

MITIGATION BANK ENABLING INSTRUMENT
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*California multi-agency Project Delivery Team Bank Enabling Instrument
(Template Version Date: May 2008)*

BANK ENABLING INSTRUMENT
[BANK NAME] MITIGATION BANK

This Bank Enabling Instrument (“BEI”), dated this _____ day of _____, 20__, is made by and among [Bank Sponsor’s full legal name(s)] (“Bank Sponsor”), [Property Owner’s full legal name(s)] (“Property Owner”), and [*delete name(s) of any of the following agencies which is not a party*]: the _____ District of the U.S. Army Corps of Engineers (“USACE”), Region IX of the U.S. Environmental Protection Agency (“USEPA”), the _____ Office of the U.S. Fish and Wildlife Service (“USFWS”), and the California Department of Fish and Game (“CDFG”), _____ Region]. These agencies comprise and are referred to jointly as the Interagency Review Team (“IRT”). The Bank Sponsor, Property Owner, and the IRT are hereinafter referred to jointly as the “Parties”. This BEI sets forth the agreement of the Parties regarding the establishment, use, operation and maintenance of the [Bank name] Mitigation Bank (the “Bank”).

RECITALS

- A. The Bank Sponsor is responsible for establishing and operating the Bank.
- B. The Property Owner is the owner of real property containing approximately _____ acres (the “Property”), located at _____ [*insert address and county*], State of California, designated Assessor’s Parcel No(s). _____. The Property is generally shown on the Bank Location Maps (**Exhibit A**) and legally described in the Real Estate Records and Assurances (**Exhibit E**) attached hereto.
- C. [*Choose one: Bank Sponsor’s name(s)*], as Bank Sponsor and Property Owner *or* Bank Sponsor and Property Owner] desire(s) to create the Bank over [*add if applicable: a _____-acre portion of*] the Property (the “Bank Property”). The Bank Property is generally shown on the Bank Location Maps (**Exhibit A**) and legally described in the Conservation Easement (**Exhibit E-4**) attached hereto. The Bank Property is to be conserved in perpetuity by the Conservation Easement, which shall be recorded as provided in Section V.
- D. [*Remove if CDFG is not a party*] CDFG has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of these species pursuant to California Fish and Game Code § 1802.
- E. [*Remove if USFWS is not a party*] USFWS, an agency within the U.S. Department of the Interior, has jurisdiction over the conservation, protection, restoration and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable

populations of these species within the U.S. pursuant to the federal Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, 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 provisions of federal law.

- F. USEPA and USACE have [*or, if USEPA is not a party:* USACE has] jurisdiction over Waters of the U.S. pursuant to the Clean Water Act, 33 U.S.C § 1251 *et seq.* Waters of the U.S. include jurisdictional wetlands.
- G. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Bank.
- H. The goals and objectives for the Bank are set forth in the Development Plan (**Exhibit C**) and the Bank Management and Operation Documents (**Exhibit D**).
- I. Initially-capitalized terms used and not defined elsewhere in this BEI are defined in Section II.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

Section I: Purpose and Authorities

A. Purpose

The purpose of this BEI is to set forth the agreement of the Parties regarding the establishment, use, operation, and maintenance of the Bank to compensate for unavoidable impacts to, and conserve and protect, Waters of the U.S., Covered Species, and Covered Habitat. The Bank Sponsor [*if different from Bank Sponsor, add:* and Property Owner] shall preserve, restore, create, and/or enhance and then manage and maintain Waters of the U.S., Covered Species, and Covered Habitat in accordance with this BEI, the Development Plan, Interim Management Plan and Long-term Management Plan.

B. Authorities

The establishment and use of the Bank for off-site compensatory mitigation or conservation is governed by one or more of the following statutes, regulations, policies, and guidelines:

1. Federal

- a. Clean Water Act (33 U.S.C. § 1251 *et seq.*);

- b. Rivers and Harbors Act (33 U.S.C. § 403);
- c. National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*);
- d. Endangered Species Act (16 U.S.C. § 1531 *et seq.*) (“ESA”), particularly including impacts to federally listed threatened or endangered species under § 7 and 10 of ESA and/or occupied habitat;
- e. Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*);
- f. National Historic Preservation Act (16 U.S.C. § 470);
- g. Executive Order 11990; Protection of Wetlands;
- h. Executive Order 11988; Floodplain Management;
- i. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR Parts 320-332);
- j. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
- k. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, § 404(b)(1) Guidelines (February 6, 1990);
- l. Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003); and
- m. USACE San Francisco District Public Notice 02-03, dated March 5, 2003, titled “Mitigation Bank Policy on the Santa Rosa Plain.”

2. State

- a. California Environmental Quality Act (“CEQA”) (Public Resources Code § 21000 *et seq.*) and State CEQA Guidelines (Tit. 14 Cal. Code Regs., Ch. 3);
- b. California Endangered Species Act (“CESA”) (Fish and Game Code § 2050 *et seq.*);
- c. California Natural Community Conservation Planning (“NCCP”) Act (Fish and Game Code § 2800 *et seq.*);
- d. California State Office of Historical Preservation (“SHPO”) (Public Resources Code § 5020 *et seq.*) Archaeological, Paleontological and Historical Sites (Public Resources Code § 5097 *et seq.*) Native American Historical, Cultural and Sacred Sites (Public Resources Code § 5097.9); and Historical Resources (Public Resources Code § 21084.1)
- e. Conservation of Wildlife Resources (Fish and Game Code § 1800 *et seq.*).
- f. Lake and Streambed Alteration Program (Fish and Wildlife Protection and

Conservation, Fish and Game Code § 1600 *et seq.*)

- g. Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993 (Fish and Game Code § 1775 *et seq.*; 1784 *et seq.*; and 1790 *et seq.*);
- h. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly; and
- i. Supplemental Policy Regarding Conservation Banks within the NCCP Area of Southern California, January 24, 1996, by U.S. Fish and Wildlife Service and California Department of Fish and Game.

Section II: Definitions

The initially-capitalized terms used and not defined elsewhere in this BEI are defined as set forth below.

1. “Adaptive Management” means an approach to natural resource management which incorporates changes to management practices, including corrective actions as determined to be appropriate by the IRT in discussion with the Bank Sponsor and/or the Property Owner, as appropriate, based upon Bank annual report results and IRT review of overall Bank performance and compliance.
2. “Bank Establishment Date” is the date determined pursuant to Section V, when the Bank is considered established and Transfer of Credits may begin.
3. “Catastrophic Event” shall mean an unforeseen event, such as the impact of a vehicle or falling aircraft, which has a material and detrimental impact on the Bank Property, and over which neither the Bank Sponsor nor the Property Owner has control.
4. “Conservation Easement” means a perpetual conservation easement, as defined by California Civil Code § 815.1, in the form of **Exhibit E-4** attached hereto.
5. “Construction Security” means the financial assurance specified in Section VI.A. and **Exhibit C-2**, to be provided by the Bank Sponsor to guarantee the completion of construction and planting to create, restore or enhance Waters of the U.S. and Covered Habitat on the Bank Property in accordance with the Development Plan.
6. “Covered Habitat” means habitat of concern or habitat upon which the Covered Species depend for their continued viability that the IRT determines will be adequately conserved as a result of implementation of this BEI. Covered Habitat Credits are identified in **Exhibit F-1**.
7. “Covered Species” means the species for which the Bank has been established and for which Credits have been allocated as set forth in **Exhibit F-1**.

8. “Credits” are units of measure representing the accrual, attainment, or protection of aquatic functions and/or the Covered Species or Covered Habitat on the Bank Property. One Credit is equivalent to one acre, or as otherwise defined in **Exhibit F-1**.
9. “Credit Release” means an action by the IRT to make specified Credits available for Transfer pursuant to this BEI.
10. “Development Plan” means the document attached as **Exhibit C-1** that is the overall plan governing construction and habitat establishment activities required to be conducted on the Bank Property to establish Credits, including, without limitation, creation, restoration and enhancement of Waters of the U.S. and Covered Habitat on the Bank Property, Performance Standards, monitoring requirements and reporting requirements.
11. “Endowment Deposit” is the deposit or series of deposits made or required to be made by the Bank Sponsor to CDFG to fully fund the initial Endowment Principal. Endowment Deposits received by CDFG shall be paid into the Special Deposit Fund pursuant to Fish and Game Code Section 13014(b) and Government Code Section 16370 *et seq.*, or subsequent state-authorized trust fund established pursuant to state law.
12. “Endowment Fund” is a sum of money, held in the Special Deposit Fund in the state treasury pursuant to Fish and Game Code § 13014 and Government Code § 16370 *et seq.*, or subsequent state-authorized trust fund established pursuant to state law. The purpose of the Endowment Fund is to provide income to fund perpetual management, maintenance, monitoring, and other activities on the Bank Property consistent with the Long-term Management Plan. The term “Endowment Fund” as used in this BEI shall refer to the Endowment Deposit and all interest, dividends, other earnings, additions and appreciation thereon.
13. “Endowment Principal” means that portion of the Endowment Fund that is non-wasting and that is to be maintained and managed in perpetuity to generate earnings and appreciation in value for use in funding perpetual management, maintenance, monitoring, and other activities as required by the Long-term Management Plan. Endowment Principal shall consist of the Endowment Deposit and any additions to the principal that are made from earnings, appreciation in value or subsequent deposits for the purpose of compensating for inflation and ensuring the real value of the principal does not decline over time.
14. “Force Majeure” shall mean war, insurrection, riot or other civil disorder, flood, earthquake, fire, disease, governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction, which has a material and detrimental impact on the Bank or the Bank Property and over which neither the Bank Sponsor nor the Property Owner has control; *provided, however*, that (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank Property and its immediate locale; (ii) a flood shall be

considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where “flood” refers to a runoff event; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank Property is greater than that presently projected from an earthquake with a return period of 475 years; (iv) disease shall constitute an event of Force Majeure only if such event has broad regional impact and is not endemic to the Bank Property and its immediate locale; and (v) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure unless there is no other feasible means of Remedial Action.

15. “HCP” means a Habitat Conservation Plan prepared pursuant to § 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)).
16. “Interim Management Period” means the period from the Bank Establishment Date until the first anniversary of the full funding of the Endowment Fund has occurred and all the Performance Standards in the Development Plan have been met.
17. “Interim Management Plan” means the document attached as **Exhibit D-4** that describes the management, monitoring, Adaptive Management, reporting and other activities to be implemented by the Bank Sponsor during the Interim Management Period.
18. “Interim Management Security” is the financial assurance specified in Section VI.C. and **Exhibit D-1**, to be provided by the Bank Sponsor to guarantee the implementation of the Interim Management Plan.
19. “Long-term Management Period” means the period beginning upon conclusion of the Interim Management Period and continuing in perpetuity, during which the Bank Property is to be managed, monitored and maintained pursuant to the Long-term Management Plan.
20. “Long-term Management Plan” means the document attached as **Exhibit D-5** that is intended to ensure the Bank Property is managed, monitored and maintained in perpetuity to conserve and protect its Waters of the U.S., Covered Species and Covered Habitat.
21. “NCCP” is a Natural Community Conservation Plan created pursuant to Fish and Game Code § 2800, *et seq.*
22. “Performance Security” means the financial assurance specified in Section VI.B. and **Exhibit C-3**, to be provided by the Bank Sponsor to guarantee that the Performance Standards are met and all Remedial Action required under Section VIII.F is completed.
23. “Performance Standards” means the minimum standards set forth in the Development Plan to define the successful development of Waters of the U.S. and Covered Habitat.

24. “Phase I Environmental Site Assessment” is an assessment of the environmental condition of the Property performed in accordance with the American Society of Testing and Materials (ASTM) Standard E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” or any successor to such ASTM Standard which is active at the time of the assessment.
25. “Preservation” means the protection of existing ecologically important wildlife, habitat or other ecosystem resources in perpetuity.
26. “Property Assessment and Warranty” means the written Property evaluation and assurance signed by the Property Owner and attached as **Exhibit E-2**.
27. “Property Owner” means the owner(s) of fee simple title to the Bank Property.
28. “Remedial Action” means any corrective measures which the Bank Sponsor or Property Owner is required to take to ameliorate any injury or adverse impact to the Bank Property as preserved, restored or enhanced or as a result of a failure to achieve the Performance Standards.
29. “Service Area” means the geographic area(s) within which impacts to Waters of the U.S., Covered Species or Covered Habitat that occur may be mitigated or compensated through Credits from the Bank.
30. “Special Deposit Fund” means the Special Deposit Fund in the state treasury which is continued in existence by Section 16370 of the Government Code.
31. “Subordination Agreement” means a written, recorded agreement in which the holder of an interest in, or lien or encumbrance on the Bank Property makes the lien or encumbrance subject to and of lower priority than the Conservation Easement, even though the lien or encumbrance was recorded before the Conservation Easement.
32. “Transfer” means the use, sale, or conveyance of Credits by the Bank Sponsor.
33. “Unlawful Act” shall mean the unlawful act of any person or entity other than the Bank Sponsor or Property Owner and shall include an event or series of events, such as the intentional release within the Bank Property, or any connected watercourse, of any Hazardous Substance, or the discharge of such a substance in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the Bank Property.
34. “Waters of the U.S.” means all waters and wetlands over which the USACE and the USEPA is granted jurisdiction in the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (2006), and the River and Harbor Act, 33 U.S.C. § 401, *et seq.* (2006). This definition encompasses both the term “waters of the United States” as defined in 33 CFR. Part 328 (2006) and “navigable waters” as defined in 33 CFR. Part 329 (2006).

Section III: Stipulations

A. Baseline Condition

The current condition of the Bank Property is described in the Development Plan (**Exhibit C-1**) and the Biological Resources Survey (**Exhibit H**).

B. Disclaimer

This BEI does not in any manner limit the legal authorities or responsibilities of the IRT, or of any IRT agency, but is, instead, an implementation of such authorities and responsibilities.

C. Exhibits

The following Exhibits are attached to and incorporated by this reference into this BEI:

1. “Exhibit A” - Bank Location Maps
 - A-1 General Vicinity Map
 - A-2 Map showing [*if applicable, include:* Property and] Bank Property
2. “Exhibit B” - Service Area Map(s) and Description(s)
 - B-1 Map(s) of the Bank’s Service Area(s)
 - B-2 Narrative description(s) of the Bank’s Service Area(s)
3. “Exhibit C” - Development Plan
 - C-1 Development Plan
 - C-2 Construction Security Analysis and Schedule
 - C-3 Performance Security Analysis and Schedule
4. “Exhibit D” - Bank Management and Operation Documents
 - D-1 Interim Management Security Analysis and Schedule
 - D-2 Endowment Fund Analysis and Schedule
 - D-3 Instructions and Forms for Submission or Disbursement of Funds
 - D-4 Interim Management Plan
 - D-5 Long-Term Management Plan

- D-6 Bank Closure Plan
- 5. “Exhibit E” - Real Estate Records and Assurances
 - E-1 Preliminary Title Report, Legal Description, and Parcel Map(s)
 - E-2 Property Assessment and Warranty
 - E-3 Plat Map(s)
 - E-4 Approved-as-to-form Conservation Easement Deed or Grant Deed
- 6. “Exhibit F” - Bank Crediting and Credit Transfers
 - F-1 Credit Evaluation and Credit Table
 - F-2 Credit Purchase Agreement and Payment Receipt Templates
 - F-3 Credit Transfer Ledger Template
- 7. “Exhibit G” - Phase I Environmental Site Assessment
- 8. “Exhibit H” - Biological Resources Survey
- 9. “Exhibit I” – [*include only if there are jurisdictional Waters of the U.S.:* Verified Waters of U.S. Jurisdictional Determination and Verification Letter]
- 10. “Exhibit J” - Cultural Resources
- 11. “Exhibit K” - Other Environmental Documentation, Permits, Amendments or Revisions

Section IV: Bank Evaluation and Development

A. Bank Site Assessment by the IRT

Representatives of the IRT have inspected and evaluated the Bank’s Waters of the U.S., Covered Species and Covered Habitat and have agreed upon the assignment of Credits set forth in **Exhibit F-1**.

B. Bank Sponsor’s Responsibilities for Bank Development

The Bank Sponsor agrees to perform all necessary work, in accordance with the provisions of this BEI, to establish, monitor, and maintain the Waters of the U.S., Covered Species and Covered Habitats, as described in the Development Plan, on the Bank Property until the Bank Sponsor has demonstrated to the satisfaction of the IRT that the Bank complies in all respects with all requirements contained in this BEI pertaining to Bank development.

C. Phase I Environmental Site Assessment

Bank Sponsor or Property Owner has provided a current Phase I Environmental Site Assessment of the Bank Property, attached hereto as **Exhibit G**, showing that the Bank Property is not subject to any recognized environmental conditions as defined by the American Society for Testing and Materials (ASTM) Standard E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” (i.e., the presence or likely presence of any Hazardous Substances or petroleum products). If the Phase I Environmental Site Assessment identified any recognized environmental conditions, the Bank Sponsor and Property Owner represent and warrant to the IRT that all appropriate assessment, clean-up, remedial or removal action has been completed.

D. Permits

The Bank Sponsor will obtain all appropriate permits and other authorizations needed to construct and maintain the Bank. This BEI does not constitute or substitute for any such approval.

E. Subsequent Phases

If the Bank is to be established in phases, the Bank Sponsor or Property Owner shall submit a written request to the IRT for approval of each phase. Subsequent phases will need to comply with IRT documentation requirements in effect on the date of submission of the complete documentation for the proposed phase. Establishment of each phase must be approved by the IRT.

F. Modification of the Development Plan

In the event that after the BEI is signed by the Parties, the Bank Sponsor and the IRT determine that modifications must be made in the Development Plan to ensure successful creation, restoration, and enhancement of Waters of the U.S and Covered Habitat within the Bank, or in order to comply with specific permits or other authorizations needed to establish the Bank, the Parties shall meet to discuss the required modifications, and the Bank Sponsor shall submit a written request for approval of such modifications to each member of the IRT within 60 days of the meeting. Upon written approval from each member of the IRT, the Bank Sponsor shall then implement all approved modifications. The Bank Sponsor shall provide revised as-built drawings to the IRT members within 90 days of completion of the modifications.

G. Property Assessment and Warranty

Property Owner shall notify the IRT of any errors or discrepancies in the Property Assessment and Warranty (**Exhibit E-2**) discovered subsequent to Property Owner’s signing of this BEI. The IRT shall evaluate any impacts of the errors or discrepancies on the Bank Property and the Conservation Easement, and may reduce the number of available Credits as a result of such impacts according to the policies of the IRT in effect

at the time of notice to the IRT.

Section V: Bank Establishment Date

The Bank Establishment Date will occur and Transfer of Credits may begin only when all of the following actions have occurred:

1. The BEI has been fully executed by all of the Parties,
2. The Conservation Easement [*Or, if fee title to the State, substitute:* The Grant Deed to the State of California has been accepted by CDFG] has been accepted by a Grantee approved by the IRT and recorded in the Official Records of the county in which the Bank Property is located, and;
3. The Bank Sponsor has complied with its obligation to furnish financial assurances in accordance with Section VI.

Within 30 days of the Bank Establishment Date, the Bank Sponsor shall provide an electronic copy of the final, signed BEI including all of its Exhibits, to each member of the IRT.

Section VI: Financial Assurances

The Bank Sponsor is responsible for providing financial assurances for the performance and completion of Bank construction, management, monitoring, and Remedial Action in accordance with this BEI, as set forth in this Section VI. The financial assurances shall be held in accordance with Section VIII.E. The Bank Sponsor shall notify each member of the IRT in accordance with Section XII.K. upon furnishing each of the following financial assurances:

A. Construction Security

Prior to the first Credit Release, the Bank Sponsor shall furnish to [*choose one:* CDFG or USACE] Construction Security in the amount of 100% of a reasonable third party estimate or contract to create, restore or enhance Waters of the U.S. and Covered Habitat on the Bank Property in accordance with the Development Plan as specified in **Exhibit C-2**. The Construction Security shall be in the form of [*Choose one:* an irrevocable standby letter of credit *or* a cashier's check]. The Bank Sponsor shall ensure that the full amount of the Construction Security shall remain in effect throughout the performance of construction and planting to create, restore or enhance Waters of the U.S. and Covered Habitat on the Bank Property in accordance with the Development Plan. *Provided, however,* that if all such construction and planting is completed in accordance with the Development Plan prior to the date on which Bank Sponsor would otherwise be required to furnish the Construction Security then no Construction Security shall be required.

B. Performance Security

Concurrent with the Transfer of the first Credit, Bank Sponsor shall furnish to [*Choose one:* CDFG *or* USACE] Performance Security in the amount of 20% of the Construction Security as specified in **Exhibit C-3**. The Performance Security shall be in the form of

[**Choose one:** an irrevocable standby letter of credit **or** a cashier's check]. The Bank Sponsor shall ensure that the full amount of the Performance Security shall remain in effect until the IRT determines that all of the Performance Standards have been met and all Remedial Action required under Section VIII.F has been completed.

C. Interim Management Security

Concurrent with the Transfer of the first Credit, Bank Sponsor shall furnish to CDFG Interim Management Security in the amount specified in **Exhibit D-1**. The amount of the Interim Management Security shall be equal to the estimated cost to implement the Interim Management Plan during the first year of the Interim Management Period, as set forth in the Interim Management Security Analysis and Schedule (**Exhibit D-1**). Cost estimates should be based on tasks implemented by a third party in present day dollars or equipment prices in present day dollars. The Interim Management Security shall be in the form of an irrevocable standby letter of credit. The Bank Sponsor shall ensure that the full amount of the Interim Management Security shall remain in effect until the end of the Interim Management Period.

D. Letters of Credit

Letters of credit, when selected, shall be submitted to and approved by the holding agency before they satisfy any financial assurance requirement. Any letter of credit shall be issued for a period of at least one year, and shall provide that the expiration date will be automatically extended for at least one year on each successive expiration date unless, at least 120 days before the current expiration date Bank Sponsor and the holder have received notice from the issuing institution of its decision not to extend the expiration date, as evidenced by the return receipts. The letter of credit shall provide that any unused portion shall be available for 120 days after the date Bank Sponsor and the holder have received such notice, as shown on the signed return receipts. If the issuer fails to extend the expiration date of any letter of credit, Bank Sponsor shall provide the holder with replacement security in the form of a letter of credit or cashier's check, as determined by the holder, within 60 days after receiving notice of the issuer's failure to extend. If Bank Sponsor does not provide such replacement security on or before the expiration of the 60-day period, then the holder shall have the right to immediately draw upon the letter of credit for which the replacement security was required.

E. Endowment Fund

1. The Endowment Fund shall be in an amount sufficient to fully provide for the financial requirements of the long-term management of the Bank in accordance with the Long-term Management Plan and the Endowment Fund Analysis and Schedule (**Exhibit D-2**). Cost estimates should be based on tasks implemented by a third party in present day dollars or equipment prices in present day dollars.
2. The Endowment Fund shall be held in the Special Deposit Fund in the state treasury, pursuant to Fish and Game Code Section 13014, or subsequent state authorized trust

fund pursuant to state law. The Bank Sponsor shall fund the Endowment Principal through Endowment Deposits according to the schedule below. The Endowment Principal shall be funded as follows:

- a. A minimum of 15% of the Endowment Principal shall be funded prior to the earliest of: 1) the second Waters of the U.S. Credit Release; or 2) the second Covered Species and Covered Habitat Preservation Credit Release; or 3) the second Covered Species and Covered Habitat creation Credit Release;
 - b. A minimum of 40% of the Endowment Principal shall be funded prior to the earliest of: 1) the third Waters of the U.S. Credit Release; or 2) the third Covered Species and Covered Habitat Preservation Credit Release; or 3) the third Covered Species and Covered Habitat creation Credit Release;
 - c. A minimum of 70% of the Endowment Principal shall be funded prior to the earliest of: 1) the fourth Waters of the U.S. Credit Release; or 2) the fourth Covered Species and Covered Habitat Preservation Credit Release; or 3) the fourth Covered Species and Covered Habitat creation Credit Release;
 - d. 100% of the Endowment Principal shall be funded prior to the earliest of: 1) the fifth Waters of the U.S. Credit Release; or 2) the fifth Covered Species and Covered Habitat Preservation Credit Release; or 3) the fifth Covered Species and Covered Habitat creation Credit Release.
3. Until the Endowment is fully funded, the amount of the Endowment Principal shall be adjusted by the Bank Sponsor annually, on January 2 of each year following the Bank Establishment Date (each such date is referred to as an “Adjustment Date”), by a percentage equal to the percentage increase, if any, in the California Consumer Price Index, All Items (1982-1984 = 100), for All Urban Consumers for California (the “CPI”), published by the California Department of Industrial Relations, Division of Labor Statistics and Research. Adjustment of the Endowment Principal is the percentage increase of the CPI published most immediately preceding the Adjustment Date, as compared to the CPI published most immediately preceding the date of this BEI. The adjustment shall be applied to the amount of the initial Endowment Principal.
 4. Bank Sponsor shall notify each member of the IRT of each Endowment Deposit made, within 30 days of such deposit [*insert if applicable:* , using the Endowment Deposit Form provided in **Exhibit D-3**].

Section VII: Credit Release

Each Credit Release must be approved in writing by the IRT.

A. Waters of the U.S. Credit Release

1. Upon Bank Sponsor’s compliance with all applicable requirements set forth in this

Section VII.A., and approval by the IRT, Waters of the U.S Credits as described in the Credit Table (**Exhibit F-1**) shall be released for Transfer, as described below. The actual number of Credits released shall be determined by the USACE, in consultation with the other IRT agencies, based upon attainment of the Performance Standards and upon funding of the Endowment Principal in accordance with Section VI.E. No Credit Transfer shall occur until the applicable Credit Release has occurred. Credits shall be released as follows:

- a. 15% of the total anticipated Waters of the U.S Credits upon the Bank Establishment Date.
 - b. 25% of the total anticipated Waters of the U.S Credits upon submission of the as-built drawings pursuant to Section VII.A.2.
 - c. 15% of the total anticipated Waters of the U.S Credits upon attainment of year two Performance Standards.
 - d. 15% of the total anticipated Waters of the U.S Credits upon attainment of year three Performance Standards and a verified Waters of the U.S. jurisdictional determination.
 - e. 15% of the total anticipated Waters of the U.S Credits upon attainment of year four Performance Standards.
 - f. All remaining Waters of the U.S Credits upon attainment of year five Performance Standards and a verified Waters of the U.S jurisdictional determination.
2. The Bank Sponsor shall submit as-built drawings, with accurate maps of the created, enhanced, and restored Waters of the U.S. to the IRT no later than 90 calendar days following completion of construction associated with the establishment of the Waters of the U.S. on the Bank Property. The as-built drawings and any attachments must describe in detail any deviation from the Development Plan.
 3. Each Waters of the U.S. Credit Release, with the exception of the first and the second, is also contingent upon the Bank Sponsor's submission of the annual report for the current reporting period in accordance with Section IX.B., and an IRT site visit at the appropriate time of year, as determined by the IRT.
 4. Any deviation from the Development Plan or failure to meet Performance Standards may reduce the number of Waters of the U.S. Credits available for release as determined by the USACE, in consultation with the other IRT agencies. The Bank Sponsor shall revise the Credit Table in **Exhibit F-1** as directed by USACE to reflect any reduction in the available Waters of the U.S. Credits.

B. Covered Species and Covered Habitat Credit Release

1. Credits for Covered Species and Covered Habitat shall be determined and released as described in this Section VII.B and the Credit Table (**Exhibit F-1**). Anticipated

Credits have been assigned to the Bank based upon Credit methodologies developed by the IRT.

2. Upon the Bank Sponsor's submittal of all documentation required under this BEI by the Bank Sponsor, and approval by the IRT, the IRT will release Credits for Covered Species and Covered Habitat as described below. The actual number of Credits released shall be determined by CDFG and/or USFWS, as appropriate, in consultation with the other IRT agencies, based upon attainment of the Performance Standards (if applicable) and upon funding of the Endowment Principal in accordance with Section VI.E. No Credit Transfer shall occur until the applicable Credit Release has occurred.
 - a. Preservation Credits described in the Credit Table (**Exhibit F-1**) for Covered Species and Covered Habitat shall be released as follows:
 - 1) 15% of the total anticipated Preservation Credits upon the Bank Establishment Date.
 - 2) 25% of the total anticipated Preservation Credits upon funding the Endowment Principal according to Section VI.E.2.a.
 - 3) 15% of the total anticipated Preservation Credits upon funding the Endowment Principal according to Section VI.E.2.b.
 - 4) 15% of the total anticipated Preservation Credits upon funding the Endowment Principal according to Section VI.E.2.c.
 - 5) The remaining Preservation Credits upon full funding of the Endowment Principal according to Section VI.E.2.d.
 - b. Creation Credits described in the Credit Table (**Exhibit F-1**) for Covered Species and Covered Habitat shall be released upon attainment of the applicable Performance Standards according to the following schedule:
 - 1) 15% of the total anticipated creation Credits upon the Bank Establishment Date.
 - 2) 25% of the total anticipated creation Credits upon funding the Endowment Principal according to Section VI.E.2.a.
 - 3) 15% of the total anticipated creation Credits upon funding the Endowment Principal according to Section VI.E.2.b.
 - 4) 15% of the total anticipated creation Credits upon funding the Endowment Principal according to Section VI.E.2.c.
 - 5) The remaining creation Credits upon full funding of the Endowment Principal according to Section VI.E.2.d.
3. The Bank Sponsor shall submit as-built drawings, with accurate maps of the

constructed habitats, to the IRT no later than 90 calendar days following completion of construction associated with the establishment of the constructed habitats on the Bank Property. The as-built drawings and any attachments must describe in detail any deviation from the Development Plan.

4. Any deviation from the Development Plan or failure to meet Performance Standards may reduce the number of Covered Species and Covered Habitat creation Credits available for release as determined by CDFG and/or USFWS, as appropriate, in consultation with the other IRT agencies. The Bank Sponsor shall revise the Credit Table in **Exhibit F-1** as directed by CDFG and USFWS, to reflect any reduction in the available Covered Species and Covered Habitat Creation Credits.

Section VIII: Operation of the Bank

A. Service Area

The Service Area is described and shown in **Exhibit B**.

B. Transfer of Credits

1. The Transfer of Credits may begin only upon the Bank Establishment Date. Bank Sponsor shall have the exclusive right to determine the price for any and all Bank Credits it offers for sale. The minimum Credit unit that may be Transferred is 0.01 Credit.
2. In no case shall the number of Credits or any particular type Transferred or obligated exceed the total number of Credits of that type which have been released for Transfer, as evidenced by written approval of the IRT.
3. Use of Credits at the Bank to mitigate or compensate impacts to Waters of the U.S., Covered Species or Covered Habitat must be authorized by the appropriate IRT agency or agencies on a case-by-case basis.
4. Bank Sponsor shall notify all members of the IRT upon any Credit Transfer in accordance with Section IX.C. of this BEI.
5. If the Bank Property is damaged after the Bank Establishment Date, and such damage materially impairs Waters of the U.S. or habitat values on such damaged Bank Property, then the IRT may, at its discretion, direct Bank Sponsor to suspend the Transfer of Credits and/or reduce the number of Credits allocated to the Bank in proportion to such damaged area unless and until the Bank Sponsor has reasonably restored such damaged area pursuant to a Remedial Action plan approved by the IRT.
6. If any member(s) of the IRT approve(s) an NCCP and/or HCP covering all or any part of the Service Area, and that plan uses habitat categories different from those set forth in **Exhibit F-1**, then, at the request of the Bank Sponsor, the remaining Credits for Covered Species or Covered Habitat may be reallocated at the discretion

of the IRT to conform to the habitat categories in the approved NCCP or HCP, as applicable.

7. Credit modifications due to expansion, restoration or other means that have been approved in writing by the IRT, shall be set forth in an amendment to this BEI according to Section XII.D.1.
8. Each Credit Transfer shall be made pursuant to a written purchase agreement in the form of **Exhibit F-2**.

C. Interim and Long-term Management and Monitoring

1. Interim Management and Monitoring

Bank Sponsor shall be responsible for conducting management and monitoring activities according to the Interim Management Plan (**Exhibit D-4**) until all of the Performance Standards are met and the Endowment Fund has been fully funded for one year.

2. Long-term Management and Monitoring

Once the Performance Standards have been met and the Endowment Fund has been fully funded for one year, the Property Owner shall implement long-term management and monitoring of the Bank Property according to the Long-term Management Plan. Property Owner shall be obligated to manage and monitor the Bank Property in perpetuity to preserve its habitat and conservation values in accordance with this BEI, the Conservation Easement and the Long-term Management Plan (**Exhibit D-5**). Such activities shall be funded through the Endowment Fund according to Section VIII.E.2.b. Property Owner and the IRT members shall meet and confer upon the request of any one of them, to consider revisions to the Long-term Management Plan which may be necessary or appropriate to better conserve the habitat and conservation values of the Bank Property. During the Long-term Management Period Property Owner shall be responsible for submitting annual reports to each member of the IRT in accordance with Section IX.B of this BEI.

D. Bank Closure Plan

1. Upon Bank closure, no further Credit Transfer shall occur.
2. The Bank closure shall be deemed to take place upon occurrence of all of the following:
 - a. All Performance Standards have been met; and
 - b. Either:
 - 1) The last authorized Credit has been Transferred; or

- 2) The Bank Sponsor requests bank closure by written notice to the IRT and IRT provides written approval of the closure; and
- c. All financial responsibilities of the Bank Sponsor have been met, including 100% funding of the Endowment Fund for not less than one year.

E. Financial Operations

All financial transactions shall be reported in accordance with Section IX.

1. Securities

a. Construction Security

- 1) The holder shall be entitled to draw upon the Construction Security if:
 - a) any Transfer of Credits has been made; and
 - b) either (i) at any time after the Bank Establishment Date, the IRT determines that the Bank Sponsor is not making good faith efforts to complete construction and planting in accordance with the Development Plan, or (ii) two years has elapsed since the Bank Establishment Date, and construction and planting in accordance with the Development Plan is not complete.
- 2) The Construction Security (or any portion of such security then remaining) shall be released to the Bank Sponsor after the Bank Sponsor completes the construction and planting activities in accordance with the Development Plan, as demonstrated by:
 - a) Bank Sponsor's submission of as-built drawings in accordance with Section VII.A.2 and Section VII.B.3;
 - b) An on-site inspection by the IRT; and
 - c) Written approval from the IRT.

b. Performance Security

- 1) The holder shall be entitled to draw upon the Performance Security in accordance with Section VIII.F.1.
- 2) If any portion of the Performance Security is drawn upon pursuant to this Section VIII.F.1, then the Bank Sponsor shall replenish the Performance Security to the amount specified in **Exhibit C-3** within 90 days after written notice from the holder.
- 3) The Performance Security (or any portion of such security then remaining) shall be released to the Bank Sponsor after all of the Performance Standards have been met and all Remedial Action, if any, has been completed, as evidenced by:

- a) Timely submission of all required annual reports in accordance with Section IX.B;
- b) The third anniversary of the completion of all Remedial Action, if any, in accordance with the applicable Remedial Action plan(s);
- c) An on-site inspection by the IRT; and
- d) Written approval from the IRT.

c. Interim Management Security

- 1) The holder shall be entitled to draw upon the Interim Management Security if any Transfer of Credits has been made and the IRT determines that during any 12-month period the Bank Sponsor has not performed all tasks as required under the Interim Management Plan.
- 2) In the event that the Interim Management Security is drawn upon pursuant to this section, the Bank Sponsor shall replenish the Interim Management Security to the amount specified in **Exhibit D-1** within 90 days after written notice from the holder.
- 3) Provided that the Bank Property has been managed in accordance with the Interim Management Plan, the Interim Management Security (or any portion of such security then remaining) shall be released to the Bank Sponsor one year after the Endowment Fund has been fully funded and all Performance Standards in the Development Plan have been met.

2. Endowment Fund

a. Endowment Fund Deposits

- 1) CDFG shall deposit the Endowment Deposits it receives into the Special Deposit Fund or subsequent state authorized trust fund established pursuant to state law.

b. Endowment Fund Management

- 1) The Endowment Principal amount should not decrease in value through expenditure or investment strategy. The Endowment Principal amount is intended to increase in value to keep up with inflation. Therefore a portion of the interest and earnings on the Endowment Principal balance shall be reinvested into the Endowment Fund as required to adjust the Endowment Principal using the same CPI adjustment formula as set forth in Section VI.E.3. After the Endowment Principal is fully funded, even if

interest earnings are insufficient to increase the Endowment Principal to keep up with inflation, no additional Endowment monies will be required from the Property Owner or the Bank Sponsor.

- 2) Interest earnings beyond those necessary to provide for Endowment Principal growth commensurate with inflation will be made available to fund annual management of the Bank Property in accordance with the terms of this BEI and the Long-term Management Plan.
- 3) Any Endowment Fund revenues (including earnings and interest) remaining after the Endowment Principal is adjusted for inflation that exceed the anticipated annual management expenses of the Bank Property shall be retained in the Endowment Fund and may be made available to fund unexpected expenses and Adaptive Management needs.
- 4) Property Owner shall invoice CDFG for management activities following the invoicing instructions in **Exhibit D-3**.
- 5) If there is not sufficient funding available from the Endowment Fund interest and earnings or if Long-term Management expenses exceed those estimated in the Endowment Fund Analysis and Schedule (**Exhibit D-2**), the Bank Sponsor or Property Owner shall consult with the IRT to identify the most effective means to implement the management measures and tasks with the resources available. After consultation with the IRT, the Bank Sponsor or Property Owner shall submit the resulting proposal in writing to the IRT within 60 days after completion of its consultation with the IRT. Upon written approval of the IRT, the Bank Sponsor or Property Owner shall implement the approved management measures and tasks.

3. Financial Records and Auditing

The Bank Sponsor and/or Property Owner, as appropriate, shall maintain complete and accurate records relating to the financial operation of the Bank using generally accepted accounting methods, principles and practices consistently applied. The financial operation of the Bank includes all financial assurances received or expended during the establishment and operation of the Bank. At the request of the IRT, no more frequently than annually, the Bank Sponsor and/or Property Owner, as appropriate, shall have records relating to the financial operation of the Bank audited by an independent, licensed Certified Public Accountant and shall submit the auditor's report to the IRT upon completion.

The signatory agencies or their designated representatives shall also have the right to review and copy any records and supporting documentation pertaining to the

performance of this BEI. Bank Sponsor and Property Owner agree to maintain such records for possible audit for a minimum of three years after Bank Closure, or three years after the date of performance, whichever is later. Bank Sponsor and Property Owner agree to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employee or representative who might reasonably have information related to such records. Further, Bank Sponsor and Property Owner agree to include a similar right of State and federal auditors to audit records and interview employees and representatives in any contract related to the performance of this BEI.

F. Remedial Action Plan

Prior to Bank closure, if any Party discovers any failure to achieve the Performance Standards or any injury or adverse impact to the Bank Property as preserved, restored, or enhanced, the Party making the discovery shall notify the other Parties. The IRT may require the Bank Sponsor to develop and implement a Remedial Action plan to correct such condition, as described below. The annual report required under Section IX.B. shall identify and describe any Remedial Action proposed, approved, or performed and, if the Remedial Action has been completed, evaluate its effectiveness.

1. Within 60 days of the date of written notice from the IRT, the Bank Sponsor shall develop a Remedial Action plan and submit it to the IRT for approval. The Remedial Action plan must identify and describe proposed actions to achieve the Performance Standards or ameliorate injury or adverse impact to the Bank Property and set forth a schedule within which the Bank Sponsor will implement those actions. The Bank Sponsor shall, at Bank Sponsor's cost, implement the necessary and appropriate Remedial Action in accordance with the Remedial Action plan approved by the IRT. In the event the Bank Sponsor fails to submit a Remedial Action plan to the IRT in accordance with this section, the IRT will notify the Bank Sponsor that the Bank Sponsor is in default and may identify Remedial Action the IRT members deems necessary. If (a) the Bank Sponsor fails to develop a Remedial Action plan or to implement Remedial Action identified by the IRT, in accordance with this section, or (b) conditions have not improved or continue to deteriorate two years after the date that the IRT approved a Remedial Action plan or notified Bank Sponsor of Remedial Actions the IRT deemed necessary, then the holder of the Performance Security may draw upon that security to undertake Remedial Action on the Bank Property.
2. If the IRT determines that the Bank is operating at a Credit deficit (i.e., that Credit Transfers made exceed the Credits authorized for release, as adjusted in accordance with this BEI), then the IRT shall notify the Bank Sponsor. Upon the IRT giving such notice, Bank Sponsor shall immediately cease Transfer of Credits. The IRT will determine what Remedial Action is necessary to correct the Credit deficit, and Bank Sponsor shall implement such Remedial Action, in accordance with this Section VIII.F.

Section IX: Reporting

A. Annual Inflation Adjustments to Endowment Fund Report

On January 2nd of each year following the Bank Establishment Date and until the Endowment Fund is fully funded, the Bank Sponsor shall report to the IRT, in hard copy and in editable electronic format, the following values:

1. The adjusted Endowment Principal, determined in accordance with Section VI.E.3; and
2. The resulting adjusted Endowment Deposit amounts.

B. Annual Report

Bank Sponsor or Property Owner, as appropriate, shall submit an annual report to each member of the IRT, in hard copy and in editable electronic format, on or before August 15th of each year following the Bank Establishment Date. Each annual report shall cover the period from July 1 of the preceding year (or if earlier, the Bank Establishment Date for the first annual report) through June 30th of the current year (the “Reporting Period”). The Bank Sponsor shall be responsible for the reporting tasks described below until Bank closure. After Bank closure, the Property Owner shall be responsible for such reporting, annually, as per the Long-term Management Plan. The annual report shall address the following:

1. Bank Development

The annual report shall document the degree to which the Bank is meeting the Performance Standards. The annual report shall describe any deficiencies in attaining and maintaining Performance Standards and any Remedial Action proposed, approved, or performed. If Remedial Action has been completed, the annual report shall also evaluate the effectiveness of that action.

2. Interim Management and Long-term Management

The annual report shall contain an itemized account of the management tasks conducted during the reporting period in accordance with the Interim Management or Long-term Management Plan, including the following:

- a. The time period covered, i.e. the dates “from” and “to”;
- b. A description of each management task conducted, the dollar amount expended and time required; and
- c. The total dollar amount expended for management tasks conducted during the reporting period.

3. Transfer of Credits

The annual report shall include an updated Credit Transfer Ledger (**Exhibit F-3**) showing all Credits transferred since the Bank Establishment Date and an accounting of remaining Credits.

4. Financial Operation

The annual report shall set forth an itemized account of any and all activity of Bank Sponsor and/or Property Owner regarding the Construction Security, Performance Security, Interim Management Security, and the Endowment Fund.

C. Credit Transfer Reporting

Upon the Transfer of each and every Credit the Bank Sponsor shall submit to each member of the IRT:

1. A copy of the fully executed Credit Purchase Agreement in the form provided at **Exhibit F-2**; and
2. An updated Credit Transfer Ledger, in hard copy and in editable electronic format in the form provided at **Exhibit F-3**.

Section X: Responsibilities of the Bank Sponsor and Property Owner

35. Without limiting any of its other obligations, including without limitation, under the Conservation Easement, Bank Sponsor and Property Owner each hereby agrees and covenants that:
 - a. If the entity proposed to hold the Conservation Easement is not an IRT agency, Bank Sponsor and Property Owner shall, prior to the execution of the Conservation Easement at **Exhibit E-4** hereof, provide the IRT with satisfactory evidence that the entity proposed to hold the Conservation Easement (Grantee) is authorized to do so pursuant to California Civil Code § 815.3 and Government Code § 65965, and has agreed to hold said Conservation Easement.
 - b. Bank Sponsor shall be responsible for all activities and costs associated with the establishment and operation of the Bank, including but not limited to construction, planting, Remedial Action, documentation, maintenance, management, monitoring, and reporting, until the Endowment Principal has been fully funded for one year and all Performance Standards have been met.
 - c. Bank Sponsor agrees to assume responsibility for compensatory mitigation requirements of USACE permits for which it Transfers Credits once a permittee has secured the appropriate number and type of Credits from the Bank Sponsor and to provide USACE with documentation that confirms that the Bank Sponsor has accepted the responsibility for providing the required compensatory mitigation.

- d. It shall not discharge or release to or from the Bank Property, or permit others to discharge or release to or from the Bank Property, any material, waste or substance designated as hazardous or toxic or as a pollutant or contaminant under any federal, state, or local environmental law or regulation (each a “Hazardous Substance”).
 - e. Property Owner shall not create or suffer any lien or encumbrance upon the Bank Property other than as set forth in the Property Assessment and Warranty approved by the IRT, and Property Owner shall not execute, renew, or extend any lien, lease, license, or similar recorded or unrecorded right or interest in the Bank Property without the prior written consent of the IRT.
 - f. It shall not construct or install any structure or improvement on, or engage in any activity or use of, the Bank Property, including mineral exploration or development, excavation, draining, dredging, or other alteration of the Bank Property that is not consistent with and in accordance with this BEI and its Exhibits.
 - g. Bank Sponsor shall ensure that the Bank Property is managed and maintained in accordance with this BEI and its Exhibits.
 - h. Property Owner shall allow, or otherwise provide for, access to the Bank Property by Bank Sponsor, Grantee, the IRT agencies and third parties, as described in the Conservation Easement.
 - i. The Property Owner shall grant to Bank Sponsor all rights and authority necessary to carry out, and shall not limit the Bank Sponsor in performing, its responsibilities and obligations on and affecting the Bank Property in accordance with this BEI.
36. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this BEI, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this BEI or extensions for the performance of the requirements of this BEI.
37. An extension of one compliance date based upon or related to a single incident shall not extend any subsequent compliance dates. The Bank Sponsor or Property Owner must show cause for any or every delayed step or requirement for which an extension is sought.

Section XI: Responsibilities of the IRT

A. IRT Oversight

The IRT agrees to provide appropriate oversight in carrying out provisions of this BEI.

B. IRT Review

The IRT will make a good faith effort to provide comments on the annual reports and Remedial Action plans within 60 days from the date of complete submittal. If the IRT is unable to review Remedial Action plans within the time specified, this fact will be reflected in any schedule established for performance of Remedial Action and any evaluation of timely performance of Remedial Action by Bank Sponsor or Property Owner.

C. Compliance Inspections

The IRT shall conduct compliance inspections as necessary:

1. To verify the Credits currently available in the Bank; and/or
2. Recommend Remedial Action as needed; or
3. For any other purpose determined by the IRT as necessary to assess compliance with this BEI.

Section XII: Other Provisions

A. Force Majeure

1. The Bank Sponsor and Property Owner shall be responsible to maintain the Bank Property and perform Remedial Action except for damage or non-compliance caused by Catastrophic Events, events of Force Majeure or Unlawful Acts. In order for such exception to apply, the Bank Sponsor and Property Owner shall bear the burden of demonstrating all of the following:
 - a. That the damage or non-compliance was caused by circumstances beyond the control of the Bank Sponsor, Property Owner, and any person or entity under the direction or control of the Bank Sponsor or Property Owner, including its employees, agents, contractors and consultants;
 - b. That neither the Bank Sponsor, Property Owner, nor any person or entity under the direction or control of the Bank Sponsor or Property Owner, including its employees, agents, contractors and consultants, could have reasonably foreseen and prevented such damage or non-compliance; and
 - c. The period of damage or non-compliance was a direct result of such circumstances.
2. The Bank Sponsor and Property Owner shall notify the IRT within 24 hours of occurrence of a Catastrophic Event, event of Force Majeure, or Unlawful Act, and as promptly as reasonably possible thereafter Bank Sponsor, Property Owner, and the IRT shall meet to discuss the course of action in response to such occurrence. In the meantime, Bank Sponsor and Property Owner shall continue to manage and maintain the Bank Property to the full extent practicable.

B. Dispute Resolution

1. The members of the IRT, the Bank Sponsor, and the Property Owner agree to work together in good faith to resolve disputes concerning this BEI, but any of the Parties may seek any available remedy. Unless any of the Parties has initiated legal action, any Party may elect to employ an informal dispute resolution process whereby:
 - a. The electing Party shall notify the other Parties of the dispute, the position of the aggrieved Party (including, if applicable, the basis for contending that a violation has occurred), and the remedies the electing Party proposes;
 - b. The notified Parties shall have 30 days (or such other time as the Parties may mutually agree) to respond. During this time, any such other Parties may seek clarification of the initial notice;
 - c. Within 30 days after such notified Parties' response was provided or due, whichever is later, the Parties shall confer and negotiate in good faith toward a mutually satisfactory resolution, or shall establish a specific process and timetable to seek such resolution.
 - d. The dispute resolution process may be terminated by any Party upon written notice to all other Parties.

C. Conveyance of Bank Property or Other Interests

1. All transfers of any interest in the Bank Property or the Conservation Easement are subject to the applicable provisions of the Conservation Easement.
2. The Property Owner shall have the right to sell, assign, transfer or convey (each a "transfer") its interest in the Bank Property at any time; *provided, however*, that any such transfer on or after the execution date of this BEI must be made in accordance with this BEI and the Conservation Easement, and shall be subject to written concurrence by the IRT and Bank Sponsor. Such concurrence shall be subject to the requirement that the transferee assumes and agrees in writing to observe and perform all of the Property Owner's obligations pursuant to this BEI and the Conservation Easement. From and after the date of any transfer by Property Owner of its interest in the Bank Property, the transferor shall have no further obligations hereunder and all references to Property Owner in this BEI shall thereafter refer to such transferee, except that the transferor's liability for acts, omissions, or breaches occurring prior to the transfer shall survive the transfer. Any transfer of the Property Owner's interest in the Bank Property made without the prior written concurrence of the IRT may, at the discretion of the IRT, result in the termination of this BEI according to Section XII.D.2.c.
3. The Bank Sponsor may sell or convey its interest in the Bank at any time, provided that Bank Sponsor is in full compliance with all requirements of this BEI (including all financial assurance requirements), and subject to the prior written approval of the IRT. If any of the financial assurances required under this BEI are not completely

funded at the time the Bank Sponsor requests IRT approval of a sale or conveyance, then the IRT shall not approve such sale or conveyance unless and until either the current Bank Sponsor, or the proposed replacement Bank Sponsor, shall have provided all required financial assurances. In addition, prior to sale or conveyance, the Bank Sponsor shall provide to each member of the IRT a written agreement signed by the replacement Bank Sponsor in which the Bank Sponsor assigns to the replacement Bank Sponsor, and the replacement Bank Sponsor assumes and agrees to perform, all of the responsibilities and obligations of the Bank Sponsor under the BEI. Any such sale or conveyance made without the prior written concurrence of the IRT may, at the discretion of the IRT, result in the termination of this BEI according to Section XII.D.2.c.

D. Modification and Termination of the BEI

1. Amendment and Modification

This BEI, including its Exhibits, may be amended or modified only with the written approval of the Parties. All amendments and modifications shall be fully set forth in a separate document signed by all Parties that shall be appended to this BEI.

2. Termination

- a. The Bank Sponsor and Property Owner may jointly withdraw the entire Bank Property and terminate this BEI at any time prior to any Credit Transfer, provided that Waters of the U.S. and other habitat values existing on the Bank Property prior to the initiation of any efforts to restore or enhance the Bank Property shall be preserved in a condition at least equal to that which existed prior to initiation of Bank establishment efforts, and as the Conservation Easement may require.
- b. In the event this BEI is terminated or the Bank is closed prior to the Transfer of all authorized Credits, any remaining Credits shall be extinguished and will no longer be available for Transfer.
- c. The IRT may terminate this BEI if the Bank Sponsor or Property Owner sells or conveys the Bank or the Bank Property without the prior written concurrence of the IRT, as required by Section XII.C.
- d. USEPA may terminate its participation upon 30 days' written notice to all other Parties.
- e. The USACE, CDFG, and USFWS may each terminate its participation in this BEI upon 30 days' notice to the other Parties, on the condition that each of the following has occurred:
 - 1) Bank Sponsor or Property Owner has breached one or more covenants, terms or conditions set forth herein;
 - 2) Bank Sponsor or Property Owner, as applicable, has received notice

of such breach from the terminating IRT Agency in accordance with paragraph XII.B., if applicable, and XII.K.; and

- 3) Bank Sponsor or Property Owner, as applicable, has failed to cure such breach within 30 days after such notice; provided that in the event such breach is curable in the judgment of the terminating IRT agency, but cannot reasonably be cured within such 30 day period, the terminating IRT agency shall not terminate this BEI so long as Bank Sponsor or Property Owner has commenced the cure of such breach and is diligently pursuing such cure to completion.
- f. If any member of the IRT so requests, the member(s) of the IRT proposing to terminate participation in the BEI agree to meet with the other IRT members to discuss the reason(s) for such termination, prior to the termination taking effect. Notice of a request for such meeting shall be made by the requesting IRT member(s) not later than 15 calendar days from receipt of the notice of termination.
 - g. Termination by one member of the IRT of its involvement in this BEI shall not terminate or affect the relationship between the remaining members of the IRT, toward each other or the Bank Sponsor or Property Owner, under this BEI. Remaining Credits authorized under the authority of the withdrawing agency will no longer be available for Transfer.
 - h. Nothing in this Section XII.D.2 is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to the USACE, CDFG and USFWS in the event of a threatened or actual breach of this BEI.

E. Default

The Bank Sponsor and/or Property Owner shall be in default if that Party fails to observe or perform any obligations or responsibilities required of it by this BEI. In the event the Bank Sponsor and/or Property Owner realizes it is in default, it shall promptly notify the other Parties. Once the Parties receive notification or otherwise become aware that the Bank Sponsor and/or Property Owner is in default, the Parties may elect to either pursue informal dispute resolution consistent with Section XII.B or may cause the holder to draw upon and expend the appropriate financial security as necessary to continue Bank development, management, or operation, as provided in Section VI and VIII.E. In the event the informal dispute resolution process is invoked, the IRT shall not draw upon financial securities until such time as the informal dispute resolution process has been terminated. This Section XII.E shall not be construed to modify or limit any specific right, remedy, or procedure in any Section of this BEI or any remedy available under applicable State and/or Federal Law.

F. Controlling Language

The Parties intend the provisions of this BEI and each of the documents incorporated by reference in it to be consistent with each other, and for each document to be binding in accordance with its terms. To the fullest extent possible, these documents shall be interpreted in a manner that avoids or limits any conflict between or among them. However, if and to the extent that specific language in this BEI conflicts with specific language in any document that is incorporated into this BEI by reference, the specific language within the BEI shall be controlling. The captions and headings of this BEI are for convenient reference only, and shall not define or limit any of its terms or provisions.

G. Entire Agreement

This BEI, and all exhibits, appendices, schedules and agreements referred to in this BEI, constitute the final, complete and exclusive statement of the terms of the agreement between and among the IRT and the Bank Sponsor and Property Owner pertaining to the Bank, and supersede all prior and contemporaneous discussions, negotiations, understandings or agreements of the Parties. No other agreement, statement, or promise made by the Parties, or to any employee, officer, or agent of the Parties, which is not contained in this BEI, shall be binding or valid. No alteration or variation of this instrument shall be valid or binding unless contained in a written amendment in accordance with Section XII.D.1. Each of the Parties acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any of the other Parties or anyone acting on behalf of any of the Parties unless the same has been embodied herein.

H. Reasonableness and Good Faith

Except as specifically limited elsewhere in this BEI, whenever this BEI requires Bank Sponsor, Property Owner, or the IRT to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If the Bank Sponsor, Property Owner, or the IRT disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining Party shall furnish its reasons in writing and in reasonable detail within 30 days following the request.

I. Successors and Assigns

This BEI and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns subject to the limitations on transfer set forth in this BEI.

J. Partial Invalidity

If a court of competent jurisdiction holds any term or provision of this BEI to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining terms and provisions, or portions of them, shall not be affected unless an essential purpose of this BEI would be defeated by loss of the invalid or unenforceable provision.

K. Notices

1. Any notice, demand, approval, request, or other communication permitted or required by this BEI shall be in writing and deemed given when delivered personally, sent by receipt-confirmed facsimile, or sent by recognized overnight delivery service, addressed as set forth below, or five days after deposit in the U.S. mail, postage prepaid, and addressed as set forth below.
2. Notice by any Party to any other Party shall be given to all Parties. Such notice shall not be effective until it is deemed to have been received by all Parties.
3. Addresses for purposes of giving notice are set forth below. Any Party may change its notice address by giving notice of change of address to the other Parties in the manner specified in this Section XII.K.

Bank Sponsor:

[NAME]
[ADDRESS]
Telephone:
Fax:

Property Owner:

[NAME]
[ADDRESS]
Telephone:
Fax:

IRT Members:

U.S. Army Corps of Engineers
_____ District
[DISTRICT ADDRESS]
Attn: Chief, Regulatory Branch
Telephone:
Fax:

U.S. Fish and Wildlife Service
_____ Office
[FIELD OFFICE ADDRESS]

Attn: Field Supervisor
Telephone:
Fax:

U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105
Attn: Director, Water Division
Telephone: 415-947-8707
Fax: 415-947-3549

California Department of Fish and Game
_____Region
[REGION ADDRESS]
Attn: Regional Manager
Telephone:
Fax:

California Department of Fish and Game
Habitat Conservation Branch
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Attn: Branch Chief
Telephone: 916-653-4875
Fax: 916-653-2588

L. Counterparts

This BEI may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall constitute a single executed agreement.

M. No Third Party Beneficiaries

This BEI shall not create any third party beneficiary hereto, nor shall it authorize anyone not a Party hereto to maintain any action, suit or other proceeding, including without limitation, for personal injuries, property damage or enforcement pursuant to the provisions of this BEI. The duties, obligations and responsibilities of the Parties to this BEI with respect to third parties shall remain as otherwise provided by law in the event this BEI had never been executed.

N. Availability of Funds

Implementation of this BEI by the IRT is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds. Nothing in this BEI may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the California State Treasury. No agency of the IRT is required under this BEI to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

O. No Partnerships

This BEI shall not make or be deemed to make any Party to this BEI an agent for or the partner or joint venturer of any other Party.

P. Governing Law

This BEI shall be governed by and construed in accordance with the Federal Endangered Species Act, 16 U.S.C. § 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f) *et seq.*, Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the laws of the State of California, including but not limited to the Fish and Game Code, and other applicable federal and State of California laws and regulations.

Section XIII: Execution

Each of the undersigned certifies that he or she has full authority to bind the Party that he or she represents for purposes of entering into this BEI. This BEI shall be deemed executed on the date of the last signature by the Parties.

IN WITNESS WHEREOF, the Parties have executed this BEI as follows:

Bank Sponsor

By: _____

Name: _____

Title: _____

Date: _____

Property Owner

By: _____

Name: _____

Title: _____

Date: _____

Corps of Engineers, District Engineer
_____ District
U.S. Army Corps of Engineers

Date

Field Supervisor
_____ Office
U.S. Fish and Wildlife Service

Date

Regional Manager
_____ Region
California Department of Fish and Game

Date

Director, Water Division
Region IX
U.S. Environmental Protection Agency

Date

Appendix 1 –Required Exhibits

1. **“Exhibit A” - Bank Location Maps**
 - A-1. General Vicinity Map**

This map should show the Bank location in relation to cities, towns, or major roads, and other distinguishable landmarks.
 - A-2. Map of Property including Bank Property**

This map should illustrate Property and Bank Property boundaries on a topographic map.
2. **“Exhibit B” – Service Area Map(s) and Description(s)**
 - B-1. Map(s) of the Bank’s Service Area(s)**

Include Service Area map(s) showing the area within which each type of Credit (i.e., Waters of the U.S., Covered Species or Covered Habitat) may be sold or obligated.
 - B-2. Narrative description(s) of the Bank’s Service Area(s)**

Include a detailed description of the area within which each type of Credit may be sold or obligated
3. **“Exhibit C” - Development Plan**
 - C-1. Development Plan**

This plan should include the baseline conditions of the Bank Property including biological resources, geographic location and features, topography, hydrology, vegetation, past present and adjacent land uses, verified Waters of the U.S. jurisdictional determination, species and habitats occurring on the Bank Property; a description of the activities and methodologies for creating, restoring or enhancing Waters of the U.S. or other habitat types; a map of the approved modifications, overall habitat establishment goals, objectives and Performance Standards; monitoring methodologies required to evaluate and meet the Performance Standards; an approved schedule for reporting monitoring results; a discussion of possible Remedial Actions; and any other information deemed necessary by the IRT.
 - C-2. Construction Security Analysis and Schedule**

Provide a copy of the third-party estimate or contract that is being relied upon to determine the amount of the Construction Security.
 - C-3. Performance Security Analysis and Schedule**

Specify the amount of the Performance Security based upon the amount of Construction Security in Exhibit C-2.
4. **“Exhibit D” - Bank Management and Operation Documents**

Any and all standard required forms to be used for the submission of financial

information shall be included in this **Exhibit D** in template form.

D-1. Interim Management Security Analysis and Schedule

This analysis and schedule shall consist of a table and/or spreadsheet that shows all of the tasks (management, monitoring, reporting); task descriptions; labor (hours); cost per unit; cost, frequency, timing or scheduling of the tasks; the total annual funding necessary for each task; and any associated assumptions for each task required by the Interim Management Plan. The total annual expenses should include administration and contingency costs.

D-2. Endowment Fund Analysis and Schedule

This analysis and schedule shall consist of a table and/or spreadsheet that shows all of the tasks (management, monitoring, reporting); task descriptions; labor (hours); cost per unit; cost, frequency, timing or scheduling of the tasks; the total annual funding necessary for each task; and any associated assumptions for each task required by the Long-term Management Plan. The total annual expenses should include, but are not limited to, administration, contingency, and the IRT-approved annual capitalization rate.

D-3. Instructions and Forms for Submission or Disbursement of Funds

The information and forms which shall be attached as Exhibit D-3 include:

- 1) Mitigation Account Setup Procedures;
- 2) Processing Procedures for Mitigation Payment Transmittal Forms and Mitigation Funds;
- 3) Mitigation Payment Transmittal Form;
- 4) Conservation and Mitigation Account Disbursement Procedures;
- 5) Payee Notification (information explaining the purpose of the STD 204 and instructions for submitting the STD 204);
- 6) Payee Data Record form coversheet (for sending in the completed STD 204); and
- 7) Payee Data Record form (STD 204).

D-4. Interim Management Plan

The Interim Management Plan identifies the short-term management, monitoring and reporting activities to be conducted from the time the Bank is established until the Endowment Fund has been fully funded for one year and all the Performance Standards in the Development Plan have been met.

D-5. Long-term Management Plan

The Long-term Management Plan identifies the perpetual management, monitoring and reporting activities to be conducted after the Interim Management Period, and should include at minimum:

- 1) Purpose of Bank Establishment and Purpose of Long-term Management Plan;
- 2) A baseline description of the setting, location, history and types of land use activities, geology, soils, climate, hydrology, habitats present (once Bank meets Performance Standards) and species descriptions;
- 3) Overall management, maintenance and monitoring goals; specific tasks and timing of implementation; and a discussion of any constraints which may affect goals;
- 4) The Endowment Fund Analysis and Schedule (**Exhibit D-2**);
- 5) Discussion of Adaptive Management actions for reasonably foreseeable events and possible thresholds for evaluating and implementing Adaptive Management;
- 6) Rights of access to the Bank Property and prohibited uses of the Bank Property as provided in the CE; and
- 7) Procedures for Bank Property transfer, land manager replacement, amendments, and notices.
- 8) Include a reference to the Historic Properties Treatment Plan (**Exhibit J-3**), if applicable.

D-6 Bank Closure Plan

Provide Bank closure plan.

5. **“Exhibit E” - Real Estate Records and Assurances**

The Property Owner shall provide each member of the IRT the following, with the understanding that the Bank will not be deemed established and authorized to sell Credits until the Bank Property has been protected in perpetuity by acceptance and recording of the Conservation Easement or Grant Deed and all of the other requirements for Bank establishment have beset forth in the BEI have been met:

E-1. Preliminary Title Report, Legal Description, and Parcel Map(s)

Parcel map(s) and a legal description, as well as a Preliminary Report which includes pertinent exceptions (e.g., excepted or reserved easements or rights, liens, encumbrances and other matters affecting title), of the Bank Property.

E-2. Property Assessment and Warranty

Property Assessment and Warranty utilizing the IRT template.

E-3. Plat Maps

Plat maps supporting the Property Assessment and Warranty which illustrate

the physical extent of the title exceptions and identify the locations of all structures, roads, fences, and other physical improvements.

E-4. Conservation Easement Deed or Grant Deed

The Conservation Easement or Grant Deed approved as to form by the Grantee and third-party beneficiaries.

6. **“Exhibit F” - Bank Crediting and Credit Transfers**

F-1. Credit Evaluation and Credit Table

A “Credit Evaluation” is an explanation of the evaluation undertaken to formulate the value of each type of Credit and the total number of each type of Credit. The “Credit Table” should show the number and type of Credits approved by the IRT to Transfer as mitigation or compensation for agency-approved Projects and other impacts in the Service Area(s). The table should distinguish between the following three categories of Credits: Waters of the U.S.; Covered Species and Covered Habitat Preservation; Covered Species and Covered Habitat Creation.

F-2. Credit Purchase Agreements and Payment Receipts Templates

F-3. Credit Transfer Ledger Template

Credit Transfer Ledger shall include at a minimum:

- 1) Bank name;
- 2) Total number of each type of Bank Credit;
- 3) Initial Credit purchaser name, address and phone number;
- 4) Project name;
- 5) Project applicant name, address, and phone number;
- 6) Agency project file numbers;
- 7) Date of Credit Transfer;
- 8) Type(s) of Credit(s) sold or obligated;
- 9) Number of Credits sold or obligated;
- 10) Number of Credits applied; and
- 11) Balance of each type of Credit remaining.

The Credit Transfer Ledger requirements may be amended at the discretion of the IRT when an electronic tracking database is implemented, at which time each Bank Sponsor will be notified of the new database, and instructed as to how to implement it for Credit Transfers and tracking purposes.

7. **“Exhibit G” - Phase I Environmental Site Assessment**

8. **“Exhibit H” - Biological Resources Survey**

The Biological Survey of the Bank Property shall include a general description of geographic location and features, topography, soils, vegetation (assessment of native vs. exotic species), past and present land use including grazing practices, species present and potentially present, and a quality assessment of all habitat types (i.e. life history requirements of Covered Species, habitat diversity, connectivity to other habitats and protected areas), and species presence based on the results of protocol surveys.

9. **“Exhibit I” – USACE Waters of the U.S. Verification Letter**

Bank Sponsor shall provide a copy of the verified jurisdictional delineation and the verification letter from USACE for the Bank Property.

10. **“Exhibit J” – Cultural, Historical, Archeological, and Native American Resources (“Cultural Resources”)**

J-1 Identification, Inventory and Evaluation

This inventory and evaluation shall include the following: a) a description and map of the area of potential effects (“APE”), b) a description of each cultural resource and a brief statement identifying the specific location of each cultural resource within the APE, c) a description of its surface characteristics that serves to locate the resource and its boundaries, and d) a determination of eligibility for the National Register of Historic Places, as determined by the USACE in consultation with the State Historic Preservation Officer (SHPO), and e) where appropriate, eligibility for listing under the California Register of Historical Resources.

J-2 Compliance Documentation [include as applicable]

If the USACE finds that the undertaking (i.e. project) will have no effect or no adverse effect upon cultural resources, the BEI shall include the USACE’s determination of effect and the required concurrence by the SHPO and the Advisory Council on Historic Preservation, as applicable. However, if it is determined that the undertaking will have an adverse effect or may cause a substantial adverse change in the significance of a cultural resource, the BEI is to include either an executed Programmatic Agreement or Memorandum of Agreement as documentation of compliance with Section 106 of the National Historic Preservation Act of 1966, as amended. If the undertaking will have an adverse effect or may cause a substantial adverse change in the significance of a cultural resource then, pursuant to California Code of Regulations, Title 14, § 15064.5(b), preparation of an environmental impact report is required.

J-3 Historic Properties Treatment Plan [include as applicable]

A historic properties treatment plan, approved by USACE and the SHPO, shall be prepared prior to any ground-disturbing activities conducted on the

Bank Property. Ground disturbing activities must be in accordance with the stipulations of either the Programmatic Agreement or Memorandum of Agreement (**Exhibit J-2**). The plan shall include both short and long-term management of the cultural resources eligible for the National Register of Historic Places.

11. **“Exhibit K” – Other Documentation, Permits, Amendments or Revisions**

To the extent not already obtained, the Bank Sponsor or Property Owner will be responsible for obtaining all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank, including but not limited to the following.

Include only those that apply:

- a. Department of the Army Permit;
- b. Environmental documents, findings and notices prepared or filed by Lead Agency to comply with CEQA and NEPA;
- c. Water Quality Certification or Waiver under § 401 of the Clean Water Act;
- d. Streambed Alteration Agreement (Fish and Game Code § 1600 *et seq.*);
- e. Federal Endangered Species Act (§ 7 or § 10) compliance; and
- f. California Endangered Species Act (Fish and Game Code § 2050 *et seq*) compliance.