

*Disclaimer: We have created a fictitious threatened species, the Potomac Highlands hedgehog and mapped it within Jefferson County as a training aid for our Habitat Conservation Planning Course ECS 3117.*

## **IMPLEMENTATION AGREEMENT**

This Implementation Agreement (“Agreement”) is made and entered into as of the Effective Date by and among West Highlands Estates, a West Virginia limited partnership (“Estates”), The Hedgehog Environmental Trust (“HET”), and the United States Fish and Wildlife Service (“USFWS”). These entities may be referred to collectively as “Parties” and each individually as a “Party.” USFWS may be referred to as the “Wildlife Agency.”

### **RECITALS**

- A. Estates is the owner of certain real property in the County of Jefferson, State of West Virginia, as depicted in Figure 1 (“Tract 90210”).
- B. USFWS has jurisdiction over the conservation, protection, restoration, enhancement, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species to the extent set forth in the federal Endangered Species Act, 16 U.S.C. §§ 1531, et seq. (“FESA”), the Fish and Wildlife Coordination Act, 16 U.S.C. (§§ 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(f) et seq.), and other federal laws.
- C. HET is a West Virginia non-profit public benefit corporation created exclusively for charitable, educational, scientific, ecological, and historical purposes within the meaning of section 501(c)(3) of the Internal Revenue Code.
- D. Estates desires to develop a portion of Tract 90210 with residential improvements and related roads, utilities, sewer systems, water and storm drainage systems, parks and other amenities as generally depicted on Figure 2 (the “Estates Project”). The Estates Project is a portion of a development on Tract 90210 which originally underwent environmental review and was approved by the City of Charles Town in 1989.

E. In cooperation with the USFWS, Estates has prepared the West Highlands Estates Habitat Conservation Plan (the “HCP”) describing both (1) the environmental and biological impacts of the Estates Project, including activities related to construction, marketing, sale, use and occupancy of the Estates Project, and (2) the comprehensive avoidance, minimization, conservation, mitigation and conserved habitat measures required to avoid impacts and mitigate for such activities.

F. Estates has submitted the HCP to USFWS as a part of its application for incidental take authorization for its Estates Project under FESA.

G. The area covered by the HCP is comprised of a portion of the Estates Project Area as depicted on Figure 3, including both areas to be developed as a part of the Estates Project and areas to be set aside off-site as mitigation lands.

H. Estates and The Hills Environmental Trust (“HET”) have cooperated to establish a conservation bank on off-site mitigation property within the USFWS’s Jefferson County Multiple Species Planning Area (the “Conservation Bank”). The proposed Conservation Bank would be implemented pursuant to a separate agreement.

I. The Parties now desire to enter into this Agreement to set forth the terms and conditions under which the HCP will be implemented.

## **AGREEMENT:**

NOW, THEREFORE, in consideration of the foregoing, the covenants and obligations hereinafter set forth, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

### **I. DEFINED TERMS**

The capitalized terms used in this Agreement shall have the meanings ascribed to them in the introductory paragraph of this Agreement, in the Recitals above, or in this Section I. All references to Figures and Tables are to those Figures and Tables set forth in the HCP. To the extent that the recitals or definitions incorporate covenants and agreements, such covenants and agreements shall bind the Parties to this Agreement.

“Changed Circumstances” means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (*e.g.*, the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

“Conservation Bank Activities” means activities related to site preparation, pre-construction, construction and passive use of recreational trails, view facilities and/or emergency access roads through the Conservation Bank as set forth in this Agreement.

“Conservation Bank” means the West Hills Bank consisting of approximately 1,000 acres, as depicted on Figure 4, and that is off-site mitigation as described in Section II.A.

“Conservation Easement” means a perpetual conservation easement in favor of the Designated Grantee in substantially the form attached hereto as Exhibit A, and approved by the Wildlife Agencies prior to recordation.

“Covered Species” means Potomac Highlands Hedgehog (*Erinaceus americanus virginianus*).

“Designated Transferee” means a public or private entity approved by the USFWS which is willing and able to immediately accept and retain fee title to the Conservation Bank Property. HET is the Designated Transferee.

“Development Activities” means all activities of any type or nature conducted by Estates to develop, construct, market, sell and cause the occupancy and use of the Estates Project within the Development Area that do not have significant off-site impacts not analyzed in the HCP, including all activities related to pre-construction, site preparation, construction, marketing and sale for, and ensuing occupancy and use of, the Estates Project. The Parties acknowledge and agree that certain Development Activities may result in temporary impacts within the Development Area which are fully minimized and mitigated under the HCP.

“Development Area” means the Estates Project Area and that certain portion of the Estates Property covered by the HCP and depicted on Figure 6 of the HCP as the “Development Area.”

“Effective Date” means the date on which the Agreement takes effect.

“Environmental Laws” means all federal and state laws governing or regulating the impact of Development Activities on Covered Species and their habitat including, without limitation, WVESA, WVEQA, FESA, NEPA, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1956, and the Federal Water Pollution Control Act (33 U.S. C. § 1251 et seq.), including any regulations promulgated pursuant to each of the foregoing laws.

“Hedgehog” means a member of the subspecies (as defined under FESA) *Erinaceus americanus virginianus* (Potomac Highlands Hedgehog).

“Mitigation Credit” means a habitat mitigation credit from the Conservation Bank.

“NEPA” means the National Environmental Policy Act (42 U.S.C. §§ 4321-4335), and all rules, regulations and guidelines promulgated thereunder, as they may be amended from time to time.

“Off-Site Mitigation Lands” means the 151 acres of open hardwood forest mitigation credits purchased in the West Hills Conservation Bank pursuant to Section II.A. of this Agreement.

“Estates Project” means the development of the West Highland Estates property with residential improvements and related roads, utilities, sewer systems, water and storm drainage systems, parks and other amenities as generally depicted on Figure 12 of the HCP.

“Section 10(a) Permit” means a permit for the incidental Take of threatened or endangered species (as defined under FESA) pursuant to Section 10(a) of FESA.

“Take” means the definition of such term in FESA and associated implementing regulations with regard to any activities subject to FESA.

“Unforeseen Circumstances” means changes in circumstances affecting a Covered Species within the Development Area that could not reasonably have been anticipated by the Parties at the time the HCP was prepared, which result in a substantial and adverse change in the status of a Covered Species.

## **II. OBLIGATIONS OF Estates**

### **A. Dedication of Off-site Mitigation Lands**

Prior to start of clearing in the Development Area, Estates shall purchase 151 acres of Open hardwood forest Habitat credits, including three hedgehog pair credits, from the Conservation Bank and shall contribute to ongoing management of the Conservation Bank. Management of the 151 acres of habitat credits shall be conducted by HET, as part of the management of the Conservation Bank. Prior to the start of clearing activities, the 1,000 acre Conservation Bank Parcel will be encumbered by a deed restriction limiting activity on the Conservation Bank property to long-term management and preservation of existing natural habitats. Within 30 days of the Effective Date, a conservation easement shall be placed on the Conservation Bank property benefitting the County of Jefferson, and the Conservation Bank Agreement will be finalized. If the Conservation Bank Agreement is not finalized prior to the

approval of the Estates HCP for reasons beyond the control of Estates, Estates may purchase 151 acres of suitable Open hardwood forest Habitat mitigation credits in another Conservation Bank, as approved by the USFWS.

**B. Impact Avoidance Measures**

Estates shall carry out the impact avoidance and reduction measures set forth in Sections IV.C. of the HCP.

**C. Conservation Bank Activities**

Designated Transferee may engage in the Conservation Bank Activities in all areas of the Conservation Bank Parcel other than those 151 acres of mitigation credits purchased by Estates.

**D. Mitigation Funding**

1. Estates shall be responsible for funding the impact avoidance measures required under Section II.B., except to the extent that such measures are carried forward as part of the long-term management responsibilities of the Designated Transferee.

2. Estates shall be responsible for funding long-term management required under Section II.A.

3. Estates warrants that it has, and will expend, such funds as may be necessary to fulfill its obligations under the HCP. Estates will promptly notify the USFWS of any material change in Estates's financial ability to fulfill its obligations.

**E. Changed Circumstances**

1. Consistent with USFWS regulations regarding Habitat Conservation Plan Assurances, this Section identifies changes in the circumstances affecting the HCP area and/or the Covered Species which can reasonably be anticipated, and describes the responses to such changes that will be carried out by the Parties. Since the HCP includes an adaptive management approach to habitat management, changes over time and adaptive responses are already contemplated. In addition, however, this Section identifies two reasonably foreseeable changes for which specific

responses are described. The Parties agree that this Section addresses all reasonably foreseeable changed circumstances, and that other changes will be treated by USFWS as Unforeseen Circumstances.

1. A pack of feral dogs taking up residence within the conservation bank area; and
2. The Wobbly Hedgehog Syndrome affecting more than 25% of the resident population on the conservation bank property.

If circumstance (1) occurs, the dogs will be trapped and relocated to a shelter within the county and if circumstance (2) will occur through the monitoring efforts in the bank, HET will use the contingency fund to place the affected hedgehogs in a quarantine area. HET and the Service may determine that prior to an outbreak, the emergency fund can be used to conduct research on a cure for the disease. Based on the research, the remedy for the affected hedgehogs will be discussed between HET, the Service and other outside experts.

## **1. OBLIGATIONS OF HET**

1. The sole obligation of HET under this Agreement is the long-term management of the off-site mitigation lands in the Conservation Bank property for the purposes stated in the West Hills Conservation Bank Agreement. The long-term management of the Off-Site Mitigation Lands shall be funded by an endowment provided by Estates pursuant to Section II.D. of this Agreement.

## **2. OBLIGATIONS OF USFWS**

### **1. Incidental Take Authority for Development Activities**

#### **A. Take Permits.**

As a condition concurrent, simultaneously with the execution of this Agreement, USFWS shall have issued the Section 10(a) Permit authorizing Take of Covered Species that is incidental to the Development Activities.

**B. Covered Species Listed After the Effective Date.**

As to each Covered Species that is not currently listed under FESA, the Section 10(a) Permit shall become effective with respect to such Covered Species under such law upon the listing of the species under such law.

**2. Take Authorization for Newly Regulated Covered Species; Savings Provision.**

To the extent that it is judicially determined that USFWS was not authorized to cause the Section 10(a) Permit to become effective automatically as to Covered Species as they become listed pursuant to FESA, the HCP and this Agreement shall be deemed adequate to support an application for any Section 10(a) Permits, and/or other Take authorizations, as applicable, as are necessary and lawful to permit Take of such Covered Species for the remaining term of the Section 10(a) Permit. USFWS shall use its best efforts to process and issue such Take authorization concurrently with the regulation of the Covered Species. In issuing such permits and/or Take authorizations, USFWS shall not request, impose, recommend, or require further mitigation, conservation, compensation, enhancement or other protection for such Covered Species except as expressly provided in this Agreement.

**3. Section 10(a) Permit Findings**

As a condition precedent to the execution of this Agreement, USFWS has considered the duration and geographic scope of the Development Activities including the potential adverse impacts of the Development Activities on the Covered Species and, after opportunity for public comment, USFWS has found that the HCP as implemented by this Agreement contains sufficient assurances that:

1. Take in connection with Development Activities of Covered Species in accordance with the HCP as implemented by this Agreement will be incidental to otherwise lawful activity;

2. Impacts of such Take will be, to the maximum extent practicable, minimized and mitigated under the HCP as implemented by this Agreement;
3. Estates has ensured through this Agreement that adequate funding for the implementation of the HCP will be provided;
4. Estates has ensured that adequate procedures to deal with unforeseen circumstances are provided in this Agreement;
5. The Take of Covered Species in connection with Development Activities in accordance with the HCP as implemented by this Agreement will not appreciably reduce the likelihood of survival and recovery of the Covered Species in the wild;
6. All other measures and assurances required by USFWS as necessary or appropriate for purposes of the HCP are set forth in and implemented by this Agreement.

#### 4. **Unforeseen Circumstances**

1. USFWS has promulgated the Habitat Conservation Plan Assurances Rule, published in the Federal Register on February 23, 1998 (63 Fed. Reg. 8859), and codified at 50 CFR 17.3, 17.22(b) and 17.32(b) ("Assurances Rule").

2. The assurances made by USFWS in this Section shall apply so long as the commitments and provisions of the HCP as implemented by this Agreement and the Section 10(a) Permit applicable to Estates have been and are being properly implemented by Estates.

3. For so long as the HCP and Section 10(a) Permit are in effect and being properly implemented in accordance with this Agreement, USFWS will not require from Estates the commitment of additional land, water or financial compensation, mitigation, conservation or enhancement, or additional restrictions on the use of land, water or other natural resources with

regard to the Covered Species beyond the level and/or amounts specified in the HCP as implemented by this Agreement.

4. USFWS has the burden of making a finding that Unforeseen Circumstances exist with regard to any Covered Species, using the best scientific and commercial data available. The findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements affected species. In deciding whether any Unforeseen Circumstances exist, USFWS shall consider, but not be limited to, the following factors:

- (1) The size of the current range of the affected species.
- (2) The percentage of the range of the species that has been adversely affected by the Development Activities.
- (3) The percentage of the range of the species that has been conserved by the HCP.
- (4) The ecological significance of that portion of the range of the species affected by the Development Activities.
- (5) The level of knowledge about the affected species and the degree of specificity of the species conservation program under the HCP.
- (6) Whether failure of Estates or the Designated Transferee to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

5. In the event that USFWS makes a finding of Unforeseen Circumstances and such Unforeseen Circumstances warrant Estates's (or Designated Transferee's) implementation of different mitigation, enhancement or compensation measures, any such different measures shall be restricted to modification of the management of the Off-site Mitigation Lands, and shall be the least burdensome measures available to address the Unforeseen Circumstances. In no event shall USFWS require additional mitigation, conservation, enhancement, compensation or other protective measures

in the form of contributions of land and/or financial contributions except as set forth in this Agreement.

6. The Parties acknowledge that the assurances provided by this Section are not intended to apply to the modifications to mitigation specifically contemplated as future actions under the HCP and this Agreement. In particular, mitigation actions related to additional actions contemplated in response to changed circumstances as provided in Section II.E and implementation of adaptive management measures remain the responsibility of Estates and its successors, and these obligations, as described in the HCP and this Agreement, do not violate the assurances of this Section.

### **3. USFWS' ASSURANCES**

#### **1. Assurances Regarding HCP**

After opportunity for public review and comment, the USFWS has found that the HCP, as implemented by this Agreement: (1) is consistent with and will complement other applicable conservation planning and regulatory programs and efforts addressing wildlife within the region, (2) is based on the best available current scientific and other information, and (3) avoids, minimizes and mitigates the potential significant adverse impacts of the Development Activities on the Covered Species. The USFWS shall not take a position inconsistent with the acknowledgments set forth in this Section, including, without limitation, in the form of comments offered by the USFWS in the context of any NEPA process associated with Development Activities.

#### **2. Assurances Regarding Agreement**

A primary purpose of this Agreement is to provide the long-term reconciliation of the Development Activities with the conservation and protection of Covered Species. Based on and in consideration of this Agreement, the USFWS hereby agree and assure Estates that:

1. Compliance with the terms of the HCP as implemented by this Agreement constitutes compliance with the provisions of NEPA, FESA, the (for those

Covered Species listed under FESA) with regard to the Development Activities;

2. Implementation of this Agreement will adequately provide for the conservation and protection of Covered Species, and minimization and mitigation of impacts to, and Take of Covered Species; and
3. Subject to the applicable provisions of this Agreement, USFWS shall not require Estates to provide further or additional mitigation, enhancement, conservation, or compensation or protection pursuant to FESA, CESA or NEPA with respect to the impacts of the Development Activities on Covered Species beyond the requirements set forth in the HCP as implemented by this Agreement, the Section 10(a) and Section 15181(b) Permits.

### **3. Changes in the Environmental Laws**

It is acknowledged and agreed by the Parties hereto that Estates is agreeing to perform substantial avoidance, minimization, mitigation, conservation and management measures set forth in this Agreement. If a change in or addition to the Environmental Laws takes place, the USFWS shall give due consideration to the measures required of Estates under the HCP in applying the new laws and regulations to Estates.

### **4. AMENDMENT OF HCP**

#### **1. Generally**

Amendments to the HCP may be proposed by any Party. The Party proposing the amendment shall provide to all other Parties a statement of the reasons for the amendment and an analysis of the effect of the amendment on the Covered Species and Take authorizations.

#### **2. Minor Amendments**

Minor amendments to the HCP shall not require amendment of this Agreement or the Section 10(a) Permit. A minor amendment to the HCP shall require a minor amendment to the

15181(b) Permit in accordance with applicable regulations. The Parties will make every effort to review a proposed minor amendment, and approve or deny the proposed amendment within 90 days of receipt of the proposal, except where longer timelines are imposed by requirements of law. Minor amendments shall require the approval of both USFWS and Estates. If the USFWS determines within 90 days of receipt of a proposed minor amendment, that the amendment should be treated as a standard amendment, the amendment will be addressed as described in paragraph C, below. Minor amendments include, but are not limited to boundary modifications which do not increase the acreage of the Development Area and which do not materially increase adverse impacts of the Development Activities to Covered Species do not require an amendment Estates will notify the USFWS of such modifications.

### **3. Standard Amendments**

A standard amendment is any proposed amendment which is not a minor amendment. Standard amendments to the HCP shall also require an amendment to this Agreement, the Section 10(a) Permit. Following receipt of the proposed standard amendment, USFWS shall publish notice of the proposed amendment to the Section 10(a) Permit in the Federal Register as required under FESA. USFWS shall use its best efforts to process the proposed amendment within 120 days of publication, except where longer periods are required by law.

## **5. REMEDIES**

### **1. Default**

Any material breach or violation of this Agreement, the HCP, or the Section 10(a) Permit shall be deemed a default under this Agreement.

### **2. Notice and Opportunity to Cure**

On occurrence of a default by any Party hereunder, any other non-defaulting Party hereunder may notify the defaulting Party and the other non-defaulting Parties in writing that a default has occurred and identify the reasons therefor. The defaulting Party shall have sixty (60)

days to respond to or refute the allegation, to cure such default, or to commence to cure a default which cannot reasonably be cured within a 60-day time period, provided that such cure is diligently pursued.

### **3. Ordinary Remedies**

Subject to Sections VII.D. and E. below, after notice of and time to cure a default as provided in Section VII.B. above, the non-defaulting Parties shall have all remedies available at law or equity, including specific performance and injunction. The Parties acknowledge that the Covered Species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate.

### **4. Additional Remedies of USFWS**

1. Except as otherwise provided, the USFWS shall have the right to revoke, terminate, or suspend the Section 10(a) Permit or any other authorization to Take Covered Species issued pursuant to this Agreement and the HCP, in conformance with the provisions of applicable law. Suspension, revocation, or termination of the Section 10(a) Permit by USFWS shall occur in conformance with the provisions of 50 CFR §§ 13.27-13.29.

2. Prior to taking action to suspend, revoke, or terminate the Section 10(a) Permit, USFWS shall meet and confer with the other Parties to this Agreement to attempt to avoid the need to suspend, revoke, or terminate the relevant permit.

3. USFWS shall not initiate an action to revoke any Section 10(a) Permit on grounds which would constitute grounds for suspension, without first pursuing action to suspend the permit in accordance with 50 CFR § 13.27. Any action by USFWS to suspend the Section 10(a) Permit shall, to the maximum extent consistent with the purposes of the suspension or revocation, be limited so as to address the specific action or inaction underlying the suspension, in order to minimize any impacts on Estates. Any Take authorizations suspended or revoked shall be reinstated immediately upon cure of the default that lead to the suspension or revocation.

## **5. No Money Damages**

No Party shall be liable in damages to any other Party or any person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

1. All Parties shall retain whatever liability they would possess for their present and future actions or failure to act without existence of this Agreement.
2. All Parties shall retain whatever liability they possess as an owner of interest in land.
3. Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under FESA.

## **6. EFFECTIVE DATE AND TERM OF AGREEMENT**

This Agreement shall be effective upon execution by USFWS and Estates. The Agreement and the Section 10(a) Permit shall run for twenty (20) years from the Effective Date, unless extended by all of the Parties hereto.

## **7. MISCELLANEOUS PROVISIONS**

### **1. Notices**

Unless otherwise specifically provided herein, all notices, demands, and other communications given hereunder shall be in writing, shall be properly addressed to the Party to receive such notice at the address or addresses for such Party listed below, or to such other address or person as any Party may designate to the others for such purpose in the manner set forth in this subsection and shall be given or sent by (1) Certified United States Mail, postage and fees prepaid, return receipt requested; (2) Federal Express, DHL, or United Parcel Service, charges prepaid or charged to sender's account; (3) personal delivery; or (4) facsimile, along with initiation on the same

day of delivery by another means described in this subsection. Each such notice shall be deemed given when received by the addressee unless delivery of a properly sent notice is not made because: (a) acceptance of delivery is refused by addressee, (b) the addressee has moved without providing proper notice of such move, or (c) the addressee is not open for business on the date of attempted delivery (unless such delivery is attempted on a Saturday, Sunday, or national holiday), in any of which events such notice shall be deemed given on the date of such attempted delivery. The addresses of the Parties for notices are as follows:

**If to Estates:**

West Highlands Estates, L.P.  
1776 Washington Drive  
Charles Town, WV 92121  
Attention: Jeb Geer

**If to USFWS:**

Regional Director  
United States Fish and Wildlife Service  
Hadley, MA 97232-4181  
Attention: Regional Director

**If to The Hills Environmental Trust:**

Don Lohofener, II, Ph.D.  
President  
The Hills Environmental Trust  
7879 Woodland Ave.  
Martinsburg, WV 92034

**2. Parties**

1. Successors and Assigns. This Agreement shall be binding upon, inure to the benefit of, and be enforceable by the Parties hereto and their respective successors and assigns, as permitted by law.

2. Third Party Beneficiaries. Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing federal or state law.

### **3. Interpretation**

1. Interpretation. This Agreement shall be governed by and interpreted in accordance with the Environmental Laws of the United States or West Virginia, as applicable, and the laws of the State of West Virginia. This Agreement shall not be construed as if it had been prepared by any one Party, but rather as if all Parties had prepared the Agreement.

2. Incorporation of HCP; Entire Agreement. The HCP and the Exhibits to this Agreement and each of their terms and conditions are hereby incorporated into this Agreement by reference; provided, however, that in the event of any inconsistency between the terms of this Agreement and the terms of the HCP, the terms of this Agreement shall control. This Agreement constitutes the entire agreement between the Parties with respect to the transaction contemplated hereby, and this Agreement supersedes all prior or contemporaneous agreements, understandings, representations, negotiations, and statements, oral or written.

3. Severability. The Parties contemplate that the provisions of this Agreement reflect the understanding of the Parties and that no element may be severed without terminating the Section 10(a) Permit. Notwithstanding the foregoing, in the event that any portion of this Agreement shall be declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, such portion shall be deemed severed from this Agreement upon written notice from Estates to the other Parties, and in the event of such notice the remaining parts of the Agreement shall remain in full

force and effect as though such invalid, illegal, or unenforceable portion had never been part of this Agreement, to the extent consistent with law.

#### **4. Amendments**

This Agreement may be altered, amended, or repealed only by a writing signed by all Parties to this Agreement.

#### **5. 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 Agreement, each Party to the litigation shall bear its own attorneys' fees, cost and expenses, except that fees and costs recoverable against the United States shall be governed by applicable federal law.

#### **6. No Partnership**

Except as otherwise expressly set forth herein, neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for, or the partner of any other Party.

#### **7. Elected Officials Not To Benefit**

No member of or delegate to the West Virginia State Legislature, the United States Congress, the government of Jefferson County, or City government shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

#### **8. Execution**

1. Further Instruments and Assurances. Each of the Parties shall, promptly upon the request of the others, execute, acknowledge, and deliver to the others any documents contemplated by this Agreement and shall take such further action as reasonably requested or appropriate to evidence or give effect to the provisions of this Agreement.

2. Duplicate Originals. This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each Party.

3. Faxed Signatures. Any Party may deliver its signed duplicate of this Agreement to any other Party by facsimile transmission, and such delivery shall be deemed made and completed upon receipt of such facsimile transmission by such other Party. Any Party delivering a signed duplicate by facsimile transmission shall promptly send the duplicate original bearing its original signature to such other Party; provided that a delay or failure to do so shall not negate the effectiveness of the delivery made by the facsimile transmission.

#### **9. Availability of Funds**

1. Implementation of this Agreement and the HCP by USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that USFWS will not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit such expenditures as evidenced in writing.

#### **10. References to Regulations**

Any reference in this Agreement, the HCP, or the Section 10(a) Permit to any regulation or rule of USFWS shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

#### **11. Applicable Laws**

All activities undertaken pursuant to this Agreement, the HCP, or the Section 10(a) Permit must be in compliance with all applicable state and federal laws and regulations.

In witness whereof, the undersigned have executed this Agreement as of the date first above written.

**West Highlands Estates, L.P.,**

West Virginia limited partnership

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Jeb P. Geer

USFWS:

**United States Fish and Wildlife Service**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**The Hedgehog Environmental Trust, Inc.,**

**a West Virginia nonprofit corporation**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Don Lohofener