

AGREEMENT TO ESTABLISH
STREAM MITIGATION BANK

THIS AGREEMENT, made and entered into this _____ day of _____, 200_ between _____, an Ohio Corporation, (hereinafter referred to as “Owner”), _____, and **Water Resources Improvement Trust**, an [STATE OF INCORPORATION] Corporation, with its principal office at [ADDRESS] (hereinafter referred to as “Developer”).

WHEREAS, in accordance with the Clean Water Act, and other federal and state laws and regulations, the Buffalo and Huntington Districts of the Corps of Engineers (“COE”), the Ohio Environmental Protection Agency (“OEPA”) and others, hereinafter collectively referred to as “Regulatory Agencies” have developed policies and procedures to establish stream mitigation banks to mitigate for the altering of certain specified waters of the United States and Waters of the State of Ohio, including Cuyahoga County, Ohio; and,

WHEREAS, the Regulatory Agencies have developed policies and procedures for the issuance of permits for the establishment and certification of stream mitigation banks and the authorization of the use of said mitigation banks for streams and waters of the United States and Waters of the State of Ohio, including Cuyahoga County, Ohio;

WHEREAS, Owner owns certain property consisting of approximately ___ acres (“Project Site”) located in the _____ Section __, T__W, R__E _____ Township all in Cuyahoga County, Ohio. The legal description of the Project Site is attached as Exhibit “A” and incorporated herein by reference; and,

WHEREAS, the Developer has the ability, with the assistance of subcontractors and the cooperation of Owner, to construct, maintain, and monitor a Stream Mitigation Bank on the Project Site; and,

WHEREAS, Owner believes that a Stream Mitigation Bank on the Project Site will improve water quality in the Cuyahoga River Valley and Lake Erie, provide a safe refuge for the wildlife in the area, and otherwise promote the general welfare of the citizens of Cuyahoga County.

NOW, THEREFORE, in consideration of the mutual covenants of the parties contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is hereby agreed as follows:

1. Owner agrees to commit the Project Site unconditionally and without restriction to the establishment and construction of a Stream Mitigation Bank in accordance with and subject to all rules, regulations and requirements of the Regulatory Agencies (hereinafter referred to as “Streams Mitigation Bank”). Within 15 days after the approval date of the Stream Mitigation Bank by COE, OEPA and other appropriate Regulatory Agencies as set forth below, Owner shall grant a permanent and perpetual conservation easement on the Project Site in a form approved by COE, OEPA and other appropriate Regulatory Agencies. In addition, Owner shall execute such further and other documents and, together with Developer, take such actions as may be necessary for the establishment, certification and continued management and maintenance of a Stream Mitigation Bank on the Project Site and/or the sale of credits of off-site streams mitigation, subject to the terms of this Agreement.

2. The Developer will submit for approval by COE, OEPA and other appropriate

Regulatory Agencies: (a) the Prospectus for the Streams Mitigation Bank, as approved by Owner, attached hereto as Exhibit “B” and incorporated herein; (b) all documents necessary to incorporate or otherwise establish the Streams Mitigation Bank; and (c) such other information reasonably required by Regulatory Agencies (hereinafter collectively the “Application”). The Developer agrees, with the assistance and cooperation of Owner, to exercise its best efforts to obtain approval of the Application and proper certification of the Stream Mitigation Bank contemplated by said Application.

3. The Developer further certifies that it will submit, if it has not already done so, the Prospectus to the appropriate regulatory agencies (hereinafter referred collectively as “The Construction Approval Agencies”) such documents as are necessary for the approval to begin the initial construction phase of the Stream Mitigation Bank. The date by which all Regulatory Agencies approve the Application is hereinafter referred to as the “Bank Approval Date.” Once the Developer commences construction, the Developer shall be obligated to complete the initial construction phase of the Stream Mitigation Bank in accordance with the Plan and within the timeliness herein established. In the event that COE, OEPA, or other Regulatory Agencies require modifications, restrictions, or changes to the Plan as a condition of approval after construction has commenced, the Developer agrees to continue construction in accordance with such required modifications, restrictions or changes.

It is agreed that, if Developer’s work under the Application is materially modified, restricted or changed at the direction of COE, OEPA or other Regulatory Agencies and the Developer is required to implement said restriction, modification or change as a condition of approval of the Application and/or sale of Mitigation Bank Assets, the figure established as the

base Cost Return, as set forth in Paragraph 8 below, shall be increased or decreased to the extent that such results in an increase or decrease of Developer's cost to complete the work as contemplated by the Plan, except that Owner shall first have the right to verify and approve the reasonableness thereof and approve any increase of the Base Cost Return through an independent, duly-qualified expert of its choosing. Developer shall provide to Owner such documentation as may be reasonably necessary to support an increase in the Base Cost Return as contemplated by this provision.

4. By _____, 200_ Developer will notify Owner of intent to proceed. The Developer expressly agrees that it is responsible, at its sole expense, for any repair or reconstruction to any portion of the Stream Mitigation Bank.

5. It is understood and acknowledged by the Developer and Owner that the Stream Mitigation Bank contemplated by this Agreement shall be subject to all rules, regulations and requirements of the Regulatory Agencies. The Developer shall provide intensive maintenance and monitoring of the Project Site for a period of not less than five years from the end of the first full growing season of the Stream Mitigation Bank, (hereinafter referred to as "Intensive Maintenance Period"). However, any and all intensive monitoring required by the COE, OEPA, or other Regulatory Agencies after all rights, title and interest in the assets of the Stream Mitigation Bank have been transferred to entity accepting title to the Project Site as herein provided, due to the failure of the Streams Mitigation Bank to meet any requirements established by COE, OEPA, other Regulatory Agencies shall be performed and paid for by the Developer. Any limited monitoring required by the COE or the maintenance and monitoring plan, which occurs after all rights, title and interest in the assets of the Streams Mitigation Bank are

transferred, shall be performed by the body to which title to the Project Site has been transferred.

The Developer and Owner shall report all monitoring results and the financial status of the Stream Mitigation Bank to COE as required.

Owner authorizes the Developer or its subcontractors to enter the Project Site during the development phase of the Stream Mitigation Bank, and upon its completion, to enter the Project Site upon 24 hours prior written notice to perform necessary maintenance activities, except that the Developer or subcontractor may enter the Project Site after completion for emergency maintenance without such notice.

6. By execution of this Agreement, Owner grants to the Developer, upon commencement of the initial construction phase, ownership by Developer of all rights, title and interest (free and clear of all restrictions, liens and encumbrances) in assets of the Stream Mitigation Bank, including, but not limited to, rights to sell off-site mitigation to public and/or private enterprises for compensating for unavoidable filling of their streams, Stream Mitigation Credits and Flood Storage Capacity arising from or attributable to the Developer's work on the Project Site (hereinafter referred to as "Mitigation Bank Assets"), subject to the rules, regulations and procedures of the Regulatory Agencies for a period of twenty (20) years from the Bank Approval Date. If required, Owner shall provide the Developer with a document certifying such ownership. Ownership of the real property at the Project Site shall be retained by Owner, subject to the rules, regulations, and procedures of the Regulatory Agencies. The Developer shall, for a period of twenty (20) years from the Bank Approval Date, have the full and exclusive right without restriction of any kind to market, sell, or otherwise convey rights or interest held by the Developer in Mitigation Bank Assets, subject to the requirements of COE and other Regulatory

Agencies and, except as set forth in Paragraph 8 below. The Developer shall disburse the proceeds arising therefrom as herein set forth. Notwithstanding anything herein to the contrary, it is agreed and understood that Developer shall sell and market assets hereinabove described, at the highest and best price attainable for the mutual benefit of the parties. Further, no assets shall be sold for a price less than \$_____.00 for each credit being sold, without the mutual consent of both parties in writing.

7. At the end of the 20 year period from the Bank Approval Date of this Agreement, all rights, title and interest in the assets of the Stream Mitigation Bank held by the Developer, pursuant to Paragraph 6, shall revert to Owner, including all rights to market, sell or otherwise convey remaining rights to interest in Mitigation Bank Credits, subject to the requirements of COE and other Regulatory Agencies, and Owner shall thereafter have the right to retain all proceeds from sales of Streams Mitigation Credits occurring after the termination of the twenty (20) year period.

8. As consideration for this Agreement, the parties agree that the Developer shall receive all proceeds of sale and shall disburse same on the basis of ___% of each dollar received to Developer and ___% of each dollar received to Owner after such time as all dollars disbursed by Developer for the development of the project have been fully repaid, (hereinafter referred to as the "Profit Sharing"), the same being consistent with the cost estimates set forth in Exhibit "C" and amended from time to time in writing by mutual agreement of the parties. Further, payment to said parties set forth in the Initial Disbursement Period is intended to reimburse Owner for the purchase of property actually being used for the Stream Mitigation Bank at the rate of \$X00 per Stream Mitigation Credit, but in no event to be less than _____ credits times \$_____ per credit.

Within thirty (30) days of the close of each calendar quarter, the Developer shall submit a sworn statement to Owner listing the amount of sales of Assets from the Stream Mitigation Bank for the quarter and for the entire project to date. Owner's share shall be paid within fourteen (14) days of receipt by the Developer. Owner shall have the right, at reasonable times and upon reasonable written notice of five (5) days, if requested by Developer, to inspect the books and financial records of Developer relating to the completed sales of the Assets.

9. To the extent permitted by law, the Developer shall indemnify and hold harmless owner, successors and assigns from and against any and all claims, liabilities, injuries, causes of action or expenses, including attorney's fees and consulting fees, arising out of or resulting from acts or omissions of the Developer in the performance of this Agreement, provided that such claim, liability, injury, cause of action, or expense is attributable to: 1) bodily injury, sickness, disease, or death; 2) injury to or destruction of tangible property (other than the work itself); or 3) fines levied by any Regulatory Agency for failure to comply with the terms of the Plan, the Developer's management and monitoring plan, or any other rule, regulation or procedure of the Regulatory Agencies. The liability of the Developer under this Paragraph shall be limited to negligent or willful acts or omissions of the Developer, a subcontractor or the Developer, anyone directly or indirectly employed by the Developer or subcontractor, or anyone for whose acts the Developer may be liable.

10. Owner represents that, to the best of its knowledge and belief, the Project Site contains no hazardous waste, extremely hazardous waste, or hazardous substance subject to and as defined by appropriate State, Federal or local laws or regulations (hereinafter referred to collectively as "Hazardous Substances"). Owner further represents that Owner has no

knowledge of any prior release, leak, discharge, spill, disposal or emission of Hazardous Substances in, on or under the Project Site. Owner agrees to provide, if requested by Developer or required as a part of the process for the approval of the Stream Mitigation Bank, a Phase I Impact Study of the Project Site, which it currently has or if necessary an updated version of same. Each party agrees to notify the other party immediately, in writing, upon discovery of any Hazardous Substances on the Project Site.

11. The Developer shall purchase from and maintain in a company or companies lawfully authorized to do business in the State of Ohio, insurance for protection from any and all claims arising under Worker's Compensation Acts and any other employee benefit acts which are applicable, including claims for damages due to bodily injury, including death, and claims for damages to property (other than the work itself) which may arise out of or result from the Developer or by a subcontractor or anyone directly or indirectly employed by any of them.

The Developer shall provide insurance coverage on a per occurrence basis, naming _____, insured in the following minimum amounts, or such other amounts as required by law, whichever is greater, during the progress of Developer's work:

- a) Worker's Compensation Insurance to the extent required by statute;
- b) Employers' Liability Insurance with limits of at least \$1,000,000 per accident or disease;
- c) Comprehensive General Liability Insurance, including personal injury, bodily injury, and property damage with combined single limits of at least \$1,000,000; and,
- d) Automobile Liability Insurance on a comprehensive basis with combined single limits of at least \$1,000,000 for personal injury, bodily injury and property damage.

Any of the above coverage may be provided by a combination of basic and umbrella policies.

Certificates of such insurance shall be submitted by the Developer to Owner prior to the commencement of the construction. The Developer shall provide Owner with thirty (30) days written notice in advance of any cancellation or material change in the policies required by this Section, which would affect Owner and/or insurance covering any aspect of the construction or maintenance of the Stream Mitigation Bank.

12. The Developer shall be responsible to pay, prior to same becoming a lien upon the premises, all costs of construction as set forth on Exhibit "C." Said costs may be amended from time to time by mutual written agreement of the parties. All costs in connection with said estimated costs shall be considered a cost of the project and reimbursable to Developer, as hereinabove set forth.

13. All cost for application, approval and development of the Stream Mitigation Bank shall be borne by the Developer, and Owner shall incur no cost therefore, except for out-of-pocket expenses, including attorney's fees and Phase 1 Impact Study incurred in defending or enforcing this Agreement and accompanying documents, or expenses incurred by Owner for its own purposes not required by this Agreement.

14. The Developer shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation, and any other facilities or services necessary for the proper execution and completion of the Streams Mitigation Bank and will provide Owner with copies of sworn Developer statements and waivers of liens for all work and materials provided in the development and maintenance of the Streams Mitigation Bank.

15. The Developer may subcontract all or any portion of the Developer's work as contemplated by this Agreement, but any such subcontract shall not relieve or release the Developer from full performance of the Developer's obligations as set forth herein.

16. It is understood and acknowledged that Developer and Owner, after the initial construction and planning phase of the work is completed, the site may be conveyed to _____ or other appropriate public or quasi-public body and/or the use thereof may be granted to said body prior to the actual conveyance, so as to utilize the Project Site as a public or quasi-public park or other nature area with all rights appurtenant thereof, subject to the rules and regulations of the Regulatory Agencies.

Owner agrees that such use shall not interfere with the obligations of the Developer to construct, maintain or monitor the Stream Bank under this Agreement.

17. This Agreement constitutes the entire agreement between the parties and supersedes any other negotiations, representations or agreements, either written or oral. This Agreement may not be amended or modified without the prior written consent of the parties. The Developer shall not assign or delegate its duties under this Agreement without the prior written consent of the Owner.

18. This Agreement shall be binding upon the heirs, successor and assigns of all parties.

19. This Agreement shall be interpreted under the laws and statutes of the State of Ohio.

IN WITNESS WHEREOF, the parties have hereunto set their hands and affixed their seals on the _____ day of _____, 200_.

By: _____

By: _____

Exhibits

- A. Legal Description of Project Site
- B. Prospectus for Stream Bank
- C. Costs of Construction