

**MITIGATION BANK INSTRUMENT
FOR
TUALATIN VALLEY ENVIRONMENTAL BANK**

This Mitigation Bank Instrument (MBI), which describes the establishment, use, operation, maintenance and long-term management of the Tualatin Valley Environmental Bank (herein after, Bank) is an agreement made and entered into by and among Dave Heikes Farms Incorporated and (Sponsor(s)) the U.S. Army Corps of Engineers, Portland District (Corps), the Oregon Department of State Lands (DSL), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), the Oregon Department of Environmental Quality (DEQ), the Oregon Department of Fish and Wildlife (ODFW), and Washington County.

This MBI, including the following exhibits, constitutes the entire agreement:

- "Exhibit A", Property Legal Description and Vicinity Map
- "Exhibit B", Preliminary Title Report
- "Exhibit C", Mitigation Plan
- "Exhibit D", Crediting and Debiting Procedures
- "Exhibit E", Service Area Map and Description
- "Exhibit F", Property Protection Instrument
- "Exhibit G", Sample Credit Receipt
- "Exhibit H", Sample Credit ledger
- "Exhibit I", Definitions
- "Exhibit J", Financial Assurance

I. PREAMBLE:

Whereas,

A. Purpose: The purpose of this MBI is to establish responsibilities and standards for the establishment, use, operation, and long-term maintenance of the Bank. The Bank will be used for compensatory mitigation for unavoidable impacts to waters of the United States and/or waters of the State that result from activities authorized under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, Oregon's Removal-Fill Law [Oregon Revised Statutes (ORS) 196.800-196.990 and Oregon Administrative Rules (OAR) 141-085] or to resolve enforcement cases resulting from activities subject to these regulations. Credits may also be used to compensate for impacts to waters of the U.S. for Corps Civil Works projects.

B. Goals and Objectives: The primary goal(s) of the Bank are to create (establish) 18.28 acres, enhance (re-habilitate) 33.29 acres, and restore (re-establish) 4.11 acres of wetland. 36.70 acres of upland and wetland buffers will be established to protect the mitigation wetlands. The total project area is 105.95 acres and includes 13.57 acres of wetland and upland areas that will not receive wetland mitigation credit but will be included within the project area. The following table summarizes the goals and objectives of the Bank. ✓

Tualatin Valley Environmental Bank Summary Table

Wetland Credit Summary	Ratio	Square Feet	Acreage	Credits
Restoration	1:1	179,120	4.11	4.11
Creation	1.5:1	796,194	18.28	12.19
Enhancement	3:1	1,450,000	33.29	11.10
Buffers	10:1	1,598,821	36.70	3.70
No Credit	0:0	591,109	13.57	0.00
TOTAL		4,615,244	105.95	31.10
Cowardin Class				
Palustrine Emergent (PEM)		734,010	16.85	
Palustrine Shrub-Scrub (PSS)		651,657	14.96	
Palustrine Forested (PFO)		1,039,647	23.87	
Buffers		1,598,821	36.70	
No Credit		591,109	13.57	
TOTAL		4,615,244	105.95	
The Hydrogeomorphic (HGM) Classes of the mitigation wetlands are approximately 70% Riverine and 30% Slopes/Flats.				

C. Bank Legal Description and Location: The Bank is located in Washington County, Township 1S, Range 2W, Section 32, Tax Lots 1200 (partial) and 691 (partial) and 601 (partial); Longitude -122.96 and Latitude 45.44. The address of the Bank is 9400 Heikes Drive, near the City of Hillsboro, Oregon. The total area of the Bank is approximately 105.95 acres and is further described in Exhibit A. Said parcels are hereinafter referred to as the "Property". A professional land survey of the bank boundary will be conducted prior to the first credit release and will be included in Exhibit F.

D. Property Ownership: The Sponsor has provided proof of ownership of the Property. A preliminary title report is included in Exhibit B, Preliminary Title Report. Any and all liens or easements on the bank property must be disclosed by the Sponsor to the Corps and DSL in Exhibit B. Any liens or easements that conflict with the mitigation purposes of the bank shall be subordinated before the first credit release.

E. Establishment and Use of Credits: In accordance with the provisions of this MBI and upon satisfaction of the performance standards contained in Exhibit C, Mitigation Plan, and the mitigation credit ratio and schedule determined in Exhibit D, Crediting and Debiting Procedure, credits will be released to be used as mitigation in accordance with all applicable requirements of Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Oregon's Removal-Fill Law (ORS 196.800-196.990).

F. Interagency Review Team: The Corps and DSL serve as Co-Chairs (“co-chair agencies”, collectively) of the Interagency Review Team (IRT). The following agencies have agreed to serve on the IRT:

Environmental Protection Agency; and

U.S. Fish and Wildlife Service; and

Oregon Department of Environmental Quality; and

Oregon Department of Fish and Wildlife; and

Washington County

G. Disclaimer: This MBI does not in any manner affect statutory authorities and/or responsibilities of the signatory parties.

NOW, THEREFORE, the parties hereto agree as to the following:

II. AUTHORITIES

The establishment, use, operation and maintenance of the Bank is carried out in accordance with the following authorities:

A. Federal:

1. Clean Water Act (33 USC 1251 et seq.);
2. Rivers and Harbors Act (33 USC 403);
3. Fish and Wildlife Coordination Act (16 USC 661 et seq.);
4. Regulatory Programs of the Corps of Engineers (33 CFR Parts 320-330);
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
6. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990); and
7. Compensatory Mitigation for Losses of Aquatic Resources (33 CFR Part 332)
8. Regulatory Guidance Letter 08-03 - Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Restoration, Establishment, and/or Enhancement of Aquatic Resources

B. State of Oregon:

1. Oregon Administrative Rules 141-45, 141-85, 141-089, 141-0100 and 141-090. Oregon Revised Statutes 196.600-196.990.

III. ESTABLISHMENT OF THE BANK

A. Scope of Work: The Sponsor agrees to perform all necessary work, in accordance with the provisions of this MBI, to establish and maintain wetlands and associated upland buffers, as described in the Exhibit C, Mitigation Plan, until it is demonstrated to the satisfaction of the co-chair agencies, considering the advice of the IRT, that the project complies with all provisions contained herein.

B. Permits: The Sponsor will obtain all appropriate permits or other authorizations needed to construct and maintain the Bank. This MBI does not fulfill or substitute for such authorization(s).

C. Approval: This MBI is effective upon the latter date of signature by the Sponsor and co-chair agencies.

D. Financial Assurance: A financial security instrument will be provided by the sponsor to DSL and Corps as required to guarantee that the bank will be constructed, monitored and maintained and meet the performance standards in accordance with this MBI. A description of the financial assurance instrument, amount and release schedule is provided in Exhibit J, Financial Assurance. DSL or the Corps may declare forfeiture of all or part of a financial security instrument for any mitigation obligation in the event the Bank fails to meet performance standards, the Sponsor fails to provide monitoring reports, or fails to follow other provisions of this MBI.

E. Real Estate Provisions: The bank sponsor shall permanently protect the bank land by recording a restrictive covenant and/or conservation easement following the DSL template or otherwise approved by the co-chair agencies, a draft of which is attached as Exhibit F, Property Protection Instrument. The sponsor shall also record an access easement granting to the co-chair agencies the right to access the bank site for compliance inspections, upon prior notice to the landowner. A copy of the recorded site protection document and access easement shall be provided to the co-chair agencies prior to the initial release of bank credit.

The sponsor agrees to notify the co-chair agencies in writing 60 days prior to taking or allowing any action that would transfer interest in the land or establish any other legal claims over the bank property. The sponsor agrees to defend the bank property from any future liens or easements that the Corps or DSL determine would be incompatible with the mitigation objectives of the bank.

F. Corps Authorization: For the initial release of advanced credits by the Corps (not to exceed 30 percent of the total number of credits available from the entire bank), the Corps authorization must be issued and activated (i.e. discharge into a water of the U.S.). The Corps will use the enforcement authority outlined in 33 CFR 326 for enforcing the success of the performance standards as necessary.

G. Reporting: The Sponsor agrees to submit an as-built report, containing a survey of the finished grades, to the co-chair agencies within 60 days following completion of the grading of the mitigation bank. The as-built report shall describe in detail any substantial deviation from the approved Mitigation Plan. If no grading is required, a brief construction completion report shall be submitted. Annual monitoring reports shall be submitted by January 31st of each year until bank closure to the

co-chair agencies, documenting the management activities, monitoring results, and up-to-date credit ledger, as described in Exhibit C.

IV. OPERATION OF THE BANK

A. Service Area: The Bank is established to provide mitigation to compensate for impacts to waters of the United States and/or Waters of the State, within the service area depicted on Exhibit E, Service Area Map and Description. This service area shall include portions of hydrologic unit 17090010, within Washington, Yamhill and Clackamas Counties, as further described in Exhibit E, Service Area Map and Description. The Bank may be used to compensate for impacts beyond the designated service area, on a case-by-case basis, upon approval by the co-chair agencies.

B. Access: Upon reasonable prior notice, the Sponsor will allow, or otherwise provide for, access to the site by the co-chair agencies, the IRT, or their agents or designees at reasonable times as necessary to conduct inspections and compliance monitoring with respect to the requirements of this MBI. The Sponsor also will allow access to the co-chair agencies, their agents and designees to carry out Bank remediation using funds provided through the financial assurance requirements of this MBI to address deficiencies related to Bank performance standards, in the circumstances specified in Exhibit J, Financial Assurance. Inspecting parties shall not unreasonably disrupt or disturb activities on the property. The sponsor shall not transfer ownership of the bank property without first recording an access easement enabling compliance inspections and remediation by the co-chairs agencies.

C. Responsible Party: The Sponsor will assume the mitigation responsibility for permittees who purchase credits from the Sponsor. The Sponsor will be named as the party responsible for providing such mitigation in the respective permits. This will be formally documented for each transaction in a Credit Receipt, a sample of which is provided in Exhibit G, Sample Credit Receipt. Credits shall only be sold by the bank sponsor.

D. Number of Credits: The number of credits expected to be generated by this Bank is described in Exhibit C, Mitigation Plan, and the ratios and release schedule is described in Exhibit D, Crediting and Debiting Procedure. The actual number of credits will be determined based on the acreage and performance standards achieved. The amount to be debited for each impact is equivalent to the area of wetlands or waters to be impacted, or as specified in each permit issued by the Corps and/or DSL.

E. Performance Standards: Credits will be released based on the achievement of performance standards, as described in Exhibit C, Mitigation Plan.

V. MAINTENANCE AND MONITORING OF THE BANK

A. Maintenance Provisions: The Sponsor agrees to perform all necessary work to maintain the Bank consistent with Exhibit C, Mitigation Plan. The Sponsor shall continue with such maintenance activities until completion of the monitoring period described in Exhibit C. Deviation from the approved Mitigation Plan is subject to review and written approval by the co-chairs agencies.

B. Monitoring Provisions: The Sponsor agrees to perform all necessary work to monitor the Bank to demonstrate achievement of the performance standards established in Exhibit C, Mitigation Plan.

C. Accounting Procedure: The Sponsor shall submit a credit receipt to the Corps and DSL each time credits are sold. A sample of this receipt is included as Exhibit G, Sample Credit Receipt. In addition, the Sponsor shall submit a ledger to the co-chair agencies by January 31st of each year, per Exhibit H, Sample Credit Ledger. The credit ledger shall document all transactions of the Bank for the previous calendar year, with a cumulative tabulation of all transactions to date. Annual ledgers and credit receipts shall be submitted to the co-chair agencies until the last credit is sold, at which time a final credit ledger shall be submitted.

D. Contingency Plans/Remedial Actions: In the event the Bank, or a specific phase or portion of the Bank, fails to achieve the performance standards specified the Mitigation Plan (Exhibit C) for two growing seasons, the Sponsor shall develop a remedial action plan before the end of the second calendar year in which the standards were not met. The remedial action plan shall be reviewed and approved in writing by the co-chair agencies prior to being implemented. The remedial action plan shall be implemented according to the schedule included in such plan. In the event the Sponsor fails to submit a plan or to implement the remedial action plan within the time specified in such plan as approved, the bank may be subject to suspension or revocation of available mitigation credits and/or forfeiture of the financial security instruments, or other enforcement action, as allowed under the regulatory authorities of the co-chair agencies.

E. Default: Should the co-chair agencies determine that the Sponsor is in material default of any provision of this MBI, the co-chair agencies shall notify the Sponsor that the sale or transfer of any credits will be suspended until the claimed deficiencies have been remedied. Upon notice of such suspension, the Sponsor agrees to immediately cease all credit sales until the co-chair agencies inform the Sponsor that sales or transfers may be resumed. Should the Sponsor remain in default, the co-chair agencies may terminate the MBI and any subsequent Bank operations. Upon termination, the Sponsor agrees to perform and fulfill all obligations under this MBI relating to credits that were sold or transferred prior to termination.

F. Long-Term Management Plan: Prior to bank closure, and prior to release of the last 25% of the mitigation credits, the Sponsor shall develop a Long-term Management Plan for review and approval by the co-chair agencies, in consultation with the IRT. The Long-Term Management Plan shall include the following five components:

- 1) Identification of long term management needs and annual cost estimates for these needs;
- 2) A long term funding mechanism to meet these needs, such as a non-wasting endowment fund;
- 3) A site protection instrument such as transfer of title or a conservation easement conveyed to an appropriate long-term steward;
- 4) Identification of the party(s) responsible for ownership and all long-term management of the bank site; and
- 5) Procedures for future amendment of the Long Term Plan to allow for adaptive management, defining situations in which review and approval of regulatory agencies would be necessary.

Implementation of the Long-term Management Plan remains the responsibility of the bank sponsor until transfer to a land stewardship entity is approved by the Co-chair agencies. The site protection

instrument must prohibit uses that are not compatible with the mitigation objectives, and must include a provision requiring 60-day advance notification to the co-chairs before any action is taken to void or modify the site protection instrument, or establish any other legal claims over the bank site.

G. Bank Closure: At the end of the monitoring period, upon satisfaction of the performance standards, upon the sale of all credits, and upon approval of a Long-Term Management Plan, the Corps and DSL shall issue a written “bank closure certification” to the Sponsor. DSL and the Corps will notify the financial security holder, and thereafter any remaining requirement for financial assurances will cease. Prior to bank closure, all elements of the Long Term Management Plan shall be established or activated such that there are no obstacles to its implementation.

VI. RESPONSIBILITIES OF CO-CHAIRS AND THE INTERAGENCY REVIEW TEAM

A. Participation in Development and Operation: The IRT members will participate, as necessary, to advise the co-chair agencies in ensuring the development and operation of the bank meets the compensatory mitigation requirements and policies of their respective agencies.

B. Review and Comment: The IRT members will strive to review and provide comments in accordance with timelines specified by the co-chair agencies, on MBI drafts, mitigation plans, annual monitoring reports, requests for credit release, remediation plans, and the Long Term Management Plan for the Bank. In making decisions related to approval and credit release for the bank, the co-chair agencies shall consider all timely comments.

C. Site Inspections and Recommendations: The co-Chair agencies and IRT members will conduct inspections, as necessary, to verify the performance of the Bank. If the Bank is not meeting performance standards, the co-chair agencies, considering the advice of the IRT members, may direct the Sponsor to implement Contingency Plans or Remedial Actions per Section V.D

D. Signatures on the MBI: Signature of the IRT member agencies indicates consistency with current policy and intent to continue participation, but does not carry any liability. Any of the IRT members may terminate their participation upon written notification to all the signatory parties thirty (30) days in advance of date of termination.

E. The co-chair agencies shall coordinate as needed to ensure a predictable and timely process for review of documents by all parties to the bank. Each Co-chair agency shall strive to respond within 30 days to any written request for action by the sponsor or the other co-chairs.

VII. OTHER PROVISIONS

A. Force Majeure: The Sponsor will not be responsible for Bank failure that is attributed to natural catastrophes such as flood, drought, disease, or regional pest infestation, as determined by the co-chair agencies to be beyond the reasonable control of the Sponsor.

B. Dispute Resolution: Disputes related to the interpretation of this instrument may be referred to independent reviewers for advice, or the parties may participate in non-binding mediation. . The co-

chair agencies will evaluate any such input in making final decisions relative to the dispute. Appeals of DSL decisions are governed by ORS 196.800-900 and OAR chapter 141, division 45.

C. Termination and Transfer of the MBI: This agreement may be terminated by the Sponsor prior to incurring any mitigation obligations (prior to any credit sales) or if all mitigation obligations are met elsewhere, to the satisfaction of the co-chair agencies. Any transfer or assignment of any portion of or interest in the Bank shall be subject to the requirement that the successor or assign assume all obligations pursuant to this Instrument and have sufficient financial capacity to carry out those obligations. Transfer or assignment of this Instrument shall also be subject to the requirement that any funds pledged toward the long-term management fund shall continue to be accrued and expended in a manner consistent and in accordance with this Instrument and the Long Term Management Plan. The bank sponsor must notify the co-chair agencies prior to changing the membership or management of the sponsorship entity (such as an LLC) and must provide documentation to the co-chair agencies that the sponsor, the party covered by the financial assurance, the land owner, and the signatory on credit receipts are all the same entity. If the initiation of construction as described in the mitigation plan (Exhibit C), to include planting of vegetation, has not occurred within three (3) years from the signing of this MBI by the co-chair agencies, this MBI shall be considered terminated, unless the co-chairs determine that circumstances warrant an extension. Any extensions must be approved by the co-chair agencies in writing.

D. Specific Language of MBI Shall Be Controlling: To the extent that specific language in this document changes, modifies, or deletes terms and conditions contained in those documents that are incorporated into the MBI by reference, the MBI shall be controlling.

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

Dave Heikes Farms Incorporated
9400 SW Heikes Drive
Hillsboro, Oregon 97123

U.S. Army Corps of Engineers
CENWP-OD-G Mitigation Program Manager
P.O. Box 2946
Portland Oregon 97208-2946

Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, Oregon 97301-1279

F. Entire MBI: This MBI constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.

G. Modifications: This MBI may only be amended or modified with the written approval of the Sponsor and co-chair agencies. In the event the Sponsor determines that modifications must be made in the Mitigation Plan to ensure successful establishment and operation of the Bank, the Sponsor shall submit a written request for such modification to the co-chair agencies, for approval. The co-chair agencies will distribute this request to the IRT to seek their recommendations.

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

I. Headings and Captions: Any paragraph heading or captions contained in this MBI shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this MBI.

J. Counterparts: This MBI may be executed by the parties in any combination, in one or more counterparts, all of which together shall constitute but one and the same instrument.

K. Binding: This MBI shall be immediately, automatically, and irrevocably binding upon the Sponsor and its heirs, successors, assigns and legal representatives upon signing by the Sponsor, the Corps, and DSL even though it may not, at that time or in the future, be executed by the other potential parties to this MBI. The signing of this MBI by EPA, DEQ, ODFW, or the USFWS, or other agency, city or county shall cause the signing agency to become a party to this MBI upon signing, even though all or any of the other potential parties have not signed the MBI.

L. Liability of Regulatory Agencies: The responsibility for financial success and risk to the investment initiated by the Sponsor rests solely with the Sponsor. The regulatory agencies (Corps and DSL) that are parties to this MBI administer their respective regulatory programs and make no guarantee of the financial success of mitigation banks, specific individuals, or entities. Accordingly, there is no guarantee of profitability for any individual mitigation bank. Sponsors should not construe this MBI as a guarantee in any way that the regulatory agencies will ensure sale of credits from this Bank or that the regulatory agencies will forgo other mitigation options that may also serve the public interest. Because the regulatory agencies do not control the number of mitigation banks proposed nor the resulting market impacts upon success or failure of individual banks, market studies of the potential and future demand for bank credits are the sole responsibility of the sponsor.

M. Grant Program Participation: State and Federal funds designated for voluntary restoration projects shall not be used to generate mitigation credits sold for profit.

N. Suspension of Credits: The co-chair agencies may suspend the sale of credits upon a determination that information contained in this MBI was falsely represented, that the bank is not performing in accordance with this MBI, in the event of default of this MBI, or when the co-chair agencies determine that suspension of credits would be in the public interest.

O. Sale of Bank Property or Conveyance of Property Interests: The Sponsor shall not transfer title or otherwise convey interests in the Property without 60 day prior notice and written approval by the

co-chair agencies. The sponsor shall notify the receiving party of the site protection instrument and access rights of the co-chair agencies.

IN WITNESS WHEREOF, the parties hereto have executed this MBI on the date herein below last written by the Co-Chairs.




Dave Heikes, Owner
Dave Heikes Farms Inc.

4-18-11

Date

INTERAGENCY REVIEW TEAM

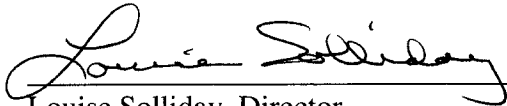
By the IRT Co-Chairs:



Steven R. Miles, P.E.
Colonel, Corps of Engineers
District Commander

31 May 2011

Date



Louise Solliday, Director
Oregon Department of State Lands

5/2/11

Date

The signatories of the Interagency Review Team (IRT) parties below indicate their participation in development of, and review of this document for consistency with their current policies. The signatories will continue to participate in compliance review and adaptive management of the Bank after approval as staffing priorities allow.

Paul Henson State Supervisor Oregon Fish and Wildlife Office U.S. Fish and Wildlife Service	Date
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Richard Parkin Director, Office of Ecosystems, Tribal, and Public Affairs U.S. Environmental Protection Agency, Region 10	Date
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Dick Pedersen, Director Oregon Department of Environmental Quality	Date
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Roy Elicker Director Oregon Department of Fish and Wildlife	Date
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