

MITIGATION BANK ENABLING INSTRUMENT

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***Note: Do not change or remove parts of the template, including: version date, footers (except to add the Bank Name), table of contents, or Appendix (list of required exhibits).**

**California Multi-agency Project Delivery Team Bank Enabling Instrument
(Template Version Date: May 5, 2021)**

**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]: _____ District of the U.S. Army Corps of Engineers (“USACE”), Region IX of the U.S. Environmental Protection Agency (“USEPA”), U.S. Fish and Wildlife Service (“USFWS”), National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NMFS”), State Water Resources Control Board (“State Water Board”), California Regional Water Quality Control Board, Region _____ (“Regional Water Board”), and California Department of Fish and Wildlife (“CDFW”). [Choose one: These agencies comprise and are referred to jointly as the Interagency Review Team (“IRT”) *or in the event some IRT agencies are not a party, use:* These agencies comprise and are referred to jointly as the “Signatory Agencies” or individually “Signatory Agency”. The Bank Sponsor, Property Owner, and the [Choose one: IRT *or* Signatory Agencies (*Signatory Agencies should be used when not all IRT members are signing the BEI. Choosing Signatory Agencies triggers the need to select Signatory Agencies in all other parts of the BEI, where the choice is presented.*)] 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, operating, and maintaining the Bank according to this BEI.
- 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 to and made a part of this BEI.

- C. 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 Real Estate Records and Assurances (**Exhibit E**) attached to and made a part of this BEI. The Bank Property is to be conserved and managed in perpetuity as provided in Section V and VIII.
- D. [*Remove if CDFW is not a party*] CDFW 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 and other provisions of California law.
- 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 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.* and USACE has jurisdiction over navigable waters of the United States pursuant to the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, *et seq.* Waters of the U.S. is defined in Section II.
- G. [*Remove if State or Regional Water Board is not a party*] State Water Board and _____ Regional Water Board, within their respective areas of jurisdiction, are responsible for protecting and regulating the quality of Waters of the State, as defined in Section II, under the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 *et seq.*, and regulating the discharge of pollutants into the Waters of the U.S. under the Clean Water Act, 33 U.S.C. §1251 *et seq.*
- H. [*Remove if NMFS is not a party*] NMFS has jurisdiction over the conservation, protection, restoration and management of certain living marine resources and the habitat necessary for biologically sustainable populations of these resources within the United States pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, the Magnuson-Stevens Fishery Conservation and Management Act, as amended, 16 U.S.C. § 1801, *et seq.*, and the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. § 1361, *et seq.*, and other provisions of Federal law.
- I. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Bank. [*If not all the IRT agencies sign the BEI add the following two sentences*: The IRT is comprised of the Signatory Agencies

and [list the non-signatory IRT agencies]. The non-signatory IRT agencies advise the Signatory Agencies in assessing monitoring reports, Development and Interim Management Plan implementation, recommending remedial actions or adaptive management measures, approving credit releases, and approving modifications to the BEI, and may raise concerns with the use of Credits.]

- J. The goals and objectives for the Bank are set forth in the Development and Interim Management Plan (**Exhibit C**) and the Bank Management and Operation Documents (**Exhibit D**) attached to and made a part of this BEI.
- K. Initially-capitalized terms used and not defined elsewhere in this BEI are defined in Section II.

AGREEMENT

NOW, THEREFORE, the Parties 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. The purpose of the Bank is to compensate for unavoidable impacts to, and conserve and protect, [delete as applicable] Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat. The Bank Sponsor [if different from Bank Sponsor, add: and Property Owner] shall preserve, restore, establish, and/or enhance and then manage and maintain Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat in accordance with this BEI, the Development and 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 subject to one or more of the following statutes, regulations, policies, and guidelines:

1. Federal [delete those that do not apply]
 - a. Clean Water Act (33 U.S.C. § 1251, *et seq.*)
 - b. Rivers and Harbors Act (33 U.S.C. § 401, *et seq.*)
 - c. National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*)
 - d. Endangered Species Act (16 U.S.C. § 1531, *et seq.*)
 - e. Fish and Wildlife Coordination Act (16 U.S.C. § 661, *et seq.*)
 - f. Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801, *et seq.*)
 - g. National Historic Preservation Act (54 U.S.C. § 300101, *et seq.*)
 - h. Regulatory Program of the U.S. Army Corps of Engineers (33 C.F.R. Parts 320-332)

- i. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 C.F.R. Part 230)
 - j. Executive Order 11990 - Protection of Wetlands
 - k. Executive Order 11988 - Floodplain Management
 - l. Memorandum of Agreement between the U.S. 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), as amended
 - m. Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003)
2. State [~~delete those that do not apply~~]
- 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 (Fish and Game Code § 2050, *et seq.*)
 - c. California Natural Community Conservation Planning Act (Fish and Game Code § 2800, *et seq.*)
 - d. California State Office of Historical Preservation (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. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly

- h. Porter-Cologne Water Quality Control Act (Water Code § 13000, *et seq.*)
- i. Conservation Bank and Mitigation Bank Applications and Fees (Fish and Game Code § 1797, *et seq.*)
- j. California Government Code, Title 7, Division 1, Chapter 4.6, §§ 65965-65968
- k. California Fish and Game Code, Division 2, Chapter 1, Article 1, § 713
- l. California Probate Code, Division 9, Part 7, §§ 18501-18510

Section II: Definitions

The initially-capitalized terms used and not defined elsewhere in this BEI are defined, for the purposes of this BEI, as set forth below.

“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.

“Bank Establishment Date” is the date determined pursuant to Section V.

“Conservation Easement” [Remove if Grant Deed] means a perpetual conservation easement, as defined by California Civil Code § 815.1, in the form of **Exhibit E-3** attached to and made a part of this BEI.

“Construction Phase,” means a phase of the Bank in which all components required by 33 C.F.R. § 332.4(c) are fully developed, beyond concept, and included within the exhibits of the BEI, but is implemented in stages over time. Implementation of a Construction Phase does not require an amendment of the BEI.

“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 establish, restore or enhance Waters of the U.S., Waters of the State, and Covered Habitat on the Bank Property in accordance with the Development and Interim Management Plan.

“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** attached to and made a part of this BEI.

“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**.

“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**.

“Credit Release” means an action by the agency with authority to make specified Credits available for Sale and/or Transfer pursuant to this BEI, as set forth in Section VII.

“Development and Interim Management Plan” means the document attached as **Exhibit C-1** that is the overall plan governing construction and habitat establishment, restoration and enhancement activities, Performance Standards, and Interim Management required to be conducted on the Bank Property to establish Credits.

“Endowment Agreement” means the document attached as **Exhibit D-2** [which may serve as a mitigation agreement pursuant to California Government Code § 65965(f)(1)], which establishes the terms and conditions pursuant to which the Endowment Holder will accept custody of and manage the Endowment Fund.

“Endowment Amount” is the amount Section VI.E requires the Bank Sponsor to provide as Endowment Deposits to the Endowment Holder to fund the Endowment Fund. The Endowment Amount is determined in **Exhibit D-1**.

“Endowment Deposit” is the deposit or series of deposits made or required to be made by the Bank Sponsor to the Endowment Holder to fund the Endowment Fund. Endowment Deposits received by the Endowment Holder shall be deposited into the Endowment Fund.

“Endowment Fund” is a financial account, held in trust for the benefit of the long-term stewardship of the Bank Property. The Endowment Fund is intended to be maintained and managed in perpetuity in accordance with Government Code §§ 65965-69568, Probate Code §§18501-18510, the BEI, and the Endowment Agreement. The Endowment Fund is intended to be invested in accordance with an investment policy statement that is designed to generate earnings and appreciation in value over the long-term. The Endowment Fund is to be used in funding perpetual management, maintenance, monitoring, and reporting pursuant to the Long-term Management Plan. The term “Endowment Fund” as used in this

BEI shall include the Endowment Deposits and all interest, dividends, gains, other earnings, additions and appreciation thereon, as well as any additions thereto.

“Endowment Holder” means an entity qualified to hold the Endowment Fund pursuant to Government Code §§ 65965-65968 and is otherwise approved by the IRT.

“Extraordinary Circumstances” shall mean an event or circumstance that has a material and detrimental impact on the Bank Property or on the ability of Bank Sponsor to attain Performance Standards and: (1) was neither foreseen nor foreseeable by the Bank Sponsor, Property Owner, or IRT; and (2) neither Bank Sponsor nor Property Owner (or anyone acting on behalf or under the control of either of them) caused or could have prevented; and (3) prevents Bank Sponsor or Property Owner from achieving an objective or undertaking an action required of it under this BEI. Extraordinary Circumstances excludes mere economic hardship.

“Grant Deed” [**Remove if Conservation Easement**] means a deed conveying fee title to the Bank Property in the form of **Exhibit E-3**.

“Grantee” means the entity authorized to hold the Conservation Easement pursuant to California Civil Code §815.3 and Government Code §§ 65966 and 65967 and is otherwise approved by the [**Choose one**: IRT or Signatory Agencies].

“Habitat Establishment” means the manipulation of the physical, chemical, or biological characteristics present on the Bank Property to develop an aquatic or terrestrial habitat resource for Covered Species. Habitat Establishment will result in a gain in resource area and/or function.

“Habitat Conservation Plan (HCP)” means an HCP prepared pursuant to § 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)).

“Implementation Fee” is the fee that Fish and Game Code § 1799(e)(2) requires CDFW to collect to pay for all or a portion of banking program costs as specified in **Exhibit F-6**.

“Interim Management Period” means the period from the Bank Establishment Date until Performance Standards have been met and the third anniversary of the full funding of the Endowment Amount has occurred.

“Interim Management” means the management, monitoring, Adaptive Management, reporting and other activities to be implemented by the Bank Sponsor during the Interim Management Period.

“Interim Management Security” is the financial assurance specified in Section VI.C and **Exhibit C-4**, to be provided by the Bank Sponsor to guarantee the implementation of the Interim Management described in the Development and

Interim Management Plan, and to guarantee all Remedial Action(s) required under Section VIII.F or Section XII.A are completed during the Interim Management Period.

“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.

“Long-term Management Plan” means the document attached as **Exhibit D-3** that provides measures intended to ensure the Bank Property is managed, monitored, and maintained in perpetuity to conserve and protect its Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat.

“Natural Community Conservation Plan (NCCP)” means an NCCP created pursuant to Fish and Game Code § 2800, *et seq.*

“Performance Security” means the financial assurance specified in Section VI.B and **Exhibit C-3**, to be provided by the Bank Sponsor to guarantee the Bank Sponsor’s obligations under this BEI through Bank closure.

“Performance Standards” means the minimum standards set forth to define the successful development of Waters of the U.S., Waters of the State, Covered Habitat, and Covered Species Credits.

“Permittee” means a person or entity seeking a Transfer.

“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 E1527-013 “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.

“Preservation” means the protection of existing ecologically important wildlife, habitat, or other ecosystem resources in perpetuity. This term applies to Covered Species and Covered Habitat.

“Property Assessment and Warranty” means the written property evaluation and assurance signed by the Property Owner and attached as **Exhibit E-1**.

“Property Owner” means the owner(s) of fee simple title to the Bank Property and grantor of the Conservation Easement.

“Remedial Action” means any measures needed to remedy any failure to achieve the Performance Standards or any injury or adverse impact to the Bank Property.

“Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS)” is a web-based application that provides information to the IRT, Bank Sponsors, agencies, and the general public on mitigation banks and in-lieu fee (ILF) programs, associated documents, credit availability, service areas, and information on policies and procedures that affect mitigation bank and ILF development and operation.

“Sale” means the sale of Credits by the Bank Sponsor. A Sale without a Transfer does not confer legal responsibility for providing compensatory mitigation to the Bank Sponsor.

“Service Area” means the geographic area(s) within which impacts to Waters of the U.S., Waters of the State, Covered Species, or Covered Habitat that occur may be mitigated or compensated at the Bank.

“Sub-Ledger” means an entry under an individual ledger transaction created at the time of the first Transfer of Credits sold as a Sale without a Transfer of Credits that tracks the use of those Credits, including the time of Transfer and associated permit(s), authorizations, and/or approvals.

“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.

“Subsequent Phase” means a phase of a bank that is either planned conceptually or added after the Bank Establishment Date and for which complete components required by 33 C.F.R. § 332.4(c) are not included in the exhibits and approved as part of the BEI. Subsequent Phases are added through an amendment of the BEI or developed as a new bank, as determined by the IRT.

“Transfer” means the use or application of Credits to mitigate for a particular project’s impacts.

“Waters of the State” means any surface water or groundwater, including saline waters, within the boundaries of the State of California. Waters of the State Credits are identified in **Exhibit F-1** attached to and made a part of this BEI.

“Waters of the U.S.” means all waters and wetlands over which the USACE and/or the USEPA are granted jurisdiction in the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Rivers and Harbor Act of 1899, 33 U.S.C. § 401, *et seq.* This

definition encompasses both the term “waters of the United States” as defined in 33 C.F.R. Part 328 and “navigable waters of the United States” as defined in 33 C.F.R. Part 329. Waters of the U.S. Credits are identified in **Exhibit F-1** attached to and made a part of this BEI.

Section III: Stipulations

A. Baseline Condition

The current condition of the Bank Property is described in the Development and Interim Management Plan (**Exhibit C-1**) and the Biological Resources Survey (**Exhibit H**) attached to and made a part of this BEI.

B. Disclaimer

This BEI does not in any manner limit the legal authorities or responsibilities of the IRT, or of any IRT agency.

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 of Property including Bank Property

A-3 Map of Conserved Areas in Bank Property Vicinity [if applicable]

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) and basis of the Bank’s Service Area(s)

3. **“Exhibit C”** - Development and Interim Management Plan

C-1 Development and Interim Management Plan

C-2 Construction Security Analysis and Schedule

C-3 Performance Security Analysis and Schedule

C-4 Interim Management Security Analysis and Schedule

4. **“Exhibit D”** - Bank Management and Operation Documents

D-1 Endowment Fund Analysis and Schedule

D-2 Agreements, Instructions, and Forms for Submission or Disbursement of Endowment Funds

D-3 Long-term Management Plan

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

E-1 Property Assessment and Warranty

E-2 Real Estate Instrument

E-3 Mineral Remoteness Opinion

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

F-1 Credit Evaluation and Credit Table

F-2 Credit Sales and Transfer Agreements and Payment Receipt Templates

F-2a: Credit Sales Agreement

F-2b: California Department of Transportation (Caltrans) Standard (STD) 213/Credit Sales Agreement

F-2c: Combined Credit Sale and Transfer Agreement

F-2d: Caltrans Combined Credit Sale and Transfer Agreement

F-2e: Credit Transfer Agreement

F-2f: Caltrans STD 213/Credit Transfer Agreement

F-3 Credit Transfer Ledger Template

F-4 Instructions for Species Credits Transfers Using RIBITS [if applicable]

F-5 Credit Release Schedule and Funding Schedule for Covered Species and Covered Habitats

F-6 Implementation Fee Schedule [if applicable]

7. **“Exhibit G”** - Phase I Environmental Site Assessment
8. **“Exhibit H”** - Biological Resources Survey
9. **“Exhibit I”** - Aquatic Resource Delineation [if applicable]
10. **“Exhibit J” – Non-confidential** Cultural, Historical, Archaeological, and Native American Resources (“Cultural Resources”).
 - J-1 Identification, Inventory, and Evaluation
 - J-2 Compliance Documentation [if applicable]
 - J-3 Historic Properties Treatment Plan (HPTP) [if applicable]
11. **“Exhibit K”** - Other Documentation, Permits, Amendments, or Revisions

Section IV: Bank Evaluation and Development

A. Bank Site Assessment by the [Choose one: IRT or Signatory Agencies]

Representatives of the [Choose one: IRT or Signatory Agencies] have inspected the Bank Property and evaluated the Bank Sponsor’s proposed development of Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat in the Development and Interim Management Plan (**Exhibit C-1**) 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, enhance, restore, monitor, and maintain the Waters of the U.S., Waters of the State, Covered Species and Covered Habitat, as described in the Development and Interim Management Plan (**Exhibit C-1**), on the Bank Property until the Bank Sponsor has demonstrated to the satisfaction of the [Choose one: IRT or Signatory Agencies] that the Bank complies in all respects with all requirements of this BEI.

C. Phase I Environmental Site Assessment

[Choose one: Bank Sponsor or Property Owner] has provided a current Phase I Environmental Site Assessment of the Property (**Exhibit G**). If the Phase I Environmental Site Assessment identifies any recognized environmental conditions, as defined in the American Society of Testing and Materials (ASTM) Standard E1527-13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” or any successor to such ASTM Standard, in place at the time of execution of instrument, the Property Owner represents and warrants to the [Choose one: IRT or Signatory Agencies] that all appropriate assessment, clean-up, remedial or removal action has been completed and the Property Owner has provided an updated Phase I Environmental Site Assessment to the [Choose one: IRT or Signatory Agencies] that concludes no recognized environmental conditions are present on the Property.

D. Approvals

The Bank Sponsor will obtain all permits, authorizations and other approvals necessary or appropriate to construct, operate, and maintain the Bank, including those of any IRT agency. This BEI does not constitute or substitute for any such approval.

E. Phases

1. Subsequent Phases. Establishment of each Subsequent Phase is subject to approval by the [Choose one: IRT or Signatory Agencies]. The Bank Sponsor may propose a Subsequent Phase by submitting a written request to the [Choose one: IRT or Signatory Agencies, with a courtesy copy to the IRT]. Subsequent Phases will need to comply with requirements in effect on the date of submission of the complete documentation for the proposed Subsequent Phase. Any Subsequent Phase will be considered as either an amendment of the BEI or a new bank, as determined by the [Choose one: IRT or Signatory Agencies, in coordination with the IRT]. Approval of this BEI does not obligate any [Choose one: IRT or Signatory Agencies] to approve any Subsequent Phase.
2. [Remove paragraph if not applicable] Construction Phases. The Bank Sponsor will establish the Bank in [Insert number of phases] Construction Phases. Each Construction Phase is presented in full in this BEI and within its Exhibits. [If each phase is independent: Each Construction Phase is independent and can be constructed alone or in conjunction with other Construction Phases and can be constructed in any sequence][If one or more phases is dependent on another: The

Construction Phases must be constructed in the sequence specified in the Development and Interim Management Plan (**Exhibit C-1**). Implementation of the Development and Interim Management Plan must be initiated no later than the first full growing season after the date of the first Credit Transfer associated with that Construction Phase. All Construction Phases must be completed within 10 years of the date of this BEI.

[Remove paragraph if not applicable] The Bank Sponsor shall notify the IRT 30 calendar days before beginning and within 30 calendar days after completing any Construction Phase.

If any Construction Phase has not begun after 10 years, from when it was first approved by the [Choose one: IRT or Signatory Agencies] (either in this BEI or in a written amendment to it), the Bank Sponsor must, prior to proceeding with any such Construction Phase, demonstrate that site conditions affecting the feasibility of constructing the Bank as designed have not changed and obtain written concurrence from of the [Choose one: IRT or Signatory Agencies] . The [Choose one: IRT or Signatory Agencies] may require additional review of any such Construction Phase, or that it is evaluated as a Subsequent Phase.

F. Modification of the Development and Interim Management Plan

In the event that the Bank Sponsor and/or the [Choose one: IRT or Signatory Agencies] determine that modifications must be made to the Development and Interim Management Plan (**Exhibit C-1**), the Parties [add with "invitation to IRT" if not all IRT members are signatory] shall meet to discuss the modifications, and the Bank Sponsor shall submit a written request for approval of such modifications to the [Choose one: IRT or Signatory Agencies, with courtesy copy to the IRT] within 60 calendar days of the meeting. Upon agreement of the Parties, the Bank Sponsor shall then implement all approved modifications. Modification of the Development and Interim Management Plan may constitute an amendment. If the [Choose one: IRT or Signatory Agencies] elects to authorize modifications to the Development and Interim Management Plan, such authorization may be conditioned upon, among other things, a change in the number of Credits available for release. The Bank Sponsor shall revise the Credit Table in Exhibit F-1 as directed by [Choose one: IRT or Signatory Agencies] to reflect any change in the available Credits. The schedule for funding the Endowment Amount shall be amended to reflect the revised Credit Table (**Exhibit F-1**).

G. Property Assessment and Warranty

The Property Owner is responsible to ensure the Property Assessment and Warranty (**Exhibit E-2**) is true, complete, and correct as of the date of this BEI. Should the Property Owner become aware of any errors or omissions in the Property Assessment and Warranty after the date of this BEI, the Property Owner shall notify the IRT agencies in writing within 30 days of discovery. The [Choose one: IRT or Signatory Agencies] shall evaluate any impacts of the errors or omissions on the Bank, Bank Property and the Grantee's interest in the Conservation Easement or the Bank Property and the [Choose one: IRT or Signatory Agencies] may find default pursuant to Section XII.E in such circumstances.

Section V: Bank Establishment Date

The Bank Establishment Date is the date when the [Choose one: IRT or Signatory Agencies] has received documentation confirming that all of the following actions have occurred:

- A. The BEI has been fully executed by all of the Parties;
- B. The Conservation Easement has been (1) accepted by a Grantee that has been approved by the [Choose one: IRT or Signatory Agencies] and (2) recorded in the Official Records of the county in which the Bank Property is located; [Or, if fee title to the State, substitute: The Grant Deed to the State of California has been (1) accepted on behalf of the State by CDFW (as evidenced by a duly executed Certificate of Acceptance) and (2) recorded in the Official Records of the county in which the Bank Property is located];
- C. The Bank Sponsor has complied with its obligation to furnish financial assurances in accordance with Section VI;
- D. Any applicable Subordination Agreement(s) is executed and recorded; and
- E. Receipt of Title Insurance to the [Choose one: IRT or Signatory Agencies] upon recordation of the [Choose one: Conservation Easement or Grant Deed].

Section VI: FUNDING

A. 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.

The financial assurances shall be held in accordance with Section VIII.E, held by [choose one: CDFW or USACE or when approved by the [Choose one: IRT or Signatory Agencies], a qualified third-party (*Choosing a qualified third-party triggers the need for conforming changes to other parts of the BEI, in particular VIII.E, Financial Operations*)]. The Bank Sponsor shall provide written confirmation from the holder of each financial assurance, as applicable, that the requirement to provide financial assurances was completed to the [Choose one: IRT or Signatory Agencies] in accordance with Section XII.K upon furnishing each of the following financial assurances:

1. Construction Security

Prior to the first Credit Release, the Bank Sponsor shall furnish a Construction Security in the amount of a reasonable third-party estimate or contract to establish, restore, or enhance Waters of the U.S., Waters of the State, and Covered Habitat in accordance with the Development and Interim Management Plan in the amount specified in **Exhibit C-2**. The Construction Security shall be in the form of [Choose one: an irrevocable standby letter of credit, check, or a cashier's check (*check or cashier's check may only be used if CDFW is holding the security*)]. The Bank Sponsor shall ensure the Construction Security shall remain available in the full amount, until cancelled, in accordance with Section VIII.E.1.a. If all construction and planting activities are completed in accordance with the Development and Interim Management Plan prior to the Bank Establishment Date, then a construction security is not required.

2. Performance Security

Concurrent with the Sale of the first Credit, Bank Sponsor shall furnish the Performance Security in the amount of 20% of the Construction Security in the amount specified in **Exhibit C-3**. This security guarantees the Bank Sponsor's obligations under this BEI through Bank closure. The Performance Security shall be in the form of [Choose one: an irrevocable standby letter of credit, check or a cashier's check (*check or cashier's check may only be used if CDFW is holding the security*)]. The Bank Sponsor shall ensure the Performance Security shall remain available in the full amount, until cancelled, in accordance with Section VIII.E.1.b.

3. Interim Management Security

Concurrent with the Sale of the first Credit, Bank Sponsor shall furnish the Interim Management Security in the amount specified in **Exhibit C-4**. The amount of the Interim Management Security shall be equal to the

estimated cost to implement the Interim Management during three years of the Interim Management Period, as set forth in the Interim Management Security Analysis and Schedule (**Exhibit C-4**). The Interim Management Security shall be in the form of [**Choose one**: an irrevocable standby letter of credit, check **or** a cashier's check (*check or cashier's check may only be used if CDFW is holding the security*)]. The Bank Sponsor shall ensure the Interim Management Security shall remain available in the full amount, until cancelled, in accordance with Section VIII.E.1.c.

4. Letters of Credit

Letters of credit, when selected, shall be submitted to and approved by the [**Choose one**: IRT **or** Signatory Agencies] before they satisfy any financial assurance requirement. The [**CDFW or USACE**] shall be the beneficiary of the letter of credit. 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 calendar days before the current expiration date Bank Sponsor and the [**CDFW or USACE**] 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 remain available for 120 calendar days after the date Bank Sponsor and the [**CDFW or USACE**] have received such notice. If the issuer elects to not extend the expiration date of any letter of credit, Bank Sponsor shall provide the [**CDFW or USACE**] with replacement security in the form of [**choose one**: a letter of credit, check **or** cashier's check (*check or cashier's check may only be used if CDFW is holding the security*)], as determined by the [**CDFW or USACE**] within 60 calendar days after receiving notice of the issuer's decision not to extend the expiration date. If Bank Sponsor does not provide such replacement security on or before the expiration of the 60-day period, then the [**CDFW or USACE**] shall have the right to immediately draw upon the letter of credit for which the replacement security was required.

B. Endowment Fund

The Bank Sponsor shall provide to the [**Choose one**: IRT **or** Signatory Agencies] written notification from the Endowment Holder confirming the Endowment Fund has been established.

1. The Endowment Fund shall be held by the Endowment Holder, 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 (**Exhibit D-3**) and the Endowment Fund Analysis and

Schedule (**Exhibit D-1**). The Bank Sponsor shall fully fund the Endowment Amount through Endowment Deposits according to the schedule below. The Endowment Amount shall be 100% funded by the 10th anniversary of the first Credit Release.

- a. Funding schedule for Waters of the U.S. and Waters of the State Credit Releases will be as follows:
 - i. No Endowment Funding is required prior to (a) the first Waters of the U.S. Credit Release; or (b) the first Waters of the State Credit Release;
 - ii. A minimum of 30% of the Endowment Amount shall be funded, through Endowment Deposit(s), prior to the earliest of: (a) the second Waters of the U.S. Credit Release; or (b) the second Waters of the State Credit Release;
 - iii. A minimum of 55% of the Endowment Amount shall be funded, through Endowment Deposit(s), prior to the earliest of: (a) the third Waters of the U.S. Credit Release; or (b) the third Waters of the State Credit Release;
 - iv. A minimum of 70% of the Endowment Amount shall be funded, through Endowment Deposit(s), prior to the earliest of: (a) the fourth Waters of the U.S. Credit Release; or (b) the fourth Waters of the State Credit Release;
 - v. 100% of the Endowment Amount shall be funded, through Endowment Deposit(s), prior to the earliest of: (a) the fifth Waters of the U.S. Credit Release; or (b) the fifth Waters of the State Credit Release.
- b. Funding schedule for Covered Species and Covered Habitat Preservation Credit Releases will be as follows:
 - i. The percentage of the Endowment Amount funded through Endowment Deposits shall be equal to or greater than the percentage of Covered Species and Covered Habitat Preservation Credits Released (See Section VII.C).

- c. Funding schedule for Covered Species and Covered Habitat Establishment Credit Releases (See Section VII.C.3) will be as follows:
 - i. No Endowment Funding is required prior to the first Covered Species and Covered Habitat Establishment Credit Release;
 - ii. Prior to the third Credit Release of Covered Species and Covered Habitat Credits, the percentage of the Endowment Amount funded through Endowment Deposits shall be equal to or greater than the percentage of Covered Species and Covered Habitat Credit Release.
 - iii. 100% of the Endowment Amount shall be funded through Endowment Deposits prior to the Credit Release of 85% (cumulative) of Covered Species and Covered Habitat Credits.
2. Each year in which the Endowment Amount is not 100% funded, the Bank Sponsor shall adjust (increase, not decrease) the total Endowment Amount to keep pace with inflation. The Bank Sponsor shall calculate inflation based upon the changes in the Annual Consumer Price Index (CPI) for California, all Urban Consumers, All Items (“Index”), published by the California Department of Industrial Relations (“DIR”), Division of Labor Statistics and Research (<http://www.dir.ca.gov/OPRL/CAPriceIndex.htm>) and shall adjust the Endowment Amount proportionally with the inflation rate. The Bank Sponsor shall measure inflation by calculating the percent change between the CPI value published in the BEI execution year and the CPI value published for the adjustment year. The Bank Sponsor shall multiply the inflation rate by the Endowment Amount in **Exhibit D-1**. The product will be the increase in the Endowment Amount. If deflation occurs (CPI is less than the previous year), then the Bank Sponsor shall not adjust the Endowment Amount until the Annual CPI exceeds the value from the most recent inflation year.
3. Bank Sponsor shall provide to the [**Choose one**: IRT **or** Signatory Agencies] an electronic copy of the receipt for each Endowment Deposit and upload to RIBITS within 30 calendar days of such deposit.

Section VII: Credit Release

A. Waters of the U.S. Credit Release

Upon receipt of Bank Sponsor’s written request and accompanying documentation of compliance with all applicable requirements set forth in this Section, the USACE may release for Sale and/or Transfer Waters of

the U.S. Credits (**Exhibit F-1**), as described below. Early achievement of Performance Standards will not accelerate Credit Releases. The actual number of Credits released shall be determined in writing by the USACE, in consultation with the IRT, based upon as-built conditions of the Bank Property, extent of Waters of the U.S. delineated on the Bank Property, attainment of the Performance Standards, funding of the Endowment Fund in accordance with Section VI.E, and compliance with requirements of this BEI and any associated authorization. Upon each Credit Release, USACE shall enter the number of Credits released into RIBITS. The applicable Credit Release shall occur prior to any Credit Sale. Credits may be released as follows:

a. Credit Release 1.

- i. 15% of the total anticipated Waters of the U.S Credits upon the Bank Establishment Date.

No Endowment Funding is required prior to the first Waters of the U.S. Credit Release.

b. Credit Release 2. Up to an additional 25% of the total anticipated Waters of the U.S. Credits (40% cumulative total) when all of the following have occurred:

- i. The Bank Sponsor has submitted as-built drawings to the IRT pursuant to Section VII.A.2.
- ii. The USACE has approved the as-built condition in writing.
- iii. If applicable, the Bank Sponsor shall submit an adjusted Credit Evaluation and Credit Table (updated **Exhibit F-1**) and Credit Transfer ledger (updated **Exhibit F-3**), reflecting as-built conditions.
- iv. The Bank Sponsor has funded a minimum of 30% of the Endowment Amount per Section VI.B.1.a.ii.
- v. Credit Release 1 has occurred.

- c. Credit Release 3. Up to an additional 15% of the total anticipated Waters of the U.S Credits (55% cumulative total) when all of the following have occurred:
 - i. The Bank Sponsor has submitted the annual report (Section IX.B).
 - ii. Year 2 Performance Standards have been attained, as required by the Development and Interim Management Plan.
 - iii. The Bank Sponsor has funded a minimum of 55% of the Endowment Amount per Section VI.B.1.a.iii.
 - iv. Credit Release 2 has occurred.
 - v. A minimum of two years of monitoring have been conducted since all requirements for Credit Release 2 have been met.
- d. Credit Release 4. Up to an additional 15% of the total anticipated Waters of the U.S Credits (70% cumulative total) when all of the following have occurred:
 - i. The Bank Sponsor has submitted the annual report (Section IX.B).
 - ii. Year 3 Performance Standards have been attained.
 - iii. The Bank Sponsor has funded a minimum of 70% of the Endowment Amount per Section VI.B.1.a.iv.
 - iv. Credit Release 3 has occurred.
 - v. A minimum of one year of monitoring has been conducted since all requirements for Credit Release 3 have been met.
- e. Credit Release 5. Up to an additional 15% of the total anticipated Waters of the U.S Credits (85% cumulative total) when all of the following have occurred:
 - i. The Bank Sponsor has submitted the annual report (Section IX.B).
 - ii. Year 4 Performance Standards have been attained.

- iii. The Sponsor has submitted a delineation of aquatic resources on the Bank Property.
 - iv. The Bank Sponsor has funded 100% of the Endowment Amount per Section VI.B.1.a.v.
 - v. Credit Release 4 has occurred.
 - vi. A minimum of one year of monitoring has been conducted since all requirements for Credit Release 4 have been met.
- f. Final Credit Release. Any remaining balance of Waters of the U.S Credits (100% cumulative total) when all of the following have occurred:
- i. The Bank Sponsor has submitted the annual report (Section IX.B), including the final Monitoring Report as required by the Development and Interim Management Plan.
 - ii. Final Performance Standards have been attained.
 - iii. Any required Remedial Actions are completed.
 - iv. Any additional Performance Standards required as a result of required Remedial Actions have been attained.
 - v. Credit Release 5 has occurred.
 - vi. A minimum of one year of monitoring has been conducted since all requirements for Credit Release 5 have been met.
1. The Bank Sponsor shall submit as-built drawings of the Bank Property, with accurate maps of the established, enhanced, and/or restored Waters of the U.S. to the IRT no later than 90 calendar days following completion of construction associated with the establishment, restoration, and/or enhancement of the Waters of the U.S. on the Bank Property. The as-built drawings shall consist of full size construction plans, with as-built conditions clearly shown. The as-built drawings and any attachments must describe in detail any deviation from the Development and Interim Management Plan.
 2. Each Waters of the U.S. Credit Release, with the exception of Credit Release 1 and Credit Release 2, 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 inspection at the

appropriate time of year, as determined by the [Choose one: IRT or Signatory Agencies].

B. Waters of the State Credit Release [if applicable]

The State Water Board or Regional Water Board may provide Credit Releases for Waters of the State pursuant to the procedures set forth in Section VII.A. For purposes of this Section, any reference in Section VII.A to “Waters of the U.S.” and “USACE” shall constitute a reference to “Waters of the State” and “State Water Board or Regional Water Board,” respectively.

C. Covered Species and Covered Habitat Credit Release

1. Upon receipt of Bank Sponsor’s written request and accompanying documentation of compliance with all applicable requirements set forth in this Section, the [Choose applicable agencies: CDFW, NMFS or USFWS] may release for Sale and/or Transfer Covered Species and Covered Habitat Credits (**Exhibit F-1**), as described below. Early achievement of Performance Standards will not accelerate Credit Releases. The actual number of Credits Released shall be determined in writing by the [Choose one: IRT agency or Signatory Agencies] with jurisdiction over the Credits, in consultation with the IRT, based upon existing and as-built conditions of the Bank Property, extent of appropriate habitat preserved or established, attainment of the Performance Standards, funding of the Endowment Fund in accordance with Section VI.E, and compliance with requirements of this BEI and any associated authorization. Upon each Credit Release, the [Choose one: IRT agency or Signatory Agency] shall enter the number of Credits released into RIBITS. The applicable Credit Release shall occur prior to any Credit Sale.
2. Preservation Credits for Covered Species and Covered Habitat are described in the Credit Table (**Exhibit F-1**) and may be released as described below. If the maximum percentage of released credits is not authorized at the time of each numbered Credit Release below, subsequent Credit Releases may be authorized.
 - a. Preservation Credit Release 1. 15% of the total anticipated Preservation Credits when all of the following have occurred:
 - i. Upon Bank Establishment Date.
 - ii. A minimum of 15% of the Endowment Amount is funded according to Section VI.B and Exhibit F-5.

- iii. The Bank Sponsor demonstrates, to the satisfaction of the [Choose one: IRT agency or Signatory Agency] in whose jurisdiction the Credit resides, that any associated Performance Standards have been met, and that the habitat values have been maintained, as required by the BEI and its exhibits.
- b. Preservation Credit Release 2. Up to an additional 15% (30% cumulative total) of the total anticipated Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded a minimum of 30% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the [Choose one: IRT agency or Signatory Agency] with jurisdiction over the Credits, that all associated Performance Standards have been met, and that the habitat values have been maintained, as required by the BEI and its exhibits.
 - iii. Credit Release 1 has occurred.
- c. Preservation Credit Release 3. Up to an additional 25% (55% cumulative total) of the total anticipated Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded a minimum of 55% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the [Choose one: IRT agency or Signatory Agency] with jurisdiction over the Credits, that all, associated Performance Standards have been met, and that the habitat values have been maintained, as required by the BEI and its exhibits.
 - iii. Credit Release 2 has occurred.
- d. Preservation Credit Release 4. Up to an additional 15% (70% cumulative total) of the total anticipated Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded a minimum of 70% of the Endowment Amount per Section VI.B and **Exhibit F-5**.

- ii. The Bank Sponsor demonstrates, to the satisfaction of the [Choose one: IRT agency or Signatory Agency] with jurisdiction over the Credits, that all, associated Performance Standards have been met, and that the habitat values have been maintained, as required by the BEI and its exhibits.
 - iii. Credit Release 3 has occurred.
 - e. Final Preservation Credit Release: Any remaining balance of Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded 100% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the [Choose one: IRT agency or Signatory Agency] with jurisdiction over the Credits, that all, associated Performance Standards have been met, and that the habitat values have been maintained, as required by the BEI and its exhibits.
 - iii. Credit Release 4 has occurred.
- 3. Establishment Credits for Covered Species and Covered Habitat described in the Credit Table (**Exhibit F-1**) for each Covered Species and/or Covered Habitat may be released as follows. If the maximum percentage of released Credits is not authorized at the time of each numbered Credit Release below, subsequent Credit Releases may be authorized.
 - a. Establishment Credit Release 1. 15% of the total anticipated Establishment Credits when all of the following have occurred:
 - i. Upon Bank Establishment Date.
 - ii. No Endowment Funding is required prior to the first Covered Species and Covered Habitat Credit Release.
 - iii. The Bank Sponsor demonstrates, to the satisfaction of the [Choose one: IRT agency or Signatory Agency] with jurisdiction over the Credits, that all, associated Performance Standards (**Exhibit C-1**) have been met (or in special circumstances identified by the [Choose one: IRT or Signatory Agencies] during BEI development, will be met), and that the habitat values identified in **Exhibit C-1** have been maintained.

- b. Establishment Credit Release 2. Up to an additional 25% of the total anticipated Establishment Credits (up to 40% cumulative total) when all the following have occurred:
 - i. The Bank Sponsor has submitted as-built drawings to the IRT pursuant to Section VII.C.1.
 - ii. The [Choose one: IRT or Signatory Agencies] [choose one: has/have] approved the as-built condition, in writing.
 - iii. If applicable, the Bank Sponsor shall submit an adjusted Credit Evaluation and Credit Table (updated **Exhibit F-1**) and Credit Transfer ledger (updated **Exhibit F-3**), reflecting as-built conditions.
 - iv. The Bank Sponsor has funded a minimum of 30% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - v. Credit Release 1 has occurred.
- c. Establishment Credit Release 3. Up to an additional 15% of the total anticipated Establishment Credits (up to 55% cumulative total) when all the following have occurred:
 - i. The Bank Sponsor has submitted complete and accurate Annual Reports to the IRT as required by the BEI and its exhibits.
 - ii. Year 2 Performance Standards have been attained, as required by the Development and Interim Management Plan.
 - iii. The Bank Sponsor has funded a minimum of 55% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - iv. Credit Release 2 has occurred.
 - v. A minimum of two years of monitoring has been conducted since all requirements for Credit Release 2 have been met.
- d. Establishment Credit Release 4. Up to an additional 15% of the total anticipated Establishment Credits (up to 70% cumulative total) when all the following have occurred:
 - i. The Bank Sponsor has submitted all annual and monitoring reports to the IRT as required by the BEI and its exhibits, and

the reports are deemed satisfactory by the [Choose one: IRT or Signatory Agencies].

- ii. Year 3 Performance Standards have been attained, as required by the Development and Interim Management Plan.
 - iii. The Bank Sponsor has funded a minimum of 70% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - iv. Credit Release 3 has occurred.
 - v. A minimum of one year of monitoring has been conducted since all requirements for Credit Release 3 have been met.
- e. Establishment Credit Release 5. Up to an additional 15% of the total anticipated Establishment Credits (up to 85% cumulative total) when all the following have occurred:
- i. The Bank Sponsor has submitted all Annual and Monitoring Reports to the IRT as required by the BEI and its exhibits, and the reports are deemed satisfactory by the [Choose one: IRT or Signatory Agencies].
 - ii. Year 4 Performance Standards have been attained, as required by the Development and Interim Management Plan.
 - iii. The Bank Sponsor has funded 100% of the Endowment Amount per Section VI.B and **Exhibit F-5**.
 - iv. Credit Release 4 has occurred.
 - v. A minimum of one year of monitoring has been conducted since all requirements for Credit Release 4 have been met.
- f. Final Establishment Credit Release. Any remaining balance of the Establishment Credits when all the following have occurred:
- i. The Bank Sponsor has submitted all Annual and Monitoring Reports to the IRT as required by the BEI and its Exhibits.
 - ii. Final Performance Standards have been attained.
 - iii. Any required Remedial Actions are complete.

- iv. Any additional Performance Standards required as a result of required Remedial Actions have been attained.
 - v. Credit Release 5 has occurred.
 - vi. A minimum of one year of monitoring has been conducted since all requirements for Credit Release 5 have been met.
4. The Bank Sponsor shall submit as-built drawings of the Bank Property, with accurate maps of the constructed habitats, to the IRT no later than 90 calendar days following completion of construction associated with the constructed habitats on the Bank Property. The as-built drawings shall consist of full-size construction plans, with as-built conditions clearly shown. The as-built drawings and any attachments must describe in detail any deviation from the Development and Interim Management Plan (**Exhibit C-1**).
 5. Each Covered Species and Covered Habitat Credit Release, with the exception of Credit Release 1 (and Credit Release 2 for Establishment Credits), 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 [**Choose one**: IRT or Signatory Agencies].
 6. Each CDFW Covered Species and Covered Habitat Credit Release is also contingent upon the Bank Sponsor's payment to CDFW the Implementation Fee, in the total amount of _____ Dollars (\$_____). This Implementation Fee may be payable in installments. Each installment shall be in an amount that equals the ratio of the number of the CDFW (Covered Species and Covered Habitat) Credits released to the total number of CDFW Credits in the Bank. Each installment shall be due following each CDFW (Covered Species and Covered Habitat) Credit Release and no later than the due date for submission of the Bank's annual report (**Exhibit F-6**). The Implementation Fee shall be paid in full by the Bank closure date.

The CDFW may require the Bank Sponsor to cease selling CDFW Credits and may stop CDFW Credit Releases until the amount due under this Section is paid in full. The CDFW shall assess, and the Bank Sponsor shall pay to CDFW upon demand, a penalty of 10% of the amount of fees due under this section if the Bank Sponsor fails to remit the amount payable when due.

7. Only federal and/or state Covered Species listed under Federal Endangered Species Act ("ESA") and/or California Endangered Species

Act (“CESA”) at the time of execution of this BEI, and associated Covered Habitat, can provide compensatory mitigation under ESA and/or CESA. Subsequent listing of any non-listed Covered Species and Covered Habitat would require review of the Bank documents by the [Choose one: IRT agency or Signatory Agency] with jurisdiction over the newly listed Covered Species and/or Covered Habitat to ensure the documents are consistent with the needs of the Covered Species and/or Covered Habitat. An amendment, as described in Section XII.D.1 (Amendment and Modification), may be required. Such amendment may include, but is not limited to, additional management requirements or modification of the Credit Evaluation and Credit Table (**Exhibit F-1**) and the number and type of Credits. [Choose one: The IRT agency or The Signatory Agency] with jurisdiction over the newly listed Covered Species and Covered Habitat Credits may reject or suspend its approval of any Sale, Transfer, or release of those Credits until required changes have been completed.

Section VIII: Operation of the Bank

A. Service Area

The Service Area and its basis are described and shown in **Exhibit B**.

B. Sale and/or Transfer of Credits

1. The Sale and/or Transfer of released Credits may begin only upon the Bank Establishment Date. Bank Sponsor shall have the exclusive right to determine the price for any and all Credits it offers for Sale.
2. In no case shall the number of Credits offered for Sale and/or Transfer exceed the total number and type of released Credits, as evidenced by written approval by the [Choose one: IRT agency or Signatory Agency] with jurisdiction over those Credits.
3. The Sale of Credits without a Transfer does not guarantee that the Credits purchased will be acceptable compensatory mitigation for any particular project. Legal responsibility for providing the compensatory mitigation is not transferred from the Permittee to the Bank Sponsor until there is a Transfer associated with a specific permit, approval, or authorization made pursuant to a written Credit Transfer Agreement in the form of **Exhibit F-2e** or **Exhibit F-2f**, or g by the [Choose one: IRT or Signatory Agencies].

4. Transfer to compensate for unavoidable impacts to Waters of the U.S., Waters of the State, Covered Species, or Covered Habitat under any permit, biological opinion, approval(s), or authorization(s) issued by an agency approving use of the specified Credits as compensatory mitigation, can only occur **after** approval by the agency or agencies executing such a permit, approval(s), or authorization(s) or issuing such an opinion. Approval is determined on a case-by-case basis to ensure the use is appropriate to compensate for the impacts of the specific project to which the Credits are proposed to be applied. Mitigation or compensation requirements for individual project impacts may or may not be compatible with the use of mitigation banks, generally, or any particular mitigation bank, specifically.
5. A Transfer may occur only if the Bank Sponsor has received all of the following: (A) a copy of the permit(s)/approval(s)/authorization(s) by the agency approving the use of the specified purchased Credits; (B) written notice from the Permittee that it is electing to use the specified purchased Credits toward the permit(s)/approval(s)/authorization(s) obligation; and (C) confirmation that the Bank Sponsor has accepted the legal responsibility for providing the required compensatory mitigation of such permit(s)/approval(s)/authorization(s).
6. Each Sale of Credits without a Transfer shall be made pursuant to a written Credit Sale Agreement in the form of **Exhibit F-2a, Exhibit F-2b**, or substantially similar form approved in writing by the [**Choose one: IRT or Signatory Agencies**] in its sole and absolute discretion. Subsequent Transfer of Credits shall be made pursuant to a written Credit Transfer Agreement in the form of **Exhibit F-2e, Exhibit F-2f**, or substantially similar form approved in writing by the [**Choose one: IRT or Signatory Agencies**] in its sole and absolute discretion.
7. Each combined Sale and Transfer of Credits to a Permittee shall be made pursuant to a written Combined Credit Sale and Transfer Agreement in the form of **Exhibit F-2c, Exhibit F-2d**, or substantially similar form approved in writing by the [**Choose one: IRT or Signatory Agencies**] in its sole and absolute discretion. [**Remove if USFWS is not a party: Prior to Transfer, Bank Sponsor shall upload pending Covered Species and Covered Habitat Combined Credit Sales and Transfer Agreements into RIBITS for approval by USFWS, per Exhibit F-4.**]
8. Bank Sponsor shall notify the [**Choose one: IRT or Signatory Agencies**, with a courtesy copy to the IRT,] upon any Credit Sale and/or Transfer in accordance with Section IX of this BEI. [**Remove**

if USFWS is not a party: Bank Sponsor shall enter pending Covered Species and Covered Habitat Credit Transfers into RIBITS for approval by USFWS, per **Exhibit F-4.**]

9. If the Bank Property is damaged after the Bank Establishment Date and such damage materially impairs any or all Waters of the U.S., Waters of the State, or habitat related to Covered Species or Covered Habitat on such damaged Bank Property, the Bank Sponsor and/or Property Owner shall implement the provisions of Section VIII.F or Section XII.A. Failure to comply with either Section shall constitute default, and the **[Choose one: IRT or Signatory Agencies]** will take action accordingly.
10. This BEI applies only to those Credits released by agencies that are signatory to this BEI and set forth in Exhibit F-1.

C. Interim and Long-term Management and Monitoring

1. Interim Management and Monitoring

Bank Sponsor shall be responsible for conducting management, monitoring, and maintenance activities according to the Development and Interim Management Plan (**Exhibit C-1**) until the end of the Interim Management Period. The Bank Sponsor shall upload all reports into RIBITS and furnish a hard copy to each IRT agency.

2. Long-term Management and Monitoring

At the end of the Interim Management Period, Property Owner shall be obligated to manage, monitor, and maintain 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-3**). Such activities shall be funded with funds disbursed from the Endowment Fund according to Section VIII.E.2.b. Property Owner and the **[Choose one: IRT or Signatory Agencies,** with invitation to the IRT,] shall meet and confer upon the request of any one of them, to consider revisions to the Long-term Management Plan and Endowment Analysis and Schedule (**Exhibit D-1**) which may be necessary or appropriate to better conserve the habitat and conservation values of the Bank Property. If either (a) the value of the Endowment Fund has decreased to levels that may threaten its continued existence as a source of perpetual funding for long-term management, whether due to unexpected investment performance or otherwise; or (b) if long-term management expenses exceed those estimated in the Endowment Fund Analysis and Schedule (**Exhibit D-1**),

the Property Owner shall consult with the IRT in accordance with Section VIII.E.2.b.v. During the Long-term Management Period, the Property Owner shall be responsible for submitting annual reports to the IRT, in accordance with Section IX.B of this BEI. The Property Owner shall upload all reports into RIBITS, with an email notification to the IRT.

D. Bank Closure

1. Upon Bank closure, no further Credit Sales and/or Transfers shall occur.
2. Bank closure shall be deemed to take place upon written approval of [Choose one: IRT or Signatory Agencies] following occurrence of all of the following:
 - a. All Performance Standards have been met and all Remedial Action required under Section VIII.F has been completed as evidenced by:
 - i. Submission of all required annual reports in accordance with Section IX.B.
 - ii. The completion of all Remedial Action, if any, in accordance with the applicable Remedial Action plan(s).
 - iii. An on-site inspection by the IRT.
 - b. Either (1) The Transfer of the last authorized Credit; or (2) Bank Sponsor provides written request to the IRT and [Choose one: IRT or Signatory Agencies] provides written approval of the closure.
 - c. All financial responsibilities of the Bank Sponsor have been met, including 100% funding of the Endowment Amount for no less than three years and full funding of the Implementation Fee, if applicable.

E. Financial Operations

1. Securities

In the event [Choose one, as applicable: CDFW or USACE], as the holder of the Construction Security, Interim Management Security, and Performance Security, terminates its participation in this BEI, the Bank Sponsor shall provide replacement Construction Security, Interim Management Security, and Performance Security in the amount specified in this BEI within 20 calendar days' after receiving written notice of termination from [Choose one, as applicable: CDFW or

USACE]. In the event the remaining [Choose one: IRT agencies or Signatory Agencies] are unable to hold the Construction Security, Interim Management Security, and Performance Security specified in Section VI, the remaining parties agree to modify the BEI to name a third-party holder of each of these securities.

a. Construction Security

- i. The [Choose one, as applicable: CDFW or USACE], as the holder of the security, after coordination with the IRT, shall be entitled to draw upon the Construction Security for default, if:

(1) after the Bank Establishment Date, but no later than the first full growing season after the date of the first Credit Transfer, the [Choose one: IRT or Signatory Agencies] determines that the Bank Sponsor has not initiated construction and planting in accordance with the Development and Interim Management Plan, or

(2) after the date of the first Credit Transfer, two years has passed since the Bank Sponsor initiated implementation of the Development and Interim Management Plan, and construction and planting in accordance with the Development and Interim Management Plan is not complete, or

(3) if after the first Transfer of Credits, the IRT determines calling on the Construction Security to resolve the default is appropriate and necessary.

- ii. If any portion of the Construction Security is drawn upon pursuant to this Section, then the Bank Sponsor shall replenish the Construction Security to the amount specified in Exhibit C-2 within 90 calendar days after written notice from [Choose one, as applicable: CDFW or USACE].

- iii. The Construction Security shall be cancelled or the monies provided as Construction Security returned to the Bank Sponsor by [Choose one, as applicable: CDFW or USACE], after coordination with the IRT, only after the Bank Sponsor completes the construction and planting activities in

accordance with the Development and Interim Management Plan, as demonstrated by:

- a) Bank Sponsor's submission of as-built drawings in accordance with Section VII.A.2 and Section VII.C.3.b.
- b) A site inspection by the IRT and confirmation by the [Choose one: IRT or Signatory Agencies] of satisfactory completion of construction and planting activities in accordance with the Development and Interim Management Plan.

b. Performance Security

- i. The [Choose one, as applicable: CDFW or USACE], as the holder of the security, in coordination with the IRT, shall be entitled to draw upon the Performance Security for default.
- ii. If any portion of the Performance Security is drawn upon pursuant to this Section, then the Bank Sponsor shall replenish the Performance Security to the amount specified in Exhibit C-3 within 90 calendar days after written notice from [Choose one, as applicable: CDFW or USACE].
- iii. The Performance Security shall be cancelled or the monies provided as Performance Security returned to the Bank Sponsor by [Choose one, as applicable: CDFW or USACE] upon Bank closure or termination in accordance with Section XII.D.2.a or the [Choose one, as applicable: CDFW or USACE] terminates its participation in this BEI pursuant to Section XII.D.2.e.

c. Interim Management Security

- i. The [Choose one, as applicable: CDFW or USACE], as the holder of the security, in coordination with the IRT, shall be entitled to draw upon the Interim Management Security for default, including but not limited to, failure to perform all tasks as required under the Interim Management Plan or Remedial Action plan during the Interim Management Period.
- ii. In the event that the Interim Management Security is drawn upon pursuant to this section, the Bank Sponsor shall restore the Interim Management Security to the amount specified in

Exhibit C-4 within 90 calendar days after written notice from [Choose one, as applicable: CDFW or USACE].

- iii. The Interim Management Security shall be cancelled or the monies provided as Interim Management Security returned to the Bank Sponsor by [Choose one, as applicable: CDFW or USACE] upon conclusion of the Interim Management Period or [Choose one as, applicable: CDFW or USACE] terminates its participation in this BEI pursuant to Section XII.D.2.e.

2. Endowment Fund

a. Endowment Deposits

- i. The Endowment Deposits that the Endowment Holder receives are to be held in the Endowment Fund.

b. Endowment Fund Management

- i. The Endowment Fund should be governed by an investment policy statement that is designed, over long periods of time, to generate investment returns sufficient to keep pace with inflation and pay the costs of long-term management, net of any financial investment and administrative fees. After the Endowment Amount is 100% funded, no additional Endowment Amount monies will be required from the Bank Sponsor.
- ii. The Parties shall ensure that the Endowment Agreement (**Exhibit D-2**) includes a provision that disbursements will not be made from the Endowment Fund any earlier than three years after the Endowment Amount has been 100% funded.
- iii. The Parties anticipate that disbursements from the Endowment Fund will be made available by the Endowment Holder to the Property Owner to fund annual long-term management of the Bank Property as anticipated in the Long-term Management Plan and estimate of costs in accordance with the Endowment Agreement.
- iv. Notwithstanding Probate Code sections 18501-18510, in the event either (a) the value of the Endowment Fund has decreased to levels that may threaten its continued existence as a source of perpetual funding for long-term management, whether due to unexpected investment performance or

otherwise; or (b) if long-term management expenses exceed those estimated in the Endowment Fund Analysis and Schedule (**Exhibit D-1**), the Property Owner shall consult with the IRT and the Grantee to identify the most effective means to implement the management measures and tasks with the resources available. Property Owner shall submit a proposed temporary revised Long-term Management Plan and Endowment Fund Analysis in writing to the IRT and Grantee within 60 calendar days after completion of Property Owner's consultation with the [Choose one: IRT or Signatory Agencies] and Grantee. Upon written approval of the temporary revised Long-term Management Plan by the [Choose one: IRT or Signatory Agencies] and any required notification to the Endowment Holder, in accordance with the Endowment Agreement, the Property Owner shall implement the approved revised management measures and tasks. The original Long-term Management Plan shall be restored in full force and effect upon expiration of the temporary revised Long-term Management Plan or sooner if the circumstances in subsections (a) or (b) above, as the case may be, cease to exist.

3. Financial Records and Auditing

- a. Bank Sponsor and Property Owner are required to maintain complete and accurate financial records relating to the operation of the Bank for which it is responsible, using generally accepted accounting principles (GAAP), developed by the Federal Accounting Standards Advisory Board. At the request of the [Choose one: IRT or Signatory Agencies], no more frequently than annually, the Bank Sponsor and Property Owner shall each have its financial records relating to the operation of the Bank audited by an independent licensed Certified Public Accountant and shall submit the auditor's report to the [Choose one: IRT or Signatory Agencies, with a courtesy copy to the IRT,] upon completion.
- b. The [Choose one: IRT or 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. 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

1. 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, and the [Choose one: IRT or Signatory Agencies, with a courtesy copy to the IRT,] does not determine that such damage is a result of Extraordinary Circumstances, the Party making the discovery shall notify the other Parties. The [Choose one: IRT or Signatory Agencies] may require the Bank Sponsor or Property Owner 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.
2. After Bank closure, if any Party discovers any injury or adverse impact to the Bank Property as Preserved, restored, or enhanced, and the [Choose one: IRT or Signatory Agencies, with a courtesy copy to the IRT,] does not determine that such damage is a result of Extraordinary Circumstances, the Party making the discovery shall notify the other Parties. The [Choose one: IRT or Signatory Agencies] may require the Property Owner 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.
3. Within 60 calendar days of the date of written notice from the [Choose one: IRT or Signatory Agencies], the Bank Sponsor or Property Owner, as applicable, shall develop a Remedial Action plan and submit it to the [Choose one: IRT or Signatory Agencies, with courtesy copy to the IRT,] for written approval. The Remedial Action plan must identify and describe proposed actions to achieve the Performance Standards or remedy injury or adverse impact to the Bank Property and set forth a schedule within which the Bank Sponsor or Property Owner, as applicable, will implement those actions. The Bank Sponsor or Property Owner, as applicable, shall implement the necessary and appropriate Remedial Action in accordance with the Remedial Action plan approved

by the [Choose one: IRT or Signatory Agencies, in consultation with the IRT].

4. If (a) the Bank Sponsor or Property Owner, as applicable, fails to develop a Remedial Action plan and submit it to the [Choose one: IRT or Signatory Agencies, in consultation with the IRT,] or to implement Remedial Action identified by the [Choose one: IRT or Signatory Agencies], in accordance with this section, or (b) a Remedial Action plan is agreed upon and implemented, but the conditions do not satisfy the plan's objective and measurable Performance Standards by the dates specified in the plan, then the [Choose one: IRT or Signatory Agencies] may find the Bank Sponsor or Property Owner, as applicable, in default pursuant to Section XII.E and take action accordingly.
5. If the [Choose one: IRT or Signatory Agencies] determines that the Bank is operating at a Credit deficit (i.e., Sales and/or Transfers exceed the Credits authorized for release, as adjusted in accordance with this BEI), the [Choose one: IRT or Signatory Agencies] shall notify the Bank Sponsor of its default pursuant to Section XII.E, and take action accordingly. Upon receipt of notification, Bank Sponsor shall cease any and all Sales and Transfers immediately and is not authorized to resume Sales and/or Transfers until notified in writing by the [Choose one: IRT or Signatory Agencies].
6. If there is damage to the Bank Property as a result of Extraordinary Circumstances, the provisions of Section XII.A apply.

Section IX: Reporting

A. Annual Inflation Adjustments to Endowment Fund Report

By April 1st of each year following the Bank Establishment Date and until the Endowment Amount is 100% funded, the Bank Sponsor shall report to the [Choose one: IRT or Signatory Agencies, with a courtesy copy to the IRT,] and the Endowment Holder, in hard copy, in editable electronic format, and uploaded to RIBITS the following:

1. The adjusted Endowment Amount determined in accordance with Section VI.B.2.
2. The resulting adjusted Endowment Deposit amounts.

B. Annual Report

Bank Sponsor or Property Owner, as specified below, shall submit an annual report to the [Choose one: IRT or Signatory Agencies, with courtesy copy to the IRT], in electronic format, and uploaded to RIBITS, on or before [insert IRT/Signatory Agencies approved date; for consistency consider 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"). Prior to Bank closure, the Bank Sponsor shall be responsible for reporting on items 1, 2, 4, and 5, below, and Property Owner shall be responsible for reporting items 3 and 5, below. After Bank closure, the Property Owner shall be responsible for annual reporting on item 3 and 5 below. The annual report shall address the following:

1. Bank Development

The Bank Sponsor shall submit an annual report that includes data, documentation, and discussion of the Bank's progress toward meeting Performance Standards described in this BEI and its Exhibits. The annual report shall describe any deficiencies in attaining and maintaining Performance Standards.

2. Interim Management

The Development and Interim Management Plan contains reporting requirements that are separate from, and in addition to, the requirements listed below for the annual report.

During the Interim Management Period, the Bank Sponsor shall submit an annual report that contains an itemized account of the management

tasks in accordance with the Development and Interim Management Plan. Each annual report shall also include 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.
- c. The total dollar amount expended for management tasks conducted during the Reporting Period.
- d. A description of the management and maintenance activities proposed for the next reporting year.
- e. A description of the overall condition of the Bank, including photos documenting the status of the Bank Property during the Reporting Period and a map documenting the location of the photo points.

3. Long-term Management

The Long-term Management Plan contains reporting requirements that are separate from, and in addition to, the requirements listed below for the annual report.

During the Long-term Management Period, the Property Owner shall submit an annual report that contains an itemized account of the management tasks in accordance with the Long-term Management Plan. Each annual report shall also include 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.
- c. The total dollar amount expended for management tasks conducted during the Reporting Period.
- d. A description of the management and maintenance activities proposed for the next reporting year.
- e. A description of the overall condition of the Bank, including photos documenting the status of the Bank Property during the Reporting Period and a map documenting the location of the photo points.

4. Sale and/or Transfer of Credits

- a. The Bank Sponsor shall submit an annual report that includes an updated ledger (Exhibit F-3) showing all Sales and Transfers since the Bank Establishment Date including Credits available for Sale and/or Transfer, along with an updated Sub-Ledger(s) (Exhibit F-3), if applicable.
- b. The Bank Sponsor shall submit an annual report that documents the Implementation Fee payment status, if applicable.

5. Remedial Action

The annual report must include any Remedial Action proposed, approved, or performed. If Remedial Action has been completed, the annual report shall also evaluate the effectiveness of that action.

C. Reporting of Credit Sales without a Transfer

Upon each Sale without a Transfer, the Bank Sponsor shall enter the Sale information into the RIBITS ledger, upload an electronic copy of the Credit Sale Agreement into the appropriate RIBITS folder, and submit to each member of the [Choose one: IRT or Signatory Agencies, with courtesy copy to the IRT]:

1. A copy of the fully executed Credit Sale Agreement in the form of **Exhibit F-2a** or **Exhibit 2b**, as applicable, or substantially similar form approved in writing by the [Choose one: IRT or Signatory Agencies] in its sole and absolute discretion.
2. A Sub-Ledger, in editable electronic format, in the form of **Exhibit F-3**.

D. Credit Sale and/or Transfer Reporting

Upon a Sale and/or Transfer of each and every Credit, the Bank Sponsor shall enter the Sale and/or Transfer into the RIBITS ledger, upload an electronic copy of the finalized Credit Sales and/or Transfer agreement into the appropriate RIBITS folder. For a Transfer of a Credit that was sold in a Sale without a Transfer, the Bank Sponsor shall create or update a Sub-Ledger in RIBITS under the individual Ledger entry for the Sale without a Transfer. The Banks Sponsor shall submit the following to the [Choose one: IRT or Signatory Agencies, with courtesy copy to the IRT]:

1. A copy of the fully executed Credit Sale Agreement in the form of **Exhibit F-2a** or **Exhibit F-2b**, as applicable, or substantially similar form

approved in writing by the [Choose one: IRT or Signatory Agencies] in its sole and absolute discretion, the fully executed Credit Transfer Agreement in the form of **Exhibit F-2e** or **Exhibit F-2f**, as applicable, or substantially similar form approved in writing by the [Choose one: IRT or Signatory Agencies] in its sole and absolute discretion, or a copy of the fully executed Combined Credit Sale and Transfer Agreement in the form of **Exhibit F-2c** or **Exhibit 2d**, as applicable, or substantially similar form approved in writing by the [Choose one: IRT or Signatory Agencies] in its sole and absolute discretion.

2. An updated Credit ledger, in electronic format, in the form of **Exhibit F-3**.
3. An updated Sub-Ledger in electronic format, in the form of **Exhibit F-3**, if applicable.

E. Reporting Compliance Measures

- A. If Bank Sponsor fails to submit complete reports on time, the Bank Sponsor is in default.
 1. Annual reports not received by the [Choose one: IRT or Signatory Agencies] will result in automatic Credit Sale and Transfer suspension effective the 30th day that the report is past due. The suspension will be lifted within 10 calendar days after the [Choose one: IRT or Signatory Agencies] receives a complete annual report.
 2. If the Bank Sponsor has been notified by the [Choose one: IRT or Signatory Agencies] of an incomplete report, the [Choose one: IRT or Signatory Agencies] will notify the Bank Sponsor of the date by which the report must be made complete.
- B. If Property Owner fails to submit complete reports on time, the Property Owner is in default. If the Property Owner has been notified by the [Choose one: IRT or Signatory Agencies] of an incomplete annual report, the [Choose one: IRT or Signatory Agencies] will notify the Property Owner of the date by which the annual report must be made complete.

Section X: Responsibilities of the Bank Sponsor and Property Owner

- A. Without limiting any of its other obligations, including without limitation, [Remove if Grant Deed: under the Conservation Easement,] Bank Sponsor

and Property Owner each hereby agrees and covenants that during the time the Bank is in operation, prior to Bank closure:

1. [Remove if Grant Deed: If the entity proposed to hold the Conservation Easement is not an [Choose one: IRT agency or Signatory Agency], Bank Sponsor and Property Owner shall, prior to the execution of the Conservation Easement in the form of **Exhibit E-4**, provide the [Choose one: IRT or Signatory Agencies] 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 § 65966-65967, has a primary purpose of long-term land stewardship for conservation purposes consistent with the purpose of the Bank, and has agreed to hold the Conservation Easement, and otherwise complies with the requirements of the [Choose one: IRT or Signatory Agencies].
2. 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 completion of the Interim Management Period. Some responsibilities and costs, including but not limited to Remedial Action and actions specified in subparagraphs 4 and 8, below, will extend past the Interim Management Period until Bank closure.
3. Bank Sponsor shall assume responsibility for compensatory mitigation requirements of Department of the Army permits for which it Transfers Credits once a USACE Permittee has secured the appropriate number and type of Credit(s) from the Bank Sponsor. Bank Sponsor shall provide USACE with the written Credit Transfer Agreement or Combined Credit Sale and Transfer Agreement (**Exhibit F-2**) confirming the Bank Sponsor has accepted the responsibility for providing the required compensatory mitigation requirements of such Department of the Army permit.
4. The Bank Sponsor shall perform the actions described in this BEI and its Exhibits to support all Credits. The Bank Sponsor shall provide [Choose as appropriate: NMFS, USFWS, CDFW] with the written Credit Transfer Agreement or Combined Credit Sale and Transfer Agreement (**Exhibit F-2**) for all Credits secured by project proponents/action agencies that confirms that the Bank Sponsor will continue to perform the aforementioned actions.
5. Bank Sponsor and Property Owner shall not discharge or release on, to or from the Bank Property, or permit others to discharge or release on, 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”).

6. 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 [Choose one: IRT or Signatory Agencies]. 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 [Choose one: IRT or Signatory Agencies] [Remove if no Grant Deed: and the Grantee, if a Conservation Easement has been granted].
 7. Bank Sponsor and Property Owner 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 prohibited by, or not consistent and in accordance with this BEI and its Exhibits.
 8. Bank Sponsor shall ensure that the Bank Property is managed and maintained in accordance with the Development and Interim Management Plan, this BEI and its Exhibits prior to Bank closure.
 9. Property Owner shall allow, or otherwise provide for, access to the Bank Property by Bank Sponsor, Grantee, the [Choose one: IRT or Signatory Agencies] [Remove if no Grant Deed:; and third parties, as described in the Conservation Easement].
 10. Property Owner shall grant to Bank Sponsor all rights and authority necessary to carry out and shall not limit the Bank Sponsor’s ability to perform its responsibilities and obligations, on and affecting, the Bank Property in accordance with this BEI and its Exhibits.
 11. Property Owner shall ensure that the Bank Property is managed and maintained in accordance with the Long-term Management Plan, this BEI, and its Exhibits.
- B. 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.

- C. An extension of one compliance date based upon or related to a single incident shall not extend any subsequent compliance dates.

Section XI: Responsibilities of the [Choose one: IRT or Signatory Agencies]

A. [Choose one: IRT or Signatory Agencies] Oversight

Subject to the “Availability of Funds” provision of this BEI, the [Choose one: IRT or Signatory Agencies] agrees to oversee the performance of this BEI.

B. [Choose one: IRT or Signatory Agencies] Review

The [Choose one: IRT or Signatory Agencies] will make a good faith effort to review the annual reports and Remedial Action plans within 60 calendar days from the date of receipt of complete submittal. If any [Choose one: IRT agency or Signatory Agency] is unable to complete its review within the time specified in this section, 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.

C. Compliance Inspections

The [Choose one: IRT or Signatory Agencies] shall conduct compliance inspections for any purpose(s) it determines as necessary to assess compliance with this BEI.

Section XII: Other Provisions

A. Extraordinary Circumstances

1. The Bank Sponsor, Property Owner, and [Choose one: IRT or Signatory Agencies] in its review of the BEI, have made a concerted effort to identify the preservation, restoration and management measures for the Bank Property, including Adaptive Management, necessary to qualify as compensatory mitigation for Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat and to manage and maintain these resources in perpetuity. However, the Parties recognize that there may be an Extraordinary Circumstance in which the Bank can no longer serve its intended purpose as compensatory mitigation, in whole or in part, for the specific resources for which it was established. An Extraordinary Circumstance of this type may lead to Bank Sponsor and/or Property Owner being relieved of some or all of its obligations under this BEI. The Parties agree that the [Choose one: IRT or Signatory Agencies] will consider whether it is appropriate to relieve

Bank Sponsor and/or Property Owner of any obligations under the process outlined below:

- a. If the Bank Sponsor or Property Owner believes that Extraordinary Circumstances have taken place that Party shall send written notification to the [Choose one: IRT or Signatory Agencies, with a courtesy copy to each IRT agency,] as promptly as possible, but no later than 14 calendar days following the date of discovery of the Extraordinary Circumstance. The Party sending the notification (invoking) will fully describe the nature of the Extraordinary Circumstance, its effect on the Party's performance of the obligations under this BEI, the habitat values affected by the Extraordinary Circumstance, and any expected timeframe of non-performance attributable to the Extraordinary Circumstance. As promptly as reasonably possible after providing notification, the Party invoking Extraordinary Circumstance shall meet with the [Choose one: IRT or Signatory Agencies, with invitation to the IRT,] to discuss whether the event qualifies as an Extraordinary Circumstance. The Party invoking the Extraordinary Circumstance shall bear the burden of demonstrating that an Extraordinary Circumstance has occurred. Until such time the [Choose one: IRT or Signatory Agencies] determine whether the event qualifies as an Extraordinary Circumstance and whether it is appropriate to suspend performance pursuant to Section XII.A.1.d, the Property Owner or Bank Sponsor shall continue to manage and maintain the Bank Property to the fullest extent practicable consistent with this BEI and other applicable documents.

- b. If the [Choose one: IRT or Signatory Agencies] concur that an Extraordinary Circumstance has taken place, such agencies will provide written notification to the Bank Sponsor or Property Owner. Within 14 calendar days of notification of concurrence from the [Choose one: IRT or Signatory Agencies, with invitation to the IRT] that an Extraordinary Circumstance has occurred, or on a date mutually agreed upon by all Parties, the Parties will meet to discuss the course of potential action to be taken in response to such occurrence, including potential Remedial Action as defined in Section II and potential suspension of Performance Standards as described in Section XII.A.1.c. Remedial Action in such circumstances may include, but is not limited to, restoration of the Bank Property, out-of-kind improvements on the Bank Property, a smaller restoration on the Bank Property (taking into account the diminution of habitat values across the Service Area), improvements to another property, or the purchase of credits from another bank. Once approved by the [Choose one: IRT or

Signatory Agencies], the Party invoking the Extraordinary Circumstance shall carry out the Remedial Action within a mutually agreed upon timeframe.

- c. If the Bank Sponsor or Property Owner is prevented from or delayed in performing an obligation under this BEI by an Extraordinary Circumstance that commences after the Bank Establishment Date, the [Choose one: IRT or Signatory Agencies] may suspend the Bank Sponsor and/or Property Owner's obligation to perform, as well as the ability of the Bank Sponsor to provide any remaining Credits released, prior to Sale and/or Transfer, as compensatory mitigation.
 - d. Following the meeting discussed in Section XII.A.1.b. to consider potential actions to be taken in response to the event, the [Choose one: IRT or Signatory Agencies] will, in writing, (1) inform the Property Owner or Bank Sponsor as to what, if any, performance is suspended, and (2) direct the Property Owner or Bank Sponsor as to what specific Remedial Action is required. The Bank Sponsor or Property Owner will continue to perform all other obligations that are not suspended.
 - e. Within 60 calendar days of notification described in Section XII.1.d., or by a date mutually agreed upon by all Parties, the Party invoking the Extraordinary Circumstance will submit to the [Choose one: IRT or Signatory Agencies, with a courtesy copy to each IRT agency], in writing, the implementation plan to meet the required Remedial Action. At a minimum, the Remedial Action will be sufficient to ensure that the habitat values which underlie all previously Transferred Credits will be supported.
 - f. If the Remedial Action agreed upon and implemented do not meet an agreed upon objective or standard within the agreed upon timeframe, the Bank Sponsor or Property Owner and the [Choose one: IRT or Signatory Agencies, with invitation to the IRT,] will reconvene to evaluate if alternative Remedial Action would be appropriate.
2. Failure to act in good faith to participate in the process outlined above in Section XII.A.1 or to implement any [Choose one: IRT or Signatory Agencies]-approved Remedial Actions shall be a default under this BEI.
 3. In accordance with Section VIII.B.9 of this BEI, the [Choose one: IRT or Signatory Agencies] may, at their discretion, direct Bank Sponsor to suspend Sale and/or Transfer, prohibit the release of additional 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 remedied the defect pursuant to the Remedial Action as described in Section XII.A.1.d.

4. Disputes over whether an event is a result of an Extraordinary Circumstance, or any Remedial Action taken in response pursuant to this Section, shall be resolved in accordance with Section XII.B.
5. Bank Sponsor and Property Owner are not entitled to termination of this BEI under Section XII.D as a result of Extraordinary Circumstances.

B. Dispute Resolution

The Parties agree to work together in good faith to resolve disputes concerning this BEI. Unless a Party has initiated legal action in connection with the particular dispute, any Party may elect (“Electing Party”) to employ an informal dispute resolution process whereby:

1. The Electing Party shall notify all other Parties to this BEI of the dispute through a Dispute Notice. The Dispute Notice shall identify the Parties against whom the Electing Party is commencing the informal dispute resolution process (“Implicated Parties”), the position of the Electing Party (including, if applicable, the basis for contending that a violation has occurred), and the resolution the Electing Party proposes.
2. Each Implicated Party shall have 45 calendar days after receipt of the Dispute Notice (or such other time as the Parties may mutually agree) to respond to the electing Party. During this time, any Party to this BEI that received the Dispute Notice may seek clarification of the Dispute Notice.
3. Within 45 calendar days after each Implicated Party’s response was provided or due, whichever is later, the Electing Party and the Implicated 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.
4. The dispute resolution process may be terminated by the Electing Party or any Implicated Party upon written notice to all other Parties to this BEI.

C. Conveyance of Bank or Bank Property or Other Interests

1. All transfers of any interest in the Bank Property are subject to the applicable provisions of the Conservation Easement.

2. Property Owner shall have the right to sell, assign, transfer or convey its interest in the Bank Property at any time; provided, however, that any such sale, assignment, transfer or conveyance on or after the date of this BEI must be made in accordance with this BEI and the Conservation Easement, and shall be subject to prior written concurrence by the [Choose one: IRT or Signatory Agencies] and Bank Sponsor. Such concurrence shall be subject to the requirement that the purchaser, assignee or 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 sale, assignment, transfer, or conveyance by Property Owner of its interest in the Bank Property in which the purchaser, assignee, or transferee has assumed and agreed in writing to observe and perform all of the Property Owner's obligations pursuant to this BEI, the Property Owner shall have no further obligations hereunder and all references to Property Owner in this BEI shall thereafter refer to such purchaser, assignee or transferee, except that the Property Owner's liability for acts, omissions, or breaches occurring prior to the assignment and assumption shall survive the assignment and assumption. Any transfer or assignment and assumption of the Property Owner's interest in the Bank Property made without the prior written concurrence of the [Choose one: IRT or Signatory Agencies] constitutes a default pursuant to Section XII.E and the [Choose one: IRT or Signatory Agencies] may take action accordingly.
3. Bank Sponsor may sell or convey its interest in the Bank at any time, provided that no uncured event of default exists, Bank Sponsor is in full compliance with all requirements of this BEI (including all financial assurance requirements), and subject to an amendment as required by Section XII.D.1. If any of the financial assurances required under this BEI are not completely funded at the time the Bank Sponsor requests [Choose one: IRT or Signatory Agencies] approval of a sale or conveyance, then the [Choose one: IRT or Signatory Agencies] 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 the [Choose one: IRT or Signatory Agencies] a written agreement signed by the replacement Bank Sponsor, acceptable to the [Choose one: IRT or Signatory Agencies] in form and substance, 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 constitutes default

pursuant to Section XII.E and the [Choose one: IRT or Signatory Agencies] may take action accordingly.

D. Modification and Termination of the BEI

1. Amendment and Modification

- a. Prior to Bank closure, this BEI, including its Exhibits, may be amended or modified only with the written approval of the Parties, which approval may be withheld or denied. All amendments and modifications shall be fully set forth in a separate document signed by all Parties that shall be appended to this BEI.
- b. After Bank closure, amendments or modifications to this BEI, including its Exhibits, which do not impact obligations of the Bank Sponsor under this BEI must be approved in writing by the Property Owner and the [Choose one: IRT or Signatory Agencies], which approval may be withheld or denied. All amendments and modifications shall be fully set forth in a separate document signed by all required parties that shall be appended to this BEI.
- c. At the request of the Bank Sponsor, the [Choose one: IRT or Signatory Agencies] may consider an amendment to the BEI to conform to an approved NCCP or HCP.
- d. Pursuant to Fish and Game Code § 1798.6(a), any person seeking to amend the Bank shall submit to CDFW, a complete Bank amendment package containing each of the original Bank agreement package documents, including any prior amendments, as well as any documents proposed to be amended or that would be affected by the proposed amendment, together with the applicable amendment fee.

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 the first Credit Sale, provided that Waters of the U.S., Waters of the State, 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. If this BEI is terminated or the Bank is closed prior to the Sale of all authorized Credits, any remaining Credits, including, without limitation any Credits sold without a Transfer, shall be extinguished and will no longer be available for Sale and/or Transfer.
- c. The [Choose one: IRT or Signatory Agencies] may terminate this BEI if the Bank Sponsor or Property Owner sells, assigns, transfers, or conveys the Bank or the Bank Property without the prior written concurrence of the [Choose one: IRT or Signatory Agencies], as required by Section XII.C.
- d. USEPA, [insert appropriate agencies signing, but not providing credits: USACE, CDFW, USFWS, State Water Board, Regional Water Board, and NMFS] may terminate its participation upon 30 calendar days' written notice to all other Parties. This BEI shall continue in full force and effect as to the remaining Parties.
- e. The [insert appropriate agencies signing and providing credits: USACE, CDFW, USFWS, State Water Board, Regional Water Board, and NMFS] may each terminate its participation in this BEI upon 30 calendar days' written notice to all other Parties, on the condition that each of the following has occurred:
 - i. Bank Sponsor or Property Owner has defaulted on one or more covenants, terms or conditions of this BEI.
 - ii. Bank Sponsor and Property Owner, have each received notice of such default from the terminating [Choose one: IRT agency or Signatory Agency] in accordance with Section XII.B, if applicable, and Section XII.K.
 - iii. Bank Sponsor or Property Owner, as applicable, has failed to cure its default to the satisfaction of the terminating [Choose one: IRT agency or Signatory Agency].
- f. If any [Choose one: IRT agency or Signatory Agency] proposes to terminate its participation in the BEI, it agrees to meet with the other IRT agencies 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 [Choose one: IRT

agency(ies) or Signatory Agency(ies)] not later than 15 calendar days from receipt of the notice of termination.

- g. Termination by any [Choose one: IRT agency or Signatory Agency] of its participation in this BEI shall not terminate this BEI or affect the relationship between the remaining [Choose one: IRT agencies or Signatory Agencies] toward each other or the Bank Sponsor or Property Owner under this BEI. Remaining Credits, including unused Credits sold without a Transfer, under the authority of the terminating [Choose one: IRT agency or Signatory Agency] will no longer be available for Sale and/or Transfer. Consistent with Section VIII.E.1., in the event [Choose one, as applicable: CDFW or USACE], as the holder of the Construction Security, Interim Management Security, and Performance Security, terminates its participation in this BEI, the Bank Sponsor shall provide replacement Construction Security, Interim Management Security, and Performance Security in the amount specified in this BEI within 20 calendar days after receiving written notice of termination from [Choose one, as applicable: CDFW or USACE]. In the event the remaining [Choose one: IRT agencies or Signatory Agencies] are unable to hold the Construction Security, Interim Management Security, and Performance Security specified in Section VI, the remaining Parties agree to modify the BEI to name a third party holder of each of these securities.
- h. In the event termination is commenced, the Bank Sponsor agrees to fulfill its pre-existing obligations to perform all establishment, monitoring, maintenance, management, and remediation responsibilities that arise directly from Credits that were transferred at the time of termination.

Notwithstanding termination of the BEI in its entirety or the termination of an [Choose one: IRT agency's or Signatory Agency's] participation in the BEI, the Bank Sponsor agrees to fulfill its pre-existing responsibilities that arise directly from Credit Transfers in effect at the time of termination.

- i. Nothing in this Section is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to the USACE, CDFW, NMFS, State Water Board, Regional Water Board, and USFWS in the event of default by Bank Sponsor and/or Property Owner.

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 of default, the [Choose one: IRT or Signatory Agencies] shall issue a notice of default to Bank Sponsor and/or Property Owner, which includes direction and specified time period to cure the default. If the Bank Sponsor and/or Property Owner fails to remedy the default within the allotted time, the [Choose one: IRT or Signatory Agencies] will take appropriate action, which includes but is not limited to, suspending Credit Sales and/or Transfers, reducing available Credits, utilizing financial assurances, and terminating the BEI. This Section 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; Headings

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 Parties 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 or incorporated herein by reference, shall be binding or valid, with respect to the subject matter hereof. 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 a Party 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 Party 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 calendar 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 sale, assignment, transfer and conveyance 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 or as to any Party, 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 or its invalidity or unenforceability as to any Party.

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 calendar 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.

- 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]

Attn:
Fax:

[Insert: Property Owner]

[NAME]
[ADDRESS]

Attn:
Fax:

[Insert appropriate agencies: IRT/Signatory Agencies]

U.S. Army Corps of Engineers
_____ District

[DISTRICT ADDRESS]
Attn: Chief, Regulatory Division
Fax:

U.S. Fish and Wildlife Service
_____ Office

[FIELD OFFICE ADDRESS]
Attn: Field Supervisor
Fax:

National Marine Fisheries Service
[Insert: California Coastal or Central Valley]
_____ Office

[OFFICE ADDRESS]
Attn: Assistant Regional Administrator
Fax:

U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105
Attn: Supervisor, Wetlands Section
Fax: 415-947-3537

California Department of Fish and Wildlife

_____ Region

[REGION ADDRESS]

Attn: Regional Manager

Fax:

California Regional Water Quality Control Board, Region

Address

City, State, Zip code

Attn: Executive Officer

Fax:

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 [Choose one: IRT or Signatory Agencies] 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 [Choose one: IRT agency or Signatory Agency] 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. Applicable Laws

Among the Bank Sponsor, Property Owner and the Federal agencies, the applicable statutes, regulations, policies, directives, and procedures of the United States will govern this BEI and all documents and actions pursuant to it. Among the Bank Sponsor, Property Owner and State of California agencies, this BEI shall be governed by and construed according to the applicable laws, statutes, regulations, orders, policies and requirements of the State of California and its agencies with jurisdiction, including without limitation the authorities identified in Section I.B of this BEI as applicable

Q. No Federal Contract or Monetary Damages

1. USACE approval of this BEI constitutes the regulatory approval required for the Mitigation Bank to be used to provide compensatory mitigation for Department of Army permits pursuant to 33 C.F.R. § 332.8(a)(1). This BEI is not a contract between the Bank Sponsor or Property Owner and USACE or any other agency of the Federal government. Any dispute arising under this BEI will not give rise to any claim by the Bank Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the BEI to the contrary.

[Add this if FWS and/or NMFS are Signatory] 2. This BEI is not a contract; it is a regulatory tool used by the USFWS and/or NMFS in meeting statutory and regulatory obligations to process permit applications and consult with other Federal Agencies. USFWS and/or NMFS decisions regarding implementation of this BEI are regulatory decisions and are subject to USFWS and/or NMFS regulatory discretion. Consistent with the Credit Transfer Agreement, and Combined Credit Sale and Transfer Agreement templates (Exhibits F), once the Credits are Transferred the Bank Sponsor assumes legal responsibility for the compensatory mitigation. Therefore, the USFWS and/or NMFS are relying on the Bank Sponsor/Property Owner to fully and completely satisfy any and all BEI conditions when USFWS and/or NMFS are making determinations under ESA Sections 7, 10, or any other regulatory activity. While this BEI is not a contract, it is reasonable for USFWS and/or NMFS to rely on Bank Sponsor's / Property Owner's promises contained in this BEI in meeting its statutory and regulatory obligations. Therefore, if the Bank Sponsor / Property Owner fails to materially abide by the terms and conditions of this BEI, the USFWS and/or NMFS would be injured, and it may, in addition to any other remedy available to it, seek redress in a court of competent jurisdiction under promissory estoppel and detrimental reliance. Bank Sponsor / Property Owner acknowledges that it has not received any legally enforceable promises from USFWS and/or NMFS under this BEI and has no ability to seek monetary damages from the

USFWS and/or NMFS under the terms of this BEI.

R. CDFW Remedies

CDFW is entering into this BEI in its own right and not as the agent or representative of any other entity, including without limitation the IRT, any IRT agency, or any other Signatory Agency. If CDFW defaults in the performance of any of its obligations under this BEI, Bank Sponsor and Property Owner will have the right to seek, subject to the limitations set forth below, damages or specific performance as provided by law as the exclusive remedy for such defaults.

Despite the foregoing, Bank Sponsor and Property Owner each hereby waives:

1. Any right to receive consequential or punitive damages against CDFW or any officer, employee, agent or representative of CDFW; and
2. Any right to seek specific performance against CDFW based on a dispute relating to any CDFW decisions, made either independently or an IRT agency, directly related to Credits for Covered Species and Covered Habitat creation or preservation under the jurisdiction of CDFW, including but not limited to decisions under Sections VII.C (Covered Species and Covered Habitat Credit Release), VIII.B (Sale and/or Transfer of Credits), XII.A (Extraordinary Circumstance), and XII.E (Default) of this BEI. This waiver shall not preclude Bank Sponsor or Property Owner from the recovery of any compensatory damages directly related to CDFW decisions regarding Credits for Covered Species and Covered Habitat creation or preservation provided for in the BEI, which Credits are under the sole jurisdiction of CDFW.
3. Recovery of damages due to a default by CDFW will only be available after CDFW and the Bank Owner or Property Owner have undergone informal dispute resolution as specified in Section XII.B of this BEI.

Section XIII: Execution

Each of the undersigned certifies that he or she has full authority to enter into this BEI. This BEI shall be deemed executed on the date of the last signature by the Parties. Within 30 calendar days of BEI execution, the Bank Sponsor shall upload the final

signed BEI, including all of its Exhibits, to the appropriate folders in RIBITS and provide an electronic copy to each member of the IRT.

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

Bank Sponsor

By: _____ Date _____
[Name]
[Title, if applicable]

Property Owner

By: _____ Date _____
[Name]
[Title, if applicable]

U.S. Army Corps of Engineers, _____ District

By: _____ Date _____
[Name]
[Correct title as necessary] District Engineer

U.S. Fish and Wildlife Service, _____ Office

By: _____ Date _____
[Name]
Field Supervisor

National Marine Fisheries Service, West Coast Region

By: _____
[Name] Date
Regional Administrator

California Department of Fish and Wildlife, _____ Region

By: _____
[Name] Date
Regional Manager

State Water Resources Control Board

By: _____
[Name] Date
Executive Director

California Regional Water Quality Control Board, Region _____

By: _____
[Name] Date
Executive Officer

U.S. Environmental Protection Agency, Region IX

By: _____
[Name] Date
Supervisor, Wetlands Section

APPENDIX – Minimum Requirements for Each Exhibit

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 with sufficient detail to allow the Bank Property to be easily located.

A-2. Map of Property including Bank Property

This map should illustrate Property and Bank Property boundaries, Construction Phases, and any planned Subsequent Phases on a topographic map.

A-3 Map of Conserved Areas in Bank Property Vicinity [if applicable]

This map should depict other conserved lands in the vicinity of the proposed Bank Property.

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., Waters of the State, Covered Species or Covered Habitat) may be sold or Transferred.

B-2. Narrative description(s) of the Bank’s Service Area(s)

Include a detailed description of the area, and a basis for that Service Area, within which each type of Credit may be sold or Transferred. Include sufficient details to be able to determine the boundaries, including counties, landmarks, roads, etc. on all sides of the Service Area.

3. “Exhibit C” - Development and Interim Management Plan

C-1. Development and Interim Management Plan

This plan must include the baseline conditions of the Bank Property including: biological resources, geographic location and features, topography, hydrology, vegetation, past present and adjacent land uses, an Aquatic Resource Delineation (if applicable), and a list of species and

habitats occurring on the Bank Property. Include a description of the objectives of the Mitigation Bank and activities and methodologies for establishing, restoring, and/or enhancing Waters of the U.S. and/or Waters of the State or other habitat types. Detail anticipated increases in functions and services of existing aquatic resources and their corresponding effect within the watershed (i.e. habitat diversity and connectivity, floodplain management, or other landscape scale functions). Include map(s) of the overall mitigation bank design, a description of habitat establishment goals, objectives and Performance Standards, a discussion of ecological suitability of the site to achieve the stated goals and objectives (i.e. watershed/hydrology analysis, soils, topography, compatibility with adjacent land uses, watershed management plans, critical habitat designation, NCCP, HCP, and species recovery plans). Include maps detailing the anticipated location, acreages, and types of proposed Credits. Include historic aerial photographs and/or historic topographic maps (if available). If restoration is proposed; monitoring methodologies required to evaluate and meet the Performance Standards; an approved schedule for reporting monitoring results; a discussion of possible Remedial Actions; surrounding land uses and zoning along with the anticipated future development in the area; and any other information deemed necessary by the [Choose one: IRT or Signatory Agencies]. The Development and Interim Management Plan must clearly specify how each Construction Phase will be constructed and monitored in sufficient detail that a third-party acting on the Construction Security could complete establishment of any given phase.

The Development and Interim Management Plan must include a detailed description of Interim Management activities, including the short-term management, monitoring, Adaptive Management, reporting and other activities to be implemented by the Bank Sponsor during the Interim Management Period. Interim Management activities must be described for managing each Construction Phase independently as well as together.

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. Include a specific Construction Security Analysis and Schedule for each Construction Phase.

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. Include a specific Performance Security Analysis and Schedule for each Construction Phase.

C-4. 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. Include a specific Interim Management Security Analysis and Schedule for each Construction Phase.

Cost estimates should be based on tasks implemented by a third-party in present day dollars or equipment prices in present day dollars

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. Endowment Fund Analysis and Schedule

This analysis and schedule shall consist of a table and/or spreadsheet that shows the projected annual capitalization rate, 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 also include administration and contingency expenses. The Endowment Fund Analysis and Schedule is developed assuming that each Construction Phase is constructed and managed by itself without the economies of scale or other cost reductions that may occur if all Construction Phases are implemented.

Cost estimates should be based on tasks implemented by a third-party in present day dollars or equipment prices in present day dollars.

This Endowment Fund Analysis and Schedule in this **Exhibit D-2** is specific to funding long-term management of the Bank Property by the Property Owner. The endowment funding required by the Grantee to hold and monitor the Conservation Easement must be addressed by the Bank Sponsor in a separate and distinct Endowment Agreement to be included as part of **Exhibit E**. Such separate Endowment Agreement is not considered part of **Exhibit D-3**.

D-2. Agreements, Instructions and Forms for Submission or Disbursement of Endowment Funds

1. Endowment Agreement
2. Deposit Document
3. Deposit Procedures
4. Annual Funding Report Templates

D-3. 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. Monitoring and Reporting requirements and schedule;

7. Rights of access to the Bank Property and prohibited uses of the Bank Property as provided in the [Choose one: Conservation Easement or Grant Deed]; and
8. Procedures for amendments and notices.
9. Include a reference to the Historic Properties Treatment Plan (**Exhibit J-3**), if applicable.

5. "Exhibit E" - Real Estate Records and Assurances

The Property Owner shall provide each member of the [Choose one: IRT or Signatory Agencies] 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 [Choose one: Conservation Easement or Grant Deed] and all of the other requirements for Bank establishment set forth in the BEI have been met:

E-1. Property Assessment and Warranty

Property Assessment and Warranty prepared in accordance with the approved template.

E-2. Real Estate Instrument

The form of the Conservation Easement using the approved template [or, if fee title to the State, substitute: The form of the Grant Deed.]

E-3. Mineral Remoteness Opinion

If the mineral rights have been severed on the Bank Property, the Mineral Remoteness Opinion, prepared by a licensed Geologist, is required per Internal Revenue Service Code Section 170(h). This report will provide an opinion as to the likelihood of surface mining, or other forms of mining, including a determination whether the "probability of surface mining occurring on such property is so remote as to be negligible."

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 Released as mitigation or compensation for agency-approved projects and other impacts in the Service Area(s). The table should distinguish between the following categories of Credits: Waters of the U.S.; Waters of the State; Covered Species and Covered Habitat Preservation; Covered Species and Covered Habitat Establishment.

F-2. Credit Purchase Agreement and Payment Receipt Templates
This section should include all template credit sale and/or transfer agreements, including at a minimum:

- F-2a: Credit Sales Agreement
- F-2b: Caltrans STD 213/Credit Sales Agreement
- F-2c: Combined Credit Sale and Transfer Agreement
- F-2d: Caltrans Combined Credit Sale and Transfer Agreement
- F-2e: Credit Transfer Agreement
- F-2f: Caltrans STD 213/Credit Transfer Agreement

F-3. Credit Transfer Ledger Template

1. Credit Transfer Ledger shall include at a minimum:
2. Bank name;
3. Total number of each type of Bank Credit;
4. Initial Credit purchaser name, address and phone number;
5. Project name;
6. Project applicant name, address, and phone number;
7. Agency project file numbers;
8. Date of Credit Transfer;
9. Type(s) of Credit(s) sold and/or Transferred;
10. Number of Credits sold and/or Transferred;
11. Number of Credits applied; and Transferred;
12. Balance of each type of Credit remaining, and;

13. A declaration that the Bank Sponsor has entered the Transfer into RIBITS.

F-4 Instructions for Species Credit Transfers Using RIBITS [if applicable]

F-5 Credit Release Schedule and Funding Schedule for Covered Species and Covered Habitats

F-6 Implementation Fee Schedule [if applicable]

7. "Exhibit G" - Phase I Environmental Site Assessment

8. "Exhibit H" - Biological Resources Survey

Biological Resources Survey(ies) of the Bank Property shall describe the biotic and abiotic baseline of the Bank Property and should include descriptions of the following with maps: (a) the Bank Property's geographic location and features, including topography, hydrology, soils, and vegetation; (b) current functions and services of aquatic resources; (c) inventory of all biological resources, including: description of vegetation communities and a complete plant species list, presence of Federally-threatened or endangered species, and/or their habitats, as determined by protocol surveys or other appropriate survey methodology, state-listed threatened and endangered species and other species of special concern, other wildlife species that may be present, and presence of non-native species on the Bank Property; and (d) past and present land uses, including grazing practices.

9. "Exhibit I" –Aquatic Resource Delineation [if applicable].

Bank Sponsor shall provide a copy of the Aquatic Resource Delineation issued by USACE and/or Regional Board for the Bank Property, if applicable.

10. "Exhibit J" – Non-confidential Cultural, Historical, Archeological, and Native American Resources ("Cultural Resources").

Cultural Resources requirements met for all Construction Phases. Information regarding the character, location, and ownership of historic properties shall not be included within this exhibit or uploaded to RIBITS, pursuant to Section 304 of the National Historic Preservation Act (NHPA) and 36 CFR 800.11c.

J-1 Identification, Inventory, and Evaluation

Cultural resources 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 how the boundary was determined for each cultural resource identified, and (d) a determination of eligibility for the National Register of Historic Places (National Register), as determined by the lead Federal agency in consultation with the State Historic Preservation Officer (SHPO), and (e) where appropriate, eligibility recommendation for listing on the California Register of Historical Resources. Cultural resources that are recommended eligible for listing in the National Register are called “historic properties” under the Federal regulations and “historical resources” under the California regulations.

J-2 Compliance Documentation [if applicable]

If the USACE finds that the undertaking 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 on a historic property, the BEI is to include either an executed Programmatic Agreement or Memorandum of Agreement (Section 106 agreement) as documentation of compliance with Section 106 of the National Historic Preservation Act of 1966, as amended. If the undertaking may cause a substantial adverse change in the significance of a historical 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 (HPTP) [if 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. The HPTP will be included in the Section 106 agreement as an appendix. Ground disturbing activities must be conducted in accordance with the stipulations of the Section 106 agreement (**Exhibit J-2**). The plan shall include both short and long-term management of the historic properties. In addition, the Federal Agency will make compliance with the Section 106 Agreement a condition of any Federal authorization or approval.

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, permit amendments, or other authorizations needed to establish and maintain the

Bank, including but not limited to the following. Enclose the required documentation for all Construction Phases.

Include only those that apply and add others as necessary:

- 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. General or Individual Waste Discharge Requirements Under the Porter–Cologne Water Quality Control Act, Water Code § 13000 *et seq.*;
- E. Streambed Alteration Agreement (Fish and Game Code § 1600 *et seq.*);
- F. Federal Endangered Species Act compliance (16 U.S.C. § 1535 *et seq.*) (ESA)(§ 7 or § 10);
- G. California Endangered Species Act compliance (Fish and Game Code § 2050 *et seq.*);
- H. Magnuson-Stevens Fishery Conservation and Management Act compliance (16 U.S.C. § 1801, *et seq.*);
- I. Flood Protection Board Permit for streams listed in Table 8.1 in title 23 of the California Code of Regulations; and,
- J. County/City Grading Permit(s) or other local approvals
- K. List of addresses of non-signatory IRT agencies.