

1  
2  
3  
4  
5  
6  
7  
8

# Pierce County In-Lieu Fee Program Instrument

9  
10  
11  
12  
13

**AN AGREEMENT REGARDING THE OPERATION OF THE PIERCE COUNTY IN-LIEU FEE PROGRAM PURSUANT TO 33 CFR PARTS 325 AND 332 AS REVISED EFFECTIVE JUNE 9, 2008 (FEDERAL MITIGATION RULE)**

14  
15

16 In consideration of the mutual promises and covenants contained herein, Pierce County, a political subdivision of the state of Washington (hereinafter the "Sponsor"), the U.S. Army Corps of Engineers (hereinafter, the "Corps"), and the Washington State Department of Ecology (hereinafter, "Ecology") (hereinafter, collectively, as "Parties") hereby agree as follows to this In-Lieu Fee Instrument (hereinafter, the "Instrument"):

17  
18

## **I. INTRODUCTION**

19  
20  
21  
22  
23  
24  
25  
26  
27

A. Purpose: The purpose of this Pierce County In-Lieu Fee Program Instrument is to set forth the agreed upon terms specifying responsibilities for the establishment, use, operation, and management of the Sponsor's In-Lieu Fee Program ("PCILF Program"). Pierce County Public Works' Division of Surface Water Management is the Pierce County government entity responsible for meeting these responsibilities on behalf of the Sponsor. This Instrument consists of two sets of documents: this document which sets forth the general terms of agreement and establishes the central obligations assumed and considerations provided by each Party (hereinafter the "Basic Agreement") and the Appendices and Exhibits (hereinafter the "Appendices") that establish detailed provisions for operation of the PCILF Program, including the standards and procedural requirements applicable to the PCILF Program pursuant to 33 CFR Parts 325 and 332; 40 CFR Part 230. The terms and provisions of the Appendices are hereby incorporated into this Instrument and made a part hereof.

28  
29  
30  
31  
32  
33  
34  
35  
36

The PCILF Program will provide compensatory mitigation for unavoidable adverse impacts to waters of the United States, waters of the state of Washington, and tribal waters, including wetlands, aquatic resources, and their buffers (as defined by Appendix B, Definitions), that result from activities authorized by Federal, State, Tribal and local authorities. Use of the PCILF Program as a means of satisfying mitigation obligations associated with unavoidable impacts must be specifically approved by the permit reviewers from the applicable regulatory agencies for each permitted impact project. This program may also be used as a remedy to mitigate for unauthorized activities when such use of the program is approved by appropriate regulatory agencies.

37  
38  
39  
40

B. PCILF Program Goals: The primary goal of the PCILF Program is to provide a comprehensive natural resource program that addresses ecosystem needs at the local watershed level, and that provides an additional mechanism for compensatory mitigation for unavoidable impacts to aquatic resources and their buffers authorized by the Clean Water Act (33 U.S.C. §

41 1251 et seq.) and/or other Federal, State, Tribal, or local regulations while maximizing the  
42 benefit to the Chambers-Clover and a portion of the Nisqually watersheds. The PCILF Program  
43 is intended to uphold the goal of no net loss through the preservation, enhancement,  
44 establishment, and restoration of ecological functions within target watersheds through the  
45 establishment and management of Mitigation Sites. It is the intent of the Parties that this program  
46 be operated in a collaborative manner, including collaboration of the Interagency Review Team  
47 (IRT) members, as further described below, in the decision making process. Additional goals of  
48 the ILF Program include:

- 49 1. Provide high quality, successful long term mitigation for unavoidable impacts to  
50 aquatic resources and associated habitats.
- 51 2. Utilize scale efficiencies by combining the required mitigation for impacts from  
52 individual smaller projects within a service area into collective mitigation at  
53 larger sites with greater ecological value.
- 54 3. Meet Federal, State, Tribal, and local regulatory requirements by creating an  
55 efficient mechanism for fulfilling compensatory mitigation requirements.
- 56 4. Utilize a watershed approach as defined in 33 CFR Part 332 , and consistent with  
57 Pierce County Code 18.25, to identify the most appropriate off-site mitigation  
58 options available, thereby obtaining greater ecological benefits than would  
59 otherwise be achieved through on-site mitigation options that are frequently  
60 impracticable or of low ecological value.
- 61 5. Operate in a financially self-sustaining manner: collect sufficient mitigation fees  
62 to complete mitigation projects and meet no net loss in terms of wetland acreage,  
63 function, and value, as required by Pierce County Code 18E.30.010 and as a goal  
64 of federal Executive Order 11990, over the long-term operation of the PCILF  
65 Program.
- 66 6. Provide public benefit by applying mitigation resources toward improvement of  
67 ecologically-impaired publicly-owned natural areas and of privately-owned lands  
68 that have important ecological value to the watershed.

69 C. PCILF Program Interagency Review Team: Whereas, in consideration of the  
70 establishment and maintenance of the PCILF Program, the IRT is willing to award ILF credits in  
71 accordance with the procedures outlined in this Instrument. These ILF credits will be made  
72 available to serve as compensatory mitigation pursuant to applicable Federal and Washington  
73 State laws and regulations. The Corps and Ecology serve as Co-Chairs of the IRT. The PCILF  
74 Program IRT is the group of representatives from Federal, State, Tribal and local regulatory and  
75 resource agencies that has reviewed this Instrument and will advise the Co-Chairs regarding the  
76 establishment and management of the PCILF Program pursuant to the provisions of this  
77 Instrument. The IRT consists of:

- 78 1. Co-Chair: District Engineer, U.S. Army Corps of Engineers, Seattle District  
79 (District Engineer) or his designee,
- 80 2. Co-Chair: Washington State Department of Ecology,
- 81 3. U.S. Environmental Protection Agency, Region 10,
- 82 4. National Oceanographic and Atmospheric Administration, National Marine  
83 Fisheries Service,

- 84 5. Washington Department of Fish and Wildlife,  
85 6. Washington Department of Natural Resources' Aquatic Lands Program,  
86 7. Pierce County Planning and Land Services,  
87 8. City of Tacoma, and  
88 9. Other qualified parties as invited by the Co-Chairs.

89 D. The Role of the IRT: The primary role of the IRT is to assist the Corps and  
90 Ecology, in their role as Co-Chairs of the IRT, in the review of ILF Program Instruments, review  
91 and evaluation of mitigation plans, review and evaluation of monitoring reports, the  
92 recommendation of remedial measures, the approval of credit releases, and the approval of  
93 modifications to this Instrument. The IRT's role and responsibilities are more fully set forth in  
94 Section 332.8 of the Federal Mitigation Rule (33 CFR Part 332), and Appendices A, Program  
95 Overview and L, Credit Fulfillment of this Instrument. IRT members are invited to sign, but  
96 need not sign, this Instrument as an expression of their agreement with its terms. IRT members  
97 do not become a party to this Instrument by signing and expressing such agreement. Signing this  
98 Instrument does not override or nullify the independent permitting authority of a Federal, State,  
99 Tribal or local permitting entity to enforce their permit requirements at debit (impact) sites or  
100 PCILF mitigation sites.

101 The IRT will work to reach consensus in its actions. This consensus also includes giving the  
102 Sponsor the opportunity to provide information and input for the IRT members during IRT  
103 decision making processes. The IRT will seek to reach such a consensus within a reasonable  
104 period of time and with minimal delays.

105 The members of the IRT will review such documents and mitigation sites as each considers  
106 necessary to provide meaningful input to the Co-Chairs, and express any recommendations,  
107 concerns, or potential improvements concerning the implementation of the PCILF Program to  
108 the Sponsor.

109

110

## BASIC TERMS OF AGREEMENT

### 111 II. TRANSFER OF PERMIT MITIGATION RESPONSIBILITY

112 A. Transfer of Permit Mitigation Responsibility: The Sponsor agrees to accept full  
113 legal responsibility for satisfying the mitigation requirements for all Corps, State, Tribal, and  
114 local permits for which mitigation fees<sup>1</sup> from a permittee have been accepted under the terms of  
115 this Instrument. This responsibility includes compliance with 33 CFR Part 332, 40 CFR Part 230,  
116 Chapter 90.48 RCW, Pierce County Code (18E.030), and any other applicable Federal, State,  
117 local, and Tribal laws. In satisfaction of the compensatory mitigation requirements, the Sponsor  
118 shall provide compensatory mitigation of the type and in the amount necessary to meet  
119 applicable Federal, State, and local regulatory requirements. Any transfer of mitigation

---

<sup>1</sup> In Pierce County Code, 18G.20, the "mitigation fee" is labeled the "credit fee." In this Basic Agreement, "mitigation fee" is the total of the land fee and the credit fee, combined. In Pierce County Code, the full cost to the developer is known as the "credit fee", and it includes that portion of the fee that will be deposited into the land fee account.

120 responsibility is contingent upon the prior approval of this Instrument by the Sponsor, the Corps  
121 and Ecology.

- 122 1. Mitigation responsibility includes, but is not limited to: the identification and  
123 selection of mitigation sites, property rights acquisition, water rights acquisition,  
124 mitigation plan design and development, construction, monitoring, preservation,  
125 and long term maintenance and management of the required mitigation.
- 126 2. The transfer of mitigation responsibility from the permittee to the Sponsor for  
127 each impact site shall be effective upon (a) the permittee purchasing from the  
128 Sponsor the appropriate number of PCILF credits, and (b) the Corps' and  
129 Ecology's receipt of the Statement of Sale found in Exhibit 11, which expressly  
130 specifies that the Sponsor, and its successors and assigns, assume responsibility  
131 for accomplishment and maintenance of the transferee's compensatory mitigation  
132 requirements associated with the impacting project, as required by the permit  
133 conditions, upon completion of the PCILF credit sale.

134

### 135 **III. LEGAL AUTHORITIES**

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

#### 138 A. Federal:

- 139 1. Clean Water Act (33 USC §§ 1251 et seq.)
- 140 2. Rivers and Harbors Act of 1899 (33 USC § 403)
- 141 3. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR  
142 Parts 320-332)
- 143 4. Federal Register Vol. 73, No. 70, Compensatory Mitigation for Losses of Aquatic  
144 Resources; Final Rule, Department of the Army, Corps of Engineers, 33 CFR  
145 Parts 325 and 332; Environmental Protection Agency 40 CFR Part 230
- 146 5. Memorandum of Agreement between the U.S. Environmental Protection Agency  
147 and the Department of the Army concerning the Determination of Mitigation  
148 Under the Clean Water Act, Section 404(b)(1) Guidelines (February 6, 1990)
- 149 6. U.S. Army Corps of Engineers Regulatory Guidance Letter 05-1, Guidance on  
150 Use of Financial Assurances, and Suggested Language for Special Conditions for  
151 Department of the Army Permits Requiring Performance Bonds, U.S. Army  
152 Corps of Engineers, February 14, 2005
- 153 7. Guidelines for the Specification of Disposal Sites for Dredged and Fill Material  
154 (40 CFR Part 230, Section 404(b)(1))
- 155 8. National Environmental Policy Act (42 USC §§ 4321 et seq.)
- 156 9. Council on Environmental Quality Procedures for Implementing the National  
157 Environmental Policy Act (40 CFR Parts 1500-1508)

- 158 10. Executive Order 11990 (Protection of Wetlands)  
159 11. Executive Order 11988 (Floodplain Management)  
160 12. Executive Order 13112 (Invasive Species)  
161 13. Fish and Wildlife Coordination Act (16 USC §§ 661 et seq.)  
162 14. U.S. Fish and Wildlife Service Mitigation Policy (46 Federal Register 7644-7663,  
163 1981)  
164 15. Endangered Species Act (16 USC §§ 1531 et seq.)  
165 16. Magnuson-Stevens Fisheries Conservation and Management Act (16 USC §§  
166 1801 et seq.)  
167 17. National Historic Preservation Act, as amended (16 USC § 470)  
168 18. Coastal Zone Management Act (16 USC § 1451 et seq.)

169 B. State of Washington:

- 170 1. Water Pollution Control Act, Chapter 90.48 RCW and Chapter 173-225 WAC)  
171 2. State Environmental Policy Act (Chapter 43.21C RCW and Chapter 197-11 WAC)  
172 3. Growth Management Act (Chapter 36.70A RCW and Chapter 365-195 WAC)  
173 4. Construction Projects in State Waters (Chapter 77.55 RCW)  
174 5. Shoreline Management Act of 1971 (Chapter 90.58 RCW and Chapter 173-20  
175 WAC)  
176 6. Salmon Recovery Act (Chapter 75.46 RCW)  
177 7. Aquatic Resources Mitigation Act (Chapter 90.74 RCW)  
178 8. Aquatic Lands (Chapters 79.105-79.140 RCW)

179 C. Pierce County Code ("PCC") and other Local Authorities:

- 180 1. PCC Title 2--Administrative Departments  
181 2. PCC Title 18--Development Regulations – General Provisions  
182 3. PCC Title 18E--Development Regulations - Critical Areas  
183 4. PCC Title 18G.20--In-Lieu Fee Mitigation Programs  
184

185 **IV. FUNDING PROVISIONS**

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

189 Pursuant to this instrument, the Sponsor will establish a financial account (See Article IV.D.,  
190 Program Account) to accept in-lieu fees for the purpose of restoring, enhancing, creating and/or  
191 preserving aquatic resources and their buffers. The Account will be established as a separate

192 interest-bearing account solely for use by the PCILF Program, held in an FDIC-insured banking  
193 institution. The Sponsor will deposit the funds into the dedicated in-lieu fee program accounts, in  
194 the percentages outlined in Appendix F, Program Account.

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

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

202 2. Spending Agreement: The disbursement of any additional funds from the Program  
203 Account shall be made only upon written authorization from the Corps and  
204 Ecology after the Corps and Ecology have consulted with the IRT, pursuant to  
205 332.8(i)(2) and pursuant to Appendix F, Program Account, Section 5.0 and  
206 Article IV.D. Written authorization will be in the form of the Spending  
207 Agreement, a template for which is the subject of Exhibit 12. The Spending  
208 Agreement shall include:

209 a. Statement of current account balances for the Service Area,

210 b. Statement of anticipated Mitigation Site project cost,

211 c. Allocation of percentages for project operation, and

212 d. Signature of the District Engineer or his designee and of Ecology.

213 C. Mitigation Fees: The Mitigation Fee prices will be formulated to reflect full-cost  
214 accounting for establishment and management of mitigation sites, which includes costs  
215 associated with site selection, permitting and design, construction, monitoring and maintenance,  
216 long-term management, program administration, contingencies, and property rights acquisition.  
217 Mitigation Fees will be updated, as often as once a year, based on current market rates for  
218 mitigation project implementation costs and costs of property rights. Mitigation Fees are further  
219 discussed in Appendix F, Program Account, Sections 2.0 and 3.0.

220 Mitigation Fees will comprise two fees: a Credit Fee and a Land Fee. These mitigation fees will  
221 be determined separately for each Service Area. The Credit Fee prices will reflect average costs  
222 for implementing all components of a mitigation project, based on cost analyses of recent  
223 applicable projects completed by Pierce County within each Service Area. Credit Fees will be  
224 used to implement all aspects of mitigation projects undertaken by the PCILF Program.

225 The Service Area Land Fee prices are based on current market analyses of lands that were  
226 purchased or that may be considered for purchase (upon application of the compensation  
227 planning framework) for the purpose of wetland or aquatic habitat restoration. Land Fees will be

228 used for acquisition of lands and/or land interests as described in Appendix F, Program Account,  
229 Section 2.0.

230 D. Program Account: Mitigation Fees, once collected, will be allocated under Pierce  
231 County's ILF Program Account. The Program Account will be established within Pierce  
232 County's Financial Accounting System, which is run through an association with Bank of  
233 America, a member of the Federal Deposit Insurance Corporation. Upon the sale of the first  
234 PCILF credit in each Service Area, the following sub-accounts will be established for each  
235 Service Area under the PCILF Program Account: Land Fee Account, Program Administration  
236 Account, Contingency Account, Long Term Management Account, and Individual Mitigation  
237 Projects Account. The allocation of percentages for each account will be determined by the  
238 Sponsor, Ecology and the Corps in accordance with the process outlined in Appendix F, Program  
239 Account. The Sponsor must allocate and deposit funds to the appropriate accounts within 30  
240 days of the receipt of Mitigation Fees from a permittee. Collectively, the following accounts for  
241 all Service Areas constitute the ILF Program Account:

- 242 1. Land Fee Account: Each Service Area will have a Land Fee Account containing  
243 100% of the Land Fee portion of the Mitigation Fees collected in the service area.  
244 These funds will be used for payment of land acquisition costs and for the  
245 acquisition of properties to be used as mitigation receiving sites. In the event any  
246 other account in the Service Area is insufficient to meet the needs of the required  
247 action, moneys allocated to the Land Fee Account may be used as Financial  
248 Assurances.
- 249 2. Program Administration Account: Each Service Area will have a Program  
250 Administration Account. This account will be funded by a percentage of the  
251 Credit Fees collected in the Service Area. These funds will pay for program  
252 administration tasks, including but not limited to:
  - 253 a. Site selection (including stakeholder coordination) and concept design
  - 254 b. Fee and credit accounting
  - 255 c. Legal services
  - 256 d. Data management (e.g., maintaining ILF Program Database; see Appendix  
257 G, Credit Accounting, and Appendix V, Tracking Program Performance)
  - 258 e. Reporting
  - 259 f. Correspondence and meetings with the IRT and other regulatory agencies
  - 260 g. Program development
  - 261 h. Other program administration duties as necessary and determined to be  
262 appropriate by the Corps and Ecology, after consultation with the IRT
- 263 3. Contingency Account: Each service area will have a Contingency Account. This  
264 account will be funded by a percentage of the Credit Fees collected in the Service  
265 Area. Moneys in the Contingency Accounts will be held in reserve to fund  
266 adaptive management or implementation of contingency measures during the

267 Establishment Phase for mitigation sites. These funds are to be used only in their  
268 respective Service Areas for contingencies prior to a site entering Long Term  
269 Management, e.g., contingencies related to project implementation and  
270 implementation of adaptive management plans (see Appendix P, Adaptive  
271 Management and Contingencies Planning). When a site enters Long-Term  
272 Management, the remaining portion of the Contingency Account related to that  
273 site will be rolled into the Long-Term Management Account (see Appendix F,  
274 Program Account).

275 4. Long-Term Management Account: Each Service Area will have a Long-Term  
276 Management Account. This account will be funded by a percentage of the Credit  
277 Fees collected in the Service Area. The account is to be funded when Credit Fees  
278 are collected. Moneys in the Long Term Management Accounts will be held in  
279 reserve to fund long term management, including adaptive management and  
280 remediation, at mitigation sites after completion of the Establishment Phase and  
281 the project enters the Long Term Management Phase. Additionally, when a  
282 project enters the Long Term Management Phase, its portion of the Contingency  
283 Account will be rolled into the Long-Term Management Account. Moneys in the  
284 Long-Term Management Account will be available solely for use in long-term  
285 management (i.e. for implementing long-term management plans included in IRT-  
286 approved Mitigation Plans; see Appendix L, Credit Fulfillment and Appendix Q,  
287 Site Protection and Long Term Management). Long-Term Management funds are  
288 not available for use on a project until the project enters the Long-Term  
289 Management Phase (i.e. after the Establishment Phase is complete, and all ILF  
290 credits associated with a project are released.) (See Credit Release Schedule,  
291 Appendix L, Section 5.0 and Site Protection and Long-Term Management,  
292 Appendix Q).

293 5. Individual Mitigation Projects Account: Each Service Area will have a Mitigation  
294 Project Account. This account will be funded by a percentage of the Credit Fees  
295 collected in the Service Area. The fees in this account are used for development  
296 of Mitigation Plans, mitigation project implementation, and establishment period  
297 monitoring and maintenance activities for individual mitigation projects within  
298 the Service Area.

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

307 6. Accrual of Interest Earnings: Interest earnings accrued shall remain within the  
308 ILF Program Account, for use by the ILF Program. Accrued interest in the Land  
309 Fee Account shall remain with the Land Fee Account, and interest accrued in the



310 Long Term Management Account, shall remain with the Long Term Management  
311 Account. Interest earnings from the remaining Accounts will be directed equally  
312 to the Contingency Account and Long Term Management Account. (see  
313 Appendix F, Program Account).

314 E. Ability to Direct Funds: The Corps and/or Ecology, acting independently or in  
315 concert, and after consultation with each other and the Sponsor, have the authority to direct the  
316 Sponsor to disburse funds to alternative compensatory mitigation projects in cases where the  
317 Sponsor does not provide compensatory mitigation as agreed to by the parties or in cases of  
318 default, per Appendix S, Financial Assurances and Appendix T, Noncompliance, Force Majeure,  
319 and Program Closure. The provisions of Appendix S, Financial Assurances and Appendix T,  
320 Noncompliance, Force Majeure, and Program Closure, call for collaboration with the Sponsor  
321 including providing the Sponsor an opportunity to suggest solutions to avoid default. In cases  
322 where default is determined, according to Appendix S, Financial Assurances and Appendix T,  
323 Noncompliance, Force Majeure, and Program Closure, the Corps and Ecology shall consult with  
324 each other and other members of the IRT prior to making any decisions regarding direction of  
325 disbursement of PCILF Program Account funds. Termination of any Program Account shall only  
326 occur upon receipt of written instructions signed by the Sponsor, Ecology and the Corps; upon  
327 termination, all funds shall be disbursed pursuant to the instructions of the Corps and Ecology  
328 (See Appendix S, Section 1.0, and Appendix T, Noncompliance, Force Majeure, and Program  
329 Closure).

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

339 F. Financial Assurance Requirements. The Sponsor intends to satisfy its obligations  
340 under this Instrument by obtaining sufficient funding to carry out all design, development,  
341 monitoring, remediation and site management responsibilities. The following Financial  
342 Assurances are provided for the work described in this Instrument. Funding for all  
343 responsibilities and obligations arising under this Instrument has been included in the credit price  
344 estimation calculations and mitigation fees collected are based on full cost accounting (see  
345 Appendix F, Program Account, Section 2.0). Project approval by the IRT, Ecology, and the  
346 Corps is contingent upon each project being fully funded at the time of its approval to cover the  
347 Sponsor's obligations under this Instrument.

348 If funds allocated to the Mitigation Program Account are insufficient to cover the costs  
349 associated with ILF Mitigation Projects, then funds may be directed per Article IV.E., Ability to  
350 Direct Funds, from the following accounts to cover the shortfall(s) in any Service Area:  
351 Contingency Account, Long Term Management Account, and/or Land Fee Account.

352 To the extent, if any, that these funds are insufficient to fully and timely fund the Sponsor's  
353 obligations as delineated in this Instrument, Pierce County Surface Water Management shall  
354 include in its budget request to the Pierce County Council appropriations sufficient to cover the  
355 balance of the Sponsor's obligations under this Instrument, and will use all reasonable and lawful  
356 means to fulfill its obligations hereunder. In the event the Pierce County Council does not  
357 appropriate funds in sufficient amounts to discharge these obligations, Pierce County Surface  
358 Water Management shall use its best efforts to procure funding in order to satisfy its obligations  
359 under this Instrument from any other source of funds legally available for this purpose. Nothing  
360 herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the  
361 Pierce County Council.

362  
363  
364

## V. OPERATION OF THE IN-LIEU FEE PROGRAM

365 The PCILF Program is approved to provide compensatory mitigation for impacts to the waters of  
366 the United States and waters of the State, including wetlands, aquatic areas and aquatic resources  
367 and their buffers, as defined in Appendix B, Definitions. PCILF credits will be sold to impact  
368 site permittees. The fees received from permittees will be consolidated and used to implement  
369 various mitigation projects within the service areas established in this Instrument. Once a  
370 Mitigation Site successfully achieves ecological performance standards as listed in the IRT-  
371 approved or modified Mitigation Plan, additional ILF credits will be released to the Sponsor.

372 A. Service Areas: To accomplish the goal of watershed focused mitigation, the  
373 Sponsor has proposed the watershed Service Areas described in Appendix J, Service Areas. The  
374 fees for various impacts in a Service Area will be collected and combined to fund mitigation  
375 projects in that Service Area. In exceptional situations, the ILF Program may be used to  
376 compensate for an impact that occurs outside of the Service Area if specifically approved by the  
377 Corps and/or Ecology, in consultation with the IRT, pursuant to the procedures and criteria  
378 prescribed in Appendices I, Watershed Approach to Mitigation, J, Service Areas, and K, Site  
379 Selection Process. If the Corps and Ecology determine that the Sponsor has sold, used, or  
380 transferred credits at any time to provide compensatory mitigation for loss of aquatic resources  
381 outside of the Service Area where the impact occurred without prior approval under the terms of  
382 this instrument, the Corps and Ecology, in consultation with other applicable members of the  
383 IRT, may direct that the sale, use, or other transfer of PCILF credits immediately cease. The  
384 Corps and Ecology will determine, in consultation with the IRT, the Sponsor and the appropriate  
385 regulatory authority, what remedial actions are necessary to correct the situation and will direct  
386 the Sponsor's performance prior to the award of any additional PCILF credits. Notwithstanding  
387 the fact that ceasing sale, use, or other transfer of credits may have been required, unless this  
388 Instrument is terminated pursuant to Article V.S., Default, or VII.C., Entry into Effect,  
389 Modification or Amendment, and Termination of the Instrument, the Sponsor shall remain  
390 responsible for the timely and effective achievement of all the Objectives and Performance  
391 Standards mandated in Appendix N, Ecological Performance Standards.

392 B. Advanced ILF Credit Allocation to Sponsor: The Sponsor requests, and the Corps  
393 and Ecology agree, to initially grant advance ILF credits to be made available for sale to  
394 applicants undertaking permitted actions with unavoidable impacts. Appendices E, Advance  
395 Credits and J, Service Areas, detail the rationale, amount, and type of advance credits requested.

396 The Sponsor may need to request additional advance ILF credits, in which case approval must be  
397 granted by the Corps and Ecology, in consultation with the IRT. Requests for additional advance  
398 credit must also comply with Article V.C., PCILF Credit Deficit or Fraudulent Transactions.

399 C. PCILF Credit Deficit or Fraudulent Transactions: If the Corps and/or Ecology  
400 determines at any point that the PCILF Program is operating without prior written approval, at a  
401 deficit, or has engaged in fraudulent transactions in the sale, use, or other transfer of ILF credits,  
402 the Corps and/or Ecology shall direct the Sponsor to immediately cease sale, use, or other  
403 transfer of ILF credits. The Corps and Ecology will determine in consultation with the IRT and  
404 the Sponsor, what remedial actions are necessary to correct the situation and will direct the  
405 Sponsor's performance prior to the award of any additional ILF credits.

406 D. Permits: Except for the advance ILF credits provided for in Article V.B.,  
407 Advanced ILF Credit Allocation to Sponsor, the Sponsor shall obtain all appropriate  
408 environmental documentation, permits and other authorizations needed to establish and maintain  
409 mitigation sites, prior to the release of any ILF credits to the Sponsor. Compliance with this  
410 Instrument does not fulfill the requirement, or substitute, for such authorization.

411 E. Permittee Use of Program: An applicant seeking to use the ILF Program must: (1)  
412 meet the requirements in Appendix C, Mitigation Sequencing and Participating Agencies, (2) be  
413 accepted by the ILF Program Sponsor to use the program, and (3) receive permit approvals from  
414 the appropriate permitting authorities allowing use of ILF as mitigation for the impacting  
415 activities. The permitting authority(ies) should require the applicant to calculate the amount of  
416 impacts to aquatic resources and their buffers and the ILF credits proposed to compensate for  
417 those impacts. The permitting authority(ies) will determine the acceptability of the use of the ILF  
418 Program as mitigation for the proposed impact and the acceptability of the proposed amount of  
419 ILF credits. If the Sponsor and permitting authority(ies), respectively, agree to the use of the ILF  
420 Program by the applicant, the Sponsor shall collect fees for the ILF credits required by the  
421 applicable permitting agencies to compensate for the impact activity. The Sponsor must receive a  
422 copy of the permit approval prior to collecting mitigation fees from a permittee. Upon the  
423 Sponsor's receipt of mitigation fees from a permittee, the Sponsor shall sign and issue to the  
424 permittee a copy of the Statement of Sale, as found in Exhibit 11. The permittee shall be  
425 responsible for providing copies of the signed Statement of Sale to the applicable permitting  
426 agencies.

427 F. Timing of Mitigation: As required by federal rule (33 CFR 332), by the end of the  
428 third full growing season after any impact in a Service Area, the Sponsor agrees to complete land  
429 acquisition and initial physical and biological improvements at a Mitigation Site using mitigation  
430 fees collected from the sale of PCILF mitigation credits in that service area, unless the District  
431 Engineer determines that more or less time is needed to plan and implement an in-lieu fee  
432 project. The Sponsor shall notify the Corps and Ecology at least 60 days prior to the deadline  
433 when additional time is required to achieve these initial improvements on a mitigation project. If  
434 funds are not expended within three growing seasons of the PCILF payment, the Corps and/or  
435 Ecology may direct funds to alternative mitigation projects, in consultation with the Sponsor and  
436 the IRT, pursuant to Article IV.E., Ability to Direct Funds.

437 G. Approval of Mitigation Sites: To establish a Mitigation Site, the Sponsor agrees to  
438 follow the requirements of Appendix L, Credit Fulfillment. The Sponsor shall submit for IRT  
439 review and Corps and Ecology approval a proposed Mitigation Site, including a preliminary  
440 concept plan for mitigation at the site, as described in Appendix L, Credit Fulfillment. The  
441 Sponsor will also submit a proposed Spending Agreement for approval and signature by the  
442 Corps and Ecology, using the template in Exhibit 12. Upon approval of a Mitigation Site by the  
443 Corps and Ecology, after consultation with the IRT, and the Sponsor's receipt of a signed  
444 corresponding Spending Agreement, the Sponsor shall prepare and submit a draft and final  
445 Mitigation Plan as described in Appendix L, Credit Fulfillment, Sections 2.0 and 3.0. Upon the  
446 approval of the Mitigation Plan, the sponsor will proceed to implement the mitigation project in  
447 accordance with the terms of the approved Mitigation Plan and approved Spending Agreement  
448 (see Article IV.B. Spending Authority and Disbursement). For each approved Mitigation Plan,  
449 Appendix W, Mitigation Plans, will be amended in this Instrument to reflect the Mitigation Site  
450 and the Site's Mitigation Plan.

451 H. Compensation Planning Framework: All mitigation projects provided by the  
452 Sponsor under the terms of this Instrument will comply with the Compensation Planning  
453 Framework presented in Appendices H through Appendix R and Appendix V. The  
454 Compensation Planning Framework will be used to select, secure, and implement aquatic  
455 resource re-establishment, rehabilitation, establishment, enhancement, and/or preservation  
456 activities.

457 I. Mitigation Site Operational Phases: Mitigation sites have two operational phases:  
458 (1) the Establishment Phase in which the Site is developed, constructed and actively managed,  
459 and (2) the Long-Term Management Phase, once the site has met performance standards of the  
460 approved Mitigation Plan.

461 1. The Establishment Phase of a particular Mitigation Site will commence upon the  
462 Sponsor receiving both the approved Mitigation Plan (See Appendix L, Credit  
463 Fulfillment, Section 3.0) and a copy of a recorded Site Protection Instrument  
464 pursuant to Article V.BB., Mitigation Site Protections. Prior to termination of the  
465 Establishment Phase of a Mitigation Site, the IRT will perform a final compliance  
466 inspection to evaluate whether all performance standards have been achieved.  
467 Upon termination of the Establishment Phase the Corps and Ecology, after  
468 consultation with the IRT, shall release all available ILF credits for the Mitigation  
469 Site to the Sponsor. Termination of the Establishment Phase is conditioned upon  
470 the Mitigation Site meeting the requirements to enter Long-Term Management.

471 2. The Long-Term Management Phase of a particular Mitigation Site will commence  
472 upon the Co-Chairs determining, in consultation with the IRT, and the Sponsor,  
473 that:

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

- 476                   b. All available ILF credits for the establishment phase of the Mitigation Site  
477                   have been awarded, or the Corps and Ecology, in consultation with the IRT,  
478                   have approved the Sponsor's written request to permanently cease PCILF  
479                   Program activities;
- 480                   c. The Sponsor has prepared a Long-Term Management Plan that has been  
481                   approved by the Corps and Ecology, in consultation with the IRT, pursuant  
482                   to Appendices L and Q;
- 483                   d. The Sponsor has either: (1) assumed responsibilities for accomplishing the  
484                   Long-Term Management Plan, in which case the Sponsor will fulfill the role  
485                   of Long-Term Steward, or (2) has assigned those responsibilities to another  
486                   Long-Term Steward pursuant to Article V, FF., Transfer of Long Term  
487                   Management Responsibilities;
- 488                   e. The Long-Term Management Account has been funded as described in this  
489                   Instrument;
- 490                   f. Appropriate funds from the Long-Term Management Account have been  
491                   transferred to the Long-Term Steward, if applicable; and
- 492                   g. The Sponsor has complied with the terms of this Instrument.

493                   J.     Deviation from Mitigation Site Plans: In establishing the mitigation sites,  
494                   deviations from the approved Mitigation Plans may only be made with the prior approval of the  
495                   Corps and Ecology, following consultation with applicable members of the IRT. In the event the  
496                   Sponsor determines that modifications to an approved Mitigation Plan are necessary, the Sponsor  
497                   shall submit a written request for such modification to the IRT, through the Co-Chairs, for  
498                   approval. Documentation of implemented modifications shall be made consistent with Article  
499                   VII.C, Entry into Effect, Modification or Amendment, and Termination of the Instrument.

500                   K.     Credit Release schedule: Subject to the documentation and scheduling provisions  
501                   of Appendix L, Credit Fulfillment, Section 5.0, the Sponsor may submit to the IRT written  
502                   evidence that particular performance standards have been achieved. If the Co-Chairs, after  
503                   consulting with the IRT and the Sponsor, concur that the required performance standards have  
504                   been achieved in full, they will notify the IRT and respond in writing to the Sponsor that the ILF  
505                   credits associated with those performance standards are released. ILF credits will be released to  
506                   the Sponsor in accordance with the procedures and schedules prescribed in the Appendices; see  
507                   Appendices L, Credit Fulfillment, N Ecological Performance Standards, and R, Implementation  
508                   of Approved Plans.

509                   L.     Modification of PCILF Credits: If the aquatic resource re-establishment,  
510                   rehabilitation, establishment, enhancement, and/or preservation activities cannot be implemented  
511                   in accordance with an approved Mitigation Plan, the Sponsor must consult with the Corps,  
512                   Ecology and the IRT to consider modifications to the Mitigation Plan, including adaptive  
513                   management, revisions to the credit release schedule, and alternatives for providing  
514                   compensatory mitigation to satisfy any credits that have already been sold (see 33 CFR  
515                   332.8(l)(2)). Once implemented, if the in-lieu fee project does not achieve its performance-based

516 milestones, the Corps and Ecology may modify the credit release schedule, including reducing  
517 the number of credits, in accordance with 33 CFR 332.8(o)(8)(iii). Any such modification to an  
518 approved Mitigation Plan or credit release schedule shall occur per Article VII.C., Entry into  
519 Effect, Modification or Amendment, and Termination of the Instrument. Conversely, if an in-lieu  
520 fee project site, once implemented, produces more acres or linear feet of re-established,  
521 rehabilitated, established, enhanced, and/or preserved aquatic resource than was originally  
522 anticipated when the Mitigation Plan and associated credit release schedule were approved, the  
523 Sponsor can request a modification in accordance with the procedures at 33 CFR 332.8(g).

524 M. Monitoring Provisions:

525 1. The Sponsor agrees to perform all necessary work, pursuant to Appendix O,  
526 Monitoring and Reporting, to monitor PCILF Mitigation Sites during: (1) the  
527 establishment phase for the purpose of demonstrating compliance with the  
528 performance standards established in the Mitigation Plan, and (2) The Long Term  
529 Management phase (Appendix Q, Site Protection and Long Term Management),  
530 to ensure all PCILF Mitigation Sites' continued adherence to the project  
531 objectives.

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

534 N. Maintenance Provisions: The Sponsor agrees to perform all necessary  
535 maintenance work during the establishment phase to ensure achievement of all performance  
536 standards established in the Mitigation Plan, pursuant to Appendix L, Credit Fulfillment.  
537 Following achievement of the performance standards, the Sponsor agrees to perform all  
538 necessary work to maintain those standards as prescribed in Appendix Q, Site Protection and  
539 Long Term Management.

540 O. Contingency Plans/Adaptive Management: If during the establishment phase, ILF  
541 mitigation sites funded through the PCILF Program fail to achieve, by the specified date, one or  
542 more of the performance standards identified in the IRT-approved Mitigation Plan, consistent  
543 with provisions in Appendix L, Credit Fulfillment, and Appendix N, Performance Standards or  
544 cannot be implemented in accordance with an approved Mitigation Plan, the Sponsor shall  
545 develop necessary adaptive management/contingency plans and implement appropriate  
546 measures, as specified in Appendix P, Adaptive Management and Contingencies Planning, to  
547 attain those project objectives and performance standards including, if necessary, substitute  
548 proposals for mitigation projects. Potential contingency actions and adaptive management  
549 strategies are to be outlined by the Sponsor in the mitigation plans funded under the PCILF  
550 Program, and will meet the requirements in Appendix L, Credit Fulfillment, and Appendix P,  
551 Adaptive Management and Contingencies Planning. The Sponsor must receive approval from the  
552 Corps and Ecology, in consultation with the IRT, prior to executing any contingency plans and  
553 remediation and monitoring actions. In the event the Sponsor fails to implement the necessary  
554 measures within the prescribed period, the Corps and/or Ecology, in their sole discretion,  
555 following consultation with the Sponsor and the IRT, will direct remedial, corrective, and/or  
556 sanctioning action in accordance with the procedures specified in Appendix T, Noncompliance,

557 Force Majeure and Program Closure. In cases of default as described in Article V.S., Default,  
558 and Appendix T, Noncompliance, Force Majeure and Program Closure, the Corps and/or  
559 Ecology may accomplish such remedial action directly, acting through a third party designee, by  
560 directing use of the Financial Assurances pursuant to Articles IV.E., Ability to Direct Funds and  
561 IV.F, Financial Assurance Requirements.

562 P. Availability of ILF Credits in the Event Contingencies or Financial Assurances  
563 are Accessed: In the event the Corps and/or Ecology, acting pursuant to Articles V.O.,  
564 Contingency Plans/Adaptive Management or V.R., Noncompliance, directs the use of the  
565 Financial Assurances established pursuant to Article IV.E., Ability to Direct Funds, and IV.F.,  
566 Financial Assurance Requirements and the use of any Financial Assurances accomplishes any  
567 objectives, performance standards, or features of a Mitigation Site implemented by the PCILF  
568 Program, the Corps and Ecology, in consultation with the IRT, may award ILF credits for sale,  
569 use, or transfer by the Sponsor, in a quantity reflecting the objectives and performance standards  
570 achieved as a result of such remedial action.

571 Q. Force Majeure: The Sponsor may request, pursuant to Article VII.C., Entry into  
572 Effect, Modification or Amendment, and Termination of the Instrument, and the Corps and  
573 Ecology may approve, changes to the construction, operation, project objectives, performance  
574 standards, timelines or crediting formula of the PCILF Program, pursuant to the standards and  
575 procedures specified in applicable Appendices, if all of the following occur: an act or event  
576 causes substantial damage such that it is determined to be a force majeure; such act or event has  
577 a significant adverse impact on the quality of the aquatic functions, native vegetation, or soils of  
578 the Mitigation Site; and such act or event was beyond the reasonable control of the Sponsor, its  
579 agents, contractors, or consultants to prevent or mitigate.

580 1. The evaluation of the damage caused by a force majeure and the resulting changes  
581 to mitigation requirements will necessarily involve communication among the  
582 parties and the IRT. If the Sponsor asserts a mitigation site has sustained  
583 significant adverse impacts due to an event or act that may be determined to be a  
584 force majeure, the Sponsor shall give written notice to the Corps, Ecology and the  
585 IRT as soon as is reasonably practicable. After receiving written notice, the Corps  
586 and Ecology, in consultation with the Sponsor and the IRT, shall evaluate whether  
587 the event qualifies as force majeure. The Corps and Ecology, in consultation with  
588 the Sponsor and the IRT, will then evaluate whether significant adverse impacts  
589 have occurred to the site. If a force majeure event is determined to have occurred  
590 and significant adverse impacts are found to have occurred to the Mitigation Site,  
591 the Corps and Ecology, in consultation with the IRT and the Sponsor, will  
592 evaluate whether and to what extent changes to the Mitigation Site will be in the  
593 best interest of the site and the aquatic environment, and may approve such  
594 changes as detailed in paragraph Q above. The Corps and Ecology retain sole  
595 discretion over the final determination of whether an act or event constitutes force  
596 majeure, whether significant adverse impacts to a Mitigation Site have occurred,  
597 and to what extent changes to a Mitigation Site will be permitted.

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

600 a. Examples of a natural catastrophic event include, but are not limited to: a  
601 flood equal to or greater in magnitude than the 100-year flood event; an  
602 earthquake of a force projected from an earthquake with a return period of  
603 475 years; drought that is significantly longer than the periodic multi-year  
604 drought cycles that are typical of weather patterns in the Pacific Northwest;  
605 as well as events of the following type when they reach a substantially  
606 damaging nature: disease, wildfire, depredation, regional pest infestation, or  
607 significant fluvial-geomorphic change.

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

611 c. Examples of a deliberate and unlawful act include, but are not limited to  
612 substantial damage resulting from the following: the dumping of a  
613 hazardous or toxic substance, as well as significant acts of vandalism or  
614 arson.

615 R. Noncompliance: Noncompliance not rising to the level of default is categorized  
616 for Mitigation Site, Service Area, and the PCILF Program. This noncompliance includes  
617 performance failure, and delinquency (see Appendix T, Noncompliance, Force Majeure and  
618 Program Closure). Before a Mitigation Site, Service Area or the program is found to be in default  
619 (See Article V.S., Default, below), the Corps and Ecology, in consultation with the IRT and the  
620 Sponsor, shall seek to address the causes of noncompliance following the steps outlined in  
621 Appendix T, Noncompliance, Force Majeure and Program Closure, which describes the  
622 categories of non-compliance.

623 S. Default: Three levels of default exist: Mitigation Site default, Service Area  
624 default, and Programmatic default which may result from administrative failures or other actions  
625 or inactions specified in Appendix T, Noncompliance, Force Majeure and Program Closure.  
626 Should the Corps and Ecology, in consultation with the IRT, determine that the Sponsor is in  
627 Mitigation Site, Service Area, or Programmatic default, the Corps and Ecology may take the  
628 measures as further prescribed in Appendix T, Noncompliance, Force Majeure and Program  
629 Closure. Remedies available in the case of default include:

- 630 1. Suspending ILF credit sales in one or more service areas;  
631 2. Decreasing available ILF credits at a site or in one or more service areas;  
632 3. Directing the Sponsor to utilize Financial Assurances to correct identified  
633 deficiencies (i.e. access contingency funds, Long-term Management funds; see  
634 Appendices S, Financial Assurances and T, Noncompliance, Force Majeure and  
635 Program Closure);



- 636 4. Directing the Sponsor to use the PCILF Program Fund to secure necessary ILF  
637 mitigation credits (see Article IV.E., Ability to Direct Funds, and Appendix T,  
638 Noncompliance, Force Majeure and Program Closure);
- 639 5. Terminating the PCILF Program Instrument (see Article V.Z., Closure Provisions  
640 and V.AA., Closure Provisions Regarding Funding, and Appendix T,  
641 Noncompliance, Force Majeure and Program Closure, Section 5.0); or
- 642 6. Referring the non-compliance with the terms of this Instrument to the Department  
643 of Justice.

644 T. Notification of Credit Suspension or Program Suspension: In the event of default  
645 the Corps and Ecology may suspend ILF credit sales or suspend use of the program (see  
646 Appendix T, Noncompliance, Force Majeure and Program Closure). Upon written notification by  
647 the Corps and Ecology of ILF credit and/or program suspension, the Sponsor agrees to  
648 immediately cease any pending sale or transfer of credit transactions not yet finally completed  
649 and to cease any use of ILF credits as compensatory mitigation for activities within the affected  
650 site or service area deemed to be in noncompliance until informed by the Corps and Ecology that  
651 release, sale, use, or transfer of credits may be resumed.

652 U. Sponsor's Failure to Correct Default: Should the Sponsor fail to correct the  
653 reasons for default according to and within the time period specified in the default notification  
654 letter per Appendix T, Noncompliance, Force Majeure and Program Closure, the Corps and  
655 Ecology, following consultation with the IRT, may terminate this Instrument and any subsequent  
656 Pierce County ILF Program operations pursuant to the closure provisions in Article V.Z.,  
657 Closure Provisions.

658 V. Unavoidable Delays: The Sponsor shall not be deemed to be in noncompliance or  
659 default when delays to implementation or action are due to the Corps, Ecology or IRT decision  
660 making process including review and approval of mitigation actions, or to events categorized  
661 under the Force Majeure provision above in Article V.Q., Force Majeure.

662 W. Site Closure: If the Sponsor or any member of the IRT determine that a Mitigation  
663 Site will not be able to meet performance standards specified in an IRT-approved Mitigation  
664 Plan, or that for any reason continued mitigation actions at a Site are impracticable, the Sponsor,  
665 the Corps, Ecology, or any member of the IRT may recommend closure of the affected Site.  
666 Following a recommendation of closure, the Corps and Ecology, after consultation with the  
667 Sponsor and the IRT, shall have the option of closing a Site. The Sponsor, Corps, Ecology, and  
668 members of the IRT shall seek consensus on site closure decisions. If consensus cannot be  
669 reached, the Corps' and Ecology's determination shall be final.

670 X. Service Area Closure. The Sponsor, or the Corps and Ecology may terminate this  
671 Instrument as to a specific Service Area in cases where the Sponsor fails to abide by the terms of  
672 this Instrument in ways that fundamentally prevent the overall successful operation of the  
673 program in that Service Area as described in Appendix T, Noncompliance, Force Majeure and  
674 Program Closure,. Additionally, at the Sponsor's discretion, the Sponsor may terminate this  
675 Instrument as to a specific Service Area within 60 days of written notification to the other  
676 Parties. Closing a service area does not automatically trigger Program Closure.

677 Y. Program Closure: The Sponsor, the Corps, and/or Ecology, acting independently  
678 or in concert, may terminate this Instrument within 60 days of written notification to the other  
679 Parties and to the IRT members. In the event that such termination action is commenced, the  
680 Sponsor is responsible for providing to the IRT reports detailing ILF credit and fee ledger  
681 balances, as well as status reports for all mitigation projects.

682 Z. Closure Provisions: In cases of Site, Service Area, or Program Closure the  
683 Sponsor remains responsible for fulfilling any outstanding or pre-existing project obligations  
684 including the successful completion of ongoing mitigation projects, relevant maintenance and  
685 monitoring, reporting, and long-term management requirements. The Sponsor shall remain  
686 responsible for fulfilling these obligations so that the obligations are satisfied or the long-term  
687 maintenance and management of all mitigation lands has been transferred to a third party  
688 approved by the Corps and Ecology. In cases of closure, the Corps and Ecology, after  
689 consultation with the Sponsor, and other members of the IRT, will determine the amount of ILF  
690 credits the Sponsor must recover through alternative mitigation (see Appendix T,  
691 Noncompliance, Force Majeure and Program Closure.).

692 AA. Closure Provisions Regarding Funding: Funds remaining in the PCILF Program  
693 accounts after all obligations are satisfied must continue to be used for the restoration,  
694 establishment, enhancement, and /or preservation of wetland areas, buffers and aquatic  
695 resources. Any expenditure of these remaining funds requires IRT review and Corps and  
696 Ecology approval. If the Sponsor has outstanding mitigation obligations at the time of closure  
697 that it is unable to fulfill, the Corps and Ecology, in consultation with the IRT, shall direct the  
698 Sponsor to use remaining funds to secure ILF credits from a third party source of mitigation as  
699 described in Appendix T, Noncompliance, Force Majeure and Program Closure.

700 BB. Mitigation Site Protections: All real property to be included in the PCILF  
701 Program, now or in the future, will be either (1) owned in fee simple by the Sponsor and (a)  
702 subject to a restrictive covenant established by the Sponsor limiting use to compensatory  
703 mitigation, or (b) similarly restricted by a conservation easement granted by the Sponsor to a  
704 third party; or (2) land not owned by the Sponsor, subject to a conservation easement granted to  
705 the Sponsor by a landowner that restricts use to compensatory mitigation consistent with the  
706 PCILF Program. All restrictive covenants or conservation easements shall be perpetual in  
707 duration, must be approved by the Corps and Ecology, in consultation with the IRT, and must be  
708 recorded with the Pierce County Auditor's Office prior to the release of any PCILF Program  
709 credits from the PCILF Mitigation Site. Mitigation site protection provisions are provided in  
710 more detail in Appendix Q, Site Protection and Long Term Management.

711 CC. Mitigation Site Restrictions on Use: The Corps and Ecology may treat the  
712 Sponsor as being in material default of a provision of this Instrument and proceed accordingly  
713 under Article V.S., Default, should the Corps and Ecology, in consultation with the IRT,  
714 determine that either of the following has occurred:

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

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

723 DD. Inspection of PCILF Program Mitigation Sites: The Sponsor will allow, or  
724 otherwise provide rights of access for, members of the IRT or their agents or designees to the  
725 PCILF Program mitigation sites, as reasonably necessary, for the purpose of inspection,  
726 compliance, monitoring, and remediation consistent with the terms and conditions of this  
727 Instrument and the Appendices, including during both the Mitigation Site Establishment and  
728 Long-term Management Phases. This right shall remain in place even in the event the program or  
729 a service area closes. Inspecting parties shall provide the Sponsor reasonable prior notice of a  
730 scheduled inspection, and shall not unreasonably disrupt or disturb activities on the property.

731 EE. Accomplishment of Sponsor Responsibilities; Transfer of Ownership of a  
732 Mitigation Site: The Sponsor shall remain responsible for complying with the provisions of this  
733 Instrument throughout the operational life of the PCILF Program, regardless of the ownership  
734 status of the underlying real property where mitigation sites are located, unless those  
735 responsibilities have been assigned pursuant to the provisions of Article VII.D., Assignment of  
736 Obligation under this Instrument. The Sponsor is not required to, but may transfer ownership of  
737 all or a portion of the Mitigation Sites' real property interest to another party, provided the Corps  
738 and Ecology, following consultation with the other members of the IRT, expressly approve the  
739 transfer in writing. The Sponsor shall provide no less than 60 days' written notice to the Corps,  
740 Ecology and the IRT of any transfer of fee title or any portion of the ownership interest in the  
741 PCILF Program real property interest to another party.

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

748 Upon execution of a long-term management assignment agreement and the transfer of the  
749 contents of the Long-Term Management Account, and upon satisfaction of the remaining  
750 requirements for termination of the Establishment Phase of a PCILF Mitigation Site under  
751 Article V.I., Mitigation Site Operational Phases, the Sponsor shall be relieved of all further long-  
752 term management responsibilities under this Instrument that are associated with the Mitigation  
753 Site, and for which responsibilities have been transferred.

754 **VI. RESPONSIBILITIES OF THE CORPS AND ECOLOGY AS CO-CHAIRS OF THE**  
755 **IRT**

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

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

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

769 D. The Corps and Ecology agree to act in good faith when rendering decisions about  
770 acceptability of financial assurances, requiring corrective or remedial actions, requiring long-  
771 term management and maintenance actions, and releasing credits from mitigation sites. The  
772 Corps and Ecology shall exercise good judgment in accessing financial assurances, and will  
773 utilize those moneys only to the extent they reasonably and in good faith conclude that such  
774 remedial or corrective actions are an effective and efficient expenditure of resources. In  
775 implementing the process delineated in Article IV.E., Ability to Direct Funds, the Corps and  
776 Ecology shall act in good faith in determining the scope and nature of corrective actions to be  
777 undertaken, shall act in good faith in conducting monitoring, developing reports, and assessing  
778 compliance with performance standards; and shall not unreasonably limit options available as  
779 corrective action activities or otherwise apply their discretion so as to unduly prejudice the  
780 Sponsor regarding the timing or number of ILF credits released from any given mitigation site.  
781 Approval by the Corps and by Ecology of the identity of any assignee responsible for executing  
782 the Long Term Management Plan, and approval of the terms of any long-term management  
783 assignment agreement, will not be unreasonably withheld.

784 E. The Corps and/or Ecology will periodically inspect the mitigation sites as  
785 necessary to evaluate, in consultation with the IRT, the achievement of performance standards, to  
786 assess the results of any corrective measures taken, to monitor implementation of Long Term  
787 Management Plans, and, in general, to verify the Sponsor's compliance with the provisions of  
788 this Instrument.

789 F. Upon satisfaction of the requirements of Article V.K., Credit Release Schedule,  
790 for any Mitigation Site under this Instrument, the Corps and Ecology will certify, following  
791 consultation with the Sponsor and the IRT, that the establishment phase of a Mitigation Site has  
792 terminated, all ILF credits associated with the site have been released, and that the site has  
793 entered the Long-Term Management Phase. Certification of termination of the Establishment  
794 Phase of each Mitigation Site will occur upon the Sponsor's receipt of a letter issued by the  
795 Corps and Ecology to the Sponsor confirming that all credits have been released.

796

## 797 **VII. GENERAL PROVISIONS**

798 A. Effect of the PCILF Program on Federal, State, Tribal and Local Permitting  
799 Requirements: Decisions on the use of the PCILF Program to provide compensatory mitigation

800 will be made by the applicable permitting agencies during the permitting process for each permit.  
801 The Parties to this Instrument recognize that permit decisions regarding the need for, type,  
802 quantity, and appropriateness of compensatory mitigation are to be made by the appropriate  
803 permit reviewers for the applicable permitting agencies. The Corps and Ecology each have  
804 independent authority for permitting actions under their respective jurisdictions. The Corps holds  
805 the responsibility and authority under Section 404 of the Clean Water Act, and Ecology holds  
806 independent responsibility and authority under Section 401 of the Clean Water Act and Chapter  
807 90.48 RCW. This independent authority applies to both impact sites and mitigation receiving  
808 sites. Nothing in this Instrument shall be construed to override the permitting authority of the  
809 Corps, Ecology, or any Tribal or local permitting entity to regulate applicable permit  
810 requirements on either impact or mitigation sites.

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

817 1. Where consensus cannot otherwise be reached within a reasonable timeframe,  
818 following full consideration of the comments of the members of the IRT and  
819 following consultation with the Sponsor, the Corps holds the responsibility and  
820 authority under Section 404 of the Clean Water Act, and Ecology holds  
821 independent responsibility and authority under Section 401 of the Clean Water  
822 Act and Chapter 90.48 RCW, to make final decisions regarding the application of  
823 the terms of this Instrument IRT members may instigate the dispute resolution  
824 process found in 33 CFR 332.8(e).

825 C. Entry into Effect, Modification or Amendment, and Termination of the  
826 Instrument: This Instrument, consisting of both this Basic Agreement and the Appendices, will  
827 enter into effect upon the signature by authorized representatives of the Corps, the Sponsor, and  
828 Ecology as of the date of the last of these signatures.

829 1. This Basic Agreement portion of this Instrument may be amended or modified  
830 only with the written approval of the Sponsor, Ecology, and the Seattle District  
831 Engineer on behalf of the Corps, or their designees, following consultation with  
832 the other members of the IRT, and following the modification procedures outlined  
833 in 33 CFR Part 332, Section 332.8(g)—Modification of instruments.

834 2. Amendment of the provisions of the Appendices, including amendments to  
835 include Mitigation Plans or to modify existing Mitigation Plans must be  
836 accomplished according to the procedures outlined in 33 CFR Part 332, Section  
837 332.8(g)—Modification of instruments.

838 3. This Instrument may be terminated by the mutual agreement of the Sponsor,  
839 Ecology, and the Corps, following consultation with the IRT, or may be  
840 terminated under the terms of Article V.S., Default, Article V.Y., Program  
841 Closure, and V.Z., Closure Provisions, in the case of default by the Sponsor. In

842 the event any termination action is commenced, the Sponsor agrees to fulfill its  
843 pre-existing obligations to perform all establishment, monitoring, management,  
844 maintenance, and remediation responsibilities that arise directly from ILF credits  
845 that have already been awarded, sold, used, or transferred at the time of  
846 termination.

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

852 D. Assignment of Obligations under this Instrument: The Sponsor may be permitted  
853 to assign its obligations, responsibilities, and entitlements under this Instrument to a third party  
854 provided that such assignment is consistent with the federal rule and approved by the Corps and  
855 Ecology. The Corps and Ecology, following consultation with the IRT, must approve the identity  
856 of the assignee in order for any assignment to effectively relieve the Sponsor of those  
857 obligations. In evaluating a prospective assignee, the Corps and Ecology may consider  
858 characteristics such as environmental mitigation expertise, wetlands mitigation project or  
859 analogous experience, and financial strength and stability. Approval of the identity of the  
860 assignee will not be unreasonably withheld. The Sponsor must amend this Instrument  
861 accordingly to reflect third party assignments pursuant to the terms of Article VII.C., Entry into  
862 Effect, Modification or Amendment, and Termination of this Instrument. In this case applicable  
863 Financial Assurances must be approved by the Corps and Ecology. The physical ownership of a  
864 mitigation site's real property and the obligations, responsibilities, and entitlements under this  
865 Instrument are separate and distinct; thus, ownership of the PCILF Program interest may be  
866 transferred independently with the approval of the Corps and Ecology and pursuant to the  
867 provisions of Article V.DD., Inspection of PCILF Program Mitigation Sites. Once assignment  
868 has been properly accomplished, the Sponsor will be relieved of all its obligations and  
869 responsibilities under this Instrument associated with the mitigation site(s) for which third party  
870 assignments are made. Specific additional provisions pertaining to the assignment of long-term  
871 management obligations are described at Article V.FF., Transfer of Long Term Management  
872 Responsibilities.

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

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

884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908

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

Washington State Department of Ecology  
Wetland Manager/ Co-Chair of the IRT  
Shorelands and Environmental Assistance Program  
P.O. Box 47600  
300 Desmond Drive  
Olympia, WA 98504-7600  
360-407-7045

Pierce County Public Works  
Surface Water Management  
In-Lieu Fee Program Manager  
2702 S. 42nd Street, Suite #201  
Tacoma, WA 98409-7322  
253-798-4694

909 G. Entire Agreement: This Instrument and its Appendices constitute the entire  
910 agreement between the parties concerning the subject matter hereof.

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

915 I. Effect of Agreement:

916 1. This Instrument does not in any manner affect statutory authorities and  
917 responsibilities of the signatory Parties. This Instrument is not intended, nor may it  
918 be relied upon, to create any rights in third parties enforceable in litigation with  
919 the United States or the State of Washington. This Instrument does not authorize,  
920 nor shall it be construed to permit, the establishment of any lien, encumbrance, or  
921 other claim with respect to the ILF Program Mitigation Sites, with the sole  
922 exception of the right on the part of the Corps and/or Ecology to require the  
923 Sponsor to implement the provisions of this Instrument, including recording  
924 conservation easements or similarly restrictive covenants, required as a condition  
925 of the issuance of permits for discharges of dredged and fill material into waters of  
926 the United States or waters of the State of Washington associated with  
927 construction and operation and maintenance of a Mitigation Site.

928 2. Corps approval of this Instrument constitutes the regulatory approval required for  
929 the PCILF Program to be used to provide compensatory mitigation for Department  
930 of the Army permits pursuant to 33 C.F.R. 332.8(a)(1). This Instrument is not a  
931 contract between the Sponsor or property owner and the Corps or any other  
932 agency of the Federal government. Any dispute arising under this Instrument will  
933 not give rise to any claim by the Sponsor or property owner for any monetary  
934 damages. This provision is controlling notwithstanding any other provision or  
935 statement in the Instrument to the contrary.

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

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

944 L. Headings and Captions: Any paragraph heading or caption contained in this  
945 Instrument shall be for convenience of reference only and shall not affect the construction or  
946 interpretation of any provision of this Instrument.

947 M. Counterparts: This Instrument may be executed by the Parties in any combination,  
948 in one or more counterparts, all of which together shall constitute one and the same Instrument.

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



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

955

956 SPONSOR:

957

958

959

960

\_\_\_\_\_  
PAT MCCARTHY  
Pierce County Executive

\_\_\_\_\_  
Date

961

962

963 UNITED STATES ARMY CORPS OF ENGINEERS:

964

965

966

967

968

969

970

971

972

973

974 WASHINGTON STATE DEPARTMENT OF ECOLOGY:

975

976

977

978

979

980

981

982

983

984

985

\_\_\_\_\_  
GORDON WHITE  
Program Manager, Shorelands and Environmental Assistance Program  
Washington State Department of Ecology

\_\_\_\_\_  
Date

986 **OTHER IRT MEMBERS**

987 Signature by other IRT members expressing agreement on the part of the represented  
988 organization with the terms of this Instrument. This instrument is not binding on nor does it give  
989 rise to any affirmative obligations, express or implied, to other IRT members.

990

991 By the United States Environmental Protection Agency

992

993

994

995 \_\_\_\_\_  
DAVID ALLNUTT

\_\_\_\_\_  
Date

996 Director, Office of Ecosystems, Tribal, and Public Affairs

997 US Environmental Protection Agency

998