

MITIGATION BANK ENABLING INSTRUMENT
Table of Contents

1
2
3
4 Section I: Recitals..... 2
5 A. Purpose..... 2
6 B. Location and Ownership of Parcel..... 2
7 C. Authorities and Permits..... 2
8 D. Project Elements 4
9 Section II: Definitions..... 5
10 Section III. Stipulations 9
11 A. Baseline Condition..... 9
12 B. Disclaimer 9
13 C. Modification of the BEI Template 9
14 D. Exhibits and Appendices..... 9
15 Section IV: Bank Evaluation and Acceptance 11
16 Section V: Bank Establishment 12
17 Section VI: Financial Assurances 12
18 A. Construction Security..... 12
19 B. Performance Security..... 12
20 C. Interim Management Security..... 12
21 D. Endowment Fund..... 13
22 Section VII. Credit Release Schedule and Bank Habitat Establishment Performance Criteria 13
23 A. Wetland Credit Release..... 13
24 B. Covered Species and Covered Habitat Types Credit Release Schedule..... 14
25 C. Modification of the Development Plan..... 15
26 D. Remediation Plans 15
27 Section VIII: Operation of the Bank..... 16
28 A. Service Area..... 16
29 B. Credit Sales 16
30 C. Interim and Long-Term Management and Monitoring..... 17
31 D. Bank Closure..... 18
32 E. Financial Operations 18
33 Section IX: Reporting 21
34 A. Annual Report..... 21
35 Section X: Responsibilities of the Bank Owner 22
36 Section XI: Responsibilities of the MBRT 23
37 A. MBRT Oversight 23
38 B. MBRT Review 23
39 C. Evaluation of Bank Progress..... 23
40 D. Compliance Inspections 23
41 Section XII: Other Provisions..... 24
42 A. Force Majeure 24
43 B. Dispute Resolution..... 25
44 C. Transfer 27
45 D. Execution, Modification, and Termination of the BEI 27

1	E.	Specific Language of Bank Enabling Instrument Shall be Controlling.....	29
2	F.	Entire Agreement.....	29
3	G.	Reasonableness, And Good Faith.....	30
4	H.	Successors and Assigns.....	30
5	I.	Partial Invalidity.....	30
6	J.	Notices.....	30
7	K.	Restriction on Benefit.....	32
8	L.	Counterparts.....	32
9	M.	No Third Party Beneficiaries.....	32
10	N.	Attorney Fees.....	33
11	O.	Availability of Funds.....	33
12	P.	No Partnerships.....	33
13	Q.	Governing Law.....	33
14		Section XIII: Execution.....	34
15		Appendix 1 – Description of the Exhibits necessary for the review and Bank Establishment.....	35
16	1.	“ Exhibit A ” - Bank Location Maps.....	35
17	2.	“ Exhibit B ” – Service Area Map(s) and Description(s).....	35
18	3.	“ Exhibit C ” - Bank Development Plan.....	35
19	4.	“ Exhibit D ” - Bank Management and Operation.....	36
20	5.	“ Exhibit E ” - Real Estate Records and Assurances.....	37
21	6.	“ Exhibit F ” - Bank Crediting and Sales.....	39
22	7.	“ Exhibit G ” - Phase I Environmental Site Assessment.....	40
23	8.	“ Exhibit H ” - Biological Resources Survey.....	40
24	9.	“ Exhibit I ” - Verified Wetland Delineation and Verification Letter.....	40
25	10.	“ Exhibit J ” - Other Environmental Documentation, Permits, Amendments or Revisions.....	40

PLEASE NOTE:

The following Mitigation Bank Enabling Instrument is provided as a standardized template document requiring only a limited amount of information to be entered into the spaces where indicated.

(Version Date: August 5, 2005)

MITIGATION BANK ENABLING INSTRUMENT

(BANK NAME) MITIGATION BANK

This Bank Enabling Instrument (hereinafter “BEI”) regarding the establishment, use, operation and maintenance of the (Bank Name) Mitigation Bank (hereinafter "Bank") is made and entered into this ____ day of ____ 20__, by and among (Bank Owner’s name(s)) (hereinafter, "Bank Owner(s)"), the _____ District of the U.S. Army Corps of Engineers (“USACE”), Region IX of the U.S. Environmental Protection Agency (hereinafter “USEPA”), the _____ Field Office of the U.S. Fish and Wildlife Service (“USFWS”), and the State of California, Department of Fish and Game (hereinafter “CDFG”). These State and Federal agencies comprise and are referred to jointly as the Mitigation Bank Review Team (hereinafter “MBRT”), and the Bank Owner and the MBRT are hereinafter referred to jointly as the “Parties”, with reference to the following:

(Bank Name) Mitigation Bank

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40

Section I: Recitals

A. Purpose

The purpose of this BEI is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the Bank. The Parties have determined the establishment of this Bank will provide compensation, conservation, and protection for wetlands and other waters of the United States (“Waters”), Covered Species, and Covered Habitat Types that the Parties determine will be adequately conserved as a result of implementation of this BEI. Goals and objectives for the Bank are set forth in the Bank Development Plan (“Development Plan”), Exhibit C, Long-term Management Plan (“Management Plan”), Exhibit D, and a general baseline description of Bank resources may be found in the Biological Resources Survey, Exhibit H.

B. Location and Ownership of Parcel

The Bank Owner is the owner of real property (“Bank Property”) located at _____ (include county), as more completely described in Exhibit A (Bank Location Maps) and in Exhibit E (Real Estate Records and Assurances) attached hereto. The overall property size is approximately _____ acres, _____ acres of which are proposed as the Bank.

C. Authorities and Permits

The Bank is available to be used for off-site compensatory mitigation for unavoidable impacts to Covered Species and Covered Habitat Types including wetlands and other wetland habitat types as regulated by the following, provided the Bank meets all requirements applicable for mitigation or conservation with respect to a particular project and that mitigation or conservation through use of this bank is authorized by the appropriate authority.

1. Federal:

- a. Clean Water Act (33 USC 1251 *et seq.*);
- b. Rivers and Harbors Act (33 USC 403);
- c. National Environmental Policy Act (42 USC 4321 *et seq.*);
- d. Endangered Species Act (16 USC 1531 *et seq.*), particularly including impacts to federally-listed threatened or endangered species under §§7 and 10a of the Endangered Species Act (hereinafter “§7” and “§10” respectively) and/or occupied habitat;
- e. Fish and Wildlife Coordination Act (16 USC 661 *et seq.*);

- 1
2 f. National Historic Preservation Act (16 USC 470);
3
4 g. Swampbuster provisions of the Food Security Act;
5
6 h. Executive Order 11990; Protection of Wetlands;
7
8 i. Executive Order 11988; Floodplain Management;
9
10 j. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR
11 Parts 320-330);
12
13 k. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40
14 CFR Part 230);
15
16 l. Memorandum of Agreement between the Environmental Protection Agency and
17 the Department of the Army concerning the Determination of Mitigation Under
18 the Clean Water Act, Section 404(b)(1) Guidelines;
19
20 m. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60
21 FR 58605 *et seq.*, hereinafter "Guidelines"). Waters of the United States,
22 including wetlands, which result from activities authorized under Section 404 of
23 the Clean Water Act (hereinafter "\$404");
24
25 n. Guidance for the Establishment, Use and Operation of Conservation Banks
26 (United States Department of Interior Memorandum, dated May 2, 2003);
27
28 o. San Francisco District Public Notice 02-03, dated March 5, 2003, titled
29 "Mitigation Bank Policy on the Santa Rosa Plain"; and
30
31 p. Regulatory Guidance Letter 02-2, dated December 24, 2002, titled "Guidance on
32 Compensatory Mitigation Projects for Aquatic Resource Impacts Under the
33 Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and
34 Section 10 of the Rivers and Harbors Act of 1899".

35
36 2. State

- 37 a. California Environmental Quality Act (Pub. Res. Code §21000 *et seq.*);
38

- 1 b. California Endangered Species Act (Fish & Game Code §2050 *et seq.*);
- 2
- 3 c. California Natural Community Conservation Planning Act (Fish & Game Code
- 4 §2800 *et seq.*);
- 5
- 6 d. Streambed Alteration Agreements (Fish & Game Code §§1600 *et seq.*);
- 7
- 8 e. Sacramento-San Joaquin Valley Mitigation Bank Act of 1993 (Fish & Game
- 9 Code §1775 *et seq.*);
- 10
- 11 f. Official Policy on Conservation Banks, April 7, 1995, by California Resources
- 12 Agency and California Environmental Protection Agency, jointly;
- 13
- 14 g. Mitigation for significant impacts to wetland and wildlife resources under the
- 15 applicable sections of the California Environmental Quality Act, Public
- 16 Resources Code Sections 21000 *et seq.* (hereinafter "CEQA"); and,
- 17
- 18 h. The establishment and/or preservation of habitat associated with the Natural
- 19 Communities Conservation Planning program, Fish and Game Code §2800 *et*
- 20 *seq.* (hereinafter "NCCP").

21

22

23 **D. Project Elements**

24 Whereas, under this BEI, the Bank Owner may preserve, restore, create, enhance and/or

25 establish, and then manage and maintain any or all of the following in accordance with

26 the Development Plan (Exhibit C), Interim Management and Long-term Management

27 Plans (all in Exhibit D):

- 28
- 29 1. Corps jurisdictional Wetlands and Waters of the United States;
- 30
- 31 2. Non-Corps jurisdictional Riparian Habitat;
- 32
- 33 3. Habitat(s) of Endangered and Threatened Species listed under the ESA, or any other
- 34 species deemed to be of concern or special importance to the USFWS;
- 35
- 36 4. Habitat(s) of Endangered and Threatened Species listed under the CESA;
- 37
- 38 5. Habitat(s) of special status species or other species impacted by projects under
- 39 CEQA;

6. Habitat(s) impacted through activities to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream, or lake designated by the CDFG; and,
7. Wetland habitat as defined by the USFWS, and CDFG.

Section II: Definitions

The terms used in this BEI are defined as set forth below.

1. “Adaptive Management” means changes to management practices, including corrective actions as determined to be appropriate by the MBRT, in discussion with the Bank Owner, and based upon Bank monitoring report results and MBRT review of overall Bank performance and compliance. Bank Owner is responsible for implementation of any adaptive management and incorporation into the Management Plan.
2. “Wetland habitat” means waters that provide habitat for special status species as further defined by the USFWS wetland definition and classification system and as adopted by the CDFG.
3. “Bank Closure Plan” is a plan designed to ensure that the Bank is managed and maintained, in perpetuity, consistent with the conservation purposes of the Bank. The Bank Closure Plan describes actions required to close the Bank following the sale of the last authorized Credit. This Plan should include proposed entities for long-term ownership, long-term management, and their agreement to assume all of the ongoing obligations thereof.
4. “Bank Enabling Instrument (BEI)” means this document and all Exhibits, Addenda and Amendments incorporated by reference.
5. “Bank Establishment Date” is the date when the Bank is officially considered open for operation and credit sales may begin. The Bank Establishment Date occurs upon signature of the BEI by all Parties, recording of the conservation easement, and establishment of specified financial assurances.
6. “Bank Owner” means the legal owner of the Bank Property, and the bank operator, unless otherwise specified herein.
7. “CDFG” means the California Department of Fish and Game, a subdivision of the California Resources Agency.
8. “CEQA” means the California Environmental Quality Act (California Public Resources Code Sections 21000 et seq.; guidelines for implementation at California Public

1 Resources Code Sections 15000 et seq.), including all regulations promulgated pursuant
2 to that Act.

3
4 9. “CESA” means the California Endangered Species Act (California Fish and Game Code
5 Sections 2050 et seq.), including all regulations promulgated pursuant to that Act.

6
7 10. “Conservation Easement” is an interest in real property in perpetuity voluntarily created
8 in accordance with Section 815 of California Civil Code and freely transferable in whole
9 or in part by any lawful method for the transfer of interests in real property in this state.
10 The purpose of such a conservation easement is to retain land for the specific goals for
11 which the Bank was established, to prohibit certain activities and uses, and to conserve
12 the biological resources, as more fully described throughout this BEI.

13
14 11. “Construction Security” means an amount funded by the Bank Owner in the amount of
15 100% of a reasonable third party estimate or contract to construct the waters of the U.S.
16 and Covered Habitat (including, but not limited to, earthmoving, planting, structure
17 installation) in accordance with the Development Plan.

18
19
20 12. “Covered Habitat” means the habitat including wetland habitat upon which the Covered
21 Species depend for their continued viability which the Parties determine will be
22 adequately conserved as a result of implementation of this BEI.

23
24 13. “Covered Species” means the species for which the Bank has been established and for
25 which Credits have been allocated. These may include endangered and threatened
26 species or any other species which the Parties determine will be adequately conserved as
27 a result of implementation of the BEI.

28
29 14. "Credit" is a unit of measure representing the accrual, attainment, or protection of aquatic
30 functions and/or the Covered Species or Covered Habitats at a mitigation bank; where
31 one credit here is equivalent to one acre or as otherwise defined in the Development Plan.
32 Credits serve as mitigation or compensation for agency-approved projects, and possibly
33 for other impacts, in the Service Area.

34
35 15. “Development Plan” means the document that describes the proposed construction and
36 habitat establishment activities conducted to establish the Bank Credits including
37 creation, restoration, enhancement, habitat establishment period, the performance criteria
38 to obtain successful habitat establishment, monitoring to evaluate the performance, and
39 reporting.

40
41 16. “Endowment Deposit” is money to be deposited in the Endowment Fund in order to fully
42 fund the endowment principal.

43
44 17. “Endowment Fund” means an investment fund maintained in trust by the CDFG, from
45 which a portion of the interest and earnings shall be used exclusively for the long term

1 management of the Bank Property in accordance with the BEI and Long-Term
2 Management Plan. The Endowment Fund shall be non-wasting. “Non-wasting” means
3 an Endowment Fund principal amount which does not decrease in value through
4 expenditure, inflation, or investment strategy. Re-investment contingency means
5 investing into the principal any unexpended interest in any given year.
6

- 7 18. “ESA” means the federal Endangered Species Act (16 U.S.C. §§ 1531 et seq.), including
8 all regulations promulgated pursuant to that Act.
9
- 10 19. “Financial Assurances Analysis and Schedule” means the spreadsheet or another
11 accounting tool, and the assumptions, used to estimate the Construction, Performance
12 Security, Interim Management Security, and Endowment Fund. This Analysis and
13 Schedule will also contain the transaction dates for management of the financial
14 assurances.
15
- 16 20. “Habitat Conservation Plan” (“HCP”) means a conservation plan prepared pursuant to
17 Section 10(a)(2)(A) of the ESA (16 U.S.C. Section 1539(a)(2)(A)).
18
- 19 21. “Habitat Restoration/Creation” means the re-establishment of ecologically important
20 habitat and/or other ecosystem resource characteristics and functions at a site where they
21 have ceased to exist or exist in a substantially degraded state.
22
- 23 22. “Interim Management Period” means the period of time prior to full funding of the
24 Endowment Fund plus one year for interest accrual. During this period the short-term
25 management, monitoring and reporting activities will be implemented as described in the
26 Interim Management Plan. Following the one-year interest accrual period of the
27 Endowment Fund, the Interim Management Security may be released by the MBRT
28 according to the Interim Management Security Section of this BEI.
29
- 30 23. “Interim Management Plan” means the document that describes the management,
31 monitoring, and reporting activities and details for the Interim Management Period of the
32 bank.
33
- 34 24. “Interim Management Security” is to insure the implementation of maintenance,
35 management and monitoring activities. The Interim Management Security shall be in the
36 amount equal to 1 year of the estimated maintenance, management, and monitoring costs
37 during the Interim Management Period. The Interim Management Security is released as
38 specified in the Financial Operations Section of this BEI.
39
- 40 25. “Long-term Management Period” means the management of the Bank in perpetuity
41 pursuant to the approved Long-Term Management Plan, and any subsequent amendments
42 and adaptive management requirements.
43
- 44 26. “Long-term Management Plan” (“Management Plan”) means a specific plan developed
45 for the Bank to ensure that the Bank is managed and maintained, in perpetuity, consistent

1 with the conservation purposes of the Bank. The Management Plan is the document
2 approved by the MBRT that governs the maintenance, management, monitoring, adaptive
3 management and reporting of the waters, wetlands, Covered Species and Covered
4 Habitats after Bank closure, and as funded by the Endowment Fund.
5
6

- 7 27. “Mitigation Bank Review Team” (MBRT) means an interagency group of Federal, State
8 and /or local agency representatives which oversee the establishment, use and operation
9 of a mitigation bank. The group of agencies signatory to this BEI is described in the
10 opening paragraph of this BEI.
11
- 12 28. “NCCP” (Natural Community Conservation Plan) is a conservation plan created pursuant
13 to Fish and Game Code, Section 2801, *et seq.* An NCCP is a plan developed in
14 accordance with the NCCP Act which provides comprehensive management and
15 conservation of multiple wildlife species, and which identifies and provides for the
16 regional or area-wide protection and perpetuation of natural wildlife diversity while
17 allowing compatible and appropriate development and growth.
18
- 19 29. “Performance Security” means a fund (in a form acceptable to the MBRT) established by
20 the Bank Owner for any required remediation, without limitation. The security shall be
21 in the amount of 20% of the Construction Security.
22
- 23 30. “Perpetuity” means an indefinite period of time; forever.
24
- 25 31. “Phase I Environmental Site Assessment” is an evaluation of the environmental
26 conditions of the property performed as outlined by the American Society of Testing and
27 Materials (ASTM) 1527 “Standard Practice for Environmental Site Assessments: Phase I
28 Environmental Assessment Process.”
29
- 30 32. “Preservation” means the protection of existing ecologically important habitat or other
31 ecosystem resources in perpetuity.
32
- 33 33. “Property” or “Bank Property” means Bank Owner’s real property on which a Bank may
34 be established by this BEI, Conservation Easements will be recorded, and protection and
35 management will occur in perpetuity.
36
- 37 34. “Property Assessment” means a written evaluation and maps depicting legal description
38 and the number of acres on the Property that Bank Owner intends to convey for
39 conservation purposes in accordance with California Civil Code Section 815 and this
40 BEI. This Property Assessment describes any portion of the Bank Property subject to
41 any recorded or unrecorded rights of way, recorded or unrecorded easements, and
42 recorded or unrecorded liens or other encumbrances that may prevent establishment of a
43 Conservation Easement on that portion of the Property for conservation purposes in
44 accordance with California Civil Code Section 815 and this BEI, and which shall be
45 attached hereto in Exhibit E. Plat maps depicting encumbrances and improvements

1 should be included as part of this Property Assessment.

- 2
- 3 35. "Property Assessment Acknowledgement" means a Property Assessment that is signed
- 4 and dated by the Bank Owner, a copy to be attached hereto as Exhibit E.
- 5
- 6 36. "Re-investment contingency" means investing into the principal any unexpended interest
- 7 in any given year unless such interest is intended to build in value for specific capital
- 8 expenditures in certain years.
- 9
- 10 37. "Remediation" means corrective measures taken to ameliorate injury, impact to, or lack
- 11 of performance in accordance with the Development Plan, Interim and Long-term
- 12 Management Plans, Conservation Easement or any other portion of this BEI.
- 13
- 14 38. "Service Area" means the geographic area(s) within which impacts that occur may be
- 15 mitigated or compensated through the sale or use of Credits in accordance with this BEI.
- 16
- 17 39. "USACE" mean the United States Army Corps of Engineers, an agency of the
- 18 Department of the Army.
- 19
- 20 40. "USFWS" means the United States Fish and Wildlife Service, an agency of the United
- 21 States Department of Interior.
- 22
- 23 41. "Wetland Creation, Restoration, and Enhancement" are defined in USACE Regulatory
- 24 Guidance Letter 02-2, December 20, 2002.
- 25
- 26 42. "Wildlife Agencies" means the USFWS and CDFG.
- 27

28 **Section III. Stipulations**

29 A. Baseline Condition

30 Whereas, the Bank Property is currently as described in the Development Plan (Exhibit

31 C) and Biological Resources Survey (Exhibit H).

32

33 B. Disclaimer

34 Whereas, this BEI does not in any manner limit the statutory authorities and

35 responsibilities of the signatory parties, but is, instead, an implementation of such

36 statutory authorities and responsibilities.

37

38 C. Modification of the BEI Template

39 Any modifications to the November 2005 BEI template shall be identified and explained

40 in an attached addendum.

41 D. Exhibits and Appendices

1 Whereas, the following Exhibits, and all subsequent revisions and addenda to the
2 Exhibits hereto, are attachments incorporated into this BEI:

3 Appendix 1 – Description of the Exhibits necessary for BEI review and Bank Approval
4

- 5 1. “Exhibit A” - Bank Location Maps
 - 6 A-1 General Vicinity Map
 - 7 A-2 Bank property Map
- 8 2. “Exhibit B” - Service Area Map(s) and Descriptions(s)
- 9 3. “Exhibit C” - Bank Development Plan
 - 10 C-1 Development Plan
 - 11 C-2 Construction and Performance Security Financial Assurance
12 Analysis and Schedule
- 13 4. “Exhibit D” - Bank Management and Operation
 - 14 D-1 Financial Assurance Analysis and Schedule
 - 15 D-2 Endowment information sheets and financial reporting forms:
16 Mitigation Payment Transmittal Form (CDFG), Payee Data
17 Form 204 (CDFG), Endowment Invoicing Instructions
 - 18 D-5 Interim Management Plan
 - 19 D-6 Long-term Management Plan
 - 20 D-7 Bank Closure Plan
- 21 5. “Exhibit E” - Real Estate Records and Assurances
 - 22 E-1 Preliminary title report, legal description and legal parcel map
 - 23 E-2 Bank Property Assessment and Acknowledgement
 - 24 E-3 Plat Maps
 - 25 E-4 Conservation Easement and Title Insurance
 - 26 E-5 Subordination Agreement(s)
- 27 6. “Exhibit F” - Bank Crediting and Credit Sales
 - 28 F-1 Credit Evaluations
 - 29 F-2 Credit Table
 - 30 F-3 Credit Sales Ledger
 - 31 F-4 Credit Purchase Agreements
 - 32 F-5 Credit Purchase Payment Receipt
 - 33 F-6 Endowment Forms

- 1 7. “Exhibit G” - Phase I Environmental Site Assessment
- 2 8. “Exhibit H” - Biological Resources Survey
- 3 9. “Exhibit I” - Verified Wetland Delineation and Verification Letter
- 4 10. “Exhibit J” - Other Environmental Documentation, Permits, Amendments or
- 5 Revisions

6
7 NOW, THEREFORE, in consideration of the forgoing Recitals and Stipulations and other good
8 and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the
9 Parties agree to the following:

10
11 **Section IV: Bank Evaluation and Acceptance**

12 Representatives of the MBRT have inspected and generally evaluated the conservation
13 and protection of wetlands, Covered Species and Covered Habitats as provided by the Bank
14 Property for the purpose of determining its biological and wetland functions and values in
15 connection with the sale of Credits. As a result of benefits accruing to biological and wetland
16 resources, upon the establishment of the Bank for conservation purposes, the MBRT
17 acknowledges and agrees that the Property possesses biological and wetland functions and values
18 sufficient for the issuance of the Credits as acknowledged in this BEI.

19
20 Notwithstanding anything to the contrary in this BEI, in the event that the Property is
21 evaluated and the MBRT reasonably determines that portions of the Property have been damaged
22 subsequent to the establishment date of this BEI and: (1) the effect of such damage has been to
23 materially impair the habitat values on such damaged Property; and (2) Bank Owner has not
24 reasonably restored habitat value to such damaged Property or provided the MBRT with
25 reasonable evidence that habitat value will be restored, then the MBRT may, at its discretion,
26 either reduce the number of Credits allocated to the Bank in proportion to the damaged area or, if
27 the MBRT determines that habitat values on the Property have been so impaired as to render the
28 Property unsuitable for use as a Bank, the MBRT may terminate this BEI.

29
30 Bank Owner's Performance Under the BEI

31 The Bank Owner agrees to perform all necessary work, in accordance with the provisions
32 of this BEI, to establish the wetland and/or special status species habitats, as proposed in Exhibit
33 C, until it is demonstrated to the satisfaction of the MBRT that the Bank complies in all respects
34 with all conditions contained herein. Bank Owner agrees to be responsible for all costs
35 associated with the establishment of the Bank, including but not limited to construction,
36 remediation, documentation, maintenance, management, monitoring, and reporting, until one
37 year after the Management Endowment Fund is fully funded and all performance criteria are
38 met.

39 Subsequent Phases

40 The Bank Owner shall submit a written request and all relevant documents for approval

1 of each subsequent phase. Each subsequent phase(s) shall conform with this BEI and shall at a
2 minimum include the documents listed in Appendix 1 of this BEI. Subsequent phases may
3 require amendment of the Development Plan, Management Plan and other BEI Exhibits.
4 Subsequent phases need to comply with signatory agencies content requirements at the time
5 subsequent phases are proposed. Any proposals for subsequent phase(s) of the Bank must have
6 written approval by the MBRT prior to Establishment as per Section V of this BEI of that phase.
7

8 **Section V: Bank Establishment**

9 The Bank will be considered established and credit sales may begin only upon
10 completion of the following:

- 11 A. Signature of the BEI by all Parties
- 12 B. Recording of the conservation easement, and
- 13 C. Establishment of all required financial assurances.

14 **Section VI: Financial Assurances**

15 **The Bank Owner is financially responsible for all Bank establishment, management,**
16 **monitoring, and remediation activities. The following financial assurances are intended for**
17 **use only by the MBRT or its designee when the Bank Owner is non compliant or unable to**
18 **carry out their obligations under this BEI. The Bank Owner shall furnish proof of the**
19 **establishment of each of the following financial assurances to each member of the MBRT.**
20 **Any letters-of-credit shall be approved as to form by CDFG or USACE prior to**
21 **acceptance.**
22

23 A. Construction Security

24 Prior to the transfer of any Bank Credits, Bank Owner shall furnish to _____
25 (CDFG or USACE), a Construction Security in the amount specified in Exhibit C. The
26 Construction Security shall be in the form of a _____ (letter-of-credit, cashier's
27 check, or performance bond).
28

29 B. Performance Security

30 Concurrent with the sale of the first Credit, Bank Owner shall furnish to _____
31 (CDFG or USACE) a Performance Security in the amount specified in Exhibit C. The
32 Performance Security shall be in the form of _____ (letter-of-credit, cashier's check,
33 performance bond).
34

35 C. Interim Management Security

36 Concurrent with the sale of the first Credit, Bank Owner shall furnish to CDFG an
37 Interim Management Security in the amount specified in Exhibit D. The Interim
38 Management Security shall be in the form of a _____ (letter-of-credit or cashier's
39 check).

1 D. Endowment Fund

- 2 1. The Endowment Fund shall be funded by the Bank Owner through Endowment
3 Deposits in amounts according to the schedule described below and in Exhibit D.
4 Prior to the first deposit by Bank Owner, CDFG shall establish a dedicated interest
5 bearing account for the purpose of holding the cumulative Endowment Deposits.
6 The Endowment Fund shall be funded as follows:

7 A minimum of 15% of the endowment shall be funded prior to the second credit
8 release;

9 A minimum of 40% of the endowment shall be funded prior to the third credit
10 release;

11 A minimum of 55% of the endowment shall be funded prior to the fourth credit
12 release;

13 A minimum of 70% of the endowment shall be funded prior to the fifth credit
14 release;

15 100% of the endowment shall be funded prior to the final credit release.
16

- 17 2. For any year the Endowment Fund is not fully funded, the Endowment total and
18 Deposits shall be adjusted annually, beginning on January 1, 2006, and upon each
19 one-year anniversary thereafter (each such date, beginning January 1, 2006, is
20 referred to hereinafter as an "Adjustment Date"), by a percentage equal to the
21 percentage increase, if any, in the Consumer Price Index (CPI) for All Urban
22 Consumers (Base Years 1982-1984 = 100) for California, calculated by the CA
23 Department of Finance using a formula developed by the CA Dept. of Industrial
24 Relations which is published most immediately preceding the Adjustment Date, as
25 compared to the CPI published most immediately preceding the date of this BEI (the
26 "CPI Adjustment").
- 27 3. Bank Owner shall use an Endowment Deposit Form provided in Exhibit D in order
28 to notify each member of the MBRT of each Endowment Deposit made, within 30
29 days of such deposit.
30

31 **Section VII. Credit Release Schedule and Bank Habitat Establishment Performance**
32 **Criteria**

33 A. Wetland Credit Release

34 Wetland credits shall be released, as described below, based upon attainment of the
35 performance criteria described in the Development Plan (Exhibit C) and MBRT approval. No
36 subsequent credit releases may occur until the prior credit release has occurred and such
37 performance obligations have been met:
38

- 39 1. 15% of the total credits upon the Bank Establishment Date in accordance with

1 Section V of this BEI.

- 2 2. 25% of the total credits upon submission of the
- 3 as-built drawings.
- 4 3. 15% of the total credits upon attainment of year two performance criteria.
- 5 4. 15% of the total credits upon attainment of year three performance criteria and a
- 6 verified wetland delineation.
- 7 5. 15% of the total credits upon attainment of year four performance criteria.
- 8 6. 15% of the total credits upon attainment of year five performance criteria and a
- 9 verified wetland delineation.

10
11 The Bank Owner agrees to submit as-built drawings, with accurate maps of the
12 constructed wetlands no later than 90 calendar days following completion of
13 construction associated with the establishment of the Bank wetlands. The as-built
14 drawings and any attachments will describe in detail any deviation from the
15 proposal described in the Development Plan.

16 All credit releases, with the exception of the first, are subject to Bank Owner's
17 submission of a yearly monitoring report, a MBRT site visit, and approval by the
18 MBRT.

19
20 Failure to meet performance criteria will reduce the number of wetland credits
21 available for release. The Bank Owner shall revise the Credit Table in Exhibit F
22 accordingly.

23 24 B. Covered Species and Covered Habitat Types Credit Release Schedule

25 Credits for Covered Species and Covered Habitat Types shall be determined and released
26 as described in this BEI, Exhibit C, and Exhibit F. Credits have been assigned to the
27 Bank based upon credit methodologies developed by the MBRT.

28 Upon submittal of all appropriate documentation by the Bank Owner, and subsequent
29 approval by the MBRT, it is agreed that Credits for Covered Species and Covered Habitat
30 Types will be released by the MBRT in accordance with the following:

- 31 1. Preservation credits for Covered Species and Covered Habitat Types shall be
- 32 released on the Bank Establishment Date according to Bank Crediting (Exhibit F).
- 33 2. Creation, restoration, enhancement credits shall be released according to the
- 34 Development Plan (Exhibit C) and Bank Crediting (Exhibit F)

35 Credits Table, as described in Exhibits C and F.

36 The Bank Owner agrees to submit as-built drawings, with accurate maps of the
37 constructed habitats no later than 90 calendar days following completion of construction

1 associated with the establishment of the Bank habitats. The as-built drawings and any
2 attachments will describe in detail any deviation from the proposal described in the
3 Development Plan.

4 Failure to meet performance criteria will reduce the number of Covered Species and
5 Covered Habitat Credits available for release. Bank Owner shall revise the Credit Table
6 in Exhibit F accordingly.

7
8 C. Modification of the Development Plan

9 Establishment of the Bank will be performed and Credits will be released as described in
10 this BEI. In the event that the Bank Owner or the MBRT determine that modifications
11 must be made in the Development Plan to ensure successful establishment of habitat
12 within the Bank, or in order to comply with specific permits or other authorizations
13 needed to establish the Bank after the BEI is signed by the Parties, the Parties shall meet
14 to discuss the required modifications, and the Bank Owner shall submit a written request
15 for approval of such modification within 60 days of the meeting. Upon written approval
16 from each member of the MBRT, the Bank Owner shall then implement all modifications
17 approved by the MBRT. The Bank Owner shall provide all final amended documents to
18 MBRT members within 60 days of implementation.

19
20 D. Remediation Plans

21 The MBRT shall be notified upon discovery by any Party of a failure to achieve the
22 performance criteria as described in the Development Plan. The MBRT shall require, in
23 writing, that the Bank Owner develop a remediation plan. All remediation efforts and an
24 evaluation of their effectiveness shall be incorporated into the annual monitoring report.

25 1. Within 60 days of the written notification, the Bank Owner shall develop a
26 remediation plan and submit it to the MBRT. The remediation plan will include
27 proposed remedial actions and a schedule within which the actions will be
28 implemented. The Bank Owner shall, at Bank Owner's cost, implement the
29 necessary and appropriate remedial actions as approved by the MBRT. In the event
30 the Bank Owner fails to implement such remedial actions approved by the MBRT,
31 the MBRT will notify the Bank Owner that the Bank Owner is in default and
32 identify remedial actions the MBRT members believe to be necessary in order to
33 achieve the performance criteria set forth in the Development Plan. If conditions do
34 not change or continue to deteriorate, within two years from the date that the
35 specific remediation actions were first identified in writing to the Bank Owner by
36 the MBRT, control of the Performance Security shall be transferred to the CDFG, or
37 another designee, as appropriate, to undertake corrective measures as approved by
38 the MBRT.

39
40 2. If the MBRT determines that the Bank is operating at a credit deficit, the Bank
41 Owner shall be notified, whereupon credit sales and debiting of credits will

1 immediately cease, and the members of the MBRT and the Bank Owner, will
2 determine what remedial actions are necessary to correct the credit deficit. If
3 conditions do not change or continue to deteriorate, within two years from the date
4 that the specific remediation actions were first identified in writing to the Bank
5 Owner by the USACE, control of the Performance and/or the Interim Management
6 Security and the Long-term Management Endowment funds shall be transferred to
7 the CDFG or other MBRT-approved entity or their designees, as appropriate, to
8 undertake corrective measures as approved by the MBRT.

9 10 **Section VIII: Operation of the Bank**

11 12 **A. Service Area**

13 The Bank is established to provide mitigation to compensate for unavoidable impacts to
14 Waters of the United States, including wetlands, streambed habitat and endangered and
15 sensitive species habitat within the Service Area of the Bank, as described and shown in
16 Exhibit B. Decisions authorizing use of Credits from the Bank for project compensation
17 will be made by the appropriate MBRT agencies on a case-by-case basis in accordance
18 with applicable requirements. In general, it is agreed that use of Credits from the Bank
19 will be authorized whenever the appropriate authority determines: (i) that the particular
20 project requiring compensation/mitigation may purchase Bank Credits; and, (ii) the Bank
21 has available for sale Credits of the type required for the particular project, and in an
22 appropriate location, and (iii) the Bank Owner is in compliance with this BEI. Wetlands,
23 habitats and species at the Bank are intended to provide "in-kind"
24 compensation/mitigation.

25 26 **B. Credit Sales**

- 27 1. Upon Bank Establishment, the Bank shall have Credits to sell or convey as specified
28 in Exhibit F and the Wetland Credit release schedule in this BEI. In no case shall
29 the Credits sold or expended exceed the total number of Credits which have been
30 released by written verification by the MBRT prior to the proposed date of sale. All
31 Credit releases subsequent to this BEI shall be approved in writing by the
32 appropriate MBRT members, with a copy sent to all Parties, prior to any Credit
33 sales.
- 34 2. Subject to Bank Owner's obligations under this BEI, Bank Owner shall have the
35 exclusive right to determine the price for any and all Credits offered for sale or use
36 at this Bank.
- 37 3. Upon determination by appropriate MBRT members that the purchase of credits is
38 an acceptable form of mitigation, a project applicant will be referred by the
39 appropriate agencies to acceptable MBRT-approved Banks. Bank Owner shall
40 follow the agency-specific methodology for selling credits as detailed in Exhibit F,
41 and shall notify all members of the MBRT upon completion of any credit sale, as
42 described in the Reporting Section of this BEI.

- 1 4. In the event that the MBRT reasonably determines that portions of the Bank have
2 been damaged subsequent to the Bank Establishment Date, and the effect of such
3 activity has been to materially impair habitat values on such damaged Property; and
4 Bank Owner has not reasonably restored habitat value to such damaged area or
5 provided the MBRT with reasonable evidence that habitat value will be restored,
6 then the MBRT may, at their discretion, suspend Credit sales and/or reduce the
7 number of Credits allocated to the Bank in proportion to such damaged area.
- 8 5. If any member(s) of the MBRT approve(s) an NCCP and/or HCP covering all or any
9 part of the Service Area, and that plan uses habitat categories different from those
10 set forth herein, then, at the request of the Bank Owner, the remaining credits may
11 be reallocated by the MBRT in accordance with such different habitat categories.
- 12 6. All Credit sales shall be reported to the MBRT in accordance with reporting
13 requirements described below in this Section.
- 14 7. Credit modifications due to expansion, restoration or other proposed means, shall be
15 amended to this BEI according to the Modification Section below.
- 16 8. Credit sales agreements are contracts between the Bank Owner and project applicant
17 detailing the sale and purchase of Bank Credits by a specific project applicant.

18 C. Interim and Long-Term Management and Monitoring

19 1. Interim Management and Monitoring

20 Interim management, maintenance, monitoring and reporting activities shall be
21 implemented according to the Interim Management Plan in Exhibit D and remain in
22 effect until the all of the performance criteria are met and the Endowment Fund is
23 fully funded for one year.
24

25 2. Long-Term Management

26 Once the short-term performance objectives in the Development Plan have been met
27 and the Endowment Fund is fully funded for one year, long-term maintenance and
28 management of the Bank shall be implemented as per Exhibit D. Bank Owner, or
29 its successors or assigns, shall be obligated to oversee, manage, monitor and
30 maintain the Bank lands in perpetuity to preserve its habitat and conservation values
31 in accordance with the terms of this BEI, the Conservation Easement and the
32 prescriptions identified in the Management Plan (Exhibit D) as funded through the
33 Management Endowment Fund. The Management Plan prepared for the Bank shall
34 provide the basis for the implementation of the specific management measures and
35 tasks and identify the priority of the various measures and tasks. Bank Owner or its
36 successors or assigns and the MBRT shall meet and confer from time to time, upon
37 the request of any one of them, to revise the Management Plan to better preserve the
38 habitat and conservation values of the Property through Adaptive Management.
39 Any amendments to the Management Plan which cost more than the anticipated
40 costs estimated for the endowment will only be carried out when there is sufficient
41 funding available in the endowment or if the Bank Owner agrees to implement the

1 management at their own expense. Management activities shall be funded
2 according to the Financial Operations Section of this BEI.

3
4 3. Long-Term Monitoring

5 Long-term monitoring shall be performed as described within the Management
6 Plan. The Management Plan shall include specific measures for regular and
7 continuous long-term monitoring of the Bank and the biological resources to be
8 conducted by a monitoring entity or entities approved by the MBRT. Bank Owner
9 shall be responsible for annual reporting to the MBRT per the Reporting Section of
10 this BEI.

11 4. Conservation Easement Monitoring

12 Bank Owner's obligations shall include using reasonable efforts to prevent third
13 party use of the Property in a manner not permitted under this BEI or the
14 Conservation Easement. Easement monitoring shall be conducted by the holder of
15 the Conservation Easement or another MBRT-approved designee, and reported as
16 per the Reporting Section below.

17
18
19 D. Bank Closure

20 1. The Bank shall be deemed closed upon the following:

- 21 a. All performance criteria have been met consistent with the objectives in the
22 Development Plan; and
23 b. Either:
24 1) The last authorized Bank Credit has been transferred; or
25 2) The Bank Owner requests bank closure by written notice to the MBRT and
26 MBRT provides written approval of the closure; and
27 c. All financial responsibilities have been met, including full funding of the long-
28 term endowment fund, and
29 d. The Bank Closure Plan identifies the Bank Owner, and any intended successors
30 or assigns for long-term management, and identifies grantee or fee title owner of
31 the Property.

32
33 2. Deviation from the approved Bank Closure Plan is subject to review and written
34 approval by the MBRT.

35
36 E. Financial Operations

37 1. Securities

1 Securities held by USACE or the CDFG shall be released along with any interest
2 generated in accordance with the following:

3 a. Construction Security

4 The Construction Security shall be provided by the Bank Owner according to
5 Appendix 1 and Exhibit C. The Construction Security shall be retained by the
6 USACE or the CDFG until Bank Owner's completion of the construction and
7 planting activities as demonstrated by:

- 8 1) Submission of the as-built drawings;
- 9 2) An on-site inspection involving some or all of the members of the MBRT;
10 and
- 11 3) Written approval from the appropriate MBRT agencies.

12
13 b. Performance Security

14 The Performance Security shall be provided by the Bank Owner according to
15 Appendix 1 and Exhibit C. The Performance Security shall be retained by the
16 USACE or the CDFG. Until all performance criteria have been met, the
17 Performance Security shall remain in effect. In the event that any portion of the
18 Performance Security is expended the Bank Owner shall replenish the security in its
19 entirety within one (1) year. The Performance Security shall be released upon
20 demonstration of meeting performance criteria as described in the Development
21 Plan, as evidenced by:

- 22 1) Submission of all required monitoring reports,
- 23 2) The third anniversary of the remedial action most recently taken in order to
24 meet the performance criteria set forth in the Development Plan;
- 25 3) An on-site inspection involving some or all of the members of the MBRT;
26 and
- 27 4) Written approval from the appropriate MBRT agencies

28
29 c. Interim Management Security

30 The Interim Management Security shall be funded per the method and schedule
31 described in Exhibit D and Appendix 1. In the event that any portion of the Interim
32 Management Security is expended during the Interim Management Period, the Bank
33 Owner shall replenish the security in its entirety within one (1) year.

34 Provided the Bank meets all obligations as described under Interim Management
35 Security Section in Exhibit D, the Interim Management Security shall be released
36 after the latest of the following:

- 37 1) The fifth anniversary of the date of this BEI; or

1 2) One year after the Endowment Fund has been fully funded. If the
2 Endowment Fund has not been fully funded by the time the obligations
3 secured by the Interim Management Security have been met, the Interim
4 Management Security shall be used to supplement the funding of the
5 Management Endowment Fund.

6
7 2. Management Endowment Fund

8 a. Endowment Fund Trustee

9 1) CDFG shall hold the Management Endowment Fund principal and interest
10 monies as required by existing law in the Special Deposit Fund or
11 subsequent State authorized trustee fund, which consists of monies that are
12 paid into it in trust pursuant to law, and is appropriated to fulfill the purposes
13 for which payments into it are made. CDFG shall manage these monies as
14 required by Fish and Game Code Section 13014 and Section 16370 of the
15 Government Code and use the interest monies to fund long-term
16 management, enhancement, monitoring, and enforcement activities on
17 habitat lands in a manner consistent with the terms of this BEI, including the
18 Management Plan and any amendments to the Management Plan (Adaptive
19 Management) approved by CDFG and USFWS.

20 2) If CDFG will not manage funds in the Fish and Game Mitigation and
21 Protection Endowment Principal Account for the Bank, the MBRT shall
22 approve in writing of an appropriate successor entity to hold the funds. An
23 appropriate entity may be another government agency with a legal public
24 trust mandate regarding conservation of fish and wildlife resources or private
25 non-profit fund, non-profit foundation, or non-profit corporation which is
26 organized and operated exclusively for charitable purposes and which has
27 established its tax exempt status under Section 501(c)(3) of the Internal
28 Revenue Code, and whose purposes are consistent with the overall purpose
29 to develop, acquire, and maintain in perpetuity wetlands, other habitats, and
30 habitats for listed species and species of concern, as consistent with
31 California Civil Code Section 815. The successor entity shall agree to hold,
32 manage, and disperse the funds in a manner consistent with the requirements
33 of the MBRT, and shall submit such a proposal for approval by the MBRT,
34 and a final, approved agreement as Exhibit D to this BEI, and as an
35 amendment to the Management Plan.

36 b. A portion of the interest and earnings from the Management Endowment Fund
37 shall be used for the long-term management, monitoring, maintenance and
38 reporting of the Bank and Bank related activities. The Management Endowment
39 Fund shall be determined through an economic analysis as provided in Exhibit D
40 of this BEI. The Management Endowment Fund shall be held by the CDFG or
41 other MBRT-approved entity as trustee and expended in accordance with the
42 Declaration of Trust Agreement herein.

- 1 c. Interest earnings on the Endowment Funds available from the Endowment
2 Account, beyond those necessary to provide for Endowment Principal growth
3 commensurate with inflation and a re-investment contingency, may be used by
4 the Bank Owner for management of the Property in accordance with the
5 Management Plan and following the general estimate of the Financial
6 Assurances Analysis and Schedule.
- 7 d. Bank Owner may invoice CDFG for management activities following the
8 invoicing instructions in Exhibit D.
- 9 e. If there is not sufficient funding available from the Endowment Fund interest
10 and earnings or if long-term Property management expenses exceed those
11 estimated in the Financial Analysis and Schedule, Bank Owner shall consult
12 with the MBRT to identify the most effective means to implement the
13 management measures and tasks with the resources available. Any endowment
14 fund revenues (including earnings and interest) as adjusted for inflation that may
15 be determined to be generated in excess of the anticipated annual expenditures
16 shall be retained to address unexpected expenses, including but not limited to,
17 adaptive management needs and other unexpected events.

18
19 **Section IX: Reporting**

20 A. Annual Report

21 Bank Owner shall submit an annual report to each member of the MBRT on or before
22 August 15th of each year, with the first report due after the first full growing season is
23 complete after re-vegetation. All elements required to be in the annual reports shall be
24 described in the Management Plan, and include but are not limited to management and
25 maintenance tasks, any adaptive management or remediation actions or concerns, a
26 schedule of monitoring dates for all activities and for monitoring the easement,
27 evaluation of attainment of performance criteria, financial accounting and credit sales
28 accounting.

29
30 1. Bank Development and Interim Management Monitoring and Maintenance

31 This information shall include habitat establishment monitoring and maintenance
32 requirements, the schedule for, and progress towards meeting, performance criteria;
33 deficiencies, recommendations, proposed actions. All of the required information
34 shall be described in detail in the Development Plan (Exhibit C).

35
36 2. Long-term Bank Management, Maintenance and Monitoring

37 The reporting requirements for long-term management, maintenance and monitoring
38 are fully described in the Management Plan

39 a. Financial Accounting

40 Bank Owner shall submit to each member of the MBRT a copy of any and all

1 payment transmittals for Performance Security and Interim Management
2 Security. Bank Owner shall maintain an accounting of all funds deposited into
3 the Endowment Fund. This accounting shall be reported annually to the MBRT.

4 Bank Owner shall maintain an accounting of all funds received and expended
5 for the management of the Property using accepted accounting methods. An
6 itemized account of the management activities conducted in accordance with the
7 Management Plan shall be submitted to the MBRT annually according to the
8 schedule provided in Exhibit D, including the following:

- 9 1) The time period covered, i.e. the dates “from” and “to”;
- 10 2) All endowment disbursements received for Bank Activities (from Interest
11 and Earnings on Endowment Funds, or any other source to fund Bank
12 activities);
- 13 3) A description of the activities completed, e.g. management and monitoring
14 tasks, operations, and equipment. The accounting must be itemized using
15 the categories and following the format of the Annual Funding Schedule,
16 PAR or equivalent economic analysis and the Management Plan;
- 17 4) The rate charged for the activity;
- 18 5) Number of hours worked; and,
- 19 6) The total amount expended.

20 Bank Owner’s accounts shall be audited annually and the results of the audits
21 shall be submitted to the MBRT.

22
23 b. Credit Sales Accounting and Reporting

24 The Bank Owner shall notify the MBRT upon the sale of each and every Bank
25 Credit. Notification of each credit sale shall be in the form of the appropriate
26 credit sale agreement(s) (Exhibit F). Bank Owner shall send a full and complete
27 updated ledger to each member of the MBRT within 10 days of each credit sale.
28 Bank Owner shall be responsible for entering all required Bank information into
29 electronic database and tracking systems approved by the MBRT and as
30 amended to this agreement. Bank Owner is responsible for reporting, separately
31 and in writing, to each member of the MBRT any additional crediting awarded
32 to the Bank after completion of the BEI.

33
34 **Section X: Responsibilities of the Bank Owner**

35 A. Bank Owner hereby agrees and covenants for so long as this BEI is in effect, that:

- 37 1. Bank Owner shall not discharge or release to the Property, or permit others to
38 discharge or release to the Property, any material or substance deemed hazardous or
39 toxic under any federal, state, or local environmental law;

- 1 2. Bank Owner shall not create any encumbrance to the title of the Property other than
2 those set forth in Exhibit E and accounted for in the Property Assessment in Exhibit
3 E, and Bank Owner shall not execute, renew, or extend any lien, license, or similar
4 interest without the prior written consent of the MBRT;
- 5 3. Bank Owner shall not construct any structure or engage in any activity or use of the
6 Property, including mineral exploration, excavating, draining, dredging, or other
7 alteration of the Property, that is not consistent with and in accordance with this
8 BEI, any Conservation Easement, and the Management Plan, without the prior
9 written consent of the MBRT; and
- 10 4. Bank Owner shall ensure that the Property is maintained to ensure its suitability as a
11 Bank consistent and in accordance with this BEI, any Conservation Easement, and
12 the Management Plan.
- 13 5. The Bank Owner shall allow, or otherwise provide for, access to the site by all
14 signatory Parties, as necessary, for the purpose of inspection and compliance
15 monitoring consistent with the terms and conditions of this BEI. Inspecting Parties
16 shall provide reasonable notice to the Bank Owner during normal business hours
17 and not less than 48 hours in advance, prior to inspection of the Bank.

18 19 **Section XI: Responsibilities of the MBRT**

20 21 **A. MBRT Oversight**

22 The MBRT agrees to provide appropriate oversight in carrying out provisions of this
23 banking instrument.

24 25 **B. MBRT Review**

26 The MBRT agrees to review and provide comments on all required documents for the
27 Bank, as identified or incorporated by reference into this BEI, in a timely manner.

28 Comments on the annual reports and remediation plans will be reviewed within 60
29 calendar days from the date of complete submittal, except for good cause. If the MBRT
30 is unable to review remediation plans within the time specified, this fact will be reflected
31 in any schedule established for remediation and any evaluation of Bank Owner for time
32 of performance.

33 34 **C. Evaluation of Bank Progress**

35 The MBRT agrees to review as-built drawings and monitoring reports and provide
36 comments or release credits within 60 calendar days from the date of complete submittal,
37 except for good cause.

38 39 **D. Compliance Inspections**

40 The MBRT shall conduct compliance inspections as necessary:

- 1 1. To verify the credits then currently available in the Bank; and/or
- 2 2. Recommend corrective measures as needed; or
- 3 3. For any other purpose as necessary to assure compliance with this BEI. These
- 4 inspections shall continue until the effort to restore and enhance the Bank property,
- 5 as described in this BEI, has been determined to be successful or otherwise ceases,
- 6 and as necessary thereafter, as determined by the MBRT.

7
8 **Section XII: Other Provisions**

9
10 A. Force Majeure

- 11 1. The Bank Owner shall be responsible to maintain and remediate the Bank except
- 12 upon Catastrophic Events, events of Force Majeure or unlawful acts as defined
- 13 below.

14
15 2. Definitions

- 16 a. Catastrophic Event shall mean an event, such as a spill of hazardous or toxic
- 17 substance, the impact of a vehicle or falling aircraft, or a fire, which has a
- 18 material and detrimental impact on the quality of native vegetation, soils, or
- 19 wildlife of the mitigation bank and over which the Bank Owner has no control.
- 20
- 21 b. Force Majeure shall mean war, insurrection, riot or other civil disorders, flood,
- 22 earthquake, fire, governmental restriction or the failure by authority, or any
- 23 injunction, which has a material and detrimental impact on the Bank; provided,
- 24 however, that (i) a riot or other civil disorder shall constitute an event of Force
- 25 Majeure only if the event has broad regional impacts and is not endemic to the
- 26 Bank and its immediate locale; (ii) a flood shall be considered an event of Force
- 27 Majeure only if it is greater than a presently projected 100-year flood, where
- 28 "flood" refers to a runoff event; (iii) an earthquake shall constitute an event of
- 29 Force Majeure only if the ground motion it generates at the Bank is greater than
- 30 that presently projected from an earthquake with a return period of 475 years;
- 31 (iv) disease shall constitute an event of Force Majeure only if such event has
- 32 broad regional impact and is not endemic to the Bank and its immediate locale;
- 33 and (v) governmental restriction or the failure by any governmental agency to
- 34 issue any requisite permit or authority, or any injunction or other enforceable
- 35 order of any court of competent jurisdiction shall not constitute an event of
- 36 Force Majeure unless there is no other feasible means of remediation.
- 37
- 38 c. Unlawful Act shall mean the unlawful act of another and shall include an event
- 39 or series of events, such as the intentional dumping within the Bank, or any
- 40 connected watercourse, of a hazardous toxic substance, or the discharge of such
- 41 a substance by any person or entity other than the Bank Owner in violation of a

1 statute, ordinance, regulation or permit, which event or series of events has a
2 material and detrimental impact on the water quality, native vegetation, soils or
3 wildlife of the Bank.

- 4
- 5 3. Notwithstanding the foregoing, subject to the availability of funds in the
6 Performance Security, the Interim Management Security and/or the Management
7 Endowment Fund, Bank Owner shall not be relieved from the obligation to maintain
8 and remediate the Bank by reason of any such discharge which occurs as a result of
9 normal non-catastrophic activities. In case of occurrence of a Catastrophic Event,
10 events of Force Majeure, or unlawful acts, Bank Owner, and the MBRT shall meet
11 to discuss the future course of action and management of the Bank and shall
12 continue their obligation to the extent practicable using the remaining funds in the
13 accounts.
- 14
- 15 4. The Bank Owner shall bear the burden of demonstrating
- 16 a. That the non-compliance was caused by circumstances beyond the control of the
17 Bank Owner and/or any entity controlled by the Bank Owner, including its
18 contractors and consultants;
- 19 b. That neither the Bank Owner nor any entity controlled by the Bank Owner,
20 including its contractors and consultants, could have reasonably foreseen and
21 prevented such noncompliance; and
- 22 c. The period of noncompliance was caused by such circumstances.
- 23
- 24 5. Reasonably foreseeable technical problems, or unanticipated or increased costs or
25 expenses associated with the implementation of actions called for by this BEI, or
26 changed financial or business circumstances in and of themselves shall not serve as
27 the basis for modifications of this BEI or extensions for the performance of the
28 requirements of this BEI.
- 29
- 30 6. Compliance with any requirement of this BEI by itself shall not constitute
31 compliance with any other requirement. An extension of one compliance date based
32 on a particular incident shall not necessarily result in the extension of a subsequent
33 compliance date or dates. The Bank Owner must make an individual showing of
34 proof regarding the cause of each delayed step or requirement for which an
35 extension is sought.

36

37 B. Dispute Resolution

- 38 1. Disagreements Regarding Interpretation of this BEI Between the MBRT and Bank
39 Owner

1 In the event of any disagreement or dispute between one or more of the members of
2 the MBRT, and the Bank Owner, regarding the interpretation and applications of
3 this BEI, the appropriate MBRT member(s) and the Bank Owner shall meet within
4 30 days of a written request therefore made by a party, and shall attempt to resolve
5 such disagreement or dispute. In the event that the MBRT member(s) and Bank
6 Owner have not resolved the disagreement or dispute within 60 days of the date of
7 the notice first requesting a meeting, then either party may elect to resolve the
8 disputed disagreement by the appropriate remedies below.

9
10 2. Disputes Between Members of the MBRT:

11 Resolution of disputes about application of this banking instrument as between the
12 members of the MBRT shall be in accordance with those stated in the Federal
13 Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR
14 58605 et seq.).

15
16 3. Disputes Between the MBRT and Bank Owner:

17 a. Members of the MBRT and the Bank Owner shall each have all of the remedies
18 available in equity (including specific performance and injunctive relief) and at
19 law to enforce the terms of this BEI and to seek remedies for any breach or
20 violation thereof. Nothing in this BEI shall be deemed to limit the jurisdiction of
21 the individual members of the MBRT over endangered, threatened, and sensitive
22 species, biological resources, and waters of the United States, or to restrict the
23 ability of the members of the MBRT to seek civil or criminal penalties or
24 otherwise fully discharge their responsibilities under applicable law.

25 b. The Members of the MBRT and the Bank Owner agree to work together in good
26 faith to resolve disputes concerning this BEI, but any party may seek any
27 available remedy. Unless an aggrieved party has initiated administrative
28 proceedings or suit in federal court, the Parties may elect to employ an informal
29 dispute resolution process whereby:

- 30 1) The aggrieved party shall notify any other Parties of the provision that may
31 have been violated, the basis for contending that a violation has occurred,
32 and the remedies it proposes to correct the alleged violation;
- 33 2) The party alleged to be in violation shall have thirty (30) days or such other
34 time as may be agreed upon to respond and, during this time, may seek
35 clarification of the initial notice and shall use its best efforts to provide any
36 responsive information;
- 37 3) Within thirty (30) days after such response was provided or due, party
38 representatives shall confer and negotiate in good faith toward a resolution
39 satisfactory to each party, or shall establish a specific process and timetable
40 to seek such solution.

1 C. Transfer

- 2 1. Once the Bank has been established the Bank Owner shall, at any time, have the
3 right to convey or transfer the Property in accordance with this BEI and subject to
4 written concurrence by the MBRT, which concurrence shall be subject to the
5 requirement that the successor or assign assume all of the Bank Owner's obligations
6 pursuant to this BEI. If such transfer is made without the prior written concurrence
7 of the MBRT, such transfer may, at the MBRT's discretion, result in the termination
8 of this BEI.
- 9
- 10 2. If any of the required financial obligations under this BEI are not completely funded
11 at the time of transfer, either the current Bank Owner, or the replacement Bank
12 Owner, successors or assigns, shall deposit or provide security in a form approved
13 by the MBRT for any funds necessary to completely fund these accounts prior to the
14 transfer of the Bank. Prior to transfer, the Bank Owner shall provide to each
15 member of the MBRT a signed commitment from the replacement Bank Owner
16 stating that the replacement Bank Owner accepts all of the responsibilities of the
17 BEI. Transfer or assignment of this BEI to a party approved in writing by the
18 MBRT shall also be subject to the requirement that any funds in a Contingency
19 Fund or Management Endowment Fund shall continue to be expended in a manner
20 consistent and in accordance with this BEI, the Conservation Easement, and the
21 Management Plan.

22

23 D. Execution, Modification, and Termination of the BEI

24 1. Execution

25 The Bank Owner must sign the BEI prior to the signature and execution of the BEI
26 by the members of the MBRT. Subsequently, the BEI shall be executed by each
27 signatory agency to said document. The Conservation Easement shall be recorded,
28 and a copy of the recorded easement shall be submitted to the MBRT for inclusion
29 in the BEI.

30

31 2. Modification

32 This banking instrument may be amended or modified with the written
33 approval of each member of the MBRT and the Bank Owner.

34

35 3. Termination of this BEI

36 a. Termination of BEI Prior to Credit Sales

37 Prior to any Credit sales, the Bank Owner may withdraw the entire Bank
38 property and terminate this BEI at any time provided that:

- 39 1) No Credits developed in the Bank have been sold or conveyed in order to

1 compensate for the loss of wetlands and special status species habitats; and

2 2) The wetland acreage and habitat values of any habitat existing on the Bank
3 property prior to the initiation of efforts to restore and enhance the site shall
4 be preserved in a condition at least equal to that prior to initiation of Bank
5 establishment efforts.

6 3) Bank Owner shall have the right to convey or transfer the Property prior to
7 establishment of the Bank in accordance with this BEI and subject to written
8 concurrence by the MBRT. If such transfer is made without the prior written
9 concurrence of the MBRT, such transfer shall result in the termination of
10 this BEI.

11
12 b. Termination of BEI after Credit Sales begin. As regards individual signatories
13 to the BEI, termination of the BEI may only happen consistent with the
14 following terms:

15 1) Any of the MBRT members, with the exception of the USACE, USFWS,
16 and CDFG may terminate their participation upon 30 calendar days' written
17 notification to all signatory Parties.

18 2) The CDFG and USFWS may terminate their participation in this BEI on the
19 condition that each of the following has occurred:

20 a) Bank Owner has breached one or more Owner Covenants or terms and
21 conditions set forth herein;

22 b) Bank Owner has received written notice of such breach and order to
23 cease Credit sales from the CDFG and USFWS;

24 c) Bank Owner has failed to cure such breach within thirty (30) days after
25 such notice; provided that in the event such breach is curable in the
26 judgment of the CDFG and USFWS, but cannot reasonably be cured
27 within such thirty (30) day period, the CDFG and USFWS shall not
28 terminate this BEI so long as Bank Owner has commenced the cure of
29 such breach and is diligently pursuing such cure to completion. Nothing
30 in this paragraph is intended or shall be construed to limit the legal or
31 equitable remedies (including specific performance and injunctive relief)
32 at law available to the CDFG and USFWS in the event of a threatened or
33 actual breach of this BEI;

34 d) Bank Owner is in default under this BEI as described above, and fails to
35 cure such breach, and Bank Owner fails to designate a replacement Bank
36 Owner in accordance with this BEI within 180 days of Bank Owner's
37 receipt of written notice from any member of the MBRT that the Bank
38 Owner is in default of its obligations under the BEI. If Bank Owner fails
39 to designate a replacement Bank Owner, then such public or private land
40 or resource management organization acceptable to and as directed by
41 the MBRT may enter onto the Property in order to fulfill the purposes of

1 the Bank as described in the BEI; and

2 3) Upon written concurrence of the MBRT, this BEI may be terminated
3 following the sale or conveyance of all available Credits and satisfaction of
4 all substantive terms and conditions of this BEI other than ongoing
5 management obligations such as maintenance and monitoring, as set forth in
6 the Management Plan, provided that the Endowment Fund shall continue to
7 be expended in a manner consistent and in accordance with the conservation
8 purposes for which it was established pursuant to this BEI and California
9 Civil Code Section 815, any Conservation Easement, and the Management
10 Plan, and any Conservation Easement shall continue in perpetuity as a
11 covenant running with the land.

12 4) If requested, the member(s) of the MBRT proposing to terminate
13 participation in the MBRT agree to meet with the other MBRT members to
14 discuss the reason(s) for such termination, prior to the termination taking
15 effect. Notice of a request for such meeting shall be made by the requesting
16 MBRT member(s) not later than 15 calendar days from receipt of the notice
17 of termination.

18 c. Termination by one member of the MBRT of its involvement in this BEI shall
19 not terminate or affect the relationship between the remaining members of the
20 MBRT, toward each other or the Bank Owner, under this BEI.

21 d. As regards the termination of the BEI in its entirety, the terms and provisions of
22 this BEI will be valid:

23 1) For two years from the last date of execution of the BEI by the MBRT
24 members in the event that no credits are sold from the bank; or

25 2) Until the Bank Closure Plan has been implemented to the satisfaction of the
26 MBRT and the USACE provides notice, in writing, to the Bank Owner that
27 this instrument may be terminated.

28
29 E. Specific Language of Bank Enabling Instrument Shall be Controlling

30 To the extent that specific language in this document changes, modifies or deletes terms
31 and conditions contained in those documents that are incorporated into the BEI by
32 reference, the specific language within the BEI shall be controlling.

33
34 F. Entire Agreement

35 This BEI, and all exhibits, addenda, schedules and agreements referred to in this BEI, in
36 addition to any other elements of a BEI required under the Federal Guidelines not
37 heretofore provided by the Bank Owner, constitute the final, complete and exclusive
38 statement of the terms of the agreement between and among the MBRT and the Bank
39 Owner pertaining to the Bank and supersedes all prior and contemporaneous
40 understandings or agreements of the Parties. No other agreement, statement, or promise

1 made by the Parties, or to any employee, officer, or agent of the Parties, which is not
2 contained in this BEI, shall be binding or valid. Each party acknowledges that no
3 representation, inducement, promise or agreement, oral or otherwise, has been made by
4 any other party or anyone acting on behalf of any party unless the same has been
5 embodied herein.

6 All Exhibits referred to in this BEI are attached to this BEI and are incorporated herein by
7 reference.

8
9 G. Reasonableness, And Good Faith

10 Except as specifically limited elsewhere in this BEI, whenever this BEI requires Bank
11 Owner or the MBRT to give its consent or approval to any action on the part of the other,
12 such consent or approval shall not be unreasonably withheld or delayed. If either the
13 Bank Owner, or the MBRT disagrees with any determination covered by this provision
14 and reasonably requests the reasons for that determination, the determining party shall
15 furnish its reason in writing and in reasonable detail within 30 calendar days following
16 the request.

17
18 H. Successors and Assigns

19 This BEI and each of its covenants and conditions shall be binding on and shall inure to
20 the benefit of the Parties and their respective successors and assigns.

21 Bank Owner may transfer or assign its rights and obligations under this BEI consistent
22 with applicable Federal and State regulations, this BEI, and with the prior written
23 approval of the MBRT, which approval shall not be unreasonably withheld.

24
25 I. Partial Invalidity

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

30
31 J. Notices

32 Any notice, demand, approval, request, or other communication permitted or required by
33 this BEI shall be in writing and delivered personally, sent by facsimile, or sent by
34 recognized overnight delivery service, to the persons in the positions set forth below or
35 shall be deemed given five (5) days after deposit in the United States mail, certified and
36 postage prepaid, return receipt requested, and addressed as follows or at such other
37 address as any of the Parties may from time to time specify in writing:

38 Notices by the Bank Owner to the MBRT shall be made to all of the members of the
39 MBRT. Such notice shall not be effective until deemed received by all members of the
40 MBRT.

1 Addresses for purposes of giving notice are set forth below. Either party may change its
2 address or telephone or fax number by giving the other party notice of the change in any
3 manner permitted by this Section.

4 Bank Owner:

5 [NAME]

6 [ADDRESS]

7 Telephone:

8 Fax:

9
10
11 MBRT Members:

12 U.S. Army Corps of Engineers

13 _____ District

14 [DISTRICT ADDRESS]

15 Attn: Chief, Regulatory Branch

16
17 Telephone:

18 Fax:

19
20
21 U.S. Fish and Wildlife Service

22 Sacramento Field Office

23 2800 Cottage Way, Room W-2605

24 Sacramento, CA 95825-1846

25 Attn: Field Supervisor

26
27 Telephone: 916-414-6600

28 Fax: 916-414-6713

29
30
31 U.S. Environmental Protection Agency

32 Region 9

33 75 Hawthorne Street

34 San Francisco, CA 94105

35 Attn: Director, Water Division

36
37 Telephone: 415-947-8707

1 Fax: 415-947-3549

2
3
4 California Department of Fish and Game

5 _____Region

6 [REGION ADDRESS]

7 Attn: Regional Manager

8
9 Telephone:

10 Fax:

11
12 California Department of Fish and Game

13 Habitat Conservation Planning Branch

14 1416 Ninth Street, 12th Floor

15 Sacramento, CA 95814

16 Attn: Branch Chief

17
18 Telephone: 916-653-4875

19 Fax: 916-653-2588

20
21
22 K. Restriction on Benefit

23 No member of or delegate to the United States Congress or Federal Resident
24 Commissioner shall be entitled to any share or part of this BEI, or to any benefit that may
25 arise from it.

26
27 L. Counterparts

28 This BEI may be executed in any number of duplicate and counterpart originals. A
29 complete original of this BEI containing original signatures of each of the Parties shall be
30 circulated to each of the Parties by Bank Owner and a complete original of this BEI shall
31 be maintained in the official records of each of the Parties hereto.

32
33 M. No Third Party Beneficiaries

34 This BEI shall not create any third party beneficiary hereto, nor shall it authorize anyone
35 not a party hereto to maintain a suit for personal injuries, property damages or
36 enforcement pursuant to the provisions of this BEI. The duties, obligations and
37 responsibilities of the Parties to this BEI with respect to third Parties shall remain as
38 otherwise provided by law in the event this BEI had never been executed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

N. Attorney Fees

If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this BEI, each Party to the litigation shall bear its own attorneys= fees and costs.

O. Availability of Funds

Implementation of this BEI by the MBRT 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 United States Treasury. No agency of the MBRT 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.

P. No Partnerships

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

Q. Governing Law

This BEI shall be governed by and construed in accordance with the Federal Endangered Species Act, 16 U.S.C. ' ' 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. ' 742(f) et seq., the laws of the State of California, and other applicable federal laws and regulations. Nothing in this BEI is intended to limit the authority of the agencies who are members of the MBRT to seek penalties or otherwise fulfill its responsibilities under the ESA or as an agency of the Federal or State government.

1 **Section XIII: Execution**

2
3 This BEI shall be deemed executed on the date of the signature by the last agency to sign
4 this BEI, and shall be binding only upon Bank Owner and the agencies so signing.

5
6
7 _____
8 Bank Owner Date _____

9
10
11
12 _____
13 Corps of Engineers, District Engineer Date _____
14 _____ District
15 U.S. Army Corps of Engineers

16
17
18
19 _____
20 Manager, California/Nevada Office Date _____
21 U.S. Fish and Wildlife Service

22
23
24
25 _____
26 Regional Manager Date _____
27 _____ Region
28 California Department of Fish and Game

29
30
31
32
33 _____
34 Director, Water Division Date _____
35 Region 9
36 U.S. Environmental Protection Agency

1
2
3
4
5 Appendix 1 – Description of the Exhibits Necessary for Bank Establishment.

6
7 1. “Exhibit A” - Bank Location Maps

- 8 a. Bank property map - This map should illustrate bank property boundaries on a
9 topographic map and indicate bank phase boundaries, if applicable.
10 b. General vicinity Map - This map should show the Bank location in relation to
11 cities, towns, or major roads, and other distinguishable landmarks.

12
13 2. “Exhibit B” – Service Area Map(s) and Description(s)

- 14 a. Map(s) and narrative description(s) of the Bank’s Service Area(s) – Include a
15 Service Area map and description of the area within which credits may be sold
16 for each credit type e.g. wetlands, species or habitat type.

17
18 3. “Exhibit C” - Bank Development Plan

- 19 a. Development Plan - should include: the baseline conditions of the Bank Property
20 including biological resources, geographic location and features, topography,
21 vegetation, past and present land uses, verified wetland delineation, species,
22 Covered Species and Covered habitat occurring on the Bank Property, a
23 description of the activities and methodologies for creating, restoring or
24 enhancing wetlands or other habitat types, a map of the approved modifications,
25 overall habitat establishment goals, objectives and performance criteria,
26 monitoring methodologies required to evaluate and meet the performance and
27 eventual success, an approved schedule for reporting monitoring results, a
28 discussion of possible remedial actions, and any other information deemed
29 necessary by the MBRT.

30 b. Construction and Performance Security Financial Assurance Analysis and
31 Schedule

32 1) Construction Security

33 The cost of construction and planting of waters, wetland habitat and
34 other habitat types may be demonstrated with the construction estimate or
35 contract entered into by Bank Owner. The Construction Security shall be in
36 the form of a letter-of-credit or cashier’s check. Any letters-of-credit shall
37 be approved as to form by CDFG or USACE prior to acceptance.

38 2) Performance Security

1 The Performance Security shall be in the amount of 20% of the
2 reasonably estimated total cost of construction and planting of waters,
3 wetland habitats, and other habitat types and monitoring of those created,
4 restored or enhanced habitats for performance. The Performance Security
5 shall be in the form of a letter-of-credit or cashier's check. Any letters-of-
6 credit shall be approved as to form by CDFG or USACE prior to acceptance.

7
8 4. **“Exhibit D” - Bank Management and Operation**

- 9 a. Interim Management Plan – identifies the short-term management, monitoring
10 and reporting activities to be conducted from the time the Bank is established
11 until the Endowment Fund is fully funded for one year and all performance
12 criteria have been met.
- 13 b. The Bank Closure Plan - Identifies and describes the long-term proposals for:
14 Bank Owner, Bank Property Manager, fee title holder, conservation easement
15 grantee, endowment trustee and beneficiaries, and their respective
16 responsibilities. Describes actions required to close the Bank prior to
17 implementing long-term management and termination of credit sales.
- 18 c. The Long-Term Management Plan (Management Plan) takes effect when all
19 performance criteria have been met and approved by the MBRT and the
20 Endowment Fund has been fully funded for one year, and should include at
21 minimum:
- 22 1) Purpose of Bank Establishment and Purpose of Management Plan;
 - 23 2) A baseline description of the setting, location, history and types of land use
24 activities, geology, soils, climate, hydrology, habitats present (once Bank
25 meets performance criteria) and species descriptions;
 - 26 3) Overall management, maintenance and monitoring goals and specific tasks
27 and timing of implementation and a discussion of any constraints which may
28 affect goals;
 - 29 4) Discussion of adaptive management actions for reasonably foreseeable
30 events and possible thresholds for evaluating and implementing adaptive
31 management;
 - 32 5) Property accessibility and prohibited uses of the Property; and
 - 33 6) Property transfer, land manager replacement, amendment process, and
34 notices section.
- 35 d. Interim Management Security and Endowment Fund Financial Assurance
36 Analysis and Schedule
- 37 1) Any and all standard required forms to be used for the submission of
38 financial information shall be included in this Exhibit D in template form.
 - 39 2) Upon transfer, assignment, or termination of this BEI, any funds in the

1 Construction Security and the Endowment Fund shall continue to be
2 expended in a manner consistent and in accordance with the conservation
3 purposes for which they were established pursuant to this BEI and California
4 Civil Code Section 815, any Conservation Easement, and the Management
5 Plan.

6
7 a) Interim Management Security Analysis

8 The Interim Management Security Analysis and Schedule shall
9 consist of a table and/or spreadsheet analysis that shows all of the tasks
10 (management, monitoring, reporting), task descriptions, effort (hours),
11 cost per unit, cost, frequency, timing or scheduling of the tasks, the total
12 annual funding necessary for each task and any associated assumptions
13 for the Interim Management Plan. Cost estimates should be based on
14 tasks implemented by a third party in present day dollars or equipment
15 prices in present day dollars. The total annual expenses should include
16 administration costs for the tasks.

17
18 b) Management Endowment Fund

19 This Exhibit shall fully describe the proposed funding mechanism
20 to support the financial requirements of the long-term management of the
21 Bank. The analysis shall consist of a table and/or spreadsheet analysis
22 that shows all of the tasks (management, monitoring, reporting); task
23 descriptions; effort (hours); cost per unit; cost, frequency, timing or
24 scheduling of the tasks; the total annual funding necessary for each task;
25 and, any associated assumptions for each task required by the
26 Management Plan. Cost estimates should be based on tasks implemented
27 by a third party in present day dollars or equipment prices in present day
28 dollars. The total annual expenses should include administration costs for
29 the tasks, Property taxes, and the MBRT approved annual capitalization
30 rate.

- 31
32 e. CDFG Endowment and Payee information sheets and reporting forms, which
33 shall be attached to this exhibit when applicable, include an endowment deposit
34 form (Mitigation Payment Transmittal Form), Payee Notification Sheet, Payee
35 Form and Invoicing Instructions.

36
37 5. “Exhibit E” - Real Estate Records and Assurances

- 38 a. The Bank Owner shall provide each member of the MBRT the following, with
39 the understanding that the Bank will not be deemed established and available to
40 sell credits until the Property is protected in perpetuity:

- 41 1) Legal Description and Parcel Map(s)

- 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
- 2) Preliminary Title Report - a current title report listing all exceptions and encumbrances for the proposed Bank Property.
 - 3) Acknowledged Bank Property Assessment - Bank Owner shall identify and acknowledge the number of acres on the Property including copies of the other encumbrance documents i.e., leases, or easements that the Bank Owner warrants as available to be burdened by conservation easement(s) for conservation purposes in accordance with this BEI and California Civil Code Section 815. The Property Assessment shall exclude any portion of the Property subject to any right-of-way, easement, encumbrance or any other matter that prevents establishment of a conservation easement on that portion of the Property. The Property Assessment shall be signed by the MBRT as an acknowledgement of receipt of the Property Assessment.
 - 4) Plat Maps supporting the Property Assessment shall illustrate the physical extent of the title exceptions, encumbrance, structures and other physical improvements.
 - 5) Title Insurance Policy shall be in an amount adequate to cover the value of the Property, used as insurance to protect the Conservation Easement Grantee's interest in the proposed bank Property.
 - 6) Subordination Agreement (if applicable) is an agreement in which a mortgage or easement holder consents to give a conservation easement priority over the mortgage or other interest although the mortgage was recorded prior to the conservation easement. Bank Owner shall provide the agreement for recordation prior to recording of the conservation easement.
 - 7) Approved-as-to Form Conservation Easement Deed or Grant Deed. A duly executed Conservation Easement and a detailed map of the lands covered by the Conservation Easement and protected in perpetuity; or, a duly executed, Grant Deed conveying fee title of the Property to the CDFG and a detailed map of the lands covered by the Grant Deed containing provisions requiring that the Property be held and managed in perpetuity in accordance with the purposes of the Bank.
 - a) These draft documents shall be provided to the MBRT for review and approval-as-to-form prior to recordation, including advance approval of the Grantee to the Conservation Easement and subordination agreement and shall be recorded directly upon signing of this BEI.
 - b) The Conservation Easement or Grant Deed shall cover the entire Bank Property that the MBRT determines constitutes a biologically sustainable unit for conservation purposes contemplated by this BEI.
 - c) All Parties shall use reasonable efforts to cooperate in the expeditious clearing of title encumbrances and the expeditious recordation of the conveyance documents.
 - d) Bank Owner shall pay any and all taxes and charges associated with the

1 Property, including obtaining a valid title report and title insurance, and
2 establishing, recording, selling, and conveying any Conservation Credit,
3 Easement, Grant Deed or the Conservation Bank.

- 4 e) If the Property is owned by the State of California through Grant Deed
5 and is transferred to another qualified, MBRT-approved entity, a
6 Conservation Easement approved by the MBRT shall be reserved and/or
7 imposed by CDFG in conjunction with the transfer in order to ensure the
8 ongoing management and protection of the Property for conservation
9 purposes.

10 Any Conservation Easement shall be attached hereto and
11 incorporated herein. If any additional easements are recorded on the
12 Property, Bank Owner shall provide the MBRT with an updated Property
13 Assessment of the acres potentially and actually available in the
14 Conservation Bank for conservation purposes in accordance with this BEI
15 and the MBRT shall provide Bank Owner with a revised Acknowledged
16 Property Assessment.

17 The Property subject to this BEI may be expanded in accordance
18 with and by amendment to this BEI upon approval of the Parties, with any
19 expansion of the Property described in a general and site location map, title
20 report, legal description, and legal parcel map to be incorporated in BEI by
21 amendment.

22
23 6. **"Exhibit F" - Bank Crediting and Credit Sales**

- 24 a. Any and all standard required forms, for each agency, to be used for the
25 submission of Bank Credit sales information shall be attached to this Exhibit. A
26 "Credit Evaluation" - which is an explanation of the evaluation undertaken to
27 formulate the value of each type of Credit, and the total number of each type of
28 Credit, and shall be included for each Covered Species, and the habitat acreage
29 of Covered Habitat Types conserved within the Bank. Initial
30 Creation/Restoration Credits are assigned to the Bank based upon the level of
31 projected habitat function minus the level of habitat function existing prior to
32 Bank Development, with the final number of Creation/Restoration Credits
33 determined upon review of the completed Bank Development Plan and
34 evaluation and approval of the performance criteria as measured by the MBRT.

- 35 b. A "Credit Table" - should show the number of Wetland Credits, Covered Habitat
36 Types and Covered Species Credits approved by the MBRT to sell or apply as
37 mitigation or compensation for agency-approved Projects and other impacts in
38 the Service Area(s). The table should distinguish between preservation,
39 enhancement, restoration and creation credits (this table must be amended with
40 each credit release). This table may comprise a copy of the template that will
41 function as the credit sales ledger, used to track credit sales and application at
42 the Bank after establishment.

1
2 c. Credit Sale Ledger (Ledger)

3 Credit Sale Ledger shall include at a minimum: Bank name; total number of
4 each type of bank credits; initial credit purchaser name, address and phone
5 number; project name; project applicant name, address, and phone number;
6 agency project file numbers; date of Credit sale; type of Credits sold; number of
7 Credits sold; number of Credits applied; balance of each type of credit
8 remaining.

9
10 This Section may be amended at the discretion of the MBRT when an
11 electronic tracking database is implemented, at which time each Bank Owner will
12 be notified of the new database, and instructed as to how to implement it for credit
13 sales and tracking purposes. At that time, the database implementation information
14 will also describe how the new procedure will affect the following procedure.
15

16
17 7. “Exhibit G” - Phase I Environmental Site Assessment

18 Bank Owner shall provide an evaluation of the environmental conditions of the
19 Property showing that the Property has been evaluated by a qualified party and that
20 there are no indications of hazardous materials or contamination. If hazardous
21 materials or any other form of contamination are identified, further assessment and
22 clean-up may be necessary prior to Bank approval and may prevent Bank approval.

23
24 8. “Exhibit H” - Biological Resources Survey

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

31
32 9. “Exhibit I” - Verified Wetland Delineation and Verification Letter

33 Bank Owner shall provide a wetland delineation performed by a qualified wetland
34 delineator and a letter of verification from the USACE District Office having
35 regulatory jurisdiction over the geographic location of the Bank.

36
37 10. “Exhibit J” - Other Environmental Documentation, Permits, Amendments or
38 Revisions

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

5 Include only those that apply:

- 6 a. Department of the Army Permit
- 7 b. CEQA compliance;
- 8 c. Section 401 Water Quality Certification or Waiver;
- 9 d. Streambed Alteration Agreement;
- 10 e. Federal Endangered Species Act (Section 7 or Section 10) compliance; and
- 11 f. California Endangered Species Act (Fish and Game Code Section 2050 et seq)
- 12 compliance
- 13 g. Archaeological records search and site evaluation