 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, Chapter 90.48 RCW,       ***[insert local and Tribal citations that are applicable to ILF Program]***, and any other applicable Federal, State, ***[insert Tribal if applicable]*** and local 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, ***[insert Tribal, if applicable]*** and local regulatory 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, site protection, 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 ***[insert and resource type, if applicable]***of ILF credits, and (b) the Corps’ and Ecology’s receipt of the Statement of Sale found in Exhibit      , which expressly specifies that the Sponsor, and its successors and assigns, assume responsibility for accomplishment and maintenance of the permittee’s compensatory mitigation requirements associated with the impacting project, as required by the permit conditions, upon completion of the ILF credit sale.

**III. LEGAL AUTHORITIES**

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

1. **Federal:**
2. Clean Water Act (33 USC §§ 1251 et seq.)
3. Rivers and Harbors Act of 1899 (33 USC § 403)
4. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320- 332)
5. Federal Register Vol. 73, No. 70, Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, Department of the Army, Corps of Engineers, 33 CFR Parts 325 and 332; Environmental Protection Agency 40 CFR Part 230, Pages 19593-19705.
6. 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)
7. U.S. Army Corps of Engineers Regulatory Guidance Letter 05-1, Guidance on Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds, U.S. Army Corps of Engineers, February 14, 2005
8. Guidelines for the Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230, Section 404(b)(1))
9. National Environmental Policy Act (42 USC §§ 4321 et seq.)
10. Council on Environmental Quality Procedures for Implementing the National Environmental Policy Act (40 CFR Parts 1500-1508)
11. Executive Order 11990 (Protection of Wetlands)
12. Executive Order 11988 (Floodplains Management)
13. Executive Order 13112 (Invasive Species)
14. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.)
15. Fish and Wildlife Service Mitigation Policy (46 FR 7644-7663, 1981)
16. Endangered Species Act (16 USC §§ 1531 et seq.)
17. Magnuson-Stevens Fishery Conservation and Management Act (16 USC §§ 1801 et seq.)
18. National Historic Preservation Act, as amended (16 USC § 470)
19. Coastal Zone Management Act (16 USC § 1451 et seq.)
20. **State of Washington**:
21. Water Pollution Control Act, Chapter 90.48 RCW and Chapter 173-225 WAC)
22. Environmental Policy Act (Chapter 43.21C RCW and Chapter 197-11 WAC)
23. Growth Management Act (Chapter 36.70A RCW and Chapter 365-195 WAC)
24. Construction Projects in State Waters (Chapter 77.55 RCW)
25. Shoreline Management Act of 1971 (Chapter 90.58 RCW and Chapter 173-20 RCW)
26. Salmon Recovery Act (Chapter 75.46 RCW)
27. Aquatic Resources Mitigation Act (Chapter 90.74 RCW)
28. Aquatic Lands (Chapters 79.105 - 79.140 RCW)
29. ***[Add other applicable local and/or Tribal codes and regulations that would pertain to the ILF Program]***

**IV. FUNDING PROVISIONS**

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

Pursuant to this instrument, the Sponsor will establish a financial account (see Article IV.D., Program Account) to accept in-lieu fees for the purpose of restoring, enhancing, creating and/or preserving aquatic resources and their buffers. The account will be established as a separate interest-bearing account solely for use by the       In-Lieu Fee Program, held in an FDIC-insured banking institution. The Sponsor will deposit the funds into the dedicated in-lieu fee program accounts, in the percentages outlined in Appendix      , Program Account.

1. **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 Program Administrative Account in the percentage amount specified in Appendix      , Program Account.
   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      , Program Account, Section      . Written authorization will be in the form of the Spending Agreement found in Exhibit      . The Spending Agreement shall include:
      1. Statement of current account balances for the Service Area,
      2. Statement of anticipated Mitigation Site project cost,
      3. Allocation of percentages for project operation, and
      4. Signature of the District Engineer or his designee and of Ecology.
2. **Mitigation Fees:** 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, program administration, contingencies, and property rights acquisition. Mitigation Fees are further discussed in Appendix      , Program Account, Section      .

Mitigation Fees will comprise of: 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 applicable projects completed by the ***[insert Sponsor name or agency department responsible for the analyses].*** Credit Fees will be used to implement all aspects of mitigation projects undertaken by the       ILF Program.

The Land Fee prices will be based on an analysis of average cost of recent ***[insert area where ILF Program will be applicable]*** natural lands acquisitions ***[revise as necessary according to roster lands or potential ILF Program land acquisitions, within different areas and zoning categories [revise as appropriate].*** Land Fees will be used for acquisition of lands and/or land interests as described in Appendix      , Program Account, Section      .

1. **Program Account:** Mitigation fees, once collected, will be allocated under an ILF Program Account. The ILF Program Account will be established within       Bank ***[state the specific bank or be more general by saying an FDIC member bank]***, a member of the Federal Deposit Insurance Corporation. Upon the sale of the first ILF credit in each Service Area the following accounts below will be established under the ILF Program Account: Land Fee Account, Program Administration Account, Contingency Account, Long Term Management Account, and Mitigation Project Account. The allocation of percentages for each account will be determined by the Sponsor, the Corps and Ecology in accordance with the process outlined in Appendix      , Program Account. 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 for all Service Areas ***[or Service Area if there is only one Service Area associated with the ILF Program]*** constitute the ILF Program Fund:
2. Land Fee Account: Each Service Area ***[or it may read “The Service Area” if only one Service Area associated with ILF Program]*** will have a Land Fee Account containing 100% of the Land Fee portion of the Mitigation Fees collected in the service area. These funds will be used for the acquisition of property to include as mitigation sites. In the event an account in the Service Area is insufficient to meet the needs of the required action, moneys allocated to the Land Fee Account may be used as Financial Assurances.
3. Program Administration Account: Each Service Area ***[if only one Service Area, revise text as necessary]*** will have a Program Administration Account. The Administrative Account(s) will be funded by a percentage of Credit Fees collected in the Service Area. These funds will pay for program administration duties, including but not limited to:
   1. Site selection and concept design,
   2. Fee and Credit accounting,
   3. Legal services,
   4. Data management (e.g., maintaining ILF Program Database; see Appendices      , Credit Accounting and      , Tracking Program Performance,
   5. Reporting,
   6. Correspondence and meetings with the IRT and other regulatory agencies,
   7. Program development, and
   8. Other program administration duties as necessary.
4. Contingency Account: Each Service Area ***[if only one Service Area, revise text as necessary]*** will have a Contingency Account. The Contingency 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 or contingency measures during the Establishment Phase for mitigation sites. These funds are to be used only in their respective Service Areas ***[if only one Service Area, revise text as necessary]*** for contingencies prior to a site entering Long Term Management, e.g., contingencies related to project implementation, implementation of adaptive management plans (see Appendix      , Adaptive Management and Contingencies Planning). When a site enters Long Term Management, the remaining portion of the Contingency Account related to that site will be rolled into the Long Term Management Account (see Appendix      , Program Account).
5. Long Term Management Account: Each Service Area ***[if only one Service Area, revise text as necessary]*** will have a Long Term Management Account. 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 Account will be rolled into the Long Term Management Account. Moneys in the Long Term Management Account 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      , Credit Fulfillment, Section       and Appendix      , Long Term Management). 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 ILF credits associated with a project are released.) (See Credit Release Schedule, Appendix      , Section       and Long Term Management, Appendix      ).
6. Mitigation Project Account: Each Service Area ***[if only one Service Area, revise text as necessary]*** will have a Mitigation Project Account. The fees in this account, deposited into the account following the signing of a spending agreement, are an allocation of the percentage of fees that are not allocated to the other accounts, i.e. Contingency Account, Program Administration Account, and Long Term Management Account. The fees in this account are used for development of the Mitigation Plans, site protection costs, mitigation project implementation, and the establishment period monitoring and maintenance activities for individual mitigation projects within the Service Area.

Upon approval by the IRT of a mitigation project site and conceptual plan for a mitigation project, the Sponsor will appropriately earmark within or place into a sub-account within the Mitigation Project Account the estimated funds necessary to accomplish the tasks associated with the mitigation project (see above). The Sponsor will ask for disbursements from the earmarked funds associated with the applicable mitigation project. For all accounts, the Sponsor shall keep track of earmarked funds, disbursements, expenditures, and remaining available funds.

1. Accrual of interest earnings: Interest earnings accrued shall remain within the ILF Program Account, for use by the ILF Program. Accrued interest in the Land Fee Account shall remain with the Land Fee Account, and interest accrued in the Long Term Management Account, shall remain with the Long Term Management Account. Interest earnings from the remaining Accounts will be directed equally to the Contingency Account and Long Term Management Account. (see Appendix      , Program Account).
2. **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      , Noncompliance, Force Majeure, and Program Closure. The provisions of Appendix      , Noncompliance, Force Majeure, and Program Closure, 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      , Noncompliance, Force Majeure, and Program Closure, 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 ILF Program Account funds. Termination of any Program Account shall only occur upon receipt of written instructions signed by the Sponsor, Ecology, and the Corps; upon termination, all funds shall be disbursed pursuant to the instructions of the Corps and Ecology (see Appendix      , Financial Assurances, Section      ).

The Corps and/or Ecology shall direct the use of funds through the issuance of a signed Directive Letter to the Sponsor. 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 ILF Program funds. The Sponsor acknowledges that failure to abide by the Spending Agreement or Directive Letters of the Corps and/or Ecology, as provided for herein, may constitute a violation of the Instrument and may result in penalties including, in the most severe case, ILF Program termination.

1. **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. The following 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 ILF credit price estimation calculations, and mitigation fees collected are based on full cost accounting (see Appendix      , Program Account, Section      ). Project approval by the IRT, Ecology, and the Corps is contingent upon each project being fully funded at the time of its approval to cover the Sponsor’s obligations under this Instrument.

If funds allocated to the Mitigation Program Account are insufficient to cover the costs associated with ILF Mitigation Projects, then funds may be directed per Article IV.E., Ability to Direct Funds, from the following accounts to cover the shortfall(s) in any Service Area: ***[if only one Service Area, revise text as necessary]*** Contingency Account, Long Term Management Account, and/or Land Fee Account.

To the extent, if any, that these funds are insufficient to fully and timely fund the Sponsor’s obligations as delineated in this Instrument, the       ***[insert Sponsor, Program Administrator name, or entity responsible for making such request]*** shall include in its budget request appropriations sufficient to cover the balance of the Sponsor’s obligations under this Instrument, and will use all reasonable and lawful means to fulfill its obligations hereunder. In the event the       ***[insert county, Tribal council, or other legislative appropriation body]*** does not appropriate funds in sufficient amounts to discharge these obligations, the       ***[insert Sponsor, Program Administrator name]*** shall use its best efforts to procure funding in order to satisfy its obligations under this Instrument from any other source of funds legally available for this purpose. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the       ***[insert name of Sponsor’s governing body]***.

***[Revision of the paragraph immediately above will be necessary for ILF Programs with non-profit conservation or natural resource entities as Sponsors].***

# V. OPERATION OF THE ILF PROGRAM

The ILF Program is approved to provide compensatory mitigation for impacts to the waters of the United States and waters of the State, ***[add Tribal waters if appropriate]*** including wetlands, aquatic areas, and aquatic resources ***[add buffers if appropriate]*** as defined in Appendix      , Definitions. ILF credits will be sold to impact site permittees. The funds received from permittees will be consolidated and used to implement various mitigation sites. Once a Mitigation Site successfully achieves Performance Standards, as listed in the IRT-approved or modified Mitigation Plan, additional ILF credits will be released to the Sponsor.

1. **Service Areas:** To accomplish the goal of watershed focused mitigation, the Sponsor has proposed the watershed Service Area(s) described in Appendix      , Service Area(s). The fees for various impacts in a Service Area will be collected and combined to fund mitigation projects in that Service Area. In exceptional situations, the 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      , Watershed Approach to Mitigation,      , Service Area(s), and      , Site Selection Process. If the Corps and Ecology determine that the Sponsor has sold, used, or transferred ILF 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 ILF 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 ILF credits. Notwithstanding the fact that ceasing sale, use, or other transfer of ILF credits may have been required, unless this Instrument is terminated pursuant to Article V.S., Default, or VII.C., Entry into Effect, Modification or Amendment, and Termination of the Instrument, the Sponsor shall remain responsible for the timely and effective achievement of all the Objectives and Performance Standards mandated in Appendix      , Ecological Performance Standards.
2. **Advanced ILF Credit Allocation to Sponsor:** The Sponsor requests, and the Corps and Ecology agree to initially grant advance ILF credits to be made available for sale to applicants undertaking permitted actions with unavoidable impacts. Appendices      , Advance Credits and      , Service Area(s) detail the rationale, amount, and type of advance ILF credits requested. The Sponsor may need to request additional advance ILF credits, in which case approval must be granted by the Corps and Ecology, in consultation with the IRT. Requests for additional advance ILF credit must also comply with Article V.C., ILF Credit Deficit or Fraudulent Transactions.
3. **ILF Credit Deficit or Fraudulent Transactions:** If the Corps and/or Ecology determine at any point that the 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 ILF credits, the Corps and/or Ecology shall direct the Sponsor to immediately cease sale, use, or other transfer of ILF credits. The Corps and/or Ecology will determine in consultation with 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 ILF credits.
4. **Permits:** Except for the advance ILF credits provided for in Article V.B., Advanced ILF Credit Allocation to Sponsor, 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 ILF credits to the Sponsor. Compliance with this Instrument does not fulfill the requirement, or substitute, for such authorizations.
5. **Permittee Use of Program:** An applicant seeking to use the ILF Program must: (1) meet the requirements in Appendix      , Mitigation Sequencing and Participating Agencies, (2) be accepted by the ILF Program Sponsor to use the program, and (3) receive permit approvals from the appropriate permitting authorities allowing use of ILF as mitigation for the impacting activities. The permitting authority(ies) should require the applicant to calculate the amount of impacts to aquatic resources ***[add buffers if appropriate]*** and the ILF credits proposed to compensate for those impacts. The permitting authority(ies) will determine the acceptability of the use of the ILF Program as mitigation for the proposed impact and the acceptability of the proposed amount of ILF credits. If the Sponsor and permitting authority(ies), respectively, agree to the use of the ILF Program by the applicant, the Sponsor shall collect fees for the ILF credits required by the applicable permitting agencies to compensate 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, as found in Exhibit      . The permittee shall be responsible for providing copies of the signed Statement of Sale to the applicable permitting agencies.
6. **Timing of Mitigation**: By the end of the third full growing season after any impact in a ***[change “a” to “the” if only one Service Area]*** Service Area 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 ***[change “that” to “the” if only one Service Area]*** Service Area unless the District Engineer determines that more or less time is needed to plan and implement an in-lieu fee project. The Sponsor shall notify the Corps and Ecology at least 60 days prior to the deadline when additional time is required to achieve these initial improvements on a project. If funds are not expended within 3 growing seasons of in-lieu fee payment, the Corps and/or Ecology may direct funds to alternative mitigation projects, in consultation with the Sponsor and the IRT, pursuant to Article IV.E., Ability to Direct Funds.
7. **Approval of Mitigation Sites:** To establish a Mitigation Site, the Sponsor agrees to follow the requirements of Appendix      , Credit Fulfillment. The Sponsor shall submit for IRT review and Corps and Ecology approval a proposed Mitigation Site, including a preliminary concept plan for mitigation at the site, as described in Appendix      , Credit Fulfillment. The Sponsor will also submit a proposed Spending Agreement for approval and signature by the Corps and Ecology, using the template in Exhibit      . Upon approval of a Mitigation Site by the Corps and Ecology, after consultation with 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      , Credit Fulfillment, Section      . Upon the approval 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 IV.B., Spending Authority and Disbursement). For each approved Mitigation Plan, Appendix      , Mitigation Plans, will be amended in this Instrument to reflect the Mitigation Site and the Site’s Mitigation Plan.
8. **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       through Appendix       ***[revise to one Appendix if appropriate]***. The Compensation Planning Framework will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities.
9. **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 once the Site has met performance standards of the approved Mitigation Plan.
   1. The Establishment Phase of a particular Mitigation Site will commence upon the Sponsor receiving both the approved Mitigation Plan (see Appendix      , Credit Fulfillment, Section      ) and a copy of a recorded Site Protection Instrument pursuant to Article V.BB., Mitigation Site Protections. 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 ILF 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-Chairs determining, in consultation with the IRT and the Sponsor, that:
      1. All applicable performance standards for the Site prescribed in the IRT-approved Mitigation Plan have been achieved;
      2. All available ILF credits for that phase have been awarded, or the Corps and Ecology have approved the Sponsor’s written request to permanently cease ILF Program activities;
      3. 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      , Credit Fulfillment and      , Long Term Management;
      4. 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 V.FF., Transfer of Long Term Management Responsibilities;
      5. The Long Term Management Account has been funded as described in this Instrument;
      6. Appropriate moneys from the Long Term Management Account have been transferred to the Long Term Steward, if applicable; and
      7. The Sponsor has complied with the terms of this Instrument.
10. **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 applicable members of 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 IRT, through the Co-Chairs, for approval. Documentation of implemented modifications shall be made consistent with Article VII.C., Entry into Effect, Modification or Amendment, and Termination of the Instrument.
11. **Credit Release Schedule**: Subject to the documentation and scheduling provisions of Appendix      , Credit Fulfillment, Section      , the Sponsor may 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 ILF credits associated with those performance standards are released. ILF credits will be released to the Sponsor in accordance with the procedures and schedules prescribed in the Appendices; see Appendices      , Credit Fulfillment, \_\_\_\_\_, Ecological Performance Standards, and      , Implementation of Approved Plans.
12. **Modification of ILF Credits:** If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with an approved mitigation plan, the Sponsor must consult with the Corps and Ecology 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 ILF credits that have already been sold (see 33 CFR 332.8(l)(2)). Once implemented, if the in-lieu fee project does not then achieve its performance-based milestones, the Corps and Ecology may modify the credit release schedule, including reducing the number of ILF 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 VII.C., Entry into Effect, Modification or Amendment, and Termination of the Instrument. Conversely, if an in-lieu fee project site, once implemented, produces more acres or linear feet of re-established, rehabilitated, established, enhanced, and/or preserved aquatic resource than was originally anticipated when the Mitigation Plan and associated credit release schedule were approved, the Sponsor can provide a written request to amend the ILF Instrument in accordance with the procedures at 33 CFR 332.8(g).
13. **Monitoring Provisions**: The Sponsor agrees to perform all necessary work, pursuant to Appendix      , Monitoring and Reporting, to monitor the Mitigation Sites during: (1) the establishment period for the purpose of demonstrating compliance with the performance standards established in the Mitigation Plan, and (2) the Long Term Management phase (Appendix      , Long Term Management), to ensure the Mitigation Site’s continued adherence to the project objectives.

The Sponsor agrees to perform all necessary work, pursuant to Appendix      ,Tracking Program Performance, to monitor the overall ILF Program performance.

1. **Maintenance Provisions**: The Sponsor agrees to perform all necessary maintenance work during the establishment period to ensure achievement of all performance standards established in the Mitigation Plan, pursuant to Appendix      , Credit Fulfillment. Following achievement of the performance standards, the Sponsor agrees to perform all necessary work to maintain those standards as prescribed in Appendix      , Long Term Management.
2. **Contingency Plans/Adaptive Management**: If during the establishment period, mitigation projects funded through the ILF Program do not achieve, by the specified date, one or more of the performance standards identified in an IRT-approved Mitigation Plan consistent with provisions in Appendix      , Credit Fulfillment, Section      , or cannot be implemented in accordance with an approved Mitigation Plan, the Sponsor shall develop necessary adaptive management/contingency plans and implement appropriate measures for the ILF Program as specified in Appendix      , Adaptive Management and Contingencies Planning, to attain those project objectives and performance standards including, if necessary, substitute proposals for mitigation projects. Potential contingency actions and adaptive management strategies are to be outlined by the Sponsor in the mitigation plans funded under this program, and will meet the requirements in Appendix      , Credit Fulfillment and      , Adaptive Management and Contingencies Planning. The Sponsor must receive approval from the Corps and Ecology, in consultation with the IRT, prior to executing any contingency plans and remediation and monitoring actions. In the event the Sponsor fails to implement the necessary measures within the prescribed period, the Corps and/or 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      , Noncompliance, Force Majeure, and Program Closure. In cases of default as described in Article V.S., Default, and Appendix      , Noncompliance, Force Majeure, and Program Closure, the Corps and/or Ecology may accomplish such remedial action directly, acting through a third party designee, by directing use of the Financial Assurances pursuant to Articles IV.E., Ability to Direct Funds, and IV.F., Financial Assurance Requirements.
3. **Availability of ILF Credits in the Event Contingencies or Financial Assurances are Accessed**: In the event the Corps and/or Ecology, acting pursuant to Articles V.O., Contingency Plans/Adaptive Management, or V.R., Noncompliance, directs the use of the Financial Assurances established pursuant to Article IV.E., Ability to Direct Funds, and IV.F., Financial Assurance Requirements, and the use of any Financial Assurances accomplishes any objectives, performance standards, or features of a Mitigation Site implemented by the ILF Program, the Corps and Ecology, in consultation with the IRT, may award ILF 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.
4. **Force Majeure**: The Sponsor may request, pursuant to Article VII.C., Entry into Effect, Modification or Amendment, and Termination of the Instrument, and the Corps and Ecology may approve changes to the construction, operation, project objectives, performance standards, timelines or crediting formula of the ILF Program, 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, Ecology, and the IRT 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 Q 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.

* 1. 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 of 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; as well as events of the following type when they reach a substantially damaging nature: disease, wildfire, depredation, regional pest infestation, or significant fluviogeomorphic change.
  2. 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.
  3. Examples of a deliberate and unlawful act include, but are not limited to substantial damage resulting from the following: the dumping of a hazardous or toxic substance, as well as significant acts of vandalism or arson.

1. **Noncompliance:** Noncompliance not rising to the level of default is categorized for Mitigation Site, Service Area ***[remove all references to Service Area in this paragraph if only one Service Area in ILF Program]***, and/or the ILF Program as a whole. This noncompliance includes performance failure, and delinquency (see Appendix      , Noncompliance, Force Majeure, and Program Closure). Before a Mitigation Site, Service Area, or the program is found to be in default (see Article V.S., Default), 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      , Noncompliance, Force Majeure, and Program Closure, which further describes the categories of non-compliance.
2. **Default**: Three levels of default exist: Mitigation Site default, Service Area ***[remove reference to Service Area in this paragraph if only one Service Area in ILF Program]*** default, and programmatic default which may result from administrative failures or other actions or inactions specified in Appendix      , Noncompliance, Force Majeure, and Program Closure. 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      , Noncompliance, Force Majeure, and Program Closure, the Corps and Ecology may take the measures as further prescribed in Appendix      , Noncompliance, Force Majeure, and Program Closure. Remedies available in the case of default include:
   * 1. Suspending ILF credit sales in one or more service areas; ***[revise if only one Service Area]***
     2. Decreasing available ILF credits at a site or in one or more service areas; ***[revise if only one Service Area]***
     3. Directing the Sponsor to utilize Financial Assurances to correct identified deficiencies (i.e., access contingency funds or Long-term Management funds. See Appendix      , Financial Assurances, and Appendix      , Noncompliance, Force Majeure, and Program Closure, Section      );
     4. Directing The Sponsor to use the ILF Program Fund to secure necessary ILF credits (see Article IV.E., Ability to Direct Funds, and Appendix      , Noncompliance, Force Majeure, and Program Closure);
     5. Terminating the program Instrument (see Article V.Z., Closure Provisions, and V.AA., Closure Provisions Regarding Funding, and Appendix      , Noncompliance, Force Majeure, and Program Closure, Section      ); or
     6. Referring the noncompliance with the terms of this Instrument to the Department of Justice.
3. **Notification of ILF Credit Suspension or Program Suspension:** In the event of default the Corps and Ecology may suspend ILF credit sales or suspend use of the program (see Appendix      , Noncompliance, Force Majeure, and Program Closure). Upon written notification by the Corps and Ecology of ILF credit and/or program suspension, the Sponsor agrees to immediately cease any pending sale or transfer of ILF credit transactions not yet finally completed and to cease any use of ILF 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 ILF credits may be resumed.
4. **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      , Noncompliance, Force Majeure, and Program Closure, the Corps and Ecology, following consultation with the IRT, may terminate this Instrument and any subsequent ILF Program operations pursuant to the closure provisions in Article V.Z., Closure Provisions.
5. **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 in Article V.Q., Force Majeure.
6. **Site Closure:**  If the Sponsor or any member of the IRT determines that a Mitigation Site will not be able to meet performance standards specified in an IRT-approved Mitigation Plan, or that for any reason continued mitigation actions at a 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 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.
7. **Service Area Closure**: The Sponsor, or the Corps and Ecology may terminate this Instrument as to a specific Service Area 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 program in that Service Area as described in Appendix      , Noncompliance, Force Majeure, and Program Closure. Additionally, at the Sponsor’s discretion, the Sponsor may terminate this Instrument as to a specific Service Area within 60 days of written notification to the other Parties. Closing a Service Area does not automatically trigger Program Closure. ***[Remove this paragraph if not applicable to ILF Program because there is only one Service Area associated with the Program]***
8. **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 IRT reports detailing ILF credit and fee ledger balances, as well as status reports for all mitigation projects.
9. **Closure Provisions:** In cases of Site, Service Area ***[remove Service Area if not applicable]***, or 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 ILF credits the Sponsor must recover through alternative mitigation (see Appendix      , Noncompliance, Force Majeure, and Program Closure).
10. **Closure Provisions Regarding Funding:** Funds remaining in the ILF Program accounts after all obligations are satisfied must continue to be used for the restoration, establishment, enhancement, and/or preservation of wetland areas and resources. 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 ILF credits from a third party source of mitigation as described in Appendix      , Noncompliance, Force Majeure, and Program Closure.
11. **Mitigation Site Protections:** All real property to be included in the Roster of available sites, ***[if ILF Program does not contain a Roster of sites revise sentence to read: All real property to be included in the ILF Program, now or in the future, will be either…]*** now or in the future, will be either (1) owned in fee simple by the Sponsor ***[you may need to add additional language here if other entities may own the property, such as a public agency or accredited land trust or some other landowner]*** and (a) subject to a restrictive covenant established by the Sponsor limiting use to aquatic resource mitigation, or (b) similarly restricted by a conservation easement granted by the Sponsor to a third party; or (2) land not owned by the Sponsor, subject to a conservation easement granted to the Sponsor by a landowner that restricts use to aquatic resource mitigation consistent with this Program. 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 with the       ***[list the county or Tribal Office where the site protection mechanism will be recorded]*** prior to the release of any ILF credits. (See Appendix      , ILF Receiving Sites, ***[revise as appropriate]*** for the existing real property roster of available sites). ***[remove the last sentence in parentheses if not applicable]***
12. **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 V.S., Default, 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 and Ecology, in consultation with the IRT.
    2. The Sponsor has used or authorized use of any areas of mitigation sites within the 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 mechanism , or that interferes with the conservation purposes of the ILF Program.
13. **Inspection of Mitigation Sites:** The Sponsor will allow or otherwise provide for access to the ILF Program 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 program or a Service Area ***[remove Service Area if not applicable to ILF Program]*** 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.
14. **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 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 VII.D., Assignment of Obligation under this Instrument. The Sponsor is not required to but may transfer ownership of all or a portion of the Mitigation Site’s 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 Corps and Ecology of any transfer of fee title or any portion of the ownership interest in the ILF Program real property interest to another party.
15. **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 the contents of the Long Term Management Account, and upon satisfaction of the remaining requirements for termination of the Establishment Phase of the Mitigation Site under Article V.I., Mitigation Site Operational Phases, the Sponsor shall be relieved of all further long term management responsibilities that are associated with the Mitigation Site under this Instrument.

**VI. RESPONSIBILITIES OF THE CORPS AND ECOLOGY AS CO-CHAIRS OF THE IRT *[revise the title and content of this section if Corps and Ecology are not Co-Chairs for the ILF Program]***

1. The Corps and Ecology agree to provide appropriate oversight in carrying out their responsibilities under the provisions of this Instrument.
2. 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.
3. 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       Program, to determine achievement of performance standards in order to evaluate the award of ILF credits for each phase of the 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.
4. 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 ILF 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 IV.E., Ability to Direct Funds, 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 ILF 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.
5. The Corps and/or Ecology will periodically inspect the mitigation sites as necessary to evaluate, in consultation with 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.
6. Upon satisfaction of the requirements of Article V.K., Credit Release Schedule, for any Mitigation Site 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 ILF 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 ILF credits are released.

# VII. GENERAL PROVISIONS

***[Tribal Sponsors must include the following Article under General Provisions: Waiver of Tribal Sovereign Immunity. By*       *[title of the resolution, ordinance, or similar action in which the Sponsor has waived sovereign immunity] dated*      *, the Sponsor waived any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court related to the provisions, terms, and conditions contained in this Instrument. Further, such*       *authorized*       *[title of Sponsor's representative signing the document] to include such waiver as part of this Instrument. Accordingly, the Sponsor hereby waives any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court to (1) enforce the terms and conditions of this Instrument; and (2) recover damages for any breach of the terms and conditions of this Instrument.]***

1. **Effect of the ILF Program on Federal, State, Tribal and Local Permitting Requirements:** Decisions on the use of the ILF Program to provide compensatory mitigation will be made by the applicable permitting agencies during the permitting process for each permit. 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 ***[revise as necessary for Tribal ILF Programs]***. This independent authority applies to both impact sites and mitigation sites. Nothing in this Instrument shall be construed to override the permitting authority of the Corps, Ecology, ***[add Tribe if appropriate]*** or any local permitting entity to regulate applicable permit requirements on either impact or mitigation sites. ***[May need to add additional language here concerning Tribal Usual and Accustomed Areas and government to government consultation obligations]***
2. **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 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 discuss IRT member concerns when raised and to reach the desired consensus. Review and oversight decisions will take into account the views of the Sponsor to the maximum extent practicable.
3. 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. IRT members may instigate the dispute resolution process found in 33 CFR 332.8 (e).
4. **Entry into Effect, Modification or Amendment, and Termination of the Instrument:** This Instrument, consisting of both this Basic Agreement and the Appendices, will enter into effect upon the signature by authorized representatives of ***[insert the same Parties as listed in the introductory paragraph on page 1 of this Instrument]*** the Corps, the Sponsor, and Ecology as of the date of the last of these signatures.

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

2. 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).

3. 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 V.S., Default, V.Y., Program Closure, and V.Z., Closure Provisions, 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 ILF credits that have already been awarded, sold, used, or transferred at the time of termination.

4. Upon termination of the ILF Program pursuant to Article V.Z., Closure Provisions, this Instrument shall terminate without further action by any Party. Thereafter, the Long Term Management Plan developed, approved, and instituted in accordance with Article V.I., Mitigation Site Operational Phases, shall govern the continuing obligations of the Sponsor, or its assignee as applicable.

1. **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 VII.C., Entry into Effect, Modification or Amendment, and Termination of this Instrument. 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 ILF Program interest may be transferred independently with the approval of the Corps and Ecology and pursuant to the provisions of Article V.DD., Inspection of Mitigation Sites. 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 V.FF**.,** Transfer of Long Term Management Responsibilities.
2. **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 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.
3. **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

P.O. Box 47600

300 Desmond Drive

Olympia, WA 98504-7600

360-407-7045

***[Insert Sponsor name, address, and phone number below.]***

     -     -

1. **Entire Agreement:** This Instrument, and its appendices and exhibits, constitutes the entire agreement between the Parties concerning the subject matter hereof.
2. **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 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 or waters of the State of Washington associated with construction and operation and maintenance of a Mitigation Site.

1. **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.
2. **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.
3. **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, Corps, and Ecology.

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

**PARTIES:**

By the Sponsor:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

***[Name]*** Date

***[Title]***

***[Agency]***

By the United States Army Corps of Engineers:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

***[Name]*** Date

Colonel, Corps of Engineers

District Commander

By the Washington State Department of Ecology:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GORDON WHITE Date

Program Manager for Shorelands and Environmental Assistance Program

Washington State Department of Ecology

***[Revise signatory page as necessary to include all Parties signing]***

**OTHER IRT MEMBERS:**

Signature by other IRT members expressing agreement on the part of the represented organization with the terms of this Instrument. This Instrument is not binding on or does not give rise to any affirmative obligations, express or implied, to other IRT members.

By the United States Environmental Protection Agency

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

DAVID ALLNUTT Date

Director, Office of Ecosystems, Tribal, and Public Affairs

US Environmental Protection Agency

***[Insert other IRT Members here as applicable]***

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

***[Name] [Date]***

***[Title]***

***[Agency]***