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**MITIGATION BANKING INSTRUMENT**

**SKAGIT ENVIRONMENTAL BANK**

Skagit County, Washington

April 2011

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1 **MITIGATION BANKING INSTRUMENT**

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3 **Skagit Environmental Bank**

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6 This Mitigation Banking Instrument regarding the establishment, use, operation, and  
7 maintenance of Skagit Environmental Bank (hereinafter, the Bank) is made and entered into by  
8 and among Clear Valley Environmental Farm, LLC (hereinafter, the Sponsor), the U.S. Army  
9 Corps of Engineers (the Corps), and the Washington State Department of Ecology (Ecology)  
10 with reference to the following:

11  
12 **I. PREAMBLE**

- 13  
14 A. Purpose: The purpose of this Mitigation Banking Instrument (hereinafter, the  
15 Instrument) is to specify responsibilities for the establishment, use, operation, and  
16 maintenance of the Bank. It consists of this “Basic Agreement” establishing the central  
17 obligations assumed and consideration provided by each Party, as well as Appendices  
18 (hereinafter, the Appendices) that establish the detailed Bank implementation plan,  
19 including site-specific conditions, standards and procedural requirements applicable to  
20 the Bank. The terms and provisions of the Appendices will be incorporated into the  
21 Instrument. The Bank will provide compensatory mitigation for unavoidable adverse  
22 impacts to waters of the United States and waters of the State, including wetlands, and to  
23 aquatic habitat including habitat for endangered and threatened species, that result from  
24 activities authorized by Federal, State, and local authorities, when use of the Bank has  
25 been specifically approved by the appropriate regulatory agencies.
- 26 B. Location and Ownership of Parcel: Whereas, the Sponsor owns or has exclusive use  
27 rights to approximately 396 acres of land, as described in Exhibit 1 of the Appendices,  
28 located near the City of Mount Vernon, Skagit County, Washington (hereinafter the  
29 “Bank Site”).
- 30 C. Project Description: Whereas, the Sponsor has expressed intent to restore, rehabilitate,  
31 create and/or enhance approximately 396 acres of aquatic and associated upland habitat  
32 in accordance with the provisions of this Instrument, and shall then maintain each  
33 established phase of the Bank in accordance with the provisions of this Instrument.  
34 Please see Table 1. The Bank is projected to, among other purposes, provide habitats as  
35 shown in the table that follows and as detailed in Appendix A and Appendix B. Due to  
36 non-creditable areas consisting of 9.1 acres of utility easements and 85.1 acres of buffer  
37 setbacks, the potentially creditable area of the Bank includes 199 acres of wetland re-  
38 establishment, 46.1 acres of wetland rehabilitation, 4.5 acres of riparian upland, and 52.3  
39 acres of upland (see Table 1 below, Exhibit 1-A of the Appendices, and Figure C-30 in  
40 Exhibit 2 of the Appendices).

41

1 **Table 1. Proposed Bank Activities**

Bank Activity	Area (acres)
Re-established Wetland	199.0
Rehabilitated Wetland, Plowed Field	14.9
Rehabilitated Wetland, Reed Canary	31.2
Riparian Upland	4.6
Upland	52.3
Buffer	85.1
Utility Easements (Power and Water)	9.1
<b>TOTAL</b>	<b>396</b>

2  
3 *Phase 1 Wetland and Aquatic Functions*

4 Phase 1 sets the framework for the reintroduction of wetland hydrology to the Bank Site  
5 as well as clean up from the dairy farm operations. These two simple acts provide all of  
6 the 15 functions evaluated in the Functional Assessment. (Skagit Environmental Bank,  
7 Functional Assessment Results: WAFM, July 20 2007). In summary the primary  
8 functions will be:

- 9           ▪ Create initial hydrologic conditions to support emergent, scrub-shrub, and  
10           forested habitat and the wildlife functions provided by those habitats including  
11           foraging, nesting, and rearing for mammals, amphibians, reptiles, and birds.
- 12           ▪ Improve water quality through the removal of toxins, nutrients, and sediment  
13           into and from the creeks.
- 14           ▪ Recharge the groundwater through a combined effort of constructing  
15           Engineered Log Jams as grade control structures and filling in agricultural  
16           ditches.
- 17           ▪ Decrease Erosion through the establishment of a healthy herbaceous cover.
- 18           ▪ Increase the quality and diversity of aquatic and riverine habitat and general  
19           habitat suitability by providing the hydrology and improving the native plant  
20           richness and wildlife habitat.
- 21           ▪ Provide migration habitat for fish, amphibians, reptiles, and other aquatic  
22           dependent species.

23 *Phase 2 Wetland and Aquatic Functions*

24 Phase 2 expands the hydrologic conditions of the Bank and places a focus on establishing  
25 diverse habitats. During this phase, all 15 functions, evaluated in the Functional  
26 Assessment are elevated again. In summary, the primary emphasis is on the following:

- 1                   ▪ Provide additional hydrologic conditions that will increase the opportunity for  
2 emergent, scrub-shrub, and forested palustrine wildlife habitat.
- 3                   ▪ Increase linkages between the channel systems and restored riparian  
4 floodplain emergent, scrub-shrub, and forested wetlands.
- 5                   ▪ Slow the rising and falling stormwater movements through the floodplain, i.e.,  
6 slow the peak timing and flows and increase the detention time of stormwater  
7 in the Bank Site area. This will reduce flooding and increase infiltration into  
8 the ground water.
- 9                   ▪ Reduce the effects of winter storm events.
- 10                  ▪ Increase the quality and diversity of aquatic and riparian habitat through  
11 establishing a native plant palette rich in diversity.
- 12                  ▪ Provide rearing, refuge, and migration habitat for fish, amphibians, reptiles,  
13 and other aquatic dependent species as well as birds and mammals.

14                   *Phase 3 Wetland and Aquatic Functions*

15                   Phase 3 takes the hydrologic conditions of the Bank one step further. It is during this  
16 phase that the habitats and plant communities are refined by the special grading of the  
17 upland/wetland mosaic, increasing the habitat diversity through planting and structures.  
18 While all 15 functions, evaluated in the Functional Assessment (Skagit Environmental  
19 Bank, Functional Assessment Results: WAFM, July 20 2007), are elevated again, the  
20 primary emphasis is on the following:

- 21                   ▪ Provide the final hydrologic conditions that will maximize the opportunity for  
22 emergent, scrub-shrub, and forested palustrine wildlife habitat and the wildlife  
23 functions provided by those habitats including foraging, nesting, and rearing  
24 for ungulates and other mammals. These wetlands will also provide cover for  
25 nesting, resting, and foraging waterfowl and upland birds, habitat for small  
26 mammals and reptiles, and reproductive habitat for amphibians.
- 27                   ▪ Provide rearing, refuge, and migration habitat for fish, amphibians, reptiles,  
28 and other aquatic dependent species as well as birds and mammals.
- 29                   ▪ Create potential for primary production and organic export

30 D.               Bank Overview: The Skagit Environmental Bank is located in an area that offers the  
31 opportunity to restore reaches of the Nookachamps Creek, the East Fork of the  
32 Nookachamps Creek, Mud Lake Creek, and associated floodplain wetlands that can  
33 increase the quality of life for both the local community and resident and wintering  
34 seasonal wildlife. Thus the primary bank design goals are to restore the wetland and  
35 floodplain functions that were typical of pre-agricultural disturbance, to produce a  
36 restored system that is dynamic and self-sustaining, and to create a long-term  
37 management plan to address unforeseen changes.

1 Skagit Environmental Bank will rehabilitate 13,000 feet (2.5 miles) of existing riverine  
2 channel habitat, restore 6,500 feet (1.2 miles) of new high-flow back channel, and restore  
3 (re-establish or rehabilitate) palustrine emergent, scrub-shrub, and forested wetlands.

4 *Re-establishment of Former Wetlands and Rehabilitation of Existing Wetlands*

5 Evidence indicates that a majority of the Bank Site was wetlands prior to 1900. After  
6 completing all phases, the Bank will be comprised in part of existing wetland that will be  
7 “Rehabilitated.” These areas are either reed canary grass or plowed fields that exhibit  
8 wetland hydrology. The remaining acres that are currently non-wetland (which we refer  
9 to through the rest of the MBI as “historic wetland”) will be “Re-establishment”  
10 restoration wetlands (as defined in the Regulatory Guidance Letter on Compensatory  
11 Mitigation Projects for Aquatic Resource Impacts, No. 02-2, dated 12-24-02).

12 *General Design Considerations*

13 The restorations will result in a variety of wetland classes, vegetation communities, and  
14 canopy structures in the floodplain and along three creek reaches. Our objectives are to:

- 15       ▪ Restore palustrine forested, scrub-shrub, and emergent habitat that will  
16       provide wildlife habitat and the wildlife functions provided by those habitats  
17       including foraging, nesting, and rearing for mammals, amphibians, reptiles,  
18       and birds
- 19       ▪ Restore in-channel and off-channel rearing, refuge, and migration habitat for  
20       salmonids, resident fish, amphibians, reptiles, and other aquatic dependent  
21       species
- 22       ▪ Restore stream channel morphology with the addition of large woody debris,  
23       or engineered log jams, at certain intervals in order to effect change in  
24       geomorphic process (e.g., riffle and pool formation, channel bank  
25       undercutting, point bar formation, and duration of wetland inundation)
- 26       ▪ Shade the stream channels by restoring a scrub-shrub and forest canopy
- 27       ▪ Restore a wildlife corridor connection between four existing wetlands within  
28       0.5 mile of the Bank through the creation of an unbroken vegetation corridor.

29 E. Interagency Review Team.

30 Whereas, in consideration of the establishment and maintenance of the Bank, the  
31 Interagency Review Team (IRT) is willing to award credits in accordance with the  
32 procedures outlined in this Instrument. These credits will be made available to serve as  
33 compensatory mitigation pursuant to applicable Federal and Washington State laws and  
34 regulations. The Corps and Ecology serve as Co-chairs of the IRT. The IRT is the group  
35 of Federal, State, tribal, and local agencies that has reviewed, and will advise the Co-  
36 chairs regarding, the establishment and management of the Bank pursuant to the  
37 provisions of the Instrument.

1 NOW, THEREFORE, the Parties agree to the following:

2 **II. LEGAL AUTHORITIES**

3  
4 A. Authorities

5 The establishment, use, operation, and maintenance of the Bank shall be carried out in  
6 accordance with the following principal authorities.

7 1. Federal:

- 8 a. Clean Water Act (33 USC §§ 1251 et seq.)
- 9 b. Rivers and Harbors Act of 1899 (33 USC § 403)
- 10 c. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320  
11 -332)
- 12 d. U.S. Army Corps of Engineers Regulatory Guidance Letter 05-1,  
13 *Guidance on Use of Financial Assurances, and Suggested Language for*  
14 *Special Conditions for Department of the Army Permits Requiring*  
15 *Performance Bonds*, U.S. Army Corps of Engineers, February 14, 2005
- 16 e. Guidelines for the Specification of Disposal Sites for Dredged and Fill  
17 Material (“404(b)(1) Guidelines,” 40 CFR Part 230)
- 18 f. National Environmental Policy Act (42 USC §§ 4321 et seq.)
- 19 g. Council on Environmental Quality Procedures for Implementing the  
20 National Environmental Policy Act (40 CFR Parts 1500-1508)
- 21 h. Executive Order 11990 (Protection of Wetlands)
- 22 i. Executive Order 11988 (Protection of Floodplains)
- 23 j. Executive Order 13112 (Invasive Species)
- 24 k. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.)
- 25 l. Fish and Wildlife Service Mitigation Policy (46 FR 7644-7663, 1981)
- 26 m. Endangered Species Act (16 USC §§ 1531 et seq.)
- 27 n. Magnuson-Stevens Fishery Conservation and Management Act (16 USC  
28 §§ 1801 et seq.)
- 29 o. National Historic Preservation Act, as amended (16 USC § 470)

30 2. State of Washington:

- 31 a. Washington Water Pollution Control Act, RCW 90.48 et seq.
- 32 b. State of Washington Wetlands Mitigation Banking Statute (RCW 90.84)
- 33 c. Washington State Rule on Wetland Mitigation Banking (WAC 173-700,  
34 Wetland Mitigation Banks)
- 35 d. Washington State Environmental Policy Act (“SEPA” RCW 43.21C and  
36 WAC 197-11)
- 37 e. Growth Management Act (RCW 36.70A) and Critical Areas Regulations  
38 “Best Available Science” compliance WAC 365-195-900 to 925)
- 39 f. Washington State Hydraulic Code (RCW 77.55, WAC 220-110, and  
40 Hydraulic Permit Approval)

- 1 g. Washington State Shoreline Management Act (RCW 90.58, WAC 173-27
- 2 as amended)
- 3 h. Washington State Salmon Recovery Act (RCW 77.85)
- 4 i. Washington State Aquatic Resources Act (RCW 79.90, RCW 90.74)
- 5 j. Executive orders 89-10 and 90-04, Protection of Wetlands,

### 6 III. ESTABLISHMENT OF THE BANK

7 A Permits: The Sponsor shall obtain all appropriate environmental documentation, permits  
8 and other authorizations needed to establish and maintain the applicable phase of the  
9 Bank, prior to the award of any mitigation credits. Compliance with this Instrument does  
10 not fulfill the requirement, or substitute, for such authorization. Local authorizations and  
11 permits include, but are not limited to, Skagit County approvals, permits, and  
12 authorizations issued under the statutory and regulatory provisions listed in the  
13 Appendices of this Instrument.

14 B Bank Establishment: The Sponsor agrees to establish the Bank as described in Appendix  
15 B and to satisfactorily accomplish all performance standards reflected in Appendix C. In  
16 recognition thereof, credits will be awarded to the Sponsor in accordance with the  
17 procedures and schedules prescribed in the Appendices, particularly in Appendices C and  
18 D. In establishing the Bank, deviations from the prescribed bank development plan and  
19 design, including deviations from any performance standards, may only be made with the  
20 prior approval of the Corps and Ecology, following consultation with the IRT. To  
21 propose modifications to the bank development plan, the Sponsor shall submit a written  
22 request to the Corps and Ecology. Documentation of implemented modifications shall be  
23 made consistent with Article VI.B.2. of this Instrument. The Establishment Period of the  
24 Bank is defined in Article IV.K.

25 C Financial Assurance Requirements: The Sponsor agrees to provide the following  
26 financial assurances for the work described in this Instrument:

- 27 1. The Sponsor shall furnish a Letter of Credit to provide financial assurance  
28 underlying the establishment and initial functionality of each phase of the Bank.  
29 This Letter of Credit must be initiated by the Sponsor, in a form and content  
30 approved by the Corps and Ecology, and shall conform to the requirements of  
31 Appendix H, before any construction or implementation activities may be  
32 conducted on-site as part of the establishment period of the Bank, as defined in  
33 Article IV.K., and prior to the award of any Bank credits. Any construction or  
34 implementation activities conducted on-site prior to the inception of the  
35 establishment period must cease as of the effective date of this Instrument  
36 pursuant to Article VI.B.1, until an approved Letter of Credit is initiated. The  
37 initial award of credits in recognition of accomplishment of the performance  
38 standards under Objectives 1 and 2, pursuant to Appendix D.1.2, will serve as the  
39 IRT's notification that construction and implementation activities are authorized  
40 to commence.

1 a. The Corps and Ecology must specifically approve all terms and conditions  
2 of the Letter of Credit, as well as the identity of the financial institution  
3 issuing and underwriting the Letter of Credit.

4 (i). Only federally-insured institutions rated investment grade or  
5 higher may issue the Letter of Credit. The Sponsor shall provide  
6 the IRT with a credit rating that indicates the financial institution  
7 has the required rating as of the date of first issuance of the Letter  
8 of Credit. This credit rating shall be from a recognized  
9 commercial rating service as specified in Office of Federal  
10 Procurement Policy Pamphlet No. 7, available through the website  
11 of Office of Management and Budget, Executive Office of the  
12 President. Provided any required credit rating is held, approval of  
13 the financial institution selected by the Sponsor shall not be  
14 unreasonably withheld. If the Corps and/or Ecology determine that  
15 the credit rating of the financial institution issuing the Letter of  
16 Credit has subsequently failed to adhere to these requirements, the  
17 Corps and/or Ecology may direct the Sponsor to provide an  
18 acceptable substitute Letter of Credit within 30 days. If an  
19 acceptable substitute is not provided within the prescribed period,  
20 the Corps and/or Ecology may immediately draw on the Letter of  
21 Credit up to its full value without any further notice to the Sponsor.  
22 If notice of non-renewal as delineated in section H.1.1.B of  
23 Appendix H has been provided, and the Sponsor does not furnish  
24 an acceptable replacement Letter of Credit or other approved  
25 financial assurance at least 30 days before the Letter of Credit's  
26 expiration, the Corps and/or Ecology may immediately draw on the  
27 existing Letter of Credit up to its full value without any notice to  
28 the Sponsor. If a replacement financial assurance is required, no  
29 further credits will be awarded from the Bank without an effective  
30 Letter of Credit or other approved financial assurance.

31 (ii). If the financial assurance applicable to any phase of the Bank shall  
32 expire by its own terms prior to rescission or cancelation pursuant  
33 to the terms of Article III.C.1.e.(ii), Article III.C.1.f.(iii), or Article  
34 III.C.1.h., respectively, the Sponsor must reinitiate an acceptable  
35 financial assurance so that there is no interval in which there is no  
36 approved financial assurance in effect. No further credits will be  
37 awarded for the Bank while the Bank lacks an effective financial  
38 assurance instrument.

39 b. The Corps and/or Ecology, acting independently or in concert, may direct  
40 disbursement from the credit funds account on a Letter of Credit, under  
41 the following circumstances: upon abandonment of Bank establishment  
42 efforts; upon any failure stemming from any cause to achieve any of the  
43 Bank Objectives or Performance Standards as reflected in Appendix C,  
44 including, but not limited to, deficient design, ineffective establishment,

1 deterioration of functionality or performance, or financial limitations of  
2 the Sponsor; or upon the Sponsor's failure to maintain in force, or to  
3 promptly reinstate, renew or extend, the Letter of Credit as required by  
4 this Article III.C.1 and Appendix H. Ninety calendar days prior to  
5 accessing funds pursuant to a Letter of Credit, the Corps and/or Ecology  
6 shall provide specific and express written direction for corrective action to  
7 the Sponsor in accordance with Article IV.H. of this Instrument and  
8 Section F.1.1.4 of Appendix F. If, within 90 days of delivery of notice of  
9 the demand for corrective action, the Sponsor has initiated compliance  
10 efforts and the Corps and Ecology have determined, in their sole  
11 discretion, that substantial progress has been made toward completion of  
12 corrective action, the Corps and Ecology will defer accessing the Letter of  
13 Credit. The Corps and Ecology need not provide the prior notice to the  
14 Sponsor prescribed in this Article III.C.1: (a) when accessing the Letter of  
15 Credit funds account due to failure to maintain the necessary credit rating;  
16 or (b) in the event that notice of non-renewal has been provided under  
17 Article III.C.1.a.i or III.C.1.a.ii.

18 c. Following consultation with the IRT, the Corps and/or Ecology may  
19 access the funds guaranteed by the Letter of Credit to accomplish any of  
20 the following objectives or features of the Bank: construction,  
21 establishment, monitoring, maintenance, or adaptive management  
22 activities reflected in, or directly supporting accomplishment of, the  
23 Objectives and Performance Standards reflected in Appendix C. The  
24 Sponsor expressly waives any and all opportunity to challenge, delay, or  
25 require substantiation for any direction by the Corps and/or Ecology  
26 accessing and disbursing the funds guaranteed by the Letter of Credit. The  
27 Corps and/or Ecology may elect, following consultation with the IRT, to  
28 accomplish all of the Objectives and Performance Standards reflected in  
29 Appendix C and for which the Sponsor has assumed responsibility under  
30 Article III.B. of this Instrument. In lieu of accomplishing all Objectives  
31 and Performance Standards in Appendix C, the Corps and/or Ecology, in  
32 their sole discretion, following consultation with other members of the  
33 IRT, may accomplish only that component or those components of the  
34 Objectives and Performance Standards that are deemed reasonably  
35 necessary to achieve a project that is stable, self-sustaining, and provides a  
36 level of general benefit to the aquatic resources of the watershed that the  
37 Corps and/or Ecology deem appropriate under the circumstances.  
38 Corrective or remedial actions determined to be necessary will be  
39 accomplished through a Third Party Designee selected by the Corps and/or  
40 Ecology.

41 d. Any Letter of Credit shall take the general form of an agreement on the  
42 part of the issuing financial institution to honor the engagement reflected  
43 therein in the event that the Corps and/or Ecology determine, in their sole  
44 and exclusive discretion, that the principal has failed to fulfill any of the  
45 obligations established in this Instrument. A Letter of Credit shall be

1 furnished to guarantee the establishment activities of the phases of the  
2 Bank, in the following amounts:

3 (i). Phase 1: \$196,350

4 A separate and distinct Letter of Credit shall be furnished to  
5 guarantee the establishment activities of each of Phases 2 and 3,  
6 the value of which will be specified in the exclusive discretion of  
7 the Corps and Ecology, following consultation with the IRT, from  
8 within the following range of amounts:

9 (ii). Phase 2: \$1,351,000 to \$2,423,000

10 (iii). Phase 3: \$282,540 to \$294,350

11 e. Upon certification by the IRT that the following performance standards, as  
12 prescribed in Appendix C, have been achieved, the Corps and Ecology  
13 will authorize in writing that the required amount of the Letter of Credit be  
14 reduced to a specified value within the following range, with that specified  
15 value designated at the exclusive discretion of the Corps and Ecology,  
16 following consultation with the other members of the IRT and with the  
17 Sponsor:

18 (i). Following completion of all Phase 1 Year 2 performance  
19 standards: a revised required amount not less than 33% and not  
20 greater than 50% of the initial required Letter of Credit amount for  
21 Phase 1, as prescribed in Article III.C.1.(d)(i);

22 (ii). Following completion of any of the following actions or  
23 combination of actions the Corps and Ecology will waive their  
24 right to payment under, and authorize rescission or cancellation of,  
25 the financial assurance instrument applicable to Phase 1:

26 (A) Accomplishment of all Phase 1 performance standards and  
27 award of all credits associated with Phase 1, and further  
28 accomplishment of performance standard 5A, all as  
29 prescribed in Appendix C; or

30 (B) Accomplishment of all performance standards associated  
31 with Objective 11, as prescribed in Appendix C; or

32 (C) Approval by the Corps and Ecology of the Sponsor's  
33 written request to permanently cease banking activities.

34 f. Upon certification by the IRT that the following performance standards for  
35 Phase 2, as prescribed in Appendix C, have been achieved, the Corps and  
36 Ecology will authorize in writing that the required amount of the Letter of  
37 Credit be reduced to a specified value within the following range, with

1 that specified value designated at the exclusive discretion of the Corps and  
2 Ecology, following consultation with the other members of the IRT and  
3 with the Sponsor:

4 (i). Following completion of all Phase 2 Year 3 performance  
5 standards: a revised required Letter of Credit amount not less than  
6 33% and not greater than 50% of the initial required Letter of  
7 Credit amount for Phase 2, as prescribed by the Corps and Ecology  
8 pursuant to the range identified in Article III.C.1.(d)(ii);

9 (ii). Following completion of all Phase 2 Year 5 performance  
10 standards: a revised required Letter of Credit amount not less than  
11 11% and not greater than 33% of the initial required Letter of  
12 Credit amount, as prescribed by the Corps and Ecology pursuant to  
13 the range identified in Article III.C.1.(d)(ii);

14 (iii). Following completion of either of the following actions or  
15 combination of actions the Corps and Ecology will waive their  
16 right to payment under, and authorize rescission or cancellation of,  
17 the financial assurance instrument applicable to Phase 2:

18 (A) Accomplishment of all Phase 2 performance standards and  
19 award of all credits associated with Phase 1, and further  
20 accomplishment of performance standard 11A, all as  
21 prescribed in Appendix C; or

22 (B) Approval by the Corps and Ecology of the Sponsor's  
23 written request to permanently cease banking activities.

24 g. Upon certification by the IRT that the following performance standards for  
25 Phase 3, as prescribed in Appendix C, have been achieved, the Corps and  
26 Ecology will authorize in writing that the required amount of the Letter of  
27 Credit be reduced to a specified value within the following range, with  
28 that specified value designated at the exclusive discretion of the Corps and  
29 Ecology, following consultation with the other members of the IRT and  
30 with the Sponsor:

31 (i). Following completion of all Phase 3 Year 3 performance  
32 standards: a revised required Letter of Credit amount not less than  
33 33% and not greater than 50% of the initial required Letter of  
34 Credit amount, as prescribed by the Corps and Ecology pursuant to  
35 the range identified in Article III.C.1.(d)(iii);

36 (ii). Following completion of all Phase 3 Year 5 performance  
37 standards: a revised required Letter of Credit amount not less than  
38 11% and not greater than 33% of the initial required Letter of  
39 Credit amount, as prescribed by the Corps and Ecology pursuant to  
40 the range identified in Article III.C.1.(d)(iii).

1 h. Upon satisfaction of all Objectives and Performance Standards required in  
2 Appendix C, and upon a determination by the Corps and Ecology that the  
3 Sponsor has satisfied the additional requirements reflected in Article IV.K.  
4 of this Instrument for termination of the establishment period of the Bank,  
5 the Corps and Ecology will waive their right to payment under, and  
6 authorize rescission or cancellation of, the financial assurance instrument  
7 applicable to Phase 3.

8 i. Notwithstanding the fact that the financial assurance applicable to Phase 1,  
9 2, or 3 may have been accessed, or that payment upon that financial  
10 assurance may have been required, and full or partial remedial or  
11 corrective action may have been taken by the Third Party Designee, unless  
12 this Instrument is terminated pursuant to Article IV.J. or VI.B. the Sponsor  
13 shall remain responsible for the timely and effective achievement of all the  
14 Objectives and Performance Standards mandated in Appendix C.

15 j. Alternatively, the Sponsor may request, and the Corps and Ecology may  
16 approve a substitute financial assurance instrument for any of the financial  
17 assurances required under this Instrument. The form and content of any  
18 financial assurance instrument must be specifically approved before a  
19 substitution is utilized in satisfaction of the financial assurance obligations  
20 during the establishment period of the Bank. The Corps and Ecology must  
21 specifically approve the identity of the financial institution issuing and  
22 underwriting the financial assurance instrument. The provisions of the  
23 substitute financial assurance instrument must conform to each of the  
24 material requirements of this Article III.C.1., as well as Appendix H,  
25 within this Instrument. Additionally, the substitute financial assurance  
26 must extend for the full period of time that the financial assurance it  
27 replaces must extend, and may be terminated only pursuant to this Article  
28 III.C.1. and Appendix H. The replacement financial assurance instrument  
29 must be instituted so that there is no portion of the establishment period,  
30 following initiation of construction or other implementation activities on-  
31 site, during which there is no financial assurance in effect. No further  
32 credits will be awarded from any phase of the Bank while any phase lacks  
33 an effective financial assurance instrument.

34 2. Long-Term Management and Maintenance Endowment Fund:

35 a. The Sponsor shall institute an endowment fund, established and  
36 maintained through an escrow account, to fund management and  
37 maintenance actions as defined in Article IV.M.1. of this Instrument and  
38 Section G.1.2. of Appendix G, following the termination of the  
39 establishment period of the Bank. This Long-Term Management and  
40 Maintenance (LTMM) Endowment Fund shall be incrementally funded  
41 throughout the establishment period of the Bank, with the funds disbursed  
42 to a Long-Term Steward upon the Sponsor's relinquishment of  
43 responsibility for long-term maintenance and management of the Bank.

1 The Sponsor agrees to continue to deposit funds in the LTMM  
2 Endowment Fund escrow account, pursuant to Article III.C.2.b. of this  
3 Instrument, until the Long-Term Management and Maintenance  
4 Endowment Fund is fully funded in accordance with Article III.C.2.c. of  
5 this Instrument.

6 b. The LTMM Endowment Fund escrow account shall be funded through the  
7 establishment period of the Bank by depositing a designated sum  
8 corresponding to each sale or transfer of mitigation credits, or use of  
9 credits by the Sponsor as compensatory mitigation for its own activities  
10 causing adverse impacts to the aquatic environment. This designated sum  
11 shall be \$1027 per share sold, used, or transferred. Deposits to the LTMM  
12 Endowment Fund must be completed within 30 days of the sale, use, or  
13 transfer transaction. The Corps and Ecology must specifically approve the  
14 identity of the institution in which the escrow account is established, as  
15 well as the form of that account. Approval of the identity of the financial  
16 institution at which the escrow account is established, and the form of the  
17 investment account, shall not be unreasonably withheld.

18 c. The Long-Term Management and Maintenance Fund shall be considered  
19 to be fully funded when the total value of the escrow account, including  
20 the principal amounts deposited and earnings, has accumulated to a total  
21 of \$248,000.

22 d. The Sponsor shall enter into an escrow agreement with both the Corps and  
23 Ecology conforming to the requirements of Section H.1.2 of Appendix H.  
24 The escrow agreement for the Long-Term Management and Maintenance  
25 Endowment Fund shall be signed prior to the release of any credits, for  
26 any phase of the Bank, and before any construction or implementation  
27 activities may be conducted on-site during the establishment period of the  
28 Bank, as defined in Article IV.K.

29 e. Upon receipt of written instructions signed by the Sponsor, Corps, and  
30 Ecology, the Long-Term Management and Maintenance Endowment Fund  
31 escrow account shall be terminated and all funds disbursed pursuant to the  
32 instructions of the Corps and Ecology.

33 D. Real Estate Provisions: A portion of the real property to be included within the Bank  
34 Site (hereinafter, the TIC Property) is presently owned by the Sponsor and Clear Valley  
35 Environmental Farm II, Inc. (hereinafter, CVEF Inc.), as tenants in common. Pursuant to  
36 a Tenancy in Common Agreement between the Sponsor and CVEF Inc., the Sponsor  
37 holds all decision making authority with respect to the management, operation and  
38 control of the TIC Property. This authority includes the ability to burden the title to the  
39 TIC Property, upon which a portion of the Bank Site is located, through grants of  
40 conservation easement (hereinafter, the Conservation Easement), pursuant to the  
41 provisions of Section G.1.1 of Appendix G.

1 The remainder of the real property to be included within the Bank Site (hereinafter, the  
2 Easement Property) is encumbered by a reserved easement held by the Sponsor and  
3 CVEF Inc., benefitting the TIC Property, in which the Sponsor and CVEF Inc. (and their  
4 successors and assigns) hold an exclusive right to use the Easement Property for the  
5 creation of the Bank (hereinafter, the Reserved Easement). These rights under the  
6 Reserved Easement will be conveyed and assigned to the Conservation Easement holder  
7 for the implementation and the enforcement of the requirements of the Instrument  
8 through a Deed and Assignment of Easement Rights (hereinafter, the Assignment). The  
9 TIC Property and the Easement Property comprise the entire Bank Site, and is legally  
10 described in Exhibit 1 of the Appendices.

11 Both the Conservation Easement and the Assignment must be approved, initiated, and  
12 recorded pursuant to Section G.1.1 of Appendix G, prior to the award of any Bank credits  
13 and before any construction or implementation activities may be conducted on-site  
14 during the establishment period of the Bank, as defined in Article IV.K. Any construction  
15 or implementation activities conducted on-site prior to the inception of the establishment  
16 period must cease as of the effective date of this Instrument pursuant to Article VI.B.1,  
17 until an approved Conservation Easement and Assignment are recorded. The initial  
18 award of credits in recognition of accomplishment of the performance standards under  
19 Objectives 1 and 2, pursuant to Section D.1.2.A of Appendix D, will serve as the IRT's  
20 notification that construction and implementation activities are authorized to commence.

#### 21 **IV. OPERATION OF THE BANK**

22  
23 A. Service Area: The Bank is approved to provide compensatory mitigation for impacts to  
24 the Waters of the United States and waters of the State, including wetlands, within the  
25 Service Area. A detailed description and maps of the Service Area are included in  
26 Appendix E.

27 1. The Service Area for the Bank extends to within the Skagit County portion of  
28 Water Resources Inventory Area 3 (WRIA 3), "Lower Skagit Watershed," located  
29 in the Lower Skagit River Basin. The Service Area includes all freshwater  
30 wetland habitats of the Lower Skagit/Samish Watershed east of the easternmost  
31 boundaries of Swinomish Slough, Skagit Bay, Padilla Bay, and Samish Bay,  
32 excluding all islands and all brackish marshes, halitrophic wetlands or wetlands  
33 influenced by saline conditions of >0.5 parts per thousand salt at any time during  
34 the year.

35 2. In exceptional situations, the Bank may be used to compensate for an impact that  
36 occurs outside of the Service Area if specifically approved by the regulatory  
37 agency(ies) having jurisdiction over that impact and by the Corps and Ecology,  
38 following consultation with the IRT, pursuant to the procedures and criteria  
39 prescribed in Section E.1.1.B of Appendix E. If the Corps and/or Ecology  
40 determine that the Sponsor has sold, used, or transferred credits at any time to  
41 provide compensatory mitigation for loss of aquatic resources outside of the  
42 Service Area without prior approval, the Corps and/or Ecology, in consultation  
43 with the other members of the IRT, may direct that the sale, use, or other transfer

1 of credits immediately cease, and will determine, in consultation with the IRT, the  
2 Sponsor and the appropriate regulatory authority, what remedial actions are  
3 necessary to correct the situation and will direct their performance prior to the  
4 award of any additional mitigation credits. Notwithstanding the fact that ceasing  
5 sale, use, or other transfer of credits may have been required, unless this  
6 Instrument is terminated pursuant to Article IV.J. or VI.B., the Sponsor shall  
7 remain responsible for the timely and effective achievement of all the Objectives  
8 and Performance Standards mandated in Appendix C.

9 B. Access to the Bank Site: The Sponsor will allow, or otherwise provide for, access to the  
10 Bank Site by members of the IRT or their agents or designees, as reasonably necessary  
11 for the purpose of inspection, compliance monitoring, and remediation consistent with  
12 the terms and conditions of this Instrument and the Appendices, throughout the periods of  
13 Bank establishment, operation, and long-term management and maintenance. Inspecting  
14 parties shall provide the Sponsor reasonable prior notice of a scheduled inspection, and  
15 shall not unreasonably disrupt or disturb activities on the property.

16 C. Availability and Sale, Transfer, or Use of Credits:

17 1. Availability and Sale, Transfer, or Use of Credits: Subject to the documentation  
18 and scheduling provisions of Section D.1.2 of Appendix D, the Sponsor may  
19 submit to the IRT written evidence that particular performance standards have  
20 been achieved. If the Corps and Ecology, after consulting with the other members  
21 of the IRT and the Sponsor, concur that certain performance standards have been  
22 achieved in full, the Corps and Ecology will respond in writing to the Sponsor  
23 that the credits associated with those performance standards are available for sale,  
24 transfer, or use by the Sponsor as compensatory mitigation for its own activities  
25 causing adverse impacts to the aquatic environment. Each instance of sale or any  
26 other transfer of credits to a third party shall be reflected in a transaction  
27 agreement. Each such transaction agreement must include the name, address, and  
28 telephone number of the purchaser or transferee. Each credit transaction  
29 agreement that is associated with a permit must indicate the permit number of the  
30 impacting project, the number of universal credits involved in the transaction, and  
31 must expressly specify that the Sponsor, and its successors and assigns, assume  
32 legal responsibility for accomplishment and maintenance of the transferee's  
33 compensatory mitigation requirements associated with the impacting project,  
34 upon completion of the credit transaction.

35 2. Availability of Credits in the Event Financial Assurances are Accessed: In the  
36 event the Corps and/or Ecology, acting pursuant to Articles III.C.1.a. and  
37 III.C.1.b. of this Instrument, accesses the Financial Assurances established  
38 pursuant to Article III.C.1. of this Instrument and accomplishes any objectives,  
39 performance standards, or features of the Bank, the Corps and Ecology, in  
40 consultation with the other members of the IRT, may award credits for sale, use,  
41 or transfer by the Sponsor, in a quantity reflecting the objectives and performance  
42 standards achieved as a result of such remedial action.

- 1 D. Credit Deficit or Fraudulent Transactions: If the Corps and/or Ecology determine at any  
2 point that the Bank is operating without prior written approval at a deficit, or has engaged  
3 in fraudulent transactions in the sale, use, or other transfer of credits, the Corps and/or  
4 Ecology will cease award of, and will direct the Sponsor to immediately cease sale, use,  
5 or other transfer of credits. The Co-Chairs will determine, in consultation with the IRT  
6 and the Sponsor, what remedial actions are necessary to correct the situation and will  
7 direct their performance prior to the award of any additional mitigation credits.
- 8 E. Provisions For Use of the Mitigation Bank Area: The Corps and/or Ecology may  
9 consider the Sponsor as being in material default of a provision of this Instrument and  
10 proceed accordingly under Article IV.J., should the Corps and/or Ecology, in  
11 consultation with the IRT, determine that either of the following has occurred:
- 12 1. Either (i) the grant of additional easements, rights of way, or any other property  
13 interest in the TIC Property, or (ii) conveyance of all or partial rights in the  
14 Reserved Easement, without the written consent of the Corps and Ecology.
- 15 2. The use or authorization of the use of any areas within the Bank for any purpose  
16 that is contrary to the provisions of this Instrument, the Conservation Easement or  
17 the Assignment, or which interferes with the conservation purposes of the Bank.
- 18 F. Maintenance Provisions: Following achievement of the performance standards, the  
19 Sponsor agrees to perform all necessary work to maintain those standards as prescribed  
20 in Section F.1.1.5 of Appendix F.
- 21 G. Monitoring Provisions: The Sponsor agrees to perform all necessary work, pursuant to  
22 Appendix F, to monitor the Bank during the establishment period to demonstrate  
23 compliance with the performance standards established in Appendix C.
- 24 H. Contingency Plans/Remedial Actions: In the event the Bank fails to achieve, within the  
25 specified time schedule, one or more of the performance standards as delineated in  
26 Appendix C, the Sponsor shall develop necessary contingency plans and implement  
27 appropriate remedial and monitoring actions for the Bank as specified in Section F.1.1.4  
28 of Appendix F, to attain those project objectives and performance standards. Prior to  
29 implementing any remediation, monitoring, or other corrective measures, the Sponsor  
30 shall obtain approval of the contingency plans from the Corps and Ecology. The Corps  
31 and Ecology shall consult with the IRT prior to approval of the plans. All appropriate  
32 environmental documentation, permits and other authorizations needed to implement the  
33 contingency plan or take remedial action shall be obtained by the Sponsor. In the event  
34 the Sponsor fails to implement necessary contingency actions within the prescribed  
35 period, the Corps and/or Ecology, following consultation with the Sponsor and the IRT,  
36 will direct remedial, corrective, and/or sanctioning action in accordance with the  
37 procedures specified in Section F.1.1.4.A. of Appendix F. Alternatively, the Corps and/or  
38 Ecology may accomplish such remedial action directly, acting through a Third Party  
39 Designee, by accessing the financial assurance instrument pursuant to Articles III.C.1.b.  
40 and III.C.1.c. of this Instrument.

1 I. Force Majeure: The Sponsor may request, pursuant to Article III.B, and the Corps and  
2 Ecology may approve changes to the construction, operation, objectives, performance  
3 standards, timelines or credit generation and award schedule of the Bank, pursuant to the  
4 standards and procedures specified in Appendix F if all of the following occur: an act or  
5 event causes substantial damage such that it is determined to be a force majeure; such act  
6 or event has a significant adverse impact on the quality of the aquatic functions, native  
7 vegetation, or soils of the Bank Site; and such act or event was beyond the reasonable  
8 control of the Sponsor, its agents, contractors, or consultants to prevent or mitigate.

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

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

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

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

41 c. Examples of a deliberate and unlawful act include, but are not limited to  
42 substantial damage resulting from the following: the dumping of a

1 hazardous or toxic substance, as well as significant acts of vandalism or  
2 arson.

3 3. The consequences of any events of force majeure recognized as such by the Corps  
4 and Ecology shall not affect the status of previously released credits, whether or  
5 not they have yet been sold, used, or transferred.

6 J. Default: Should the Corps and/or Ecology, in consultation with the IRT, determine that  
7 the Sponsor is in material default of any provision of this Instrument, the Corps and/or  
8 Ecology may cease award of mitigation credits, and may notify the Sponsor that the  
9 award, sale, and/or transfer of mitigation credits, or use by the Sponsor of Bank credits as  
10 compensatory mitigation for its own activities causing adverse impacts to the aquatic  
11 environment, are suspended until the delineated deficiencies are rectified. Upon written  
12 notification of suspension, the Sponsor agrees to immediately cease any sale or transfer  
13 transactions not yet finally completed, and/or to cease any use by the Sponsor of Bank  
14 credits as compensatory mitigation for its own activities causing adverse impacts to the  
15 aquatic environment where a Corps or Ecology permit or authorization, as required, has  
16 not yet been issued, until informed by the notifying agency that award, sale, use, or  
17 transfer of credits may be resumed. Should the Sponsor remain in default for a period of  
18 90 days, the Corps and Ecology, following consultation with the IRT, may terminate this  
19 Instrument and any subsequent banking operations. In the event such termination action  
20 is commenced, the Sponsor agrees to fulfill its pre-existing obligations to perform all  
21 establishment, monitoring, maintenance, management, and remediation responsibilities  
22 that arise directly from credits that have already been awarded, sold, used, or transferred  
23 at the time of termination. In the event of termination, no further sale or transfer of  
24 credits may occur, nor any use by the Sponsor of Bank credits as compensatory  
25 mitigation for its own activities causing adverse impacts to the aquatic environment  
26 within the Service Area where a Corps or Ecology permit or authorization, as required,  
27 has not yet been issued.

28 K. Establishment Period of the Bank: The establishment period of the Bank will commence  
29 on the date the Instrument takes effect pursuant to Article VI.B.1. Prior to termination of  
30 the establishment period of the Bank, the Corps and Ecology, following consultation with  
31 the IRT, will perform a final compliance inspection to evaluate whether all performance  
32 standards have been achieved. The establishment period for the Bank will terminate, and  
33 the period of long-term management and maintenance will commence, when the Corps  
34 and Ecology determine, in consultation with the IRT and the Sponsor, that the following  
35 conditions have been met:

36 1. All applicable performance standards prescribed in Appendix C have been  
37 achieved;

38 2. All available credits have been awarded or the Corps and Ecology, in consultation  
39 with the IRT, have approved the Sponsor's written request to permanently cease  
40 banking activities;

- 1           3.     The Sponsor has prepared a Long-Term Management and Maintenance Plan, that  
2                     has been approved by the Corps and Ecology pursuant to Article IV.M.1 and  
3                     Section G.1.2. of Appendix G;
- 4           4.     The Sponsor has either: (i) assumed responsibilities for accomplishing the Long-  
5                     Term Management and Maintenance Plan, in which case the Sponsor will fulfill  
6                     the role of Long-Term Steward, or (ii) has assigned those responsibilities to  
7                     another Long-Term Steward pursuant to Article IV.M.2. of this Instrument;
- 8           5.     The Long-Term Management and Maintenance Endowment Fund has been fully  
9                     funded;
- 10          6.     The contents of the Long-Term Management and Maintenance Endowment Fund  
11                     have been transferred to the Long-Term Steward; and
- 12          7.     The Bank has complied with the terms of this Instrument.

13 L.     Operational Life of the Bank: The operational life of the Bank will commence on the  
14             date the Instrument takes effect pursuant to Article VI.B.1. Following the termination of  
15             the establishment period of the Bank, and (1) upon sale, transfer, or use by the Sponsor as  
16             compensatory mitigation for its own activities causing adverse impacts to the aquatic  
17             environment of all credits, or (2) upon approval by the Corps and Ecology, in  
18             consultation with the IRT, of the Sponsor's written request to permanently cease banking  
19             activities, the operational life of the Bank will terminate.

20 M.     Long-Term Management and Maintenance:

- 21           1.     The Sponsor shall develop a Long-Term Management and Maintenance (LTMM)  
22                     Plan consistent with the guidelines and objectives specified in Section G.1.2 of  
23                     Appendix G, and submit the Plan for approval by the Corps and Ecology, in  
24                     consultation with the other members of the IRT. The Sponsor is responsible, as  
25                     Long-Term Steward, for execution of the approved LTMM Plan. The Sponsor  
26                     may only deviate from the approved Plan upon written approval of the Corps and  
27                     Ecology, following consultation with the Sponsor and the IRT.
- 28           2.     The Sponsor may assign its long-term management and maintenance  
29                     responsibilities to a third party assignee, which will then serve as Long-Term  
30                     Steward in place of the Sponsor. The identity of the assignee and the terms of the  
31                     long-term management and maintenance agreement between the Sponsor and the  
32                     assignee must be approved by the Corps and Ecology, following consultation with  
33                     the IRT, in advance of long-term management and maintenance assignment.
- 34           3.     Upon execution of a long-term management and maintenance assignment  
35                     agreement and the transfer of the contents of the LTMM Endowment Fund, and  
36                     upon satisfaction of the remaining requirements for termination of the  
37                     establishment period of the Bank under Article IV.K. of this Instrument, the  
38                     Sponsor shall be relieved of all further long-term management and maintenance  
39                     responsibilities under this Instrument.

1 N. Accomplishment of Sponsor Responsibilities; Transfer of Ownership of or Rights in the  
2 Bank Site: The Sponsor shall remain responsible for complying with the provisions of  
3 this Instrument throughout the operational life of the Bank, regardless of the ownership  
4 status of the underlying real property, unless those responsibilities have been assigned  
5 pursuant to the provisions of Article VI.C. of this Instrument. Ownership of all or a  
6 portion of the TIC Property, or all or partial rights in the Reserved Easement, may be  
7 transferred to another party, provided that, in either case, the Corps and Ecology,  
8 following consultation with the other members of the IRT, expressly approve the transfer  
9 in writing. The Sponsor shall provide written notice at least 60 days in advance of any  
10 transfer of ownership of all or a portion of the Bank real property or rights as described  
11 herein.

12 In the event the Sponsor fails to provide the notice required under this Article and under  
13 Section G.1.1.A of Appendix G, and the Corps and/or Ecology determine, following  
14 consultation with the IRT and the Sponsor, that the transfer of fee title or any portion of  
15 the ownership interest, in all or a portion of the Bank real property, to a third party has  
16 the effect of voiding or modifying this Instrument, the Conservation Easement, or the  
17 Assignment, the Corps and/or Ecology may institute action, with respect to credits  
18 attributable to the Easement Property component of the Bank, to (1) revoke credits  
19 previously awarded and not sold, transferred, or used by the Sponsor as compensatory  
20 mitigation for its own activities causing adverse impacts to the aquatic environment  
21 within the Service Area where a Corps or Ecology permit or authorization, as required,  
22 has not yet been issued, and (2) deny subsequent award of credits; alternatively, the  
23 Corps and/or Ecology may institute other appropriate action pursuant to Article IV.J.

## 24 **V. RESPONSIBILITIES OF THE CORPS AND ECOLOGY**

- 25
- 26 A. The Corps and Ecology agree to provide appropriate oversight in carrying out provisions  
27 of this Instrument.
- 28 B. The Corps and Ecology agree to review and provide comments on project plans,  
29 monitoring reports, contingency and remediation proposals, and similar submittals from  
30 the Sponsor in a timely manner. The Corps and Ecology will coordinate their review with  
31 the other members of the IRT.
- 32 C. The Corps and Ecology agree to review requests to modify the terms of this Instrument,  
33 transfer title or interest in the Bank, determine achievement of performance standards in  
34 order to evaluate the award of credits for each phase of the Bank, or approve the Long-  
35 Term Management and Maintenance Plan. The Corps and Ecology will coordinate  
36 review with the members of the IRT so that a decision is rendered or comments detailing  
37 deficiencies are provided in a timely manner. The Corps and Ecology agree to not  
38 unreasonably withhold or delay decisions 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  
41 long-term management and maintenance actions, and awarding credits. The Corps and  
42 Ecology will exercise good judgment in accessing financial assurances, and will utilize

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

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

17 F. Upon satisfaction of the requirements of Article IV.K. under this Instrument, the Corps  
18 and Ecology will jointly issue a letter certifying that the establishment period of that  
19 phase of the Bank has terminated, and that the period of long-term management and  
20 maintenance has begun, following consultation with the IRT. Upon satisfaction of the  
21 requirements of Article IV.L. of this Instrument, the Corps and Ecology will jointly issue  
22 a letter certifying that the operational life of the Bank has terminated.

## 23 VI. GENERAL PROVISIONS

24  
25 A. Decision Making by Consensus: The Corps and Ecology will strive to achieve consensus  
26 among the IRT regarding issues that arise pertaining to the establishment, operation,  
27 maintenance, and management of the Bank. The Corps and Ecology will coordinate the  
28 review and oversight activities of the IRT so as to best facilitate opportunity to reach the  
29 desired consensus. Review and oversight decisions will take into account the views of the  
30 Sponsor to the maximum extent practicable. Where consensus cannot otherwise be  
31 reached within a reasonable timeframe, following full consideration of the comments of  
32 the members of the IRT and following consultation with the Sponsor, the Corps holds the  
33 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  
35 and RCW ch. 90.48, to make final decisions regarding the application of the terms of this  
36 Instrument.

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

38 1. This Instrument, consisting of both this Basic Agreement and the Appendices,  
39 will enter into effect upon the signature by authorized representatives of each of  
40 the Corps, Ecology, Skagit County fulfilling its role as the 'local jurisdiction'  
41 pursuant to RCW 90.84.040, and the Sponsor, as of the date of the last of these  
42 signatures.

1 2. This Basic Agreement portion of the Instrument may be amended or modified  
2 only with the written approval of the Sponsor, the Program Manager for  
3 Shorelands and Environmental Assistance on behalf of Ecology, and the Seattle  
4 District Engineer on behalf of the Corps, or their designees. Any such  
5 modifications or amendments will take effect following consultation with the  
6 other members of the IRT. Amendment or modification of the provisions of the  
7 Appendices may be effectuated through an exchange of letters signed by the  
8 Sponsor, the Mitigation Banking Specialist serving as Co-Chair on behalf of the  
9 Corps, and the Wetland Section Manager serving as Co-Chair on behalf of  
10 Ecology, following consultation with the other members of the IRT, provided the  
11 exchange of letters expresses mutual agreement as to the exact language to be  
12 deleted or modified, and the exact language to be inserted.

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

21 4. Upon termination of the operational life of the Bank pursuant to Article IV.L., and  
22 certification to that effect pursuant to Article V.F., this Instrument shall terminate  
23 without further action by any Party. Thereafter, the Long-Term Management and  
24 Maintenance Plan developed, approved, and instituted in accordance with Article  
25 IV.M. shall govern the continuing obligations of the Sponsor, or its assignee as  
26 applicable.

27 C. Assignment of Obligations under this Instrument: The Sponsor may be permitted to  
28 assign its obligations, responsibilities, and entitlements under this Instrument to a third  
29 party. The Corps and Ecology, following consultation with the IRT, must approve the  
30 identity of the assignee in order for any assignment of this Instrument to effectively  
31 relieve the Sponsor of those obligations. In evaluating a prospective assignee, the Corps  
32 and Ecology may consider characteristics such as environmental mitigation expertise,  
33 wetlands mitigation project or analogous experience, and financial strength and stability.  
34 Approval of the identity of the assignee will not be unreasonably withheld. The assignee  
35 must execute a mitigation banking instrument with the Corps and Ecology under terms  
36 identical, to the extent practicable, to the present Instrument. The applicable financial  
37 assurances established pursuant to Articles III.C.1. and III.C.2. of this Instrument must be  
38 initiated. The obligations, responsibilities, and entitlements under this Instrument may  
39 reside in only a single entity at any one time, and may not be severed or transferred  
40 piecemeal. However, the physical ownership of the Bank Site real property and the  
41 obligations, responsibilities, and entitlements under this Instrument are separate and  
42 distinct; thus, ownership may be transferred, pursuant to the provisions of Article IV.N,  
43 independently of assignment of this Instrument. Once assignment of this Instrument has  
44 been properly accomplished, the Sponsor will be relieved of all its obligations and

1 responsibilities under this Instrument. Specific additional provisions pertaining to the  
2 assignment of long-term management and maintenance obligations are described at  
3 Article IV.M.

4 D. Specific Language of this Basic Agreement Shall Be Controlling: To the extent that  
5 specific provisions of this Basic Agreement portion of the Instrument are inconsistent  
6 with any terms and conditions contained in the Appendices, or inconsistent with other  
7 documents that are incorporated into this Instrument by reference and that are not legally  
8 binding, the specific language within this Basic Agreement shall be controlling.

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

15 Jerome Ryan, President  
16 Clear Valley Environmental Farm, LLC  
17 c/o Herrera Environmental Consultants  
18 2200 6<sup>th</sup> Ave Ste 1100  
19 Seattle, WA 98136  
20 (206)441-9080

21 U.S. Army Corps of Engineers, Seattle District  
22 Mitigation Banking Specialist/Co-chair of the IRT  
23 Regulatory Branch  
24 Seattle District, Corps of Engineers  
25 4735 E. Marginal Way South  
26 P.O. Box 3755  
27 Seattle, WA 98124-3755  
28 206-764-3495

29 Washington State Department of Ecology  
30 Mitigation Banking Specialist/ Co-chair of the IRT  
31 Shorelands and Environmental Assistance Program  
32 P.O. Box 47600  
33 300 Desmond Drive  
34 Olympia, WA 98504-7600  
35 360-407-6000

36 F. Entire Agreement: This Instrument, consisting of both this Basic Agreement and the  
37 Appendices, constitutes the entire agreement between the parties concerning the subject  
38 matter hereof.

39 G. Invalid Provisions: In the event any one or more of the provisions contained in this  
40 Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity,

1           illegality or unenforceability will not affect any other provisions hereof, and this  
2           Instrument shall be construed as if such invalid, illegal or unenforceable provision had  
3           not been contained herein.

4   H.   Effect of Agreement: This Instrument does not in any manner affect statutory authorities  
5           and responsibilities of the signatory Parties. This Instrument is not intended, nor may it  
6           be relied upon, to create any rights in third parties enforceable in litigation with the  
7           United States or the State of Washington. This Instrument does not authorize, nor shall it  
8           be construed to permit, the establishment of any lien, encumbrance, or other claim with  
9           respect to the Bank Site, with the sole exception of the right on the part of the Corps and  
10          Ecology to require the Sponsor to implement the provisions of this Instrument, including  
11          recording the Conservation Easement and the Assignment, required as a condition of the  
12          issuance of permits for discharges of dredged and fill material into waters of the United  
13          States associated with construction and operation and maintenance of the Bank.

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

17   J.   Availability of Funds: Implementation of this Instrument is subject to the requirements  
18          of the Anti-Deficiency Act, 32 U.S.C. § 1341, and the availability of appropriated funds.  
19          Nothing in this Instrument may be construed to require the obligation, appropriation, or  
20          expenditure of any money from the United States Treasury, in advance of an  
21          appropriation for that purpose.

22   K.   Headings and Captions: Any paragraph heading or caption contained in this Instrument  
23          shall be for convenience of reference only and shall not affect the construction or  
24          interpretation of any provision of this Instrument.

25   L.   Counterparts: This Instrument may be executed by the Parties in any combination, in one  
26          or more counterparts, all of which together shall constitute one and the same instrument.

27   M.   Binding: This Instrument, consisting of both this Basic Agreement and the Appendices,  
28          shall be immediately, automatically, and irrevocably binding upon the Sponsor and its  
29          heirs, successors, assigns and legal representatives upon execution by the Sponsor,  
30          Ecology, the Corps and Skagit County, fulfilling its role as the 'local jurisdiction' acting  
31          pursuant to RCW 90.84.040.

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

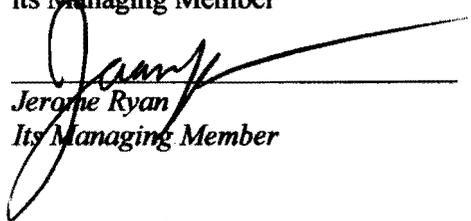
34

1 PARTIES:

2  
3 By the Sponsor:

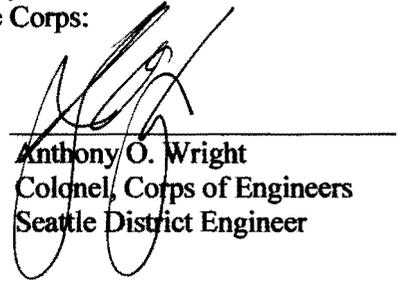
4  
5 CLEAR VALLEY ENVIRONMENTAL FARM, LLC,  
6 a Washington limited liability company

7  
8 By: Sustainable Environments, LLC,  
9 a Washington limited liability company  
10 its Managing Member

11  
12   
13 \_\_\_\_\_  
14 Jerome Ryan  
15 Its Managing Member

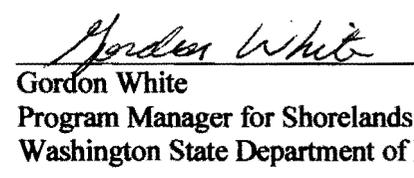
16  
17 Date 5/9/11

18 By the Corps:

19  
20   
21 \_\_\_\_\_  
22 Anthony O. Wright  
23 Colonel, Corps of Engineers  
24 Seattle District Engineer

25  
26 Date 27 July 2011

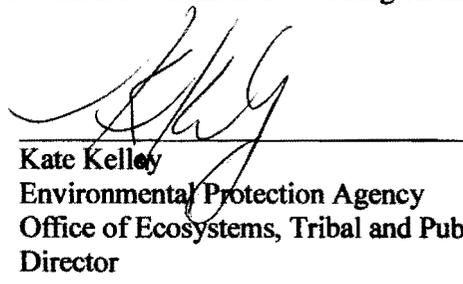
27 By Ecology:

28  
29   
30 \_\_\_\_\_  
31 Gordon White  
32 Program Manager for Shorelands and Environmental Assistance Program  
33 Washington State Department of Ecology

34  
35 Date 5/23/11

36 OTHER IRT MEMBERS:

37 Signature by other IRT members indicates assent on the part of the represented organization to  
38 the provisions of this Instrument, but does not give rise to any affirmative obligations, express or  
39 implied. This Instrument is not binding on the other IRT members.

40  
41   
42 \_\_\_\_\_  
43 Kate Kelley  
44 Environmental Protection Agency  
45 Office of Ecosystems, Tribal and Public Affairs  
46 Director

47  
48 Date 6/6/11

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10

  
\_\_\_\_\_  
Gary R. Christensen, AICP, Director,  
Skagit County Planning and Development Services  
Skagit County Washington

5/24/11  
Date