

MITIGATION BANK ENABLING INSTRUMENT
Table of Contents

RECITALS 1

AGREEMENT 3

Section I: Purpose and Authorities 3

 A. Purpose..... 3

 B. Authorities..... 3

Section II: Definitions 5

Section III: Stipulations 9

 A. Baseline Condition..... 9

 B. Disclaimer 9

 C. Exhibits 9

Section IV: Bank Evaluation and Development 11

 A. Bank Site Assessment by the IRT..... 11

 B. Bank Sponsor's Responsibilities for Bank Development 11

 C. Phase I Environmental Site Assessment 11

 D. Approvals 11

 E. Phases..... 11

 F. Modification of the Development Plan..... 12

 G. Property Assessment and Warranty 12

Section V: Bank Establishment Date 13

Section VI: Financial Assurances 13

 A. Construction Security..... 13

 B. Performance Security 14

 C. Interim Management Security..... 14

 D. Letters of Credit 14

 E. Endowment Fund 15

Section VII: Credit Release..... 16

 A. Waters of the U.S. Credit Release 16

 B. Waters of the State Credit Release [**If applicable**] 18

 C. Covered Species and Covered Habitat Credit Release 18

Section VIII: Operation of the Bank 23

 A. Service Area..... 23

 B. Transfer and Use of Credits 23

 C. Interim and Long-term Management and Monitoring 24

 D. Bank Closure Plan..... 24

 E. Financial Operations 25

 F. Remedial Action Plan 28

Section IX: Reporting 29

 A. Annual Inflation Adjustments to Endowment Fund Report 29

 B. Annual Report..... 29

 C. Credit Transfer Reporting..... 31

 D. Reporting Compliance Measures 31

Section X: Responsibilities of the Bank Sponsor and Property Owner	31
Section XI: Responsibilities of the IRT	33
A. IRT Oversight	33
B. IRT Review	33
C. Compliance Inspections	33
Section XII: Other Provisions	33
A. Force Majeure	33
B. Dispute Resolution.....	34
C. Conveyance of Bank or Bank Property or Other Interests	35
D. Modification and Termination of the BEI	36
E. Non-compliance	37
F. Controlling Language	40
G. Entire Agreement	40
H. Reasonableness and Good Faith	40
I. Successors and Assigns.....	40
J. Partial Invalidity.....	40
K. Notices	41
L. Counterparts	43
M. No Third Party Beneficiaries	43
N. Availability of Funds	43
O. No Partnerships	44
P. Applicable Laws	44
Q. No Contract or Monetary Damages	44
Section XIII: Execution.....	45
Appendix 1 – Minimum Requirements for Each Exhibit	48
1. “ Exhibit A ” - Bank Location Maps.....	48
A-1. General Vicinity Map	48
A-2. Map of Property including Bank Property.....	48
A-3. Map of Conserved Areas in Bank Property Vicinity [<i>if applicable</i>]	48
2. “ Exhibit B ” – Service Area Map(s) and Description(s).....	48
B-1. Map(s) of the Bank’s Service Area(s)	48
B-2. Narrative description(s) of the Bank’s Service Area(s)	48
3. “ Exhibit C ” - Development Plan	48
C-1. Development Plan.....	48
C-2. Construction Security Analysis and Schedule	49
C-3. Performance Security Analysis and Schedule	49
4. “ Exhibit D ” - Bank Management and Operation Documents.....	49
D-1. Interim Management Security Analysis and Schedule	49
D-2. Endowment Fund Analysis and Schedule.....	49
D-4. Agreements, Instructions and Forms for Submission or Disbursement of Endowment Funds	50
D-5. Interim Management Plan.....	50
D-6. Long-term Management Plan	51
D-7. Bank Closure Plan.....	51

5.	“ Exhibit E ” - Real Estate Records and Assurances	51
	E-1. Preliminary Title Report, Legal Description, and Parcel Map(s)	51
	E-2. Property Assessment and Warranty	52
	E-3. Plat Map(s).....	52
	E-4. Real Estate Instrument	52
	E-5. Title Insurance (applicable for final BEI approval)	52
6.	“ Exhibit F ” - Bank Crediting and Credit Transfers	52
	F-1. Credit Evaluation and Credit Table	52
	F-2. Credit Purchase Agreement and Payment Receipt Templates.....	52
	F-3. Credit Transfer Ledger Template.....	52
	F-4. Instructions for Species Credit Transfers Using RIBITS [<i>if applicable</i>].....	53
	F-5. Credit Release Schedule and Funding Schedule for Covered Species and Covered Habitats	53
	F-6. Implementation Fee Schedule [<i>if applicable</i>]	53
7.	“ Exhibit G ” - Phase I Environmental Site Assessment	53
8.	“ Exhibit H ” - Biological Resources Survey	53
9.	“ Exhibit I ” –Jurisdictional Determination and Delineation of Waters of the U.S. and/or Waters of the State.....	53
10.	“ Exhibit J ” – Cultural, Historical, Archeological, and Native American Resources (“Cultural Resources”).	53
	Cultural Resources requirements met for all Construction Phases.....	53
	J-1. Identification, Inventory, and Evaluation	53
	J-2. Compliance Documentation [<i>include as applicable</i>]	54
	J-3. Historic Properties Treatment Plan (HPTP) [<i>include as applicable</i>].....	54
11.	“ Exhibit K ” – Other Documentation, Permits, Amendments or Revisions.....	54

**Note: Do not change or remove parts of the template, including: version date, footers (except to add the Bank Name), table of contents, or Appendix 1 (list of required exhibits).
California Multi-agency Project Delivery Team Bank Enabling Instrument
(Template Version Date: September 30, 2015)**

BANK ENABLING INSTRUMENT

[BANK NAME] MITIGATION BANK

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

RECITALS

- A. The Bank Sponsor is responsible for establishing, operating, and maintaining the Bank according to this BEI.
- B. The Property Owner is the owner of real property containing approximately _____ acres (the “Property”), located at _____ [*insert address and county*], State of California, designated Assessor’s Parcel No(s). _____. The Property is generally shown on the Bank Location Maps (**Exhibit A**) and legally described in the Real Estate Records and Assurances (**Exhibit E**) attached to and made a part of this BEI.
- C. [*Choose one: Bank Sponsor’s name(s), as Bank Sponsor and Property Owner or Bank Sponsor and Property Owner*] desire(s) to create the Bank over [*add if applicable: a _____-acre portion of*] the Property (the “Bank Property”). The Bank Property is generally shown on the Bank Location Maps (**Exhibit A**) and legally described in the Real Estate Records and Assurances (**Exhibit E**) attached to and made a part of this BEI. The Bank Property is to be conserved and managed in perpetuity as provided in Section V and VIII.

- D. **[Remove if CDFW is not a party]** CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of these species pursuant to California Fish and Game Code § 1802 and other provisions of California law.
- E. **[Remove if USFWS is not a party]** USFWS, an agency within the U.S. Department of the Interior, has jurisdiction over the conservation, protection, restoration and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the U.S. pursuant to the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f), *et seq.*, and other provisions of federal law.
- F. USEPA and USACE have **[or, if USEPA is not a party: USACE has]** jurisdiction over Waters of the U.S. pursuant to the Clean Water Act, 33 U.S.C § 1251, *et seq.* Waters of the U.S. is defined in Section II.
- G. **[Remove if State or Regional Water Board is not a party]** State Water Board and ___Regional Water Board, within their respective areas of jurisdiction, are responsible for protecting and regulating the quality of Waters of the State, as defined in Section II, under the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 *et seq.*, and regulating the discharge of pollutants into the Waters of the U.S. under the Clean Water Act, 33 U.S.C. §1251 *et seq.*
- H. **[Remove if NMFS is not a party]** NMFS has jurisdiction over the conservation, protection, restoration and management of certain living marine resources and the habitat necessary for biologically sustainable populations of these resources within the United States pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, the Magnuson-Stevens Fishery Conservation and Management Act, as amended, 16 U.S.C. § 1801, *et seq.*, and the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. § 1361, *et seq.*, and other provisions of federal law.
- I. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Bank.
- J. The goals and objectives for the Bank are set forth in the Development Plan (**Exhibit C**) and the Bank Management and Operation Documents (**Exhibit D**) attached to and made a part of this BEI.
- K. Initially capitalized terms used and not defined elsewhere in this BEI are defined in Section II.

AGREEMENT

NOW, THEREFORE, the Parties agree as follows:

Section I: Purpose and Authorities

A. Purpose

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

B. Authorities

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

1. Federal
 - a. Clean Water Act (33 U.S.C. § 1251, *et seq.*)
 - b. Rivers and Harbors Act (33 U.S.C. § 403)
 - c. National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*)
 - d. Endangered Species Act (16 U.S.C. § 1531, *et seq.*) (“ESA”)
 - e. Fish and Wildlife Coordination Act (16 U.S.C. § 661, *et seq.*)
 - f. Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801, *et seq.*)
 - g. National Historic Preservation Act (54 U.S.C. § 306101, *et seq.*)
 - h. Regulatory Programs of the U.S. Army Corps of Engineers (33 C.F.R. Parts 320-332)
 - i. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 C.F.R. Part 230)
 - j. Executive Order 11990 - Protection of Wetlands
 - k. Executive Order 11988 - Floodplain Management

- l. Memorandum of Agreement between the U.S. Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, § 404(b)(1) Guidelines (February 6, 1990), as amended
 - m. Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003)
 - n. USACE San Francisco District Public Notice 02-03, dated March 5, 2003, titled “Mitigation Bank Policy on the Santa Rosa Plain”
2. State
- a. California Environmental Quality Act (“CEQA”) (Public Resources Code § 21000, et seq.) and State CEQA Guidelines (Tit. 14 Cal. Code Regs., Ch. 3)
 - b. California Endangered Species Act (“CESA”) (Fish and Game Code § 2050, et seq.)
 - c. California Natural Community Conservation Planning (“NCCP”) Act (Fish and Game Code § 2800, et seq.)
 - d. California State Office of Historical Preservation (“SHPO”) (Public Resources Code § 5020, et seq.) Archaeological, Paleontological and Historical Sites (Public Resources Code § 5097, et seq.) Native American Historical, Cultural and Sacred Sites (Public Resources Code § 5097.9); and Historical Resources (Public Resources Code § 21084.1)
 - e. Conservation of Wildlife Resources (Fish and Game Code § 1800, et seq.)
 - f. Lake and Streambed Alteration Program (Fish and Wildlife Protection and Conservation, Fish and Game Code § 1600, et seq.)
 - g. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly
 - h. Supplemental Policy Regarding Conservation Banks within the NCCP Area of Southern California, January 24, 1996, by U.S. Fish and Wildlife Service and California Department of Fish and Game
 - i. Porter-Cologne Water Quality Control Act (Water Code § 13000, et seq.)
 - j. Conservation Bank and Mitigation Bank Applications and Fees (Fish and Game Code § 1797, et seq.)
 - k. California Government Code, Title 7, Division 1, Chapter 4.6, §§ 65965-65968
 - l. California Fish and Game Code, Division 2, Chapter 1, Article 1, § 713

m. California Probate Code, Division 9, Part 7, §§ 18501-18510

Section II: Definitions

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

“Adaptive Management” means an approach to natural resource management which incorporates changes to management practices, including corrective actions as determined to be appropriate by the IRT in discussion with the Bank Sponsor and/or the Property Owner, as appropriate, based upon Bank annual report results and IRT review of overall Bank performance and compliance.

“Bank Establishment Date” is the date determined pursuant to Section V, when the Bank is considered established and Transfer of Credits may begin.

“Conservation Easement” means a perpetual conservation easement, as defined by California Civil Code § 815.1, in the form of **Exhibit E-4** attached to and made a part of this BEI.

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

“Construction Security” means the financial assurance specified in Section VI.A. and **Exhibit C-2**, to be provided by the Bank Sponsor to guarantee the completion of construction and planting to establish, restore or enhance Waters of the U.S., Waters of the State, and Covered Habitat on the Bank Property in accordance with the Development Plan.

“Covered Habitat” means habitat of concern or habitat upon which the Covered Species depend for their continued viability that the IRT determines will be adequately conserved as a result of implementation of this BEI. Covered Habitat Credits are identified in **Exhibit F-1** attached to and made a part of this BEI.

“Covered Species” means the species for which the Bank has been established and for which Credits have been allocated as set forth in **Exhibit F-1**.

“Credits” are units of measure representing the accrual, attainment, or protection of aquatic functions and/or the Covered Species or Covered Habitat on the Bank Property. One Credit is equivalent to one acre, or as otherwise defined in **Exhibit F-1**.

“Credit Release” means an action by the agency that has jurisdiction over specified Credits available for Transfer pursuant to this BEI, as set forth in Section VII.

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

“Endowment Agreement” means the document attached as **Exhibit D-4** (which may serve as

a mitigation agreement pursuant to California Government Code § 65965(f)(1), which establishes the terms and conditions pursuant to which the Endowment Holder will accept custody of and manage the Endowment Fund.

“Endowment Amount” is the amount Section VI.E requires the Bank Sponsor to provide as Endowment Deposits to the Endowment Holder to fund the Endowment Fund. The Endowment Amount is determined in **Exhibit D-2**.

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

“Endowment Fund” is a sum of money in a long-term stewardship account, held in trust in a fund designated [*If CDFW holds the endowment, insert: by CDFW. or If CDFW does not hold the endowment, insert: in the Endowment Agreement.*] The Endowment Fund is to be maintained and managed in perpetuity in accordance with Government Code §§ 65965-69568, Probate Code §§18501-18510, the BEI, and the Endowment Agreement to generate earnings and appreciation in value for use in funding perpetual management, maintenance, monitoring, and other activities as required by the Long-term Management Plan. The term “Endowment Fund” as used in this BEI shall include the Endowment Deposits and all interest, dividends, gains, other earnings, additions and appreciation thereon, as well as any additions thereto.

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

“Force Majeure” shall mean an event or circumstance which 1) was neither foreseen nor foreseeable by the Bank Sponsor, Property Owner, or IRT agencies; and 2) has a material and detrimental impact on the Bank Property; and 3) neither Bank Sponsor nor Property Owner (or anyone acting on behalf or under the control of either of them) caused or could have prevented; and 4) prevents Bank Sponsor or Property Owner from achieving an objective or undertaking an action required of it under this BEI; provided that the event or circumstance is limited to the following:

- a. War, insurrection, riot or other civil disorder which has broad regional impacts and is not endemic to the Bank Property and its immediate locale;
- b. A physical natural disaster, including flood, earthquake, or fire, but excluding drought or weather conditions regardless of severity;
- c. Disease which has broad regional impacts and is not endemic to the Bank Property and its immediate locale;
- d. Governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction; or

- e. The act of any person or entity other than Bank Sponsor or Property Owner (or anyone acting on behalf or under the control of either of them) on or directly affecting the Bank Property in violation of any applicable law, statute, regulation, code, order, ordinance, requirement or permit, including without limitation, the release or discharge of any Hazardous Substance (defined in Section X.A.5).

Force majeure excludes mere economic hardship or failure to attain Performance Standards.

“Grant Deed” means a deed conveying fee title to the Bank Property in the form of **Exhibit E-4**.

“Grantee” means the entity authorized to hold the Conservation Easement pursuant to California Civil Code §815.3 and Government Code §§65966 and 65967 and is otherwise approved by the IRT.

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

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

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

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

“Interim Management Plan” means the document attached as **Exhibit D-5** that describes the management, monitoring, Adaptive Management, reporting and other activities to be implemented by the Bank Sponsor during the Interim Management Period.

“Interim Management Security” is the financial assurance specified in Section VI.C. and **Exhibit D-1**, to be provided by the Bank Sponsor to guarantee the implementation of the Interim Management Plan and to guarantee all Remedial Action(s), and any additional Performance Standards required to satisfy a Remedial Action plan under Section VIII.F are met.

“Long-term Management Period” means the period beginning upon conclusion of the Interim Management Period and continuing in perpetuity, during which the Bank Property is to be managed, monitored, and maintained pursuant to the Long-term Management Plan.

“Long-term Management Plan” means the document attached as **Exhibit D-6** that provides measures intended to ensure the Bank Property is managed, monitored, and maintained in perpetuity to conserve and protect its Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat.

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

“Performance Security” means the financial assurance specified in Section VI.B. and **Exhibit C-3**, to be provided by the Bank Sponsor to guarantee that the Performance Standards, all Remedial Action(s), and any additional Performance Standards required to satisfy a Remedial Action plan under Section VIII.F are met.

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

“Phase I Environmental Site Assessment” is an assessment of the environmental condition of the Property performed in accordance with the American Society of Testing and Materials (ASTM) Standard E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” or any successor to such ASTM Standard which is active at the time of the assessment.

“Preservation” means the protection of existing ecologically important wildlife, habitat, or other ecosystem resources in perpetuity.

“Property Assessment and Warranty” means the written Property evaluation and assurance signed by the Property Owner and attached as **Exhibit E-2**.

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

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

“RIBITS” means the Regulatory In-lieu Fee and Bank Information Tracking System.

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

“Subordination Agreement” means a written, recorded agreement in which the holder of an interest in, or lien or encumbrance on the Bank Property makes the lien or encumbrance subject to and of lower priority than the Conservation Easement, even though the lien or encumbrance was recorded before the Conservation Easement.

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

“Transfer” means the use, sale, or conveyance of Credits by the Bank Sponsor.

“Waters of the State” means any surface water or groundwater, including saline waters, within the boundaries of the State of California.

“Waters of the U.S.” means all waters and wetlands over which the USACE and/or the USEPA are granted jurisdiction in the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Rivers and Harbor Act of 1899, 33 U.S.C. § 401, *et seq.* This definition encompasses both the term “waters of the United States” as defined in 33 C.F.R. Part 328 and “navigable waters of the United States” as defined in 33 C.F.R. Part 329.

Section III: Stipulations

A. Baseline Condition

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

B. Disclaimer

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

C. Exhibits

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

1. “Exhibit A” - Bank Location Maps
 - A-1 General Vicinity Map
 - A-2 Map of Property including Bank Property
 - A-3 Map of Conserved Areas in Bank Property Vicinity [*if applicable*]
2. “Exhibit B” - Service Area Map(s) and Description(s)
 - B-1 Map(s) of the Bank’s Service Area(s)
 - B-2 Narrative description(s) of the Bank’s Service Area(s)
3. “Exhibit C” - Development Plan
 - C-1 Development Plan
 - C-2 Construction Security Analysis and Schedule
 - C-3 Performance Security Analysis and Schedule
4. “Exhibit D” - Bank Management and Operation Documents
 - D-1 Interim Management Security Analysis and Schedule

- D-2 Endowment Fund Analysis and Schedule
 - D-3 Agreements, Instructions, and Forms for Submission or Disbursement of Endowment Funds
 - D-4 Interim Management Plan
 - D-5 Long-term Management Plan
 - D-6 Bank Closure Plan
5. “Exhibit E” - Real Estate Records and Assurances
 - E-1 Preliminary Title Report, Legal Description, and Parcel Map(s)
 - E-2 Property Assessment and Warranty
 - E-3 Plat Map(s)
 - E-4 Real Estate Instrument
 - E-5 Title Insurance [*attach once received*]
 6. “Exhibit F” - Bank Credits and Credit Transfers
 - F-1 Credit Evaluation and Credit Table
 - F-2 Credit Purchase Agreement and Payment Receipt Templates
 - F-3 Credit Transfer Ledger Template
 - F-4 Instructions for Species Credits Transfers Using RIBITS [*if applicable*]
 - F-5 Credit Release Schedule and Funding Schedule for Covered Species and Covered Habitats
 - F-6 Implementation Fee Schedule [*if applicable*]
 7. “Exhibit G” - Phase I Environmental Site Assessment
 8. “Exhibit H” - Biological Resources Survey
 9. “Exhibit I” - Jurisdictional Determination and Delineation of Waters of the U.S. and/or Waters of the State [*if applicable*]
 10. “Exhibit J” - Cultural, Historical, Archaeological, and Native American Resources (“Cultural Resources”).
 - J-1 Identification, Inventory, and Evaluation
 - J-2 Compliance Documentation [*include as applicable*]
 - J-3 Historic Properties Treatment Plan (HPTP) [*include as applicable*]

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

Section IV: Bank Evaluation and Development

A. Bank Site Assessment by the IRT

Representatives of the IRT have inspected the Bank Property and evaluated the Bank Sponsor’s development of Waters of the U.S., Waters of the State, Covered Species, and Covered Habitat in the Development Plan (**Exhibit C-1**) and have agreed upon the assignment of Credits set forth in **Exhibit F-1**.

B. Bank Sponsor's Responsibilities for Bank Development

The Bank Sponsor agrees to perform all necessary work, in accordance with the provisions of this BEI, to establish, enhance, restore, monitor, and maintain the Waters of the U.S., Waters of the State, Covered Species and Covered Habitats, as described in the Development Plan (**Exhibit C-1**), on the Bank Property until the Bank Sponsor has demonstrated to the satisfaction of the IRT that the Bank complies in all respects with all requirements of this BEI.

C. Phase I Environmental Site Assessment

[Choose one: Bank Sponsor or Property Owner] has provided a current Phase I Environmental Site Assessment of the Property, attached hereto as **Exhibit G**. If the Phase I Environmental Site Assessment identified any recognized environmental conditions, as defined in the American Society of Testing and Materials (ASTM) Standard E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” or any successor to such ASTM Standard, the Property Owner represents and warrants to the IRT that all appropriate assessment, clean-up, remedial or removal action has been completed and the Property Owner has provided an updated Phase I Environmental Site Assessment to the IRT that concludes no recognized environmental conditions are present on the Property.

D. Approvals

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

E. Phases

1. Subsequent Phases. Establishment of each Subsequent Phase is subject to approval by the IRT. The Bank Sponsor may propose a Subsequent Phase by submitting a written request to the IRT. Subsequent Phases will need to comply with requirements in effect on the date of submission of the complete documentation for the proposed Subsequent Phase. Any Subsequent Phase will be considered as either an amendment of the BEI or a new bank, as determined by the IRT agencies. Approval of this BEI

does not obligate any IRT agency to approve any Subsequent Phase

2. ***[Remove paragraph if not applicable:]*** Construction Phases. The Bank Sponsor will establish the Bank in ***[Insert number of phases]*** Construction Phases. Each Construction Phase is presented in full in this BEI and within its Exhibits. ***[If each phase is independent:*** Each Construction Phase is independent and can be constructed alone or in conjunction with other phases and can be constructed in any sequence***][If one or more phases is dependent on another:*** The Construction Phases must be constructed in the sequence specified in the Development Plan (**Exhibit C-1**). All Construction Phases must be completed within 10 years of the date of this BEI.

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

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

F. Modification of the Development Plan

In the event that the Bank Sponsor and the IRT determine that modifications must be made to the Development Plan (**Exhibit C-1**), the Parties shall meet to discuss the modifications, and the Bank Sponsor shall submit a written request for approval of such modifications to each member of the IRT within 60 calendar days of the meeting. Upon agreement of the Parties, the Bank Sponsor shall then implement all approved modifications. Modification of the Development Plan may constitute an amendment for CDFW. If the IRT elects to authorize modifications to the Development Plan, such authorization may be conditioned upon, among other things, a change in the number of Credits available for release. The Bank Sponsor shall revise the Credit Table in **Exhibit F-1** as directed by IRT to reflect any change in the available Credits. The schedule for funding the Endowment Amount shall be amended to reflect the revised Credit Table (**Exhibit F-1**).

G. Property Assessment and Warranty

Property Owner is responsible to ensure the Property Assessment and Warranty (**Exhibit E-2**) is true, complete, and correct as of the date of this BEI. Should Property Owner become aware of any errors or omissions in the Property Assessment and Warranty after the date of this BEI, Property Owner shall notify the IRT agencies in writing. The IRT shall evaluate any impacts of the errors or omissions on the Bank, Bank Property and the Grantee's interest in the Conservation Easement or the

Bank Property and the IRT may find default, pursuant to Section XII.E, in such circumstances.

Section V: Bank Establishment Date

The Bank Establishment Date will occur and Transfer of Credits may begin only when the IRT has received documentation confirming that all of the following actions have occurred:

1. The BEI has been fully executed by all of the Parties;
2. The Conservation Easement has been (i) accepted by a Grantee that has been approved by the IRT and (ii) recorded in the Official Records of the county in which the Bank Property is located; [*Or, if fee title to the State, substitute:* The Grant Deed to the State of California has been (i) accepted on behalf of the State by CDFW (as evidenced by a duly executed Certificate of Acceptance) and (ii) recorded in the Official Records of the county in which the Bank Property is located];
3. The Bank Sponsor has complied with its obligation to furnish financial assurances in accordance with Section VI;
4. The Bank Sponsor has obtained all permits, authorizations and other approvals necessary or appropriate to construct, operate, and maintain the Bank, including but not limited to those of any IRT agency; and
5. Any applicable Subordination Agreement(s) is executed and recorded.

Section VI: Financial Assurances

The Bank Sponsor is responsible for providing financial assurances for the performance and completion of Bank construction, management, monitoring, and Remedial Action in accordance with this BEI, as set forth in this Section. The financial assurances shall be held in accordance with Section VIII.E. The Bank Sponsor shall provide written confirmation from the agency or Endowment Holder, as applicable, that the requirement was completed to each member of the IRT in accordance with Section XII.K. upon furnishing each of the following financial assurances:

A. Construction Security

Prior to the first Credit Release, the Bank Sponsor shall furnish to [*choose one:* CDFW *or* USACE *or* State Water Board *or* Regional Water Board] a Construction Security in the amount of a reasonable third party estimate or contract to establish, restore, or enhance Waters of the U.S., Waters of the State, and Covered Habitat in accordance with the Development Plan in the amount specified in **Exhibit C-2**. The Construction Security shall be in the form of [*Choose one:* an irrevocable standby letter of credit *or* a cashier's check (CDFW only)]. The Bank Sponsor shall ensure the Construction Security shall remain in effect in the full amount required by this BEI throughout the performance of construction and planting to establish, restore, or enhance Waters of the U.S., Waters of the State, and Covered Habitat on the Bank

Property in accordance with the Development Plan. Provided, however, that if all such construction and planting is completed in accordance with the Development Plan prior to the date on which Bank Sponsor would otherwise be required to furnish the Construction Security then no Construction Security shall be required.

B. Performance Security

Concurrent with the Transfer of the first Credit, Bank Sponsor shall furnish to [**Choose one:** CDFW **or** USACE] Performance Security in the amount of 20% of the Construction Security in the amount specified in **Exhibit C-3**. The Performance Security shall be in the form of [**Choose one:** an irrevocable standby letter of credit **or** a cashier's check (CDFW only)]. The Bank Sponsor shall ensure the Performance Security shall remain available in the full amount required by this BEI in accordance with Section VIII.E.1.b. until the IRT determines that all of the Performance Standards, all Remedial Action(s), and any additional Performance Standards required to satisfy any Remedial Action plan(s) under Section VIII.F are met.

C. Interim Management Security

Concurrent with the Transfer of the first Credit, Bank Sponsor shall furnish to [**Choose one:** CDFW **or** USACE] Interim Management Security in the amount specified in **Exhibit D-1**. The amount of the Interim Management Security shall be equal to the estimated cost to implement the Interim Management Plan during three years of the Interim Management Period, as set forth in the Interim Management Security Analysis and Schedule (**Exhibit D-1**). The Interim Management Security shall be in the form of [**Choose one:** an irrevocable standby letter of credit **or** a cashier's check (CDFW only)]. The Bank Sponsor shall ensure the Interim Management Security shall remain available in the full amount required by this BEI in accordance with Section VIII.E.1.c. until the end of the Interim Management Period.

D. Letters of Credit

Letters of credit, when selected, shall be submitted to and approved by [CDFW **or** USACE **or** State Water Board **or** Regional Water Board] before they satisfy any financial assurance requirement. The [CDFW **or** USACE **or** State Water Board **or** Regional Water Board] shall be the beneficiary of the letter of credit. Any letter of credit shall be issued for a period of at least one year, and shall provide that the expiration date will be automatically extended for at least one year on each successive expiration date unless, at least 120 calendar days before the current expiration date Bank Sponsor and the [CDFW **or** USACE **or** State Water Board **or** Regional Water Board] have received notice from the issuing institution of its decision not to extend the expiration date, as evidenced by the return receipts. The letter of credit shall provide that any unused portion shall be available for 120 calendar days after the date Bank Sponsor and the [CDFW **or** USACE **or** State Water Board **or** Regional Water Board] have received such notice, as shown on the signed return receipts. If the issuer elects to not extend the expiration date of any letter of credit, Bank Sponsor shall provide the [CDFW **or** USACE **or** State Water Board **or** Regional Water Board]

with replacement security in the form of a letter of credit or cashier's check (CDFW only), as determined by the [CDFW *or* USACE *or* State Water Board or Regional Water Board], within 60 calendar days after receiving notice of the issuer's decision not to extend the expiration date. If Bank Sponsor does not provide such replacement security on or before the expiration of the 60-day period, then the [CDFW *or* USACE *or* State Water Board or Regional Water Board] shall have the right to immediately draw upon the letter of credit for which the replacement security was required.

E. Endowment Fund

1. The Endowment Fund shall be in an amount sufficient to fully provide for the financial requirements of the long-term management of the Bank in accordance with the Long-term Management Plan and the Endowment Fund Analysis and Schedule (**Exhibit D-2**). The Bank Sponsor shall fully fund the Endowment Fund through Endowment Deposits according to the schedules below and prior to 5 years after the Bank Establishment date:
 - a. Funding schedule for Waters of the U.S. and Waters of the State Credit Releases will be as follows:
 - i. A minimum of 30% of the Endowment Amount shall be funded, through Endowment Deposits, prior to the earliest of: 1) the second Waters of the U.S. Credit Release; or 2) the second Waters of the State Credit Release;
 - ii. A minimum of 55% of the Endowment Amount shall be funded, through Endowment Deposits, prior to the earliest of: 1) the third Waters of the U.S. Credit Release; or 2) the third Waters of the State Credit Release;
 - iii. A minimum of 70% of the Endowment Amount shall be funded, through Endowment Deposits, prior to the earliest of: 1) the fourth Waters of the U.S. Credit Release; or 2)) the fourth Waters of the State Credit Release;
 - iv. 100% of the Endowment Amount shall be funded, through Endowment Deposits, prior to the earliest of: 1) the fifth Waters of the U.S. Credit Release; or 2) the fifth Waters of the State Credit Release.
 - b. Funding schedule associated with Covered Species and Covered Habitat Preservation Credit Releases will be as follows:
 - i. The percentage of the endowment amount funded through Endowment Deposits shall be equal to or greater than the percentage of Covered Species and Covered Habitat Credits Released (See Section VII.C).
 - c. Funding schedule associated with Covered Species and Covered Habitat Establishment Credit Releases will be as follows:
 - i. Following the release of the first 15% of [***Remove if second sentence not required by NMFS or CDFW:*** USFWS Covered Species and Covered Habitat] Credits, the percentage of the Endowment Amount funded through Endowment Deposits shall be equal to or greater than the percentage of Covered Species and Covered Habitat Credits Released.

[Remove if not required by NMFS or CDFW: Prior to the release of the first 15% of NMFS and/or CDFW Covered Species and Covered Habitat Credits, 15% of the Endowment Amount must be funded through Endowment Deposits.]

- ii. 100 % of the Endowment Amount shall be funded through Endowment Deposits prior to the release of 85% (cumulative) of Covered Species and Covered Habitat Credits.
2. Each year the Endowment Amount is not 100% funded, the Endowment Amount in **Exhibit D-2** shall be increased (but not decreased) to account for inflation. The Bank Sponsor must make this adjustment on or before April 1 of each year (“Adjustment Year”), based upon the change in the Consumer Price Index (CPI) for California. All Urban Consumers, All Items (“Index”), published by the California Department of Industrial Relations (“DIR”), Division of Labor Statistics and Research (<http://www.dir.ca.gov/OPRL/CAPriceIndex.htm>). The Bank Sponsor shall determine the change in the Index by comparing the Index published in March of the Adjustment Year to the Index published in March of the year in which this BEI is fully executed. The DIR website also provides an adjustment calculator that may be used for this purpose. The Endowment Amount in **Exhibit D-2** shall be increased by the percent change in the CPI and the product shall be the Endowment Amount for the Adjustment Year. If the percentage change in the CPI is less than or equal to zero for any Adjustment Year, then no adjustment will be made for that year.
3. Bank Sponsor shall provide each member of the IRT a copy of the receipt for each Endowment Deposit within 30 calendar days of such deposit.

Section VII: Credit Release

A. Waters of the U.S. Credit Release

1. Upon receipt of Bank Sponsor’s written request and accompanying documentation of compliance with all applicable requirements set forth in this Section, the USACE may release for Transfer Waters of the U.S. Credits (**Exhibit F-1**), as described below. Monitoring for Performance Standards for Credit Releases is for a minimum of five years. Early achievement of Performance Standards will not accelerate Credit Release. The actual number of Credits Released shall be determined in writing by the USACE, in consultation with the other members of the IRT, based upon as-built conditions of the Bank Property, extent of Waters of the U.S. delineated on the Bank Property, attainment of the Performance Standards, funding of the Endowment Fund in accordance with Section VI.E, and compliance with requirements of this BEI and any associated authorization. Upon each Credit Release, USACE shall enter the number of Credits Released into RIBITS. The applicable Credit Release shall occur prior to any Credit Transfer. Credits may be released as follows:
 - a. Credit Release 1.
 - i. 15% of the total anticipated Waters of the U.S Credits upon the Bank

Establishment Date.

- b. Credit Release 2. Up to an additional 15% of the total anticipated Waters of the U.S. Credits (30% cumulative total) when:
 - i. The Bank Sponsor has submitted as-built drawings to the IRT pursuant to Section VII.A.2.
 - ii. The USACE has approved the as-built condition in writing.
 - iii. The Bank Sponsor has funded a minimum of 30% of the Endowment Amount per Section VI.E.1.a.i.
 - iv. Credit Release 1 has occurred.
- c. Credit Release 3. Up to an additional 25% of the total anticipated Waters of the U.S Credits (55% cumulative total) when:
 - i. The Bank Sponsor has submitted the annual report (Section IX.B).
 - ii. Year 3 Performance Standards have been attained, as required by the Development Plan.
 - iii. The Bank Sponsor has funded a minimum of 55% of the Endowment Amount per Section VI.E.1.a.ii.
 - iv. Credit Release 2 has occurred.
 - v. A minimum of three years of monitoring having been conducted since Credit Release 2.
- d. Credit Release 4. Up to an additional 15% of the total anticipated Waters of the U.S Credits (70% cumulative total) when:
 - i. The Bank Sponsor has submitted the annual report (Section IX.B).
 - ii. Year 4 Performance Standards have been attained.
 - iii. The Bank Sponsor has funded a minimum of 70% of the Endowment Amount per Section VI.E.1.a.iii.
 - iv. Credit Release 3 has occurred.
 - v. A minimum of one year of monitoring having been conducted since Credit Release 3.
- e. Credit Release 5. Up to an additional 15% of the total anticipated Waters of the U.S Credits (85% cumulative total) when:
 - i. The Bank Sponsor has submitted the annual report (Section IX.B).
 - ii. Year 5 Performance Standards have been attained.
 - iii. The Sponsor has submitted a Waters of the U.S. jurisdictional determination and delineation for the Bank Property.
 - iv. The Bank Sponsor has funded 100% of the Endowment Amount per

Section VI.E.1.a.iv.

- v. Credit Release 4 has occurred.
 - vi. A minimum of one year of monitoring having been conducted since Credit Release 4.
- f. Final Credit Release. Any remaining balance of Waters of the U.S Credits (100% cumulative total) when:
- i. The Bank Sponsor has submitted the annual report (Section IX.B), including the final Monitoring Report as required by the Development Plan.
 - ii. Final Performance Standards have been attained.
 - iii. Any required Remedial Actions are completed.
 - iv. Any additional Performance Standards required as a result of required Remedial Actions have been attained.
 - v. Credit Release 5 has occurred.
 - vi. A minimum of one year of monitoring having been conducted since Credit Release 5.
2. The Bank Sponsor shall submit as-built drawings of the Bank Property, with accurate maps of the established, enhanced, and/or restored Waters of the U.S. to the IRT no later than 90 calendar days following completion of construction associated with the establishment, restoration, and/or enhancement of the Waters of the U.S. on the Bank Property. The as-built drawings shall consist of full size construction plans, with as-built conditions clearly shown. The as-built drawings and any attachments must describe in detail any deviation from the Development Plan.
3. Each Waters of the U.S. Credit Release, with the exception of the first and the second, is also contingent upon the Bank Sponsor's submission of the annual report for the current reporting period in accordance with Section IX.B., and an IRT site inspection at the appropriate time of year, as determined by the IRT.

B. Waters of the State Credit Release [*If applicable*]

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

C. Covered Species and Covered Habitat Credit Release

- 1. Upon receipt of Bank Sponsor's written request and accompanying documentation of compliance with all applicable requirements set forth in this Section., the **[Choose one: CDFW, NMFS or USFWS]** may release for Transfer Covered Species and

Covered Habitat Credits (**Exhibit F-1**), as described below. Monitoring for Performance Standards for Credit Releases is for a minimum of five years. Early achievement of Performance Standards will not accelerate Credit Release. The actual number of Credits Released shall be determined in writing by the appropriate IRT agencies with jurisdiction over the Credits (USFWS, NMFS, or CDFW), in consultation with the other members of the IRT, based upon existing and as-built conditions of the Bank Property, extent of appropriate habitat preserved or established, attainment of the Performance Standards, funding of the Endowment Fund in accordance with Section VI.E, and compliance with requirements of this BEI and any associated authorization. Upon each Credit Release, the appropriate IRT agency shall enter the number of Credits released into RIBITS. The applicable Credit Release shall occur prior to any Credit Transfer.

2. Preservation Credits for Covered Species and Covered Habitat are described in the Credit Table (**Exhibit F-1**) and may be released as described below. If the maximum percentage of released credits is not authorized at the time of each numbered Credit Release below, subsequent Credit Releases may be authorized.
 - a. Preservation Credit Release 1. 15% of the total anticipated Preservation Credits when all of the following have occurred:
 - i. Bank is established.
 - ii. A minimum of 15% of the Endowment Amount is funded according to Section VI.E.
 - iii. The Bank Sponsor demonstrates, to the satisfaction of the IRT agency in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit D-5**) have been met, and that the habitat values identified in **Exhibit F-1** have been maintained.
 - b. Preservation Credit Release 2. Up to an additional 25% (40% cumulative total) of the total anticipated Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded a minimum of 40% of the Endowment Amount per Section VI.E and **Exhibit F-5**.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the IRT agency in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit D-5**) have been met, and that the habitat values identified in **Exhibit F-1** have been maintained.
 - iii. Credit Release 1 has occurred.
 - c. Preservation Credit Release 3. Up to an additional 15% (55% cumulative total) of the total anticipated Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded a minimum of 55% of the Endowment Amount per Section VI.E and **Exhibit F-5**.

- ii. The Bank Sponsor demonstrates, to the satisfaction of the IRT agency in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit D-5**) have been met, and that the habitat values identified in **Exhibit F-1** have been maintained.
 - iii. Credit Release 2 has occurred.
 - d. Preservation Credit Release 4. Up to an additional 15% (70% cumulative total) of the total anticipated Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded a minimum of 70% of the Endowment Amount per Section VI.E and **Exhibit F-5**.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the IRT agency in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit D-5**) have been met, and that the habitat values identified in **Exhibit F-1** have been maintained.
 - iii. Credit Release 3 has occurred.
 - e. Final Preservation Credit Release: Any remaining balance of Preservation Credits when all of the following have occurred:
 - i. The Bank Sponsor has funded 100% of the Endowment Amount per Section VI.E and **Exhibit F-5**.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the IRT agency in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit D-5**) have been met, and that the habitat values identified in **Exhibit F-1** have been maintained.
 - iii. Credit Release 4 has occurred.
- 3. Habitat Establishment Credits described in the Credit Table (**Exhibit F-1**) for each Covered Species and/or Covered Habitat may be released as follows. If the maximum percentage of released credits is not authorized at the time of each numbered Credit Release below, subsequent Credit Releases may be authorized.
 - a. Establishment Credit Release 1. 15% of the total anticipated Habitat Establishment Credits when all of the following have occurred:
 - i. The Bank is established.
 - ii. The Bank Sponsor demonstrates, to the satisfaction of the IRT in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit C-1**) have been met (*or in special circumstances identified by the IRT during BEI development, will be met*), and that the habitat values identified in **Exhibit C-1** have been maintained.
 - iii. [**Remove if not required by NMFS or CDFW**] the Bank Sponsor has funded 15% of the Endowment Amount per Section VI.E and **Exhibit**

F-5.

- b. Establishment Credit Release 2. Up to an *additional 15% of the total anticipated Habitat Establishment Credits (up to 30% cumulative total)* when all the following have occurred.
 - i. The Bank Sponsor has submitted *as-built drawings to the IRT pursuant to Section VII.A.2.*
 - ii. The IRT has approved the as-built condition in writing.
 - iii. The Bank Sponsor has funded a minimum of 30% of the Endowment Amount per Section VI.E and **Exhibit F-5.**
 - iv. The Bank Sponsor demonstrates, to the satisfaction of the IRT in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit C-1**) have been met, [*or in special circumstances identified during BEI development, will be met*] and that the habitat values identified in **Exhibit C-1** have been maintained.
 - v. Credit Release 1 has occurred.
- c. Establishment Credit Release 3. Up to an additional 25% of the total anticipated Habitat Establishment Credits (up to 55% cumulative total) when all the following have occurred:
 - i. The Bank Sponsor has submitted complete and accurate Annual Reports as required by the BEI and its exhibits.
 - ii. The Bank Sponsor has funded a minimum of 55% of the Endowment Amount per Section VI.E and **Exhibit F-5.**
 - iii. The Bank Sponsor demonstrates, to the satisfaction of the IRT in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit C-1**) have been met, and that the habitat values identified in **Exhibit C-1** have been maintained.
 - iv. Credit Release 2 has occurred.
- d. Establishment Credit Release 4. Up to an additional 15% of the total anticipated Habitat Establishment Credits (up to 70% cumulative total) when all the following have occurred:
 - i. The Bank Sponsor has submitted all annual and monitoring reports as required by the BEI and its exhibits, and the reports are deemed satisfactory by the IRT.
 - ii. The Bank Sponsor has funded a minimum of 70% of the Endowment Amount per Section VI.E. and **Exhibit F-5.**
 - iii. The Bank Sponsor demonstrates, to the satisfaction of the IRT in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit C-1**) have been met, and that the habitat values identified in

- Exhibit C-1** have been maintained.
- iv. Credit Release 3 has occurred.
 - e. Establishment Credit Release 5. Up to an additional 15% of the total anticipated Habitat Establishment Credits (up to 85% cumulative total) when all the following have occurred:
 - i. The Bank Sponsor has submitted all Annual and Monitoring Reports as required by the BEI and its exhibits, and the reports are deemed satisfactory by the IRT.
 - ii. The Bank Sponsor has funded 100% of the Endowment Amount per Section VI.E. and **Exhibit F-5**.
 - iii. The Bank Sponsor demonstrates, to the satisfaction of the IRT in whose jurisdiction the credit resides, that any associated Performance Standards (**Exhibit C-1**) have been met, and that the habitat values identified in **Exhibit C-1** have been maintained.
 - iv. Credit Release 4 has occurred.
 - f. Final Establishment Credit Release. Any remaining balance of the Habitat Establishment Credits when all the following have occurred:
 - i. The Bank Sponsor has submitted all the Monitoring Reports and the Final Monitoring Report as required by **Exhibit C-1**.
 - ii. Any required Remedial Actions are complete.
 - iii. Any additional Performance Standards required as a result of required Remedial Actions have been attained.
 - iv. Final Performance Standards have been attained as described in **Exhibit C-1**.
 - v. Credit Release 5 has occurred.
4. The Bank Sponsor shall submit as-built drawings of the Bank Property, with accurate maps of the constructed habitats, to the IRT no later than 90 calendar days following completion of construction associated with the constructed habitats on the Bank Property. The as-built drawings shall consist of full size construction plans, with as-built conditions clearly shown. The as-built drawings and any attachments must describe in detail any deviation from the Development Plan (**Exhibit C-1**).
 5. Each Covered Species and Covered Habitat Credit Release, with the exception of the first and second, is also contingent upon the Bank Sponsor's submission of the annual report for the current reporting period in accordance with Section IX.B., and an IRT site visit at the appropriate time of year, as determined by the IRT [*If Applicable*]: The Bank Sponsor shall pay to CDFW the Implementation Fee, in the total amount of _____ Dollars (\$_____). This sum may be payable in installments. Each

installment shall be in an amount that equals the ratio of the number of the CDFW (Covered Species and Covered Habitat) Credits released to the total number of CDFW Credits in the Bank. Each installment shall be due following each CDFW (Covered Species and Covered Habitat) Credit Release and no later than the due date for submission of the Bank's annual report covering the period in which the associated Credit Release occurs (**Exhibit F-6**). The Implementation Fee shall be paid in full by the Bank closure date.

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

Section VIII: Operation of the Bank

A. Service Area

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

B. Transfer and Use of Credits

1. The Transfer of Credits may begin only upon the Bank Establishment Date. Bank Sponsor shall have the exclusive right to determine the price for any and all Bank Credits it offers for sale. The minimum Credit unit that may be Transferred is 0.01 Credit.
2. In no case shall the number of Credits of any particular type Transferred exceed the total number of Credits of that type which have been released for Transfer, as evidenced by written approval by the IRT agency(ies) under whose jurisdiction the Credits reside.
3. Use of Credits from the Bank to compensate for unavoidable impacts to Waters of the U.S., Waters of the State, Covered Species, or Covered Habitat, under any permit or biological opinion issued by an IRT agency, can only occur after approval by the IRT agency or agencies executing such a permit or issuing such an opinion. Approval is determined on a case-by-case basis to ensure the use is appropriate to compensate for the impacts of the specific project to which the Credits are proposed to be applied. Mitigation or compensation requirements for individual project impacts may or may not be compatible with the use of mitigation banks, generally, or any particular mitigation bank, specifically.
4. Bank Sponsor shall notify all members of the IRT upon any Credit Transfer in accordance with Section IX.C. of this BEI. Upon Transfer of Credits, the Bank Sponsor shall enter the Credit Transfer into RIBITS. [*Remove if USFWS is not a party*: Bank Sponsor shall enter pending Covered Species and Covered Habitat Credit Transfers into RIBITS for approval by USFWS, per **Exhibit F-4**.]

5. If the Bank Property is damaged after the Bank Establishment Date and such damage materially impairs any or all Waters of the U.S., Waters of the State, or habitat related to Covered Species or Covered Habitat on such damaged Bank Property, but the IRT does not determine that such damage is a result of Force Majeure, then the IRT may, at its discretion, find the Bank Sponsor in default pursuant to Section XII.E and take action accordingly and/or invoke the Remedial Action provisions of Section VIII.F.
6. Each Credit Transfer shall be made pursuant to a written purchase agreement in the form of **Exhibit F-2**. [~~Remove if USFWS is not a party~~: Prior to Transfer, Bank Sponsor shall upload pending Covered Species and Covered Habitat Credit purchase agreements into RIBITS for approval by USFWS, per **Exhibit F-4**.]
7. This BEI applies only to those Credits released by agencies that are signatory to this BEI and set forth in **Exhibit F-1**.

C. Interim and Long-term Management and Monitoring

1. Interim Management and Monitoring

Bank Sponsor shall be responsible for conducting management, monitoring, and maintenance activities according to the Interim Management Plan (**Exhibit D-4**) until the end of the Interim Management Period. The Bank Sponsor shall upload all reports into RIBITS and furnish a hard copy to each IRT member.

2. Long-term Management and Monitoring

At the end of the Interim Management Period, Property Owner shall be obligated to manage, monitor, and maintain the Bank Property in perpetuity to preserve its habitat and conservation values in accordance with this BEI, the Conservation Easement, and the Long-term Management Plan (**Exhibit D-6**). Such activities shall be funded through the Endowment Fund according to Section VIII.E.2.b. Property Owner and the IRT members shall meet and confer upon the request of any one of them, to consider revisions to the Long-term Management Plan and Endowment Analysis and Schedule (**Exhibit D-2**) which may be necessary or appropriate to better conserve the habitat and conservation values of the Bank Property. If there is insufficient funding available from the Endowment Fund interest and earnings or if long-term management expenses exceed those estimated in the Endowment Fund Analysis and Schedule (**Exhibit D-2**), the Property Owner shall consult with the IRT in accordance with Section VIII.E.2.b.v. During the Long-term Management Period, the Property Owner shall be responsible for submitting annual reports to each member of the IRT, in accordance with Section IX.B of this BEI. The Property Owner shall upload all reports into RIBITS and furnish a hard copy to each IRT member.

D. Bank Closure Plan

1. Upon Bank closure, no further Credit Transfer shall occur.

2. The Bank closure shall be deemed to take place upon written approval of the IRT following occurrence of all of the following:
 - a. All Performance Standards have been met and all Remedial Action required under Section VIII.F has been completed as evidenced by:
 - i. Submission of all required annual reports in accordance with Section IX.B.
 - ii. The completion of all Remedial Action, if any, in accordance with the applicable Remedial Action plan(s).
 - iii. An on-site inspection by the IRT.
 - b. And either (A) The last authorized Credit has been Transferred, or (B) The Bank Sponsor requests Bank closure by written notice to the IRT and IRT provides written approval of the closure.
 - c. All financial responsibilities of the Bank Sponsor have been met, including 100% funding of the Endowment Amount for not less than three years and full funding of the Implementation Fee, if applicable.

E. Financial Operations

1. Securities

a. Construction Security

- i. The [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board], as the holder of the security, after coordination with the IRT, shall be entitled to draw upon the Construction Security if:
 - a) Any Transfer of Credits has been made; and either (A) after the Bank Establishment Date, but no later than the first full growing season after the date of the first Credit Transfer, the IRT determines that the Bank Sponsor has not initiated construction and planting in accordance with the Development Plan, or (B) two years has elapsed since the Bank Sponsor has initiated implementation of the Development Plan, and construction and planting in accordance with the Development Plan is not complete.
 - b) If any portion of the Construction Security is drawn upon pursuant to this Section, then the Bank Sponsor shall restore the Construction Security to the amount specified in **Exhibit C-2** within 90 calendar days after written notice from [***Choose on, as applicable:*** USACE, CDFW ***or*** State Water Board ***or*** Regional Water Board].
- ii. The Construction Security shall be cancelled or the monies provided as Construction Security returned to the Bank Sponsor by [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board], after coordination with the IRT, only after the Bank Sponsor

completes the construction and planting activities in accordance with the Development Plan, as demonstrated by:

- a) Bank Sponsor's submission of as-built drawings in accordance with Section VII.A.2 and Section VII.C.3.b.
 - b) An on-site inspection by the IRT and confirmation by the IRT of satisfactory completion of construction and planting activities in accordance with the Development Plan.
- b. Performance Security
- i. The [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board], as the holder of the security, in coordination with the other members of the IRT, shall be entitled to draw upon the Performance Security in accordance with this Section VIII.E.1.b.
 - ii. If any portion of the Performance Security is drawn upon pursuant to this Section, then the Bank Sponsor shall replenish the Performance Security to the amount specified in **Exhibit C-3** within 90 calendar days after written notice from [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board].
 - iii. The Performance Security shall be cancelled or the monies provided as Performance Security returned to the Bank Sponsor by [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board] after all of the Performance Standards, all Remedial Action(s), and any additional Performance Standards required to satisfy such Remedial Action plan(s) under Section VIII.F are met.
- c. Interim Management Security
- i. The [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board], as the holder of the security, in coordination with the other members of the IRT, shall be entitled to draw upon the Interim Management Security, if any Transfer of Credits has been made and the [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board] determines that during the Interim Management Period the Bank Sponsor has not performed all tasks as required under the Interim Management Plan or Remedial Action plan.
 - ii. In the event that the Interim Management Security is drawn upon pursuant to this section, the Bank Sponsor shall restore the Interim Management Security to the amount specified in **Exhibit D-1** within 90 calendar days after written notice from [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional Water Board].
 - iii. The Interim Management Security shall be cancelled or the monies provided as Interim Management Security returned to the Bank Sponsor by [***Choose one, as applicable:*** CDFW ***or*** USACE ***or*** State Water Board ***or*** Regional

Water Board] after the Bank Sponsor has performed all tasks as required under the Interim Management Plan, all Remedial Action(s), and any additional Performance Standards required to satisfy such Remedial Action plan(s) under Section VIII.F are met.

2. Endowment Fund

a. Endowment Deposits

- i. The Endowment Deposits the Endowment Holder receives are to be held in trust in a fund designated [*If CDFW holds endowment, insert:* by CDFW or *If CDFW does not hold the endowment, insert:* in the Endowment Agreement.]

b. Endowment Fund Management

- i. Notwithstanding Probate Code sections 18501-18510, the Endowment Amount should not decrease in value through expenditure or investment strategy. The Endowment Amount is intended to increase in value to keep up with inflation. A portion of the interest and earnings on the Endowment Amount balance shall be reinvested [*insert if CDFW holds the endowment:* by CDFW into the Endowment Fund to provide for growth of the Endowment Fund commensurate with inflation using the same CPI adjustment formula as set forth in Section VI.E.3] [*insert if CDFW does not hold the endowment:* by the Endowment Holder into the Endowment Fund in accordance with the Endowment Agreement.] After the Endowment Fund is 100% funded, no additional Endowment Fund monies will be required from the Bank Sponsor.
- ii. The Parties anticipate that any Endowment Fund earnings beyond those necessary to provide for growth of the Endowment Fund commensurate with inflation are expected to be made available by the Endowment Holder to the Property Owner to fund annual long-term management of the Bank Property as anticipated in the Long-term Management Plan and estimate of costs [*If CDFW does not hold the endowment, insert:* in accordance with the Endowment Agreement.]
- iii. [*insert if CDFW does not hold the endowment:* In accordance with the Endowment Agreement, any Endowment Fund revenues (including earnings and interest) remaining after the Endowment Fund is adjusted for inflation that exceed the anticipated annual long term management expenses of the Bank Property are to be retained in the Endowment Fund and are expected to be made available by the Endowment Holder to the Property Owner to fund unexpected expenses and Adaptive Management needs.]
- iv. [*Include only if CDFW is the Endowment Holder:* Property Owner, once Long-term Management Period begins, shall invoice CDFW, as the Endowment Holder, for management activities following the invoicing instructions in **Exhibit D-4.**]

- v. Notwithstanding Probate Code sections 18501-18510, in the event there is insufficient funding available from the Endowment Fund revenues to fund anticipated annual long-term management expenses the Property Owner shall consult with the IRT and the Grantee to identify the most effective means to implement the management measures and tasks with the resources available. Property Owner shall submit a proposed temporary revised Long-term Management Plan and Endowment Fund Analysis in writing to the IRT and Grantee within 60 calendar days after completion of Property Owner's consultation with the IRT and Grantee. Upon written approval of the temporary revised Long-term Management Plan by the IRT and any required notification to the Endowment Holder, in accordance with the Endowment Agreement, the Property Owner shall implement the approved revised management measures and tasks. The original Long-term Management Plan shall be restored in full force and effect upon expiration of the temporary revised Long-term Management Plan or sooner should sufficient funding become available from the Endowment Fund revenues to fund originally anticipated annual long-term management costs.

3. Financial Records and Auditing

- a. Bank Sponsor and Property Owner are required to maintain complete and accurate financial records relating to the operation of the Bank for which it is responsible, using generally accepted accounting principles (GAAP), developed by the Federal Accounting Standards Advisory Board. At the request of the IRT, no more frequently than annually, the Bank Sponsor and Property Owner shall each have its financial records relating to the operation of the Bank audited by an independent licensed Certified Public Accountant and shall submit the auditor's report to the IRT upon completion.
- b. The IRT or their designated representatives shall also have the right to review and copy any records and supporting documentation pertaining to the performance of this BEI. Bank Sponsor and Property Owner agree to maintain such records for possible audit for a minimum of three years after Bank closure, or three years after the date of performance, whichever is later. Bank Sponsor and Property Owner agree to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employee or representative who might reasonably have information related to such records. Further, Bank Sponsor and Property Owner agree to include a similar right of State and federal auditors to audit records and interview employees and representatives in any contract related to the performance of this BEI.

F. Remedial Action Plan

1. Prior to Bank closure, if any Party discovers any failure to achieve the Performance Standards or any injury or adverse impact to the Bank Property as Preserved, restored, or enhanced, the Party making the discovery shall notify the other Parties. The IRT may require the Bank Sponsor to develop and implement a Remedial Action

plan to correct such condition, as described below. The annual report required under Section IX.B. shall identify and describe any Remedial Action proposed, approved, or performed and, if the Remedial Action has been completed, evaluate its effectiveness.

2. Within 60 calendar days of the date of written notice from the IRT, the Bank Sponsor shall develop a Remedial Action plan and submit it to each member of the IRT for written approval. The Remedial Action plan must identify and describe proposed actions to achieve the Performance Standards or remedy injury or adverse impact to the Bank Property and set forth a schedule within which the Bank Sponsor will implement those actions. The Bank Sponsor shall, at Bank Sponsor's cost, implement the necessary and appropriate Remedial Action in accordance with the Remedial Action plan approved by the IRT.
3. If (A) the Bank Sponsor fails to develop a Remedial Action plan and submit it to each member of the IRT or to implement Remedial Action identified by the IRT, in accordance with this section, or (B) a Remedial Action plan is agreed upon and implemented, but the conditions do not satisfy the plan's objective and measurable Performance Standards by the dates specified in the plan, then the [*chose one*: USACE, CDFW, Regional Board], in coordination with the IRT, may find the Bank Sponsor in default pursuant to Section XII.E. and take action accordingly.
4. If the IRT determines that the Bank is operating at a Credit deficit (i.e., that Credit Transfers made exceed the Credits authorized for release, as adjusted in accordance with this BEI), then IRT shall notify the Bank Sponsor of its default, and take actions accordingly. Upon receipt of notification, Bank Sponsor shall cease Credit Transfers immediately and is not authorized to resume Credit Transfers until notified in writing by the IRT.

Section IX: Reporting

A. Annual Inflation Adjustments to Endowment Fund Report

By April 1st of each year following the Bank Establishment Date and until the Endowment Fund is 100% funded, the Bank Sponsor shall report to the IRT [*insert if CDFW does not hold the endowment*: and the Endowment Holder], in hard copy and in editable electronic format, the following values:

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

B. Annual Report

Bank Sponsor or Property Owner, as specified below, shall submit an annual report to the IRT, in hard copy and in editable electronic format, on or before [*insert IRT approved date; for consistency consider August 15th*] of each year following the Bank Establishment Date. Each annual report shall cover the period from July 1 of the preceding year (or if earlier, the Bank Establishment Date for the first annual

report) through June 30th of the current year (the “Reporting Period”). Prior to Bank closure, the Bank Sponsor shall be responsible for reporting Bank development and Interim Management tasks described below, and Property Owner shall be responsible for reporting Long-term Management tasks described below. After Bank closure, the Property Owner shall be responsible for such reporting, annually, as per the Long-term Management Plan. The annual report shall address the following:

1. Bank Development

The Bank Sponsor shall submit an annual report that includes data, documentation, and discussion of the Banks progress toward meeting Performance Standards described in **Exhibit C-1**. The annual report shall describe any deficiencies in attaining and maintaining Performance Standards and any Remedial Action proposed, approved, or performed. If Remedial Action has been completed, the annual report shall also evaluate the effectiveness of that action.

2. Interim Management and Long-term Management

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

During the Interim Management Period, the Bank Sponsor shall submit an annual report that contains an itemized account of the management tasks in accordance with the Interim Management Plan and any Remedial Actions conducted during the Reporting Period. During the Long-term Management Period, the Property Owner shall submit an annual report that contains an itemized account of the management tasks in accordance with the Long-term Management Plan and any Remedial Actions conducted during the Reporting Period. Each annual report shall also include the following:

- a. The time period covered, i.e. the dates “from” and “to.”
- b. A description of each management task conducted, the dollar amount expended and time required.
- c. The total dollar amount expended for management tasks conducted during the Reporting Period.
- d. A description of the management and maintenance activities proposed for the next reporting year.
- e. A description of the overall condition of the Bank, including photos documenting the status of the Bank Property during the Reporting Period and a map documenting the location of the photo points.

3. Transfer of Credits

- a. The Bank Sponsor shall submit an annual report that includes an updated Credit

Transfer ledger (**Exhibit F-3**) showing all Credits Transferred since the Bank Establishment Date and an accounting of remaining Credits.

- b. The Bank Sponsor shall submit an annual report that documents the Implementation Fee payment status, if applicable.

C. Credit Transfer Reporting

Upon the Transfer of each and every Credit the Bank Sponsor shall enter the Credit Transfer into the RIBITS ledger, upload an electronic copy of the finalized Credit purchase agreement into the appropriate RIBITS folder, and submit to each member of the IRT:

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

D. Reporting Compliance Measures

If Bank Sponsor fails to submit complete reports on time, the Bank Sponsor is in default.

1. Reports Not Received

Annual reports not received by the IRT will result in automatic Credit Transfer suspension effective the 30th day that the report is past due. The suspension will be lifted within 10 calendar days after the IRT receives a complete annual report.

2. Incomplete Reports

If the Bank Sponsor has been notified by the IRT of an incomplete report, the IRT will then notify the Bank Sponsor of the date by which the report must be made complete.

Section X: Responsibilities of the Bank Sponsor and Property Owner

- A. Without limiting any of its other obligations, including without limitation, under the Conservation Easement, Bank Sponsor and Property Owner each hereby agrees and covenants that during the time the Bank is in operation, prior to Bank closure:

1. **[Remove if Grant Deed:** If the entity proposed to hold the Conservation Easement is not an IRT agency, Bank Sponsor and Property Owner shall, prior to the execution of the Conservation Easement at **Exhibit E-4** hereof, provide the IRT with satisfactory evidence that the entity proposed to hold the Conservation Easement (Grantee) is authorized to do so pursuant to California Civil Code § 815.3 and Government Code § 65966-65967, has a primary purpose of long-term land stewardship for conservation purposes consistent with the purpose of the Bank, and has agreed to hold the Conservation Easement, and otherwise complies with the requirements of the IRT.]

2. Bank Sponsor shall be responsible for all activities and costs associated with the establishment and operation of the Bank, including but not limited to construction, planting, Remedial Action, documentation, maintenance, management, monitoring, and reporting, until completion of the Interim Management Period.
3. Bank Sponsor shall assume responsibility for compensatory mitigation requirements of USACE permits for which it Transfers Credits once a USACE permittee has secured the appropriate number and type of Credit(s) from the Bank Sponsor. Bank Sponsor shall provide USACE with the written Credit purchase agreement (**Exhibit F-2**) that confirms that the Bank Sponsor has accepted the responsibility for providing the required compensatory mitigation requirements of such USACE permit.
4. The Bank Sponsor agrees to perform the actions described in the Development Plan so as to support all Credits that project proponents/action agencies secure. The Bank Sponsor shall provide [Choose as appropriate: NMFS, USFWS, CDFW] with the written Credit purchase agreement (**Exhibit F-2**) for all Credits secured by project proponents/action agencies that confirms that the Bank Sponsor will continue to perform the aforementioned actions.
5. It shall not discharge or release on, to or from the Bank Property, or permit others to discharge or release on, to or from the Bank Property, any material, waste or substance designated as hazardous or toxic or as a pollutant or contaminant under any federal, state, or local environmental law or regulation (each a “Hazardous Substance”).
6. Property Owner shall not create or suffer any lien or encumbrance upon the Bank Property other than as set forth in the Property Assessment and Warranty approved by the IRT, and Property Owner shall not execute, renew, or extend any lien, lease, license, or similar recorded or unrecorded right or interest in the Bank Property without the prior written consent of the IRT and the Grantee, if a Conservation Easement has been granted.
7. It shall not construct or install any structure or improvement on, or engage in any activity or use of, the Bank Property, including mineral exploration or development, excavation, draining, dredging, or other alteration of the Bank Property that is prohibited by, or not consistent and in accordance with this BEI and its Exhibits.
8. Bank Sponsor shall ensure that the Bank Property is managed and maintained in accordance with the Interim Management Plan, this BEI and its Exhibits.
9. Property Owner shall allow, or otherwise provide for, access to the Bank Property by Bank Sponsor, Grantee, the IRT agencies and third parties, as described in the Conservation Easement.
10. Property Owner shall grant to Bank Sponsor all rights and authority necessary to carry out, and shall not limit the Bank Sponsor in performing, its responsibilities, and obligations on and affecting the Bank Property in accordance with this BEI and its Exhibits.

11. Property Owner shall ensure that the Bank Property is managed and maintained in accordance with the Long-Term Management Plan, this BEI and its Exhibits.
- B. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this BEI, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this BEI or extensions for the performance of the requirements of this BEI.
- C. An extension of one compliance date based upon or related to a single incident shall not extend any subsequent compliance dates.

Section XI: Responsibilities of the IRT

A. IRT Oversight

Subject to the “Availability of Funds” provision of this BEI, the IRT agrees to oversee the performance of this BEI.

B. IRT Review

The members of the IRT will make a good faith effort to review the annual reports and Remedial Action plans within 60 calendar days from the date of receipt of complete submittal. If any member of the IRT is unable to complete its review within the time specified in this section, this fact will be reflected in any schedule established for performance of Remedial Action and any evaluation of timely performance of Remedial Action by Bank Sponsor.

C. Compliance Inspections

The IRT shall conduct compliance inspections for any purpose(s) it determines as necessary to assess compliance with this BEI.

Section XII: Other Provisions

A. Force Majeure

1. If the Bank Sponsor or Property Owner is prevented from or delayed in performing an obligation under this BEI by an event of Force Majeure that commences after the Bank Establishment Date, the IRT may suspend the Bank Sponsor and/or Property Owner’s obligation to perform as provided in this Subsection; the scope of such suspension will be delineated by the IRT pursuant to Paragraph 3 of this Subsection. In order for such suspension to apply, the Bank Sponsor or Property Owner shall bear the burden of demonstrating that an event of Force Majeure has occurred.
2. Where there is an event of Force Majeure, the Party prevented from or delayed in performing its obligations under this BEI shall notify the applicable IRT member(s) as promptly as possible but in no event later than 7 calendar days following the date of commencement of a Force Majeure event giving full particulars of the nature of the Force Majeure event, its effect upon the performance of the Party’s obligations under

this BEI, the habitat values affected by the event, and the expected timeframe of non-performance attributable to the Force Majeure event. As promptly as reasonably possible after providing notification, the Party invoking Force Majeure shall meet with the applicable IRT member(s) to discuss the course of Remedial Action in response to such occurrence.

3. If the applicable IRT member(s) concurs that a Force Majeure event has occurred, the IRT will notify the Bank Sponsor and Property Owner. The IRT notice will identify the actions and achievements from which performance by the Property Owner or Bank Sponsor is suspended and the time period during which performance is suspended. During the period between the event of Force Majeure and the approval of the Remedial Action plan, the Property Owner or Bank Sponsor shall continue to manage and maintain the Bank Property to the full extent practicable consistent with this BEI and other applicable documents.
4. Within 60 calendar days of notification of concurrence from the IRT that a Force Majeure event has occurred, the Party invoking Force Majeure will prepare a Remedial Action plan in accordance with Section VIII.F. to ensure the restoration of the Bank Property. Once approved by the IRT, the Party invoking Force Majeure shall carry out the Remedial Action plan within the time provided in the approved plan. Failure to develop a Remedial Action plan or to implement Remedial Action identified by the IRT, in accordance with this section, or where a Remedial Action plan is agreed upon and implemented, but the conditions do not satisfy the plan's objective and measurable Performance Standards by the dates specified in the plan, shall be a default under this BEI for which the [*chose one*: USACE, CDFW, Regional Board] may draw upon the Performance Security or Interim Management Security.
5. In accordance with Section VIII.B.5. of this BEI, the applicable IRT member(s) may, at its discretion, direct Bank Sponsor to suspend the Transfer of Credits and/or reduce the number of Credits allocated to the Bank in proportion to such damaged area unless and until the Bank Sponsor has reasonably restored such damaged area pursuant to a Remedial Action plan approved by the IRT).
6. Disputes over whether an event is a result of a Force Majeure shall be resolved in accordance with Section XII.A.
7. Bank Sponsor and Property Owner are not entitled to terminate this BEI under Section XII.D. as a result of Force Majeure.

B. Dispute Resolution

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

1. The Electing Party shall notify all other Parties to this BEI of the dispute through a Dispute Notice. The Dispute Notice shall identify the Parties against which the Electing Party is commencing the informal dispute resolution process ("Implicated

Parties”), the position of the Electing Party (including, if applicable, the basis for contending that a violation has occurred), and the resolution the Electing Party proposes.

2. Each Implicated Party shall have 45 calendar days after receipt of the Dispute Notice (or such other time as the Parties may mutually agree) to respond to the electing Party. During this time, any Party to this BEI that received the Dispute Notice may seek clarification of the Dispute Notice.
3. Within 45 calendar days after each Implicated Party’s response was provided or due, whichever is later, the Electing Party and the Implicated Parties shall confer and negotiate in good faith toward a mutually satisfactory resolution, or shall establish a specific process and timetable to seek such resolution.
4. The dispute resolution process may be terminated by the Electing Party or any Implicated Party upon written notice to all other Parties to this BEI.

C. Conveyance of Bank or Bank Property or Other Interests

1. All transfers of any interest in the Bank Property are subject to the applicable provisions of the Conservation Easement.
2. Property Owner shall have the right to sell, assign, transfer or convey (each a “transfer”) its interest in the Bank Property at any time; *provided, however*, that any such transfer on or after the execution date of this BEI must be made in accordance with this BEI and the Conservation Easement, and shall be subject to prior written concurrence by the IRT and Bank Sponsor.
 - a. Except for liens and encumbrances processed in accordance with Section X(A)(6) , such concurrence shall be subject to the requirement that the transferee assumes and agrees in writing to observe and perform all of the Property Owner’s obligations pursuant to this BEI and the Conservation Easement.
 - b. From and after the date of any transfer by Property Owner of its interest in the Bank Property in accordance with (a) the transferor shall have no further obligations hereunder and all references to Property Owner in this BEI shall thereafter refer to such transferee, except that the transferor’s liability for acts, omissions, or breaches occurring prior to the transfer shall survive the transfer.
 - c. Any transfer of the Property Owner’s interest in the Bank Property, including liens and encumbrances referred to in Section X(A)(6), made without the prior written concurrence of the IRT constitutes default pursuant to Section XII.E and the IRT may take action accordingly.
3. Bank Sponsor may sell or convey its entire interest in the Bank at any time, provided that no uncured event of default exists, Bank Sponsor is in *full compliance* with all requirements of this BEI (including all financial assurance requirements), and subject to the prior written approval of the IRT. If any of the financial assurances required

under this BEI are not completely funded at the time the Bank Sponsor requests IRT approval of a sale or conveyance, then the IRT shall not approve such sale or conveyance unless and until either the current Bank Sponsor, or the proposed replacement Bank Sponsor, shall have provided all required financial assurances. In addition, prior to sale or conveyance, the Bank Sponsor shall provide to each member of the IRT a written agreement signed by the replacement Bank Sponsor, acceptable to the IRT in form and substance, in which the Bank Sponsor assigns to the replacement Bank Sponsor, and the replacement Bank Sponsor assumes and agrees to perform, all of the responsibilities and obligations of the Bank Sponsor under the BEI. Any such sale or conveyance made without the prior written concurrence of the IRT constitutes default pursuant to Section XII.E and the IRT may take action accordingly.

D. Modification and Termination of the BEI

1. Amendment and Modification

- a. This BEI, including its Exhibits, may be amended or modified only with the written approval of the Parties, which approval may be withheld or denied. All amendments and modifications shall be fully set forth in a separate document signed by all Parties that shall be appended to this BEI.
- b. At the request of the Bank Sponsor, the IRT agenc(ies) may consider an amendment to the BEI to conform to an approved NCCP or HCP.
- c. Pursuant to Fish and Game Code § 1798.6(a), any person seeking to amend the Bank shall submit to CDFW, a complete bank amendment package containing each of the original bank agreement package documents, including any prior amendments, as well as any documents proposed to be amended or that would be affected by the proposed amendment, together with the applicable amendment fee.

2. Termination

- a. The Bank Sponsor and Property Owner may jointly withdraw the entire Bank Property and terminate this BEI at any time prior to the first Credit Transfer, provided that Waters of the U.S., Waters of the State, and other habitat values existing on the Bank Property prior to the initiation of any efforts to restore or enhance the Bank Property shall be preserved in a condition at least equal to that which existed prior to initiation of Bank establishment efforts, and as the Conservation Easement may require.
- b. In the event this BEI is terminated or the Bank is closed prior to the Transfer of all authorized Credits, any remaining Credits under this BEI shall be extinguished and will no longer be available for Transfer.
- c. The IRT may terminate this BEI if the Bank Sponsor or Property Owner sells or conveys the Bank or the Bank Property without the prior written concurrence of the IRT, as required by Section XII.D.

- d. USEPA, [*insert appropriate agencies signing, but not providing credits:* USACE, CDFW, USFWS, State Water Board, Regional Water Board, and NMFS] may terminate its participation upon written notice to all other Parties. This BEI shall continue in full force and effect as to the remaining Parties.
- e. The [*insert appropriate agencies:* USACE, CDFW, USFWS, State Water Board, Regional Water Board, and NMFS] may each terminate its participation this BEI upon written notice to all other Parties, on the condition that each of the following has occurred:
 - i. Bank Sponsor or Property Owner has defaulted on one or more covenants, terms or conditions of this BEI.
 - ii. Bank Sponsor and Property Owner, has each received notice of such default from the terminating IRT agency in accordance with paragraph XII.B., if applicable, and XII.K.
 - iii. Bank Sponsor or Property Owner, as applicable, has failed to cure its default to the satisfaction of the terminating IRT agency, or, in the view of the terminating IRT agency, cannot cure its default.
- f. If any member of the IRT so requests, the member(s) of the IRT proposing to terminate participation in the BEI agree to meet with the other IRT members to discuss the reason(s) for such termination. Notice of a request for such meeting shall be made by the requesting IRT member(s) not later than 15 calendar days from receipt of the notice of termination.
- g. Termination by any member of the IRT from this BEI shall not terminate this BEI or affect the relationship between the remaining members of the IRT, toward each other or the Bank Sponsor or Property Owner, under this BEI. Remaining Credits under the authority of the terminating agency will no longer be available for Transfer.
- h. In the event such termination is commenced, the Bank Sponsor agrees to fulfill its pre-existing obligations to perform all establishment, monitoring, maintenance, management, and remediation responsibilities that arise directly from Credits that have already been transferred at the time of termination.
- i. Nothing in this Section XII.D.2 is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to the USACE, CDFW, NMFS, State Water Board, Regional Water Board, and USFWS in the event of a threatened or actual breach of this BEI.

E. Default

- 1. The Bank Sponsor and/or Property Owner shall be in default if that Party is not complying with the terms of this BEI, including the achievement of Performance Standards and the performance of any obligations or responsibilities required of it by

this BEI including, but not limited to, those identified in Section X of this BEI. In the event the Bank Sponsor and/or Property Owner realizes it is in default, it shall promptly notify the other Parties.

2. Once the Parties receive notification or otherwise become aware that the Bank Sponsor and/or Property Owner is in default, the IRT will identify the appropriate action(s) to be taken and the appropriate schedule for taking such actions; the IRT will notify the Property Owner and Bank Sponsor of its determination. These actions may include, but are not limited to, suspending Credit Transfers, adaptive management, reducing available Credits, utilizing financial assurances, and terminating the instrument. The IRT may confer with the Bank Sponsor and/or Property Owner prior to making its determination.

- i. *Responsive Actions Other Than the Utilization of Financial Assurances*
 - (a) Except as provided otherwise in (b), the Bank Sponsor or Property Owner, as identified by the IRT, will carry out the specified action(s) on the schedule specified by the IRT.
 - (b) During the optional dispute resolution process as described in Section XII.B, the parties may unanimously agree to the selection of different actions and/or schedules. Except where such agreement is reached or as provided otherwise in (c) through (g) below, where the Bank Sponsor or Property Owner (as applicable) invokes the informal dispute resolution process described in Section XII.B, the agreed upon action must be performed to the satisfaction of the IRT within 15 days after the informal dispute resolution process has been concluded or terminated.
 - (c) Even if the informal dispute resolution process in Section XII.B is invoked, where the IRT determines that Credit Transfers must be suspended, the Bank Sponsor will suspend the Transfer of the specified Credits until the agency under whose jurisdiction the Credits reside has agreed to such resumption in writing.
 - (d) Even if the informal dispute resolution process in Section XII.B is invoked, where the IRT determines that a Credit reduction is required due to damage to the Property or failure to achieve Performance Standards, the Bank Sponsor will abide by the Credit reduction until the agency under whose jurisdiction the Credits reside has agreed to such restoration of Credits in writing.
 - (e) Even if the informal dispute resolution process in Section XII.B is invoked, where an IRT agency elects to terminate its participation in the Bank, it may do so at any time after the Parties have been notified of the default.
 - (f) Even if the informal dispute resolution process in Section XII.B is invoked, where the IRT determines that the Bank Sponsor or Property Owner must desist from an activity because it may violate federal or state law, the Bank Sponsor will discontinue the activity as described

in the IRT's determination until the IRT has agreed to such resumption in writing.

- (g) Even if the informal dispute resolution process in Section XII.B is invoked, where the IRT determines that the Bank Sponsor or Property Owner must desist from an activity because, under this BEI, it must be approved but no approval has been given, the Bank Sponsor will desist from the activity until the IRT has agreed to such resumption in writing.

ii. *Utilizing Financial Assurances as a Responsive Action*

- (a) Except as provided in (c) or as otherwise provided herein, where the IRT determines that the financial assurances must be drawn upon, the Bank Sponsor shall cure such non-compliance within thirty (30) days of receipt of the aforementioned IRT determination. If said cure reasonably requires more than thirty (30) days, Bank Sponsor shall, within the thirty (30) day period, submit to the Parties for review and approval a plan and time schedule to diligently complete a cure. Bank Sponsor shall complete such cure in accordance with the approved plan.
- (b) Except as provided in (c), the holder may draw upon the appropriate financial security as necessary to continue Bank development, management, or operation, as provided in Section VIII.E and VI.D in the following circumstances:
 - (i) the Bank Sponsor has not been granted more than 30 days to cure and has not, to the satisfaction of the IRT, cured the default within the thirty day time-to-cure period;
 - (ii) the Bank Sponsor has submitted a plan within the thirty day time-to-cure period but the plan is considered insufficient or inappropriate by the IRT;
 - (iii) the Bank Sponsor has been granted more than 30 days to cure in accordance with an approved plan, and has not, to the satisfaction of the IRT, cured the default within the specified time period;
- (c) If Bank Sponsor disputes the IRT determination, it shall invoke the dispute resolution procedures of Section XII.B within thirty (30) days of receipt of the IRT determination. If the informal dispute resolution process has been invoked, the IRT shall not draw upon financial securities until such time as the informal dispute resolution process has been concluded or terminated.

3. This Section shall not be construed to modify or limit any specific right, remedy,

or procedure in any Section of this BEI or any remedy available under applicable State and/or Federal Law.

F. Controlling Language

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

G. Entire Agreement

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

H. Reasonableness and Good Faith

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

I. Successors and Assigns

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

J. Partial Invalidity

If a court of competent jurisdiction holds any term or provision of this BEI to be

invalid or unenforceable, in whole or in part, for any reason or as to any Party, the validity and enforceability of the remaining terms and provisions, or portions of them, shall not be affected unless an essential purpose of this BEI would be defeated by loss of the invalid or unenforceable provision or its invalidity or unenforceability as to any Party.

K. Notices

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

[Insert: Bank Sponsor:]

[NAME]

[ADDRESS]

Attn:

Telephone:

Fax:

[Insert: Property Owner:]

[NAME]

[ADDRESS]

Attn:

Telephone:

Fax:

[Insert appropriate agencies: IRT Members:]

U.S. Army Corps of Engineers

_____ District

[DISTRICT ADDRESS]

Attn: Chief, Regulatory Division

Telephone:

Fax:

U.S. Fish and Wildlife Service

_____ Office

[FIELD OFFICE ADDRESS]

Attn: Field Supervisor

Telephone:

Fax:

National Marine Fisheries Service

[Insert: California Coastal or Central Valley]

_____ Office

[OFFICE ADDRESS]

Attn: Assistant Regional Administrator

Telephone:

Fax:

U.S. Environmental Protection Agency

Region IX

75 Hawthorne Street

San Francisco, CA 94105

Attn: Supervisor, Wetlands Section

Telephone: 415- 972-3483

Fax: 415-947-3537

California Department of Fish and Wildlife

_____Region

[REGION ADDRESS]

Attn: Regional Manager

Telephone:

Fax:

California Regional Water Quality Control Board, Region _____

Address

City, State, Zip code

Attn: Executive Officer

Telephone:

Fax:

L. Counterparts

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

M. No Third Party Beneficiaries

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

N. Availability of Funds

Implementation of this BEI by the IRT is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds.

Nothing in this BEI may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the California State Treasury. No agency of the IRT is required under this BEI to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

O. No Partnerships

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

P. Applicable Laws

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

Q. No Federal Contract or Monetary Damages

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

R. CDFW Remedies

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

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

- (a) Any right to receive consequential or punitive damages against CDFW or any officer, employee, agent or representative of CDFW; and

- (b) Any right to seek specific performance against CDFW based on a dispute relating to any CDFW decisions, made either independently or as a member of the IRT, directly related to Credits for Covered Species and Covered Habitat creation or preservation under the jurisdiction of CDFW, including but not limited to decisions under Sections VII.B (Covered Species and Covered Habitat Credit Release), VIII.B (Transfer of Credits), XII.A.5 (Force Majeure), and XII.E.2 (Default) of this BEI. This waiver shall not preclude Bank Sponsor or Property Owner from the recovery of any compensatory damages directly related to CDFW decisions regarding Credits for Covered Species and Covered Habitat creation or preservation provided for in the BEI, which Credits are under the sole jurisdiction of CDFW.

Recovery of damages due to a default by CDFW will only be available after CDFW and the Bank Owner or Property Owner have undergone informal dispute resolution as specified in Section XII.B of this BEI.

Section XIII: Execution

Each of the undersigned certifies that he or she has full authority to enter into this BEI. This BEI shall be deemed executed on the date of the last signature by the Parties. Within 30 calendar days of BEI execution, the Bank Sponsor shall upload the final signed BEI, including all of its Exhibits, to the appropriate folders in RIBITS and provide an electronic copy to each member of the IRT.

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

Bank Sponsor

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

Property Owner

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

U.S. Army Corps of Engineers, _____ District

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

U.S. Fish and Wildlife Service, _____ Office

By: _____
[Name] Date
Field Supervisor

National Marine Fisheries Service, West Coast Region

By: _____
[Name] Date
Regional Administrator

California Department of Fish and Wildlife, _____ Region

By: _____
[Name] Date
Regional Manager

State Water Resources Control Board

By: _____
[Name] _____
Executive Director Date

California Regional Water Quality Control Board, Region _____

By: _____
[Name] _____
Executive Officer Date

U.S. Environmental Protection Agency, Region IX

By: _____
[Name] _____
Supervisor, Wetlands Section Date

Appendix 1 – Minimum Requirements for Each Exhibit

1. “Exhibit A” - Bank Location Maps

A-1. General Vicinity Map

This map should show the Bank location in relation to cities, towns, or major roads, and other distinguishable landmarks with sufficient detail to allow the Bank Property to be easily located.

A-2. Map of Property including Bank Property

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

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

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

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

B-1. Map(s) of the Bank’s Service Area(s)

Include Service Area map(s) showing the area within which each type of Credit (i.e., Waters of the U.S., Waters of the State, Covered Species or Covered Habitat) may be sold or obligated.

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

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

3. “Exhibit C” - Development Plan

C-1. Development Plan

This plan should include the baseline conditions of the Bank Property including biological resources, geographic location and features, topography, hydrology, vegetation, past present and adjacent land uses, Waters of the U.S. and/or Waters of the State jurisdictional determination and delineation, species and habitats occurring on the Bank Property; a description of the objectives of the Mitigation Bank and activities and methodologies for Establishing, Restoring, and/or Enhancing Waters of the U.S. and/or Waters of the State or other habitat types; detail anticipated increases in functions and services of existing aquatic resources and their corresponding effect within the watershed (i.e. habitat diversity and connectivity, floodplain management, or other landscape scale functions); a map of the approved modifications, overall habitat establishment goals, objectives and Performance Standards; a discussion of ecological

suitability of the site to achieve them (i.e. watershed/hydrology analysis, soils, topography, compatibility with adjacent land uses, watershed management plans, critical habitat designation, NCCP, HCP, and species recovery plans); maps detailing the anticipated location, acreages, and Credits of Waters of the U.S. or Waters of the State, habitat for federal, and state listed species; historic aerial photographs and/or historic topographic maps (if available) if restoration is proposed; monitoring methodologies required to evaluate and meet the Performance Standards; an approved schedule for reporting monitoring results; a discussion of possible Remedial Actions; surrounding land uses and zoning along with the anticipated future development in the area; and any other information deemed necessary by the IRT. The Development Plan must clearly specify how each Construction Phase will be constructed and monitored in sufficient detail that a third party acting on the Construction Security could complete establishment of any given phase.

C-2. Construction Security Analysis and Schedule

Provide a copy of the third-party estimate or contract that is being relied upon to determine the amount of the Construction Security. Include a specific Construction Security Analysis and Schedule for each Construction Phase.

C-3. Performance Security Analysis and Schedule

Specify the amount of the Performance Security based upon the amount of Construction Security in Exhibit C-2. Include a specific Performance Security Analysis and Schedule for each Construction Phase.

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

Any and all standard required forms to be used for the submission of financial information shall be included in this **Exhibit D** in template form.

D-1. Interim Management Security Analysis and Schedule

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

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

D-2. Endowment Fund Analysis and Schedule

This analysis and schedule shall consist of a table and/or spreadsheet that shows the projected annual capitalization rate, all of the tasks (management, monitoring, reporting); task descriptions; labor (hours); cost per unit; cost, frequency, timing or scheduling of the tasks; the total annual funding necessary for each task; and any associated assumptions for each task required by the Long-term Management Plan. The total annual expenses should include, but are not limited to, administration and contingency expenses. The Endowment Fund Analysis and Schedule is developed assuming that each Construction Phase is constructed and managed by itself without the economies of scale or other cost reductions that may occur if all Construction Phases are implemented.

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

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

If CDFW does not hold the Endowment, then the following forms are required:]

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

[If CDFW holds the Endowment, then the following forms are required:]

- a. Mitigation Account Setup Procedures;
- b. Processing Procedures for Mitigation Payment Transmittal Forms and Mitigation Funds;
- c. Mitigation Payment Transmittal Form;
- d. Conservation and Mitigation Account Disbursement Procedures;
- e. Payee Notification (information explaining the purpose of the STD 204 and instructions for submitting the STD 204);
- f. Payee Data Record form coversheet (for sending in the completed STD 204); and
- g. Payee Data Record form (STD 204).

D-4. Interim Management Plan

The Interim Management Plan identifies the short-term management, monitoring, Adaptive Management, reporting and other activities to be implemented by the Bank Sponsor during the Interim Management Period.

The Interim Management Plan includes provisions for managing each Construction Phase independently as well as together.

D-5. Long-term Management Plan

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

- a. Purpose of Bank establishment and purpose of Long-term Management Plan;
- b. A baseline description of the setting, location, history and types of land use activities, geology, soils, climate, hydrology, habitats present (once Bank meets Performance Standards) and species descriptions;
- c. Overall management, maintenance and monitoring goals; specific tasks and timing of implementation; and a discussion of any constraints which may affect goals;
- d. The Endowment Fund Analysis and Schedule (**Exhibit D-2**);
- e. Discussion of Adaptive Management actions for reasonably foreseeable events and possible thresholds for evaluating and implementing Adaptive Management;
- f. Monitoring and Reporting requirements and schedule;
- g. Rights of access to the Bank Property and prohibited uses of the Bank Property as provided in the [**Choose one**: Conservation Easement *or* Grant Deed]; and
- h. Procedures for amendments and notices.
- i. Include a reference to the Historic Properties Treatment Plan (**Exhibit J-3**), if applicable.

D-6. Bank Closure Plan

Provide Bank closure plan.

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

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

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

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

Property and Bank Property

E-2. Property Assessment and Warranty

Property Assessment and Warranty utilizing the IRT template.

E-3. Plat Map(s)

Plat maps supporting the Property Assessment and Warranty which illustrate the physical extent of the title exceptions and identify the locations of all structures, roads, fences, and other physical improvements.

E-4. Real Estate Instrument

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

E-5. Title Insurance (applicable for final BEI approval)

6. "Exhibit F" - Bank Crediting and Credit Transfers

F-1. Credit Evaluation and Credit Table

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

F-2. Credit Purchase Agreement and Payment Receipt Templates

F-3. Credit Transfer Ledger Template

Credit Transfer Ledger shall include at a minimum:

- a. Bank name;
- b. Total number of each type of Bank Credit;
- c. Initial Credit purchaser name, address and phone number;
- d. Project name;
- e. Project applicant name, address, and phone number;
- f. Agency project file numbers;
- g. Date of Credit Transfer;
- h. Type(s) of Credit(s) sold or obligated;
- i. Number of Credits sold or obligated;
- j. Number of Credits applied; and
- k. Balance of each type of Credit remaining.

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

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

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

F-6 Implementation Fee Schedule *[if applicable]*

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

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

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

9. **“Exhibit I” –Jurisdictional Determination and Delineation of Waters of the U.S. and/or Waters of the State.**

Bank Sponsor shall provide a copy of the jurisdictional determination and delineation issued by the USACE and/or the Regional Board for the Bank Property.

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

Cultural Resources requirements met for all Construction Phases.

J-1 Identification, Inventory, and Evaluation

Cultural resources inventory and evaluation shall include the following: a) a description and map of the area of potential effects (“APE”), b) a description of each cultural resource and a brief statement identifying the specific location of each cultural resource within the APE, c) a description of how the boundary was determined for each cultural resource identified, and d) a determination of eligibility for the National Register of Historic Places (National Register), as determined by the lead Federal agency in

consultation with the State Historic Preservation Officer (SHPO), and e) where appropriate, eligibility recommendation for listing on the California Register of Historical Resources. Cultural resources that are recommended eligible for listing in the National Register are called “historic properties” under the Federal regulations and “historical resources” under the California regulations.

J-2 Compliance Documentation *[include as applicable]*

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

J-3 Historic Properties Treatment Plan (HPTP) *[include as applicable]*

A historic properties treatment plan, approved by USACE and the SHPO, shall be prepared prior to any ground-disturbing activities conducted on the Bank Property. The HPTP will be included in the Section 106 agreement as an appendix. Ground disturbing activities must be conducted in accordance with the stipulations of the Section 106 agreement (**Exhibit J-2**). The plan shall include both short and long-term management of the historic properties. In addition, the Federal Agency will make compliance with the Section 106 Agreement a condition of any Federal authorization or approval.

11. “Exhibit K” – Other Documentation, Permits, Amendments or Revisions To the extent not already obtained, the Bank Sponsor or Property Owner will be responsible for obtaining all appropriate environmental documentation, permits, permit amendments, or other authorizations needed to establish and maintain the Bank, including but not limited to the following. Enclose the required documentation for all Construction Phases.

Include only those that apply and add others as necessary:

- a. Department of the Army Permit;
- b. Environmental documents, findings and notices prepared or filed by Lead

- Agency to comply with CEQA and NEPA;
- c. Water Quality Certification or Waiver under § 401 of the Clean Water Act;
 - d. General or Individual Waste Discharge Requirements Under the Porter–Cologne Water Quality Control Act, Water Code § 13000 *et seq.*;
 - e. Streambed Alteration Agreement (Fish and Game Code § 1600 *et seq.*);
 - f. Federal Endangered Species Act (16 U.S.C. § 1535 *et seq.*) (ESA) (§ 7 or § 10) compliance;
 - g. California Endangered Species Act (Fish and Game Code § 2050 *et seq.*) compliance;
 - h. Magnuson-Stevens Fishery Conservation and Management Act compliance; and
 - i. Flood Protection Board Permit for streams listed in Table 8.1 in title 23 of the California Code of Regulations.
 - j. County Grading Permit