**TERMS OF SALE AGREEMENT**

**Mitigation for [PERMITTEE]’s**

**[PROJECT NAME] Project in the**

**[BASIN NAME] Basin, King County, Washington**

**Using King County’s Mitigation Reserves Program**

This Agreement is made and entered into by and between [Full Permittee Name] (“[SHORT CITE PERMITTEE NAME]”) [Permittee Address] and King County, 201 S. Jackson St. Rm. 600, Seattle, WA 98104-3855, (“COUNTY”). The COUNTY and [Permittee] are referred hereinafter as the “Parties.”

WHEREAS, [PERMITTEE] has proposed [very brief description of impact project] in the [general location of impact project] of [Jurisdiction], known as the [Project Name] Project (the “Impact Project”); and

WHEREAS, the COUNTY in 2004 established the King County Mitigation Reserves Program (“KC MRP”), which is currently implemented through an in lieu fee (“ILF”) program, as approved by the COUNTY in 2012, and as administered by the Water and Land Resources Division of the King County Department of Natural Resources and Parks; and

WHEREAS, the KC MRP has been acknowledged by the US Army Corps of Engineers (“CORPS”) and the Washington State Department of Ecology as meeting federal and state programmatic requirements for operating an ILF program, as evidenced by their execution of the *King County Mitigation Reserves Program Final Program Instrument* (“Program Instrument”),dated March 12, 2012; and

WHEREAS, the KC MRP provides a means for [Permittee] to pay a fee to the COUNTY and fully and irrevocably transfer [Permittee]’s mitigation obligations associated with the unavoidable impacts at the Impact Project, as identified by the [Permitting Agencies] (“Permitting Agencies”), to the COUNTY through the purchase of In-Lieu Fee Credits, as defined in and provided for in the Program Instrument; and

WHEREAS, [PERMITTEE] agrees to pay, and the COUNTY will accept through its KC MRP, a fee in exchange for In-Lieu Fee Credits that the COUNTY will provide to [PERMITTEE]to satisfy the mitigation obligations related to the Impact Project, that are identified by the Permitting Agencies and in the In-Lieu Fee Use Plan (“ILF Use Plan”) as further described below; and

WHEREAS, the COUNTY, by receiving the funds paid by [PERMITTEE], agrees to implement a project at a mitigation site in accordance with the terms of the Program Instrument (“Mitigation Project”).

NOW, THEREFORE, in consideration of the terms, conditions, covenants, and performances contained herein,

IT IS MUTUALLY AGREED AS FOLLOWS:

1. **The above recitals are a material part hereof and are incorporated herein by this reference.**
2. **Applicant, and Impact Project Details**
3. APPLICANT

The “APPLICANT,” as used herein means:

[Full Permittee Name]

ATTN: [Contact Person]

[Mailing Address]

[City, State Zip]

Tel: [XXX-XXX-XXXX]

1. Impact Project Description

The Impact Project is known as the [Project Name] Project and is located at the [description of location] in the [Jurisdiction]. The Impact Project will [basic description of impact project].

1. [Wetland and/or Aquatic] Impacts from Impact Project

The Impact Project will [require or result in brief description of impacts]. Additional details about the [wetland and/or aquatic] impacts are provided in an ILF Use Plan that was submitted to the [list relevant permitting agency/ies] on [Month XX, XXXX].

[ADD ADDITIONAL SECTION(S) HERE IF IMPACT PROJECT WILL RESULT IN MORE THAN ONE TYPE OF UNAVOIDABLE IMPACT]

1. Impact Project Permit(s)

The permit[s] that [has/have] requirements directed toward the [aquatic and/or wetland] impacts from the Impact Project [is/are] the following:

* U.S. Army Corps of Engineers, Nationwide Permit [NWS-XXXX-XXX]

[This/these] permit[s] contain[s] a special condition requiring [PERMITTEE] to purchase [XX.XX] In-Lieu Fee Credits ([XX.XX] Water Quality Credits, [XX.XX] Hydrology Credits, and [XX.XX] Habitat Credits) from the KC MRP to meet the mitigation requirements for the [aquatic and/or wetland] impacts resulting from the [Project Name], as provided for in the ILF Use Plan.

1. **Payment and Records**
2. [PERMITTEE] hereby agrees to pay a fee to the COUNTY in accordance with the KC MRP in the amount of [Written Amount] Dollars ($XXX,XXX) (“Mitigation Fee”).
3. Within fifteen (15) days after the execution of this Agreement, the COUNTY will provide an invoice to [PERMITTEE] for the Mitigation Fee. Upon payment of the Mitigation Fee, the COUNTY acknowledges and agrees that [PERMITTEE] shall have no further monetary or mitigation obligations for, or related to, the Mitigation Project or the mitigation site, and all obligations for implementing and completing the Mitigation Project shall be the COUNTY’s sole responsibility.
4. [PERMITTEE] shall have sixty (60) days from the Mitigation Fee invoice date to make full payment to the COUNTY. If the COUNTY does not receive full payment of the Mitigation Fee within sixty (60) days of the invoice date, this Agreement shall become null and void and the remaining terms herein shall be unenforceable by either Party.
5. Within fifteen (15) days of receiving the payment of the Mitigation Fee from [PERMITTEE], the COUNTY shall provide [PERMITTEE] with a signed and dated acknowledgment which shall identify the Applicant, the Impact Project, the project impacts and the permit[s] for which required mitigation responsibility is being transferred from the Applicant to the COUNTY through the purchase of In-Lieu Fee Credits (“Statement of Sale”). A copy of the form of the Statement of Sale is attached hereto as Attachment A. The Statement of Sale is also intended to, and shall, confirm and serve as the official record of the sale of In-Lieu Fee Credits to [PERMITTEE]. This Statement of Sale shall not constitute a permit or permission to proceed with any proposed action. [PERMITTEE] is responsible for obtaining all necessary permits to construct the Impact Project.
6. **Transfer of Permit Mitigation Responsibility**

Upon acceptance by the COUNTY of the Mitigation Fee from [PERMITTEE], [PERMITTEE] transfers to the COUNTY, and the COUNTY agrees to accept, full legal responsibility and obligation for satisfying the In-Lieu Fee Credits identified in Section II.D. above in accordance with the terms of the Program Instrument.

1. **Dispute Resolution**

In the event a dispute cannot be resolved between the Parties, the dispute shall be resolved in the following manner: Each Party shall appoint a member to a dispute board. The members so appointed shall jointly appoint a third member to the dispute board who is not employed by or affiliated in any way with the two Parties. The three-member board shall conduct a dispute resolution hearing that shall be informal and unrecorded. A written recommendation shall be made by the dispute board to the Parties. An attempt at such dispute resolution in compliance with this process shall be a prerequisite to the filing of any litigation concerning the dispute. The Parties shall equally share in the cost of the third dispute board member; however, each Party shall be responsible for its own costs and fees.

1. **Legal Relations**
2. The COUNTY shall protect, defend, indemnify, and hold harmless [PERMITTEE], its officers, officials, employees, and agents, while acting within the scope of their employment as such, from any and all costs, claims, judgments, and/or awards of damages, both to persons and property, arising out of, or in any way resulting from, the COUNTY's own negligent acts or omissions, or the negligent acts or omissions of the COUNTY's officials, officers, or employees, in carrying out the County’s obligations under the terms of this Agreement. [PERMITTEE] shall protect, defend, indemnify, and hold harmless the COUNTY, its officers, officials, employees, and agents, while acting within the scope of their employment as such, from any and all costs, claims, judgments, and/or awards of damages, both to persons and property, arising out of, or in any way resulting from [PERMITTEE]’s own negligent acts or omissions, or the negligent acts or omissions of [PERMITTEE] officials, officers, or employees, in carrying out [PERMITTEE]’s obligations under the terms of this Agreement. Where such claims, suits, or actions result from concurrent negligence of the Parties, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of the Party’s own negligence. Each Party agrees that its obligations under this Section extend to any claim, demand, and/or cause of action brought by, or on behalf of, any of its employees or agents. For this purpose, each Party, by mutual negotiation, hereby waives, with respect to the other Party only, any immunity that would otherwise be available against such claims under the Industrial Insurance provisions of Title 51 RCW.

This indemnification provision shall survive the termination of this Agreement.

1. In the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the Parties hereto agree that any such action or proceedings shall be brought in a court of competent jurisdiction situated in King County, Washington. Further, each Party shall be liable for its own litigation costs and attorney’s fees.
2. **Term of Agreement and Modification**
3. This Agreement shall become effective as of the Party’s signature date last written below and shall remain in effect until the end of the monitoring and maintenance period for the Mitigation Project, as provided for in the Program Instrument, at which point this Agreement shall terminate, unless terminated earlier pursuant to Section III.C. above. Regardless of the monitoring period requirements, upon its payment of the Mitigation Fee to the COUNTY, [PERMITTEE] shall have no further mitigation and/or monetary obligation related to the Mitigation Project.
4. No modification of this Agreement is valid unless evidenced in writing and signed by both Parties. No verbal agreement may supersede, replace or amend this Agreement.
5. This Agreement may be executed in multiple counterparts, all of which taken together shall constitute one and the same Agreement.
6. **Binding Agreement**

This Agreement shall be binding on the officers, directors, shareholders, members, partners, employees, agents, personal representatives, heirs, successors, and assigns of the Parties.

IN WITNESS WHEREOF, the Parties hereto have executed the Agreement as of the Party’s date signed last below.

|  |  |
| --- | --- |
| KING COUNTY | [Full Permittee Name] |
| By | By |
| Name: Josh Baldi | Name: |
| Title: Division Director | Title: |
| Date: | Date: |

|  |  |
| --- | --- |
| APPROVED AS TO FORM | APPROVED AS TO FORM |
|  |  |
| Name: Joseph B. Rochelle | Name: |
| Title: Sr. Deputy Prosecuting Attorney | Title: |
| Date: | Date: |

**ATTACHMENT A**

**King County Mitigation Reserves Program (MRP) Statement of Sale**

**OFFICIAL RECORD OF SALE OF MITIGATION CREDITS PURSUANT TO THE TERMS AND CONDITIONS OF THE KING COUNTY MITIGATION RESERVES IN LIEU FEE PROGRAM INSTRUMENT AND PROVISIONS CONTAINED IN 33 CFR PARTS 325 AND 332 AS REVISED EFFECTIVE JUNE 9, 2008 (FEDERAL MITIGATION RULE).**

1. **PURPOSE**

This Statement of Sale confirms the sale of mitigation credits from the King County Mitigation Reserves Program (hereinafter “Sponsor”) to the Applicant listed in Article III below. This Statement of Sale does not constitute a permit or permission to proceed with any proposed action. The Applicant is responsible for obtaining all necessary permits for a proposed action.

1. **TRANSFER OF MITIGATION RESPONSIBILITY**

The Sponsor agrees to accept full legal responsibility for satisfying the mitigation requirements for all U.S. Army Corps of Engineers (Corps), State, and local permits for which mitigation fees from an Applicant have been accepted under the terms of this Statement of Sale. This responsibility includes compliance with 33 CFR 332, 40 CFR 230, King County Code Chapter 21A.24, any applicable state and local jurisdictional laws, and the terms of the King County Mitigation Reserves In Lieu Fee Program Instrument (Program Instrument). In satisfaction of the compensatory mitigation requirements, the Sponsor shall provide compensatory mitigation of the type and in the amount necessary to meet applicable Federal, State, and local regulation requirements.

1. **APPLICANT AND IMPACT PROJECT DETAILS**
2. Applicant

[Full Permittee Name]

Attn: [Contact Person]

[Mailing Address]

[City, State Zip]

Tel: [XXX-XXX-XXXX]

1. Impact Project

The Sponsor has accepted mitigation fees in the amount of [Written Amount] Dollars ($XXX,XXX) for the unavoidable impact to [aquatic and/or wetland] resources as described below. Upon acceptance of these fees from the Applicant, the Sponsor is agreeing to implement mitigation and assume all associated obligations and liabilities according to the terms of the Program Instrument, certified on March 12, 2012.

MRP Service Area: [Service Area Name] Service Area

Description of Impacts:

The Impact Project refers to the Applicant’s [Project Name] Project, located on the [description of location]. Details of the proposed Impact Project are provided in [Name of ILF Use Plan, if uniquely named, OR an In-Lieu Fee Use Plan] which was submitted to applicable regulatory agencies in [Month Year].

The permits and regulatory approvals that have requirements directed toward the wetland impacts from the Impact Project are the following:

* Department of the Army Permit [NWS-XXXX-XXX] from the U.S. Army Corps of Engineers (Corps)

The ILF Purchase Plan describes the impacts being mitigated through the purchase of mitigation credit from the Sponsor.

1. **CREDITS PURCHASED AND MITIGATION FEES PAID**
2. Credits Purchased. In exchange for the payment of mitigation fees, which the Applicant paid to the Sponsor on [Month Day, Year], the Applicant receives [XX.XX] Credits in the [Service Area Name] Service Area. This mitigation credit will draw down the Advance Credit pool in the [Service Area Name] Service Area by [XX.XX] Credits.
3. Allocation to the MRP Program Account. The mitigation fees will be deposited into the following accounts within the King County MRP Account (see Basic Agreement Article III.D and Appendix F):

MRP Service Area: [Service Area Name]

Total Mitigation Fees Collected from Applicant: $[XXX,XXX]

Land Fee Account: $XX,XXX (X.X% of total mitigation fee)

Program Admin. Account: $XX,XXX (X.X% of total mitigation fee)

Contingency Fee Account: $XX,XXX (X.X% of total mitigation fee)

Long Term Management Fund: $XX,XXX (X.X% of total mitigation fee)

Mitigation Project Accounts: $XX,XXX (XX.X% of total mitigation fee)

1. **PROOF OF PURCHASE**

This Statement of Sale shall serve as official proof that the Applicant has purchased mitigation credits from the Sponsor.

1. Signed Statement of Sale provided to Applicant. The Sponsor will provide a signed copy of this form to the Applicant within 15 days after receipt of funds from the Applicant. The Applicant is responsible for submitting copies of the signed Statement of Sale to appropriate regulatory agencies as proof of purchase of mitigation credits from the Sponsor.
2. Signed Statement of Sale provided to the Corps and Ecology. The Sponsor will provide a signed copy of this form to the IRT representatives from the Corps and Ecology, co-chairs of the IRT, within 15 days after receipt of funds from the Applicant.
3. Copies available to IRT members. Copies of this Statement of Sale will be made available any member of the IRT upon the IRT member’s request.
4. **ADDITIONAL PROVISIONS**
5. Allocation of Funds. The Sponsor will deposit the moneys listed above into the program account in the amounts listed in Article IV.B of this Statement of Sale. Record of these funds will also be added to the Program Account Ledger.
6. Spending Authorization. Upon initial receipt of mitigation fees, the Sponsor shall be authorized to spend up to 75% of funds allocated to Administrative Accounts according to the terms of the program instrument (see Appendix F, Section 4.0). The District Engineer, after consultation with the IRT, must authorize all additional expenditures from the program account pursuant to 33 CFR 332.8(i)(2) and pursuant to the Basic Agreement Article III.B.
7. Reporting requirements unaffected. This agreement shall not affect reporting requirements outlined in the program instrument.
8. Effect of Agreement. This Agreement does not in any manner affect statutory authorities and responsibilities of the Sponsor. This Statement of Sale is not intended, nor may it be relied upon, to create any rights in third parties enforceable in litigation with the United States or the State of Washington. This Statement of Sale does not authorize, nor shall it be construed to permit, the establishment of any lien, encumbrance, or other claim with respect to the Mitigation Reserves Program property, with the sole exception of the right on the part of the Corps to require the Sponsor to implement the provisions of Program Instrument, including recording conservation easements or similarly restrictive covenants, required as a condition of the issuance of permits for discharges of dredged and fill material into waters of the United States associated with construction and operation and maintenance of a Mitigation Site.
9. Attorneys’ Fees. If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Statement of Sale, the prevailing party shall be entitled to be reimbursed for its court costs and attorneys’ fees, in addition to all damages, through all levels of appeal.
10. Headings and Captions. Any paragraph heading or caption contained in this Statement of Sale shall be for convenience of reference only and shall not affect the construction or interpretation of any provision of this Statement of Sale.
11. Successors and Assigns. This Statement of Sale shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.
12. Amendments. This Statement of Sale shall not be amended without the express written agreement of the Parties.

IN WITNESS WHEREOF, the Sponsor confirms the information contained in this Statement of Sale to be true as written.

**SPONSOR**

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

Josh Baldi Date

Division Director

Water and Land Resources Division

King County Department of Natural Resources and Parks

201 South Jackson Street, Suite 600

Seattle, WA 98104-3855