

MEMORANDUM OF UNDERSTANDING
Concerning
MITIGATION AND CONSERVATION BANKING AND IN-LIEU FEE PROGRAMS
IN CALIFORNIA

Between the
California Natural Resources Agency
And
California Department of Fish and Game
And
United States Army Corps of Engineers
And
United States Fish and Wildlife Service
And
NOAA's National Marine Fisheries Service
And
United States Environmental Protection Agency
And
USDA Natural Resources Conservation Service
And
State Water Resources Control Board

This Memorandum of Understanding (MOU) is entered into by the California Natural Resources Agency (CNRA), the California Department of Fish and Game (CDFG), the U.S. Army Corps of Engineers (Corps), represented by the South Pacific Division Engineer and the Los Angeles, Sacramento, and San Francisco District Engineers, the U.S. Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS), the U.S. Environmental Protection Agency (EPA), the USDA Natural Resources Conservation Service (NRCS), and the State Water Resources Control Board (State Water Board), collectively referred to herein as the "Parties."

RECITALS

WHEREAS, the Corps and EPA jointly promulgated the Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, Department of the Army, Army Corps of Engineers and Environmental Protection Agency, 33 C.F.R. Part 332 and 40 C.F.R. Part 230, April 10, 2008, (Mitigation Rule) where the Corps has the primary responsibility to review mitigation banks and in-lieu fee (ILF) programs that may be used to offset unavoidable impacts to waters of the U.S.; and

WHEREAS, the FWS published Guidance for the Establishment, Use, and Operation of, Conservation Banks, 68 Fed. Reg. 24,753 (May 8, 2003); and

WHEREAS, the California Natural Resources Agency and California Environmental Protection Agency, jointly published the State of California's Official Policy on Conservation Banks, April 7, 1995; and

WHEREAS, the CDFG implements the Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993 (Fish and Game Code Section 1775 *et seq.*; 1784 *et seq.*; and 1790 *et seq.*); and

WHEREAS, the State Water Board is charged with preserving, protecting, enhancing, and restoring water quality within the State of California; and

WHEREAS, the Parties agree that the creation and use of mitigation banks, conservation banks, and ILF programs can be effective methods to protect important habitat and also to mitigate for unavoidable impacts to resources under the jurisdiction of one or more of the Parties; and

WHEREAS, the Parties agree that it will be beneficial to create a more streamlined, coordinated approach for the submittal, review and approval of mitigation and conservation banks and ILF programs.

NOW, THEREFORE, the Parties agree as follows:

Section 1 -Purpose

A. This MOU is entered into by the Parties for the purpose of establishing a framework for developing and using combined or coordinated approaches to mitigation and conservation banking and ILF programs in California to improve consistency of processes, services and products. It is the intent of the Parties that this MOU will provide a collaborative process for the development of standardized banking and ILF program documents (see Sections 3 and 4) and guidance, and confirmation of an agreed upon process for continuous improvement of those documents, guidance, and the processes defined therein.

B. This coordinated approach will aid in more rapid and conclusive review, comment, and completion of the review of proposed mitigation and conservation banks and ILF programs. A clearly defined and widely recognized process for development, review and approval of standardized banking and ILF program documents will facilitate and accelerate the establishment process for banks and ILF programs, simplify and clarify the process for bank sponsors and ILF program sponsors, save agency staff time, and reduce the cost of evaluating proposed bank and ILF proposals.

C. The use of mitigation and conservation banks and ILF programs to offset unavoidable adverse impacts shall be based on accepted ecological principles. The

appropriateness of the use of mitigation and conservation banks and ILF programs shall be evaluated on a case-by-case basis as part of the permitting and consultation process.

Section 2 -Incorporation with Regional Planning Efforts

Mitigation and conservation banks and ILF programs may be used to support regional planning efforts, including, but not limited to, Special Area Management Plans (SAMP), Advance Identification (ADID), Habitat Conservation Plans (HCP), Natural Community Conservation Plans (NCCP), Recovery Plans, County-wide integrated permitting strategies, advance mitigation planning efforts with infrastructure agencies, and watershed plans, as determined on a case-by-case basis by the Parties and plan participants.

Section 3 -Banking and ILF Documents

Banking and ILF program documents (Templates) consist of the following:

- A. A Bank Enabling Instrument (BEI). The BEI documents agency and bank sponsor concurrence, both on the objectives and administration of banks that provide mitigation for impacts to aquatic resources, federal and state listed species, and covered habitats, and on the physical and legal characteristics of the bank.
- B. An In-Lieu Fee Enabling Instrument (ILFEI). The ILFEI documents agency and ILF program sponsor concurrence, both on the objectives and administration of an ILF program that provides mitigation for impacts to aquatic resources, federal and state listed species, and covered habitats, and on the legal characteristics of the ILF program and physical characteristics of mitigation project sites.
- C. A Conservation Bank Enabling Instrument (CBEI). The CBEI documents concurrence of agency and bank sponsor on the objectives and administration of banks containing natural resource values that are conserved and managed in perpetuity and used to offset impacts to specified listed species.
- D. A Conservation Easement (CE). The CE is the instrument by which real property will be protected in perpetuity, retaining land forever in its natural, restored, or enhanced condition, with the purpose of preventing the impairment of, or interference with, the conservation values of the real property.
- E. A Long-Term Management Plan (LTMP). The LTMP is a document that describes how the bank property or ILF mitigation project sites will be managed after performance standards have been achieved to ensure the long-term sustainability of the resources.

- F. A Bank Proposal Review Checklist (Checklist). The Checklist documents information and exhibits required for a complete bank proposal.
- G. An ILF Proposal Review Checklist (ILF Checklist). The ILF Checklist documents information and exhibits required for a complete ILF proposal.
- H. Other Templates, guidance documents, and processes as may be determined to be necessary.

Section 4 -Responsibilities of the Parties

Each Party shall, unless otherwise indicated:

A. Appoint a representative to the Banking Agency Management Team.

1. The Banking Agency Management Team (BAMT) is composed of one representative from each Party who, at a minimum, has direct or delegated statewide responsibility for that agency. Representatives shall be designated from:

- a. Corps, South Pacific Division -San Francisco, CA
- b. FWS, Pacific Southwest Region - Sacramento, CA
- c. NMFS, Southwest Region - Long Beach, CA
- d. CDFG, Headquarters - Sacramento, CA
- e. EPA, Region IX- San Francisco, CA
- f. NRCS, California State Office -Davis, CA
- g. State Water Board -Sacramento, CA
- h. CNRA – Sacramento, CA

There shall be no overlap between representatives of the BAMT and Interagency Review Teams (IRTs) or Conservation Banking Review Teams (CBRT).

2. The BAMT shall:

- a. Review and approve Templates, guidance documents, and processes proposed by the Project Delivery Team (PDT);
- b. Disseminate the final approved Templates, guidance documents, and

processes to the IRTs and/or CBRTs for use in reviewing and approving bank and ILF program proposals;

c. As needed, meet to consider any recommended changes to Templates, guidance documents, and processes proposed by the PDT;

d. As needed, hold public meetings to provide information regarding Templates, guidance documents, and processes, and to address issues, such as new regulatory items regarding mitigation and conservation banking and ILF programs; and

e. Resolve, within 60 days, if practicable, disputes related to interpretation and integration of agency policies and practices which may arise during the development and application of Templates, guidance documents, and processes. The BAMT shall consider information on the nature of the dispute provided by their respective PDT representatives and make a decision which resolves the issue.

B. Appoint representatives to the PDT.

1. The PDT shall be composed of representatives from the Parties, except in the case of the CNRA, CDFG is the designee.

2. The PDT shall:

a. Develop standardized Templates for the various banking and ILF program documents, and will develop proposed guidance and processes for use in the evaluation of proposed mitigation and conservation banks and ILF programs;

b. Periodically review previously developed and approved Templates, guidance documents, and processes, and propose modifications as necessary. Proposed modifications may also be based on input from BAMT representatives, banking and ILF sponsors, or the public. The PDT will submit all proposed modifications to the Templates, guidance documents, and processes to the BAMT for consideration and approval; and

c. Conduct outreach to the banking and ILF provider communities, and the public at large, to ensure the widest possible understanding of the Templates, guidance documents, and processes.

C. Appoint representatives to the IRTs.

1. IRTs have the responsibility to review proposed mitigation and conservation

banks and ILF programs. The IRTs' areas of responsibility are typically based on the regulatory boundaries of the Corps districts in California (Los Angeles, San Francisco, and Sacramento). Typically, IRTs are composed of a representative from a Corps district and representative from each Party, as appropriate. Some Parties may not participate on every IRT.

2. Each IRT shall:

a. Review all bank or ILF program proposals to determine if they have the potential to provide appropriate mitigation for activities regulated by the Parties, and recommend to bank and ILF program sponsors that they use the BAMT-approved Templates in developing their proposals;

b. Thoroughly review any bank or ILF prospectus, draft and final BEI or ILFEI (including associated exhibits) for consistency with BAMT-approved Templates, guidance documents, and processes, and to ensure compliance with all applicable laws, regulations, and written policies. The Mitigation Rule established regulatory timelines for the review and approval of banks and ILF programs and associated projects, and the Corps and EPA are responsible for meeting these timelines. While the Mitigation Rule is a regulation specific to the Corps and EPA, the remaining signatory Parties to this MOU agree that adhering to the Mitigation Rule's review and approval timelines would be beneficial to bank and ILF program sponsors and the regulated public, and will endeavor to meet timelines when and where feasible;

c. Resolve disagreements between bank or ILF program sponsors and the IRT, or among IRT representatives regarding proposed minor deviations from Templates, guidance documents, or processes associated with the establishment, operation, or management of the bank or ILF program;

d. Elevate to the BAMT, through the PDT, any proposed major deviations from Templates, guidance documents, or processes for final approval before moving forward with bank or ILF program proposal. This will ensure that precedent setting changes or deviations that may have implications in the review of subsequent banks or ILF programs, or those which may adversely affect the operation of other IRTs in their evaluation of proposed banks and ILF programs, will all be afforded appropriate consideration prior to implementation (e.g., a decision to use an alternate form of financial assurance from that envisioned in the approved banking or ILF Templates);

e. Provide for public input on bank and ILF program prospectuses as required by the Parties' respective regulations, policies, practices, and guidance;

f. Conduct outreach to the banking and ILF provider communities, and the public at large, to ensure the widest possible understanding of the Templates, guidance documents, and processes; and

g. Ensure conflicting requirements are not placed on bank or ILF program sponsors by different members of the IRT.

D. Appoint representatives to the CBRTs.

1. CBRTs have the responsibility to review proposed conservation banks. CBRTs may be composed of representatives from the FWS, NMFS, and/or CDFG, as appropriate. Other Parties may request or be requested to participate on a CBRT and provide technical banking review and comments, with the understanding that final approval of any such banks shall not be withheld solely on the basis of pending review by said Party.

2. Each CBRT shall:

a. Review all conservation bank proposals to determine if they have the potential to provide appropriate mitigation for activities regulated by the CBRT agencies, and recommend to bank sponsors that they use the BAMT-approved CBEI or other relevant Templates in developing their proposals;

b. Thoroughly review any bank prospectus and draft and final CBEI (including associated exhibits) for consistency with BAMT-approved CBEI or relevant Templates, guidance documents, and processes, and to ensure compliance with all applicable laws, regulations, and written policies. The FWS, NMFS, and CDFG agree that adhering to the review and approval timelines found in the Mitigation Rule would be beneficial to bank sponsors and the regulated public, and will endeavor to meet timelines when and where feasible;

c. Resolve disagreements between bank sponsors and the CBRT, or among CBRT representatives, regarding proposed minor deviations from the CBEI or other relevant Templates, guidance documents, or processes associated with the establishment, operation, or management of a conservation bank;

d. Elevate to the appropriate BAMT members (e.g., FWS, NMFS, CDFG), through the PDT, any proposed major deviations from the CBEI or other relevant Templates, guidance documents, or processes for final approval before moving forward with a bank proposal. This will ensure that precedent setting changes or deviations that may have implications in the review of subsequent banks, or those which may adversely affect the operation of other CBRTs in their evaluation of proposed banks, will all be afforded appropriate consideration

prior to implementation (e.g., a decision to use an alternate form of financial assurance from that envisioned in the approved CBEI or other relevant Templates);

e. Provide for public input on bank prospectuses as required by the CBRT agencies' respective regulations, policies, practices, and guidance; and

f. Conduct outreach to the banking community, and the public at large, to ensure the widest possible understanding of the CBEI or other relevant Templates, guidance documents, and processes.

Section 5 -Amendment, Modification and Termination

A. This MOU may be modified or amended only by written, mutual agreement of all the Parties.

B. Any Party may terminate its participation in this MOU, without cause, by providing thirty (30) days written notice to the other Parties.

Section 6 -Miscellaneous

A. This MOU does not address all aspects of banking or ILFs, such as types of activities, regulatory authorities, crediting, and mitigation preferences.

B. Participation in this MOU does not imply endorsement of all aspects of a banking or ILF program proposal. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the Parties.

C. This MOU does not obligate expenditure of funds by any Party.

D. This MOU does not confer any right or benefit, substantive or procedural, enforceable at law or equity, upon any Party.

E. This MOU does not authorize funding or services, nor is it a legally binding contract. Any funding commitments or services will be handled in accordance with applicable laws, regulations, and procedures. Such commitments, if any, will be covered by separate agreement(s) that shall be in writing, by representatives of the Parties, and independently authorized by appropriate statutory authority. This MOU does not provide such authority.

F. This MOU is intended only to improve the cooperation among the Parties. It is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any person or against the State of California, its

agencies, its officers, or any person.

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

Section 7 - Duration

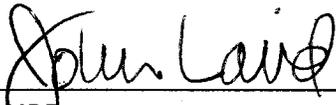
This MOU will remain in effect indefinitely.

Section 8 -Effective Date

This MOU will become effective when signed by all Parties.

[Remainder Left Intentionally Blank]

IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



JOHN LAIRD
SECRETARY FOR NATURAL RESOURCES

9/22/11
DATE

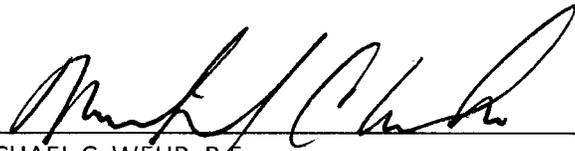
IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



CHARLTON H. BONHAM
DIRECTOR, CALIFORNIA DEPARTMENT OF FISH AND GAME

10/3/11
DATE

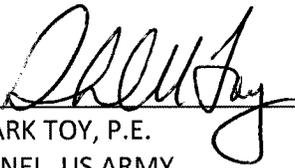
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MICHAEL C. WEHR, P.E.
COLONEL, U.S. ARMY
COMMANDING
SOUTH PACIFIC DIVISION

11 OCT-11
DATE

IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



R. MARK TOY, P.E.
COLONEL, US ARMY
COMMANDER AND DISTRICT ENGINEER
LOS ANGELES DISTRICT

24 OCT 2011
DATE

IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



TORREY A. DICIRO
LIEUTENANT COLONEL, US ARMY
COMMANDING
SAN FRANCISCO DISTRICT

11/19/2011
DATE

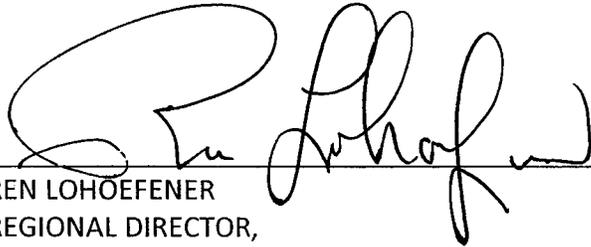
IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



WILLIAM J. LEADY, P.E.
COLONEL, U.S. ARMY
DISTRICT COMMANDER
SACRAMENTO DISTRICT

7 OCTOBER 2011
DATE

IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



REN LOHOEFENER
REGIONAL DIRECTOR,
PACIFIC SOUTHWEST REGION
U.S. FISH AND WILDLIFE SERVICE

11-21-11
DATE

IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officers the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.

Kevin Chin

for RODNEY R. MCINNIS
REGIONAL ADMINISTRATOR
SOUTHWEST REGION
NOAA's NATIONAL MARINE FISHERIES SERVICE

10/20/2011

DATE

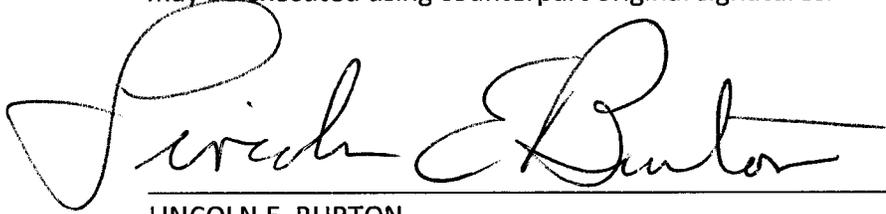
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ALEXIS STRAUSS
DIRECTOR, WATER DIVISION
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX

26 Oct. 2011
DATE

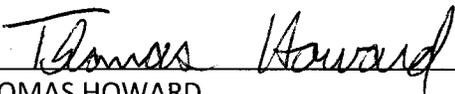
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LINCOLN E. BURTON
STATE CONSERVATIONIST, USDA NATURAL RESOURCES
CONSERVATION SERVICE, CALIFORNIA STATE OFFICE

10-4-11
DATE

IN WITNESS THEREOF, the California Natural Resources Agency, the California Department of Fish and Game, the U.S. Army Corps of Engineers acting by and through its authorized officer the South Pacific Division Engineer, Los Angeles District Engineer, San Francisco District Engineer, and Sacramento District Engineer, the U.S. Fish and Wildlife Service, Pacific Southwest Region, the National Marine Fisheries Service, Southwest Region, the U.S. Environmental Protection Agency, Region IX, USDA Natural Resources Conservation Service, California State Office, and the State Water Resources Control Board have executed this MOU on the dates set forth below. The signatures may be executed using counterpart original signatures.



THOMAS HOWARD
EXECUTIVE DIRECTOR
STATE WATER RESOURCES CONTROL BOARD

11/15/11
DATE