

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 located near the City of Mount Vernon, Skagit
28 County, Washington.
- 29 C. Project Description: Whereas, the Sponsor has expressed intent to restore, rehabilitate,
30 create and/or enhance approximately 396 acres of aquatic and associated upland habitat
31 in accordance with the provisions of this Instrument, and shall then maintain each
32 established phase of the Bank in accordance with the provisions of this Instrument.
33 Please see Table 1. Proposed Bank Activities. The Bank is projected to, among other
34 purposes, provide habitats as shown in the table that follows and as detailed in Appendix
35 A and Appendix B.

36

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
TOTAL	396

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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 II.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 (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, pursuant to the provisions of Section G.1.1 of Appendix G.

1 The remainder of the real property to be included within the Bank (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 assigned to the conservation easement holder for the
7 implementation and the enforcement of the requirements of the Instrument (hereinafter,
8 the Assignment).

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

19 **IV. OPERATION OF THE BANK**

20
21 A. Service Area: The Bank is approved to provide compensatory mitigation for impacts to
22 the Waters of the United States and waters of the State, including wetlands, within the
23 Service Area. A detailed description and maps of the Service Area are included in
24 Appendix E.

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

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

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

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

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

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

33 2. Availability of Credits in the Event Financial Assurances are Accessed: In the
34 event the Corps and/or Ecology, acting pursuant to Articles III.C.1.a. and
35 III.C.1.b. of this Instrument, accesses the Financial Assurances established
36 pursuant to Article III.C.1. of this Instrument and accomplishes any objectives,
37 performance standards, or features of the Bank, the Corps and Ecology, in
38 consultation with the other members of the IRT, may award credits for sale, use,
39 or transfer by the Sponsor, in a quantity reflecting the objectives and performance
40 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
38 and/or Ecology may accomplish such remedial action directly, acting through a Third
39 Party Designee, by accessing the financial assurance instrument pursuant to Articles
40 III.C.1.a. and III.C.1.b. 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
15 consultation with the Sponsor and the IRT, shall evaluate whether the event
16 qualifies as force majeure. The Corps and Ecology, in consultation with the
17 Sponsor and the IRT, will then evaluate whether significant adverse impacts have
18 occurred to the site. If a force majeure event is determined to have occurred and
19 significant adverse impacts are found to have occurred to the site, the Corps and
20 Ecology, in consultation with the IRT and the Sponsor, will evaluate whether and
21 to what extent changes to the Bank site will be in the best interest of the site and
22 the aquatic environment, and may approve such changes as detailed above. The
23 Corps and Ecology retain sole discretion over the final determination of whether
24 an act or event constitutes force majeure, whether significant adverse impacts to
25 the 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.

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

- 32 1. All applicable performance standards prescribed in Appendix C have been
33 achieved;
- 34 2. All available credits have been awarded or the Corps and Ecology, in consultation
35 with the IRT, have approved the Sponsor's written request to permanently cease
36 banking activities;
- 37 3. The Sponsor has prepared a Long-Term Management and Maintenance Plan, that
38 has been approved by the Corps and Ecology pursuant to Article IV.M.1 and
39 Section G.1.2. of Appendix G;

- 1 4. The Sponsor has either: (i) assumed responsibilities for accomplishing the Long-
2 Term Management and Maintenance Plan, in which case the Sponsor will fulfill
3 the role of Long-Term Steward, or (ii) has assigned those responsibilities to
4 another Long-Term Steward pursuant to Article IV.M.2. of this Instrument;
- 5 5. The Long-Term Management and Maintenance Endowment Fund has been fully
6 funded;
- 7 6. The contents of the Long-Term Management and Maintenance Endowment Fund
8 have been transferred to the Long-Term Steward; and
- 9 7. The Bank has complied with the terms of this Instrument.
- 10 L. Operational Life of the Bank: The operational life of the Bank will commence on the
11 date the Instrument takes effect pursuant to Article VI.B.1. Following the termination of
12 the establishment period of the Bank, and (1) upon sale, transfer, or use by the Sponsor as
13 compensatory mitigation for its own activities causing adverse impacts to the aquatic
14 environment of all credits, or (2) upon approval by the Corps and Ecology, in
15 consultation with the IRT, of the Sponsor's written request to permanently cease banking
16 activities, the operational life of the Bank will terminate.
- 17 M. Long-Term Management and Maintenance:
- 18 1. The Sponsor shall develop a Long-Term Management and Maintenance (LTMM)
19 Plan consistent with the guidelines and objectives specified in Section G.1.2 of
20 Appendix G, and submit the Plan for approval by the Corps and Ecology, in
21 consultation with the other members of the IRT. The Sponsor is responsible, as
22 Long-Term Steward, for execution of the approved LTMM Plan. The Sponsor
23 may only deviate from the approved Plan upon written approval of the Corps and
24 Ecology, following consultation with the Sponsor and the IRT.
- 25 2. The Sponsor may assign its long-term management and maintenance
26 responsibilities to a third party assignee, which will then serve as Long-Term
27 Steward in place of the Sponsor. The identity of the assignee and the terms of the
28 long-term management and maintenance agreement between the Sponsor and the
29 assignee must be approved by the Corps and Ecology, following consultation with
30 the IRT, in advance of assignment.
- 31 3. Upon execution of a long-term management and maintenance assignment
32 agreement and the transfer of the contents of the LTMM Endowment Fund, and
33 upon satisfaction of the remaining requirements for termination of the
34 establishment period of the Bank under Article IV.K. of this Instrument, the
35 Sponsor shall be relieved of all further long-term management and maintenance
36 responsibilities under this Instrument.
- 37 N. Accomplishment of Sponsor Responsibilities; Transfer of Ownership of or Rights in the
38 Bank Site: The Sponsor shall remain responsible for complying with the provisions of
39 this Instrument throughout the operational life of the Bank, regardless of the ownership

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

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

22 **V. RESPONSIBILITIES OF THE CORPS AND ECOLOGY**

- 23
- 24 A. The Corps and Ecology agree to provide appropriate oversight in carrying out provisions
25 of this Instrument.
- 26 B. The Corps and Ecology agree to review and provide comments on project plans,
27 monitoring reports, contingency and remediation proposals, and similar submittals from
28 the Sponsor in a timely manner. The Corps and Ecology will coordinate their review
29 with the other members of the IRT.
- 30 C. The Corps and Ecology agree to review requests to modify the terms of this Instrument,
31 transfer title or interest in the Bank, determine achievement of performance standards in
32 order to evaluate the award of credits for each phase of the Bank, or approve the Long-
33 Term Management and Maintenance Plan. The Corps and Ecology will coordinate
34 review with the members of the IRT so that a decision is rendered or comments detailing
35 deficiencies are provided in a timely manner. The Corps and Ecology agree to not
36 unreasonably withhold or delay decisions on such requests.
- 37 D. The Corps and Ecology agree to act in good faith when rendering decisions about
38 acceptability of financial assurances, requiring corrective or remedial actions, requiring
39 long-term management and maintenance actions, and awarding credits. The Corps and
40 Ecology will exercise good judgment in accessing financial assurances, and will utilize
41 those monies only to the extent they reasonably and in good faith conclude that such
42 remedial or corrective actions are an effective and efficient expenditure of resources. In

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

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

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

21 VI. GENERAL PROVISIONS

22
23 A. Decision Making by Consensus: The Corps and Ecology will strive to achieve consensus
24 among the IRT regarding issues that arise pertaining to the establishment, operation,
25 maintenance, and management of the Bank. The Corps and Ecology will coordinate the
26 review and oversight activities of the IRT so as to best facilitate opportunity to reach the
27 desired consensus. Review and oversight decisions will take into account the views of the
28 Sponsor to the maximum extent practicable. Where consensus cannot otherwise be
29 reached within a reasonable timeframe, following full consideration of the comments of
30 the members of the IRT and following consultation with the Sponsor, the Corps holds the
31 responsibility and authority under Section 404 of the Clean Water Act, and Ecology
32 holds independent responsibility and authority under Section 401 of the Clean Water Act
33 and RCW ch. 90.48, to make final decisions regarding the application of the terms of this
34 Instrument.

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

36 1. This Instrument, consisting of both this Basic Agreement and the Appendices,
37 will enter into effect upon the signature by authorized representatives of each of
38 the Corps, Ecology, Skagit County fulfilling its role as the 'local jurisdiction'
39 pursuant to RCW 90.84.040, and the Sponsor, as of the date of the last of these
40 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 to effectively relieve the Sponsor of
31 those obligations. In evaluating a prospective assignee, the Corps and Ecology may
32 consider characteristics such as environmental mitigation expertise, wetlands mitigation
33 project or analogous experience, and financial strength and stability. Approval of the
34 identity of the assignee will not be unreasonably withheld. The assignee must execute a
35 mitigation banking instrument with the Corps and Ecology under terms identical, to the
36 extent practicable, to the present Instrument. The applicable financial assurances
37 established pursuant to Articles III.C.1. and III.C.2. of this Instrument must be initiated.
38 The obligations, responsibilities, and entitlements under this Instrument may reside in
39 only a single entity at any one time, and may not be severed or transferred piecemeal.
40 However, the physical ownership of the Bank site real property and the obligations,
41 responsibilities, and entitlements under this Instrument are separate and distinct; thus,
42 ownership may be transferred, pursuant to the provisions of Article IV.N, independently
43 of assignment of this Instrument. Once assignment has been properly accomplished, the
44 Sponsor will be relieved of all its obligations and responsibilities under this Instrument.

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

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

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

14
15 Jerome Ryan, President
16 Clear Valley Environmental Farm, LLC
17 c/o Herrera Environmental Consultants
18 2200 6th 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 property, with the sole exception of the right on the part of the Corps
10 and Ecology to require the Sponsor to implement the provisions of this Instrument,
11 including recording the conservation easement, required as a condition of the issuance of
12 permits for discharges of dredged and fill material into waters of the United States
13 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
35 PARTIES:

36
37 By the Sponsor:

38
39 CLEAR VALLEY ENVIRONMENTAL FARM, LLC,
40 a Washington limited liability company

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By: Sustainable Environments, LLC,
a Washington limited liability company
its Managing Member

Jerome Ryan
Its Member

Date

By the Corps:

Anthony O. Wright
Colonel, Corps of Engineers
Seattle District Engineer

Date

By Ecology:

Gordon White
Program Manager for Shorelands and Environmental Assistance Program
Washington State Department of Ecology

Date

OTHER IRT MEMBERS:

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

Kate Kelley
Environmental Protection Agency
Office of Ecosystems, Tribal and Public Affairs
Director

Date

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9

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

Date