



## **Sacramento District California In-Lieu Fee Program**



**Amended Enabling Instrument**

**Sacramento District California  
In-Lieu Fee Program  
Amended Enabling Instrument**

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# SACRAMENTO DISTRICT CALIFORNIA

## IN-LIEU FEE PROGRAM

### AMENDED ENABLING INSTRUMENT

This Amended Enabling Instrument (“Instrument”) for the Sacramento District California In-Lieu Fee Program (“SPK CA ILF Program” or “Program”) (Amendment No. 8) is made by and among the National Fish and Wildlife Foundation (“Program Sponsor”), the Sacramento District of the U.S. Army Corps of Engineers (“USACE”), Region IX of the U.S. Environmental Protection Agency (“USEPA”), the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NMFS”), the State Water Resources Control Board (“State Water Board”), the Central Valley Regional Water Quality Control Board (“Central Valley Water Board”), and Lahontan Regional Water Quality Control Board (“Lahontan Water Board” (together, the “Parties,” and individually, a “Party”). The USACE, USEPA, NMFS, State Water Board, Central Valley Water Board, and Lahontan Water Board comprise the Interagency Review Team for the Program, as hereinafter defined (together, the “IRT,” and each individually, an “IRT Member”). As of the date of the signature of the last Party to sign this Amended Enabling Instrument (such date, the “Effective Date”), this Instrument shall amend and supersede the Program’s Enabling Instrument that was executed by the Parties on the Program’s “Execution Date” of October 10, 2014, and amended on April 1, 2015; January 26, 2017; February 23, 2018; July 3, 2018; April 27, 2020; February 16, 2021; and June 17, 2021, and sets forth the agreement of the Parties regarding the establishment, use, operation, and maintenance of the Program.

### RECITALS

- A. Section 314 of the National Defense Authorization Act for the federal government’s Fiscal Year 2004 required the Secretary of the Army, acting through the Chief of Engineers, to issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. §1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section. In response to this directive, USACE and USEPA published a proposed rule in Part II of the March 28, 2006 issue of the Federal Register (71 FR 15520). In the preamble to the March 2006 proposal, USACE and USEPA noted their decision, in light of their respective statutory roles in the section 404 program, to pursue the proposed rulemaking as a joint effort between the two agencies. On April 10, 2008, USACE and USEPA issued the final version of the regulation, known as the 2008 Final Rule on Compensatory Mitigation for Losses of Aquatic Resources (33 CFR Parts 325 and 332; 40 CFR Part 230) (“2008 Rule”). Among other things, the 2008 Rule sets forth requirements governing the establishment, use, operation, and maintenance of in-lieu fee programs as a means of providing compensatory mitigation for unavoidable adverse impacts to wetlands, streams, and other aquatic resources authorized by Clean Water Act section 404. The development of an “instrument” by prospective in-lieu fee program sponsors is a requirement of the 2008 Rule, and the Program Sponsor has developed this Instrument in satisfaction of that requirement.

- B. The Program Sponsor has elected to develop and implement the Program and will be responsible for establishing and operating the Program in accordance with the terms of this Instrument.
- C. USACE is responsible for regulating the discharge of dredged or fill material into Waters of the U.S., as hereinafter defined, under section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344 and the excavation, filling, alteration, or modification of the course, location, condition, or capacity of any navigable water of the U.S. under section 10 of the Rivers and Harbors Act (“RHA”), 33 U.S.C. § 403.
- D. USEPA is responsible for protecting and regulating the quality of Waters of the U.S., as hereinafter defined, under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*
- E. NMFS promotes the conservation of listed species under its jurisdiction and the habitats upon which they depend under the Endangered Species Act, 16 U.S.C. §1531 *et seq.*, the conservation and enhancement of fishery resources and the protection of Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §1801 *et seq.*, and the conservation of wildlife resources under the Fish and Wildlife Coordination Act, 16 U.S.C. §661-666c.
- F. State Water Board, Central Valley Water Board and Lahontan Water Board, within their respective areas of jurisdiction, are responsible for protecting and regulating the quality of Waters of the State, as hereinafter defined, 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.*
- G. The Program IRT is responsible for overseeing the establishment, use, operation, and maintenance of the Program.
- H. The primary goal of the Program is to provide an in-lieu fee option for effective Compensatory Mitigation for Impacts to aquatic resources, including Waters of the U.S., Waters of the State, and/or threatened or endangered species, authorized by IRT Members or other federal or state agencies in the geographic area of jurisdiction of the Sacramento District of the USACE within California (the “Program Area”).
- I. The objectives of the Program are to:
  - 1. Provide an in-lieu fee option for Compensatory Mitigation for Impacts to aquatic resources authorized under individual, nationwide, and programmatic permits, after-the-fact permits, enforcement actions, certifications, and other approvals or authorizations, including large-scale regional planning and/or permitting (e.g., Habitat Conservation Plans, Natural Community Conservation Plans) and large-scale and linear infrastructure projects (e.g., levees, roads, pipelines, transmission lines);
  - 2. Consolidate wetlands, waters and species credit types into Aquatic Resource Credit and Vernal Pool Credit types and apply mitigation funds with economies of scale and flexibility to serve the greatest aquatic resource needs of the affected Service Areas, as hereinafter defined, and track with sufficient detail the types of wetlands impacted and mitigated to enable assessment of Program effectiveness;

3. Achieve ecological success on a watershed basis by a) siting ILF Projects, as hereinafter defined, using the best available decision support tools; b) aligning Compensatory Mitigation with Service Area conservation priorities; and c) engaging various partners, such as non-profit conservation organizations, private entities, federal, state, tribal, and local aquatic resource management and regulatory authorities, and others with knowledge of aquatic resource needs within the Service Areas;
4. Operate a technically, operationally, and financially feasible and accountable Program that meets the requirements of the 2008 Rule.

## AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, the Parties hereby agree as follows:

### SECTION I: PURPOSE, NEED, FRAMEWORK, AND AUTHORITIES

#### *A. Purpose*

The purpose of this Instrument is to establish guidelines, responsibilities, and standards for the establishment, use, operation, and maintenance of the Program. The Program will be used for Compensatory Mitigation for (1) unavoidable Impacts to Waters of the U.S. that result from activities authorized under sections 401 and 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act; (2) unavoidable Impacts to Waters of the State that result from activities authorized under the Porter-Cologne Water Quality Control Act; (3) unavoidable Impacts to certain fish and wildlife species and their habitats that result from State or Federal actions under applicable laws or that are authorized by or otherwise addressed by State or Federal wildlife agencies under applicable laws; and (4) completed enforcement actions under the Clean Water Act, the Rivers and Harbors Act, the Porter-Cologne Water Quality Control Act, and other applicable laws.

#### *B. Framework*

This Instrument establishes multiple geographic service areas to effectively compensate for permitted Impacts to aquatic resources and two general Credit types: (1) Aquatic Resource Credits, as hereinafter defined, for permitted Impacts to wetlands (excluding vernal pools), other Waters of the U.S. and Waters of the State, and other aquatic resources, including anadromous fish in 17 Aquatic Resource Service Areas; and (2) Vernal Pool Credits, as hereinafter defined, for permitted Impacts to vernal pools in 12 Vernal Pool Service Areas.

This Instrument also establishes the framework for an implementation process for the sale of these Credits; receipt and accounting of funds from Credit sales within each Service Area; and a decision-making process for the deployment of such funds for ILF Projects involving project identification, prioritization, development, selection, and execution.

#### *C. Authorities*

The establishment, use, operation and maintenance of the Program will be carried out in accordance with the following authorities:

## 1. Federal Authorities

- a. Clean Water Act (33 U.S.C. § 1251 *et seq.*);
- b. National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*);
- c. Endangered Species Act (16 U.S.C. § 1531 *et seq.*);
- d. Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*);
- e. Magnuson-Stevens Fishery Conservation and Management Act (MSA), Essential Fish Habitat (EFH) for Chinook salmon in Amendment 14 of the Pacific Salmon Fishery Management Plan pursuant to the MSA (16 U.S.C. § 1801 *et seq.*);
- f. National Historic Preservation Act (16 U.S.C. § 470);
- g. Regulatory Program of the USACE (33 C.F.R. Parts 320-332);
- h. Rivers and Harbors Act (33 U.S.C. § 401 *et seq.*);
- i. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 C.F.R. Part 230); and
- j. Compensatory Mitigation for Losses of Aquatic Resources (33 C.F.R. Parts 325 and 332; 40 C.F.R. Part 230).

## 2. California Authorities

- a. Porter-Cologne Water Quality Control Act (Cal. Water Code § 13000 *et seq.*); and
- b. California Water Board Regulations (Cal. Code Regs., tit. 23, divs. 3-5)

## **SECTION II: DEFINITIONS**

The initially capitalized terms used and not defined elsewhere in this Instrument are defined, for this Program, as set forth below.

1. “Adaptive Management” means an approach to natural resource management that incorporates changes to management practices, including corrective actions as determined to be appropriate by the IRT in discussion with the Program Sponsor based upon annual report results and IRT review of overall Program performance and compliance.
2. “Advance Credits” means any Credits of the Program that are available for Sale or Pre-Transfer Sale and Transfer by the Program Sponsor prior to becoming a Fulfilled Credit in accordance with an approved Project Development Plan.
3. “Annual Report” shall mean the annual report provided by Sponsor pursuant to Section IV.G.1. of this Instrument.

4. “Buffer” means an upland, wetland, and/or riparian area adjacent to or otherwise associated with an ILF Project site that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with land uses adjacent to such ILF Project site.
5. “Catastrophic Event” means an unforeseen event, such as (but not limited to) the impact of a vehicle or falling aircraft, which has a material and detrimental impact on an ILF Project site, and over which neither the Program Sponsor nor the property owner has control.
6. “Closure” or “Closed” means termination of the Program, as provided under this Instrument.
7. “Compensatory Mitigation” means the Restoration, Reestablishment, Rehabilitation, Establishment, Enhancement, and/or, in certain circumstances, Preservation of aquatic resources for the purposes of offsetting unavoidable Impacts which remain after all appropriate and practicable avoidance and minimization measures have been achieved.
8. “Conservation Easement” means a perpetual conservation easement, as defined by California Civil Code § 815.1.
9. “Credit” or “Credits” means Aquatic Resource Credits and/or Vernal Pool Credits, as the context requires, provided under the Program. One Credit is generally equivalent to one acre of Establishment or Reestablishment of wetland, or the equivalent amount of functional lift or species benefit occurring on Enhancement or preservation acreage, as defined in **Exhibit C**.
10. “Credit Ledger” means the document that tracks the Sale or Pre-Transfer Sale of Advance Credits as described in **Exhibit C**.
11. “Credit Release” means an action by the applicable IRT Member(s) to make specified Credits associated with a Project Development Plan approved by the applicable IRT Members available to Fulfill one or more Advance Credits pursuant to this Instrument.
12. “Default” means a failure by the Program Sponsor to provide required Compensatory Mitigation in accordance with the terms of this Instrument that would permit any of the applicable IRT Members to exercise enforcement authority or other remedies against the Program Sponsor for failure of performance under this Instrument.
13. “Enhance” or “Enhancement” means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource Function(s). Enhancement results in the gain of selected aquatic resource Function(s) but may also lead to a decline in other aquatic resource Function(s). Enhancement does not result in a gain in aquatic resource area.
14. “Establish” or “Establishment” means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and Functions.



15. “Force Majeure” means war, insurrection, riot or other civil disorder, flood, earthquake, fire, disease, governmental restriction or the failure or delay by any governmental agency to issue any requisite permit or authority or take any action, or any injunction or other enforceable order of any court of competent jurisdiction, which has a material and detrimental impact on the Sponsor or the Sponsor’s ability to operate the ILF Program and over which the Sponsor does not have control. This definition applies to the Sponsor’s overall operation of the Program; an individual ILF Project will be subject to the definition of the term that is provided in the Project Development Plan for the ILF Project.
16. “Fulfill” or “Fulfillment” means the Sponsor’s matching of a Released Credit with an Advance Credit, as notified in writing to the applicable IRT Member(s), which results in the fulfillment of the Sponsor’s obligation and liability to provide Compensatory Mitigation with respect to such Advance Credit under this Instrument.
17. “Fulfilled Credit” means an Advance Credit for which the obligation to provide Compensatory Mitigation has been achieved through the pairing of it with a Released Credit from an ILF Project.
18. “Functions” mean the physical, chemical, or biological processes that occur in ecosystems.
19. “HCP” means a Habitat Conservation Plan prepared pursuant to § 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)).
20. “ILF Project” means a Compensatory Mitigation project funded under the Program.
21. “Impacts” means adverse effects.
22. “Interagency Review Team” or “IRT” means the USACE, USEPA, NMFS, State Water Board, Central Valley Water Board, Lahontan Water Board, who together are responsible for overseeing the establishment, use, operation, and maintenance of the Program.
23. “IRT Member” means an individual agency that is a member of the Interagency Review Team. This term refers to the agency itself and not a specific staff person representing the agency on the Interagency Review Team.
24. “Interim Management Period” means the period beginning on the date of approval of the Project Development Plan for an ILF Project and ending when the applicable IRT Members have determined that the Performance Standards in the Project Development Plan for that ILF Project have been met.
25. “Interim Management Plan” means the document that describes the management, monitoring, Adaptive Management, reporting, and other activities to be undertaken at an ILF Project site during the Interim Management Period.
26. “Long-Term Management and Maintenance Fund” or “LTMM Fund” means a financial account established by the Program Sponsor dedicated to funding the long-term, perpetual management, maintenance, and monitoring of a specific ILF Project site, consistent with the Long-term Management Plan for that specific site.

27. “Long-Term Management Period” means the period beginning upon conclusion of the Interim Management Period for an ILF Project and continuing in perpetuity (or such other period specified by the IRT), during which the ILF Project site is to be managed, monitored, and maintained pursuant to the Long-term Management Plan for that specific site.
28. “Long-Term Management Plan” means the document that identifies specific land management activities that are required to be performed on an ILF Project site, including, but not necessarily limited to, biological monitoring, improvements to biological carrying capacity, enforcement measures, and other actions designed to protect or improve the habitat values of the ILF Project site during the Long-term Management Period.
29. “NCCP” is a Natural Community Conservation Plan created pursuant to California Fish and Game Code §2800, *et seq.*
30. “Performance Standards” means the observable or measurable physical (including hydrological), chemical, and/or biological attributes set forth in the Project Development Plan for a specific ILF Project, which attributes are used to determine whether that ILF Project has met its objectives necessary to achieve a Credit Release.
31. “Phase I Environmental Site Assessment” is an assessment of the environmental condition of real 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 that is active at the time of the assessment.
32. “Preservation” means the protection of aquatic resources through removal of a threat to, or preventing the decline of, such aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.
33. “Pre-Transfer Sale” means the sale of Credits by the Program Sponsor prior to the issuance of a permit, certification, or other authorization or approval by an IRT Member that permits Impacts and authorizes or requires Credits to be purchased from the Program, without concurrent Transfer of such Credits.
34. “Pre-Transfer Sale Credit Subledger” means the document that tracks the availability for Transfer of Credits purchased through a Pre-Transfer Sale as described in **Exhibit C**.
35. “Program Account” means an account established by the Program Sponsor at a financial institution that is a member of the Federal Deposit Insurance Corporation (“FDIC”) or any successor organization to the FDIC, and that is used by the Program Sponsor for the purpose of receiving, managing, and administering funds received from Credit sales to provide Compensatory Mitigation pursuant to this Program. The Program Account will be comprised of Sub-Accounts for each Service Area and Credit type therein.

35. “Program Area” means the limits of the Program, which is defined as the boundary of the Regulatory Program for the Sacramento District of the USACE within the State of California.
36. “Program Establishment Date” is the date determined pursuant to Section VII.A.
37. “Project Development Plan” or “Mitigation Plan” means the document for each ILF Project as required by 33 C.F.R.CFR §332.4(c)(iii) of the 2008 Rule.
38. “Project Establishment Date” means the date an ILF Project is approved by the applicable IRT Members.
39. “Remedial Action” means any corrective measures associated with a failure to achieve the Performance Standards for an ILF Project site that the Program Sponsor is required to take under the terms of a Project Development Plan for that ILF Project.
40. “Reestablishment” means the manipulation of the physical, chemical, or biological characteristics of a site, with the goal of returning natural/historic Functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and Functions.
41. “Rehabilitation” means the manipulation of the physical, chemical, or biological characteristics of a site, with the goal of returning natural/historic Functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource Function but does not result in a gain in aquatic resource area.
42. “Released Credits” means Credits associated with a Project Development Plan approved by the applicable IRT Members that are available for Fulfillment of Advance Credit Sales. Credits may be released by the IRT in accordance with the Credit Release schedule included as part of the ILF Project’s Project Development Plan.
43. “Restore” or “Restoration” means the manipulation of the physical, chemical, or biological characteristics of a site, with the goal of returning natural/historic Functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.
44. “RIBITS” means the USACE’s Regulatory In-Lieu Fee and Bank Information Tracking System.
45. “Sale” means the sale of Credits by the Program Sponsor and concurrent Transfer of such Credits.
46. “Service Area” means each geographic area specified in this Instrument, within which the Program is authorized to provide Compensatory Mitigation in accordance with the terms of this Instrument.
47. “Services” means the benefits that human populations receive from Functions that occur in ecosystems.
48. “Subordination Agreement” means a written, recorded agreement in which the holder of

an interest in, or lien or encumbrance on the ILF Project site makes a lien or encumbrance subject to and of lower priority than a Conservation Easement or equivalent protection mechanism, even though the lien or encumbrance was recorded before the Conservation Easement or equivalent protection mechanism.

49. “Transfer” means the transfer by the Program Sponsor of purchased Credits to the applicable permittee for purposes of satisfying the Compensatory Mitigation obligation associated with permitted Impacts.
50. “Unlawful Act” shall include an event or series of events, such as the intentional release within the ILF Project site(s), or any connected watercourse, of any hazardous substance, or the discharge of such a substance in violation of a statute, ordinance, regulation, or permit, which event or series of events has a material and detrimental impact on the ILF Project site. Unlawful Acts can be committed by any person or entity, other than the Program Sponsor or any person or entity under the direction or control of the Program Sponsor, including its employees, agents, contractors (which may include a property owner) and consultants, to the extent such person or entity is acting within the scope of the employment, agency, contracting or consultancy relationship, as the case may be, with Program Sponsor.
51. “Waters of the State” means any surface water or groundwater, including saline waters, within the boundaries of the State of California.
52. “Waters of the U.S.” means all waters and wetlands over which the USACE and the USEPA is granted jurisdiction in the Clean Water Act, 33 U.S.C. § 1251, et seq. (2006), and the River and Harbor Act, 33 U.S.C. § 401, et seq. (2006). This definition encompasses both the term “waters of the United States” as defined in 33 CFR. Part 328 (2006) and “navigable waters” as defined in 33 CFR. Part 329 (2006).

### **SECTION III: STIPULATIONS**

#### *A. Disclaimer*

This Instrument is not intended to limit the authority of any Party to fulfill its statutory or regulatory responsibilities or to otherwise limit the powers afforded to any Party by applicable law.

#### *B. Exhibits*

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

Exhibit A -Program Area

Exhibit B -Service Areas

Exhibit C -Credit Establishment and Tracking

Exhibit D -Compensation Planning Framework

Exhibit E - ILF Project Development

Exhibit F - Program Account

Exhibit G - Approved ILF Projects

#### **SECTION IV: ELEMENTS OF THE IN-LIEU FEE INSTRUMENT REQUIRED BY 33 C.F.R 332.8(d)(6)(ii)**

In accordance with 33 C.F.R. §332.8(d)(6)(ii), the following specific elements set forth below are incorporated into this Instrument and the Program.

##### *A. Geographic Service Area (33 C.F.R. 332.8(d)(6)(ii)(A))*

This Instrument establishes multiple geographic service areas (“Service Areas”), specifically 17 Aquatic Resource Service Areas and 12 Vernal Pool Service Areas, which spans 37 counties and 65,000 square miles. In the 17 Aquatic Resource Service Areas, Credits are available for permitted Impacts to wetlands (excluding vernal pools), other Waters of the U.S., and Waters of the State, and other aquatic resources including threatened or endangered anadromous fish (“Aquatic Resource Credits”). In the 12 Vernal Pool Service Areas, Credits are available for permitted Impacts to vernal pools (“Vernal Pool Credits”). Detailed descriptions and maps of the Aquatic Resource Service Areas and Vernal Pool Service Areas are set forth in **Exhibit B**.

##### *B. Accounting Procedures (33 C.F.R. 332.8(d)(6)(ii)(B))*

Upon establishment of the Program, the Program Sponsor will establish a dedicated Program Account, in accordance with **Exhibit F** of this Instrument. Funds generated by each Credit sale will be tracked comprehensively in the Program Sponsor’s accounting systems and allocated to the appropriate Credit type (i.e., Aquatic Resource or Vernal Pool) and Service Area.

With these systems, the Program Sponsor at all times can ascertain (1) the IRT Member authorizing the Impact giving rise to the Credit Transfer; (2) the balance of any Service Area Sub-Account; (3) deposits to the Service Area Sub-Account during any period; (4) disbursements from the Service Area Sub-Account during any period; and (5) investment earnings accrued to the Service Area Sub-Account.

In addition, the Program Sponsor applies generally accepted accounting principles (“GAAP”) to all of its financial accounts, which will include the ILF Program Account. GAAP is a uniform set of minimum standards, supplemented by written guidelines, applicable to financial accounting and reporting in the United States. The Financial Accounting Standards Board (FASB) and the American Institute of Certified Public Accountants (AICPA) are authorized to establish these standards and guidelines. Importantly, under the AICPA Code of Professional Conduct (<http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx>), accountants such as the Program Sponsor’s auditors can represent that an entity’s financial statements are “in conformity with GAAP” only if those financial statements do not contain any departures from accounting principles promulgated by (or by a designee of) the AICPA. The Program Sponsor’s conformance with GAAP will thus be audited on an ongoing basis as part of the Program Sponsor’s annual independent financial audit.

##### *C. Sponsor Assumption of Legal Responsibility for Providing Compensatory Mitigation after Sale of Advance Credits (33 C.F.R. 332.8(d)(6)(ii)(C))*

Under the Program, the Transfer of Credits will occur after a permit, certification, or other

authorization or approval is issued by one or more of the IRT Members that permits Impacts and authorizes or requires Credits to be purchased from the Program to satisfy a permittee's required Compensatory Mitigation.

A Sale (which, by definition, includes the concurrent Transfer) of Credits will be effectuated at the completion of all of the following: (1) execution of a Credit Transfer Agreement, (2) payment by the purchaser to Program Sponsor of the applicable purchase price, and (3) subsequent issuance by Program Sponsor of a Bill of Sale and Payment Receipt, in each case using a Credit Transfer Agreement in substantially the form of the template set forth in **Exhibit C, Attachment A-1**, or an alternative Credit Transfer Agreement template with the written consent of the IRT.

In limited circumstances, a Pre-Transfer Sale of Credits may occur under the Program prior to the issuance of a permit, certification, or other authorization or approval by one or more of the IRT Members that permits Impacts and authorizes or requires Credits to be purchased from the Program. A Pre-Transfer Sale will be effectuated through the execution of a Pre-Transfer Credit Sale Agreement, payment by the purchaser to Program Sponsor of the applicable purchase price, and subsequent issuance by Program Sponsor of a Bill of Sale and Payment Receipt, in each case using a Pre-Transfer Credit Sale Agreement in substantially the form of the template set forth in **Exhibit C, Attachment A-2** (which is specifically for and limited to the California Department of Transportation), or an alternative Pre-Transfer Credit Sale Agreement template with the written consent of the IRT. The Transfer of such Credits shall be effectuated using a Pre-Transfer Sale Credit Transfer Authorization Form in substantially the form of the template set forth in **Exhibit C, Attachment C**.

Program Sponsor will, immediately after its receipt of payment for the Sale or Pre-Transfer Sale of Credits, commence management, obligation, and expenditure of the funds received as payment in accordance with the terms of this Instrument, including **Exhibit E**.

1. The transfer of legal responsibility for Compensatory Mitigation for permitted Impacts from a permittee to the Program Sponsor hereunder is established when all of the following have occurred:
  - a. The Instrument has been executed by the Parties;
  - b. Written authorization or confirmation from the applicable IRT Members that Credits purchased from the Program are eligible be used to satisfy a permittee's required Compensatory Mitigation for permitted Impacts, along with written indication of the specific type, Service Area, and number of Credits required or authorized for those purposes;
  - c. The applicable Credit Transfer Agreement or Pre-Transfer Credit Sale Agreement is executed;
  - d. Program Sponsor has received payment for the applicable Credit purchase and has executed the Bill of Sale and Payment Receipt, and delivered to the applicable IRT Members a copy of the Credit Transfer Agreement or Pre-Transfer Credit Sale Agreement, as applicable, and updated Credit Ledger (**Exhibit C, Attachment B**) and, if applicable, Pre-Transfer Sale Credit Subledger (**Exhibit C, Attachment C**);
  - e. If applicable, Program Sponsor has received and acknowledged in writing the

- applicable executed Pre-Transfer Sale Credit Transfer Authorization Form; and
- f. If applicable, Program Sponsor has delivered to the applicable IRT Members and purchaser a copy of the acknowledged and executed Pre-Transfer Sale Credit Transfer Authorization Form and updated the Pre-Transfer Sale Credit Subledger documenting the Transfer of the applicable Credits.
2. The satisfaction of Program Sponsor's legal responsibility for providing the required Compensatory Mitigation is established through the generation of Released Credits in an amount equal to or greater than the number of transferred Advance Credits, thereby fulfilling its obligations as set forth in this Instrument.
  3. The Program Sponsor will retain responsibility for required Compensatory Mitigation for which Credits are Transferred from the Program until one or a combination of the following has occurred:
    - a. The Advance Credits associated with the Compensatory Mitigation have been fulfilled through application of Released Credits; or
    - b. The Compensatory Mitigation obligation has been transferred to an IRT-approved third party (e.g., purchase of credits from a mitigation bank); or
    - c. The Program Sponsor assigns and otherwise transfers to another entity or entities all rights, obligations, title and interest in the Program to such entity or entities, and such entity or entities agree to assume all such rights, obligations, title and interest in the Program; or
    - d. The Program is Closed in accordance with this Instrument.
  4. The Program Sponsor will retain responsibility for any Credits that are purchased pursuant to a Pre-Transfer Credit Sale Agreement that have not been Transferred until one or a combination of the following has occurred:
    - a. The Program Sponsor assigns and otherwise transfers to another entity or entities all rights, obligations, title and interest in the Program applicable to such Credits to such entity or entities, and such entity or entities agree to assume all such rights, obligations, title and interest in the Program applicable to such Credits; or
    - b. The Program is Closed in accordance with this Instrument.
  5. Notwithstanding any other provision of this Instrument, to the maximum extent permitted by law, the Program Sponsor's maximum financial obligation and liability for the Program, including providing Compensatory Mitigation thereunder, is at all times limited to the funds in the Program Account.

*D. Default and Closure Provision (33 C.F.R. 332.8(d)(6)(ii)(D))*

1. Default

- a. Determination of Default. Any determination by an IRT Member that a Default has occurred must be communicated immediately to the Program Sponsor and other IRT

Members in writing by the IRT Member making such determination. An IRT Member may make a determination of “Default” only after (1) the applicable IRT Member(s) have provided written notice of the potential Default to the Program Sponsor and other IRT Members; (2) the Program Sponsor has been afforded a period of not less than ninety (90) days to remedy (or, if not capable of being remedied within 90 days, then to begin remedying) the circumstances forming the basis for the potential Default; and (3) the Program Sponsor and the applicable IRT Member(s) have engaged in a good faith effort to resolve the issues forming the basis for the potential Default through reasonable means including, but not necessarily limited to: (a) meeting and conferring to identify the specific deficiencies, performance failures, or other issues giving rise to the prospective Default and (b) meeting and conferring to determine the appropriate action(s) that could or should be taken by the Program Sponsor to remedy the applicable deficiencies, performance failures, or other issues.

b. Remedies for Default. If after meeting and conferring as required under Section IV.D.1.a., the potential Default cannot be remedied and therefore avoided, the applicable IRT Member(s) may make a determination of Default as provided in Section IV.D.1.a. above. Thereafter, the applicable IRT Member(s) and the Program Sponsor shall agree upon one or more of the following actions as the appropriate remedy for the Default at issue:

- 1) The Program Sponsor calls on the applicable performance guarantees the Program Sponsor will require of each contractor undertaking work on the ILF Project to remedy any deficiencies;
- 2) The Program Sponsor calls upon available funding in the Program Contingency Sub-Account (as described in Section V.E.2) the Program Sponsor will establish within the Program Account with funds collected from each Advance Credit Sale and Pre-Transfer Sale and uses such funding to remedy any deficiencies identified by IRT Member(s);
- 3) The Program Sponsor modifies the ILF Project which is the subject of the Default (including, but not necessarily limited to, its scope, objectives, performance standards, or credit release schedule) as determined by the applicable IRT Members in consultation with the IRT, in a manner that allows the deficiencies to be corrected;
- 4) The Program Sponsor secures IRT approval to abort the ILF Project which is the subject of the Default and initiate a new ILF Project;
- 5) If, on the date that the applicable IRT Member(s) make a determination of Default under Section IV.D.1.a., the Program Sponsor owns Released Credits that are not required to Fulfill outstanding Advance Credits, the IRT may require the Program Sponsor to apply such Released Credits to remedy the applicable Default (after which time any such Released Credits so applied to remedy a Default would not be available for Sale).
- 6) The Program Sponsor takes some other remedial action that is mutually acceptable to the Program Sponsor and the applicable IRT Member(s); and/or



- 7) The Program Sponsor Closes the Program in accordance with Section IV.D.2. (“Closure”).

## 2. Closure

- a. Closure may occur at the election of either the Program Sponsor or the IRT with 90 days’ advance written notice to the other Parties.
- b. Closure is effectuated when all of the following, as applicable, have occurred:
  - 1) 90 days’ written notice has been provided by the Closing Party to the non-Closing Parties.
  - 2) The Program Sponsor fulfills its legal responsibility to provide any remaining required Compensatory Mitigation for which Advance Credits have been Transferred, and Program Sponsor fulfills its legal responsibility to administer in accordance with the terms of the Instrument any remaining funds in the Program Account that were received as payment for Credits purchased pursuant to a Pre-Transfer Credit Sale Agreement, including all associated monitoring and reporting requirements, through one or more of the following options:
    - a) If no ILF Projects are in development at the time the written notice of Closure is transmitted, through the transfer of all funds then existing in the Program Account to the closest mitigation bank or other entity acceptable to the applicable IRT Members. Under this option, final Closure will be deemed to have occurred on the date of transfer of such funds by the Program Sponsor.
    - b) If one or more ILF Project(s) is in development at the time the written notice of Closure is transmitted, through completion of those ILF Project(s) to the extent achievable with funds on deposit in the Program Account, and subsequent transfer of all funds then remaining in the Program Account to the closest mitigation bank or other entity acceptable to the applicable IRT Member(s). Under this option, final Closure will be deemed to have occurred on the later of (1) the date of transfer of such funds by the Program Sponsor and (2) the date the last ILF Project is completed (to the extent achievable with funds on deposit in the Program Account).
    - c) If one or more ILF Project(s) is in development at the time the written notice of Closure is transmitted, through transfer of the ILF Project development contract(s) and associated performance guarantees, along with all related rights and responsibilities pertaining to those ILF Project(s) (including but not limited to the budgeted funds for such ILF Project existing in the Program Account), to another entity or entities acceptable to the applicable IRT Members and subsequent transfer of all funds then remaining in the Program Account to the closest mitigation bank or other entity acceptable to the applicable IRT Member(s). Under this option, final Closure will be deemed to have occurred on the later of (1) the date of transfer of such funds by the Program Sponsor and (2) the date the development contract(s) and associated performance guarantees, along with all related rights and responsibilities of

the last ILF Project, are transferred to a third party acceptable to the applicable IRT Members.

- 3) If, and only if, on the date of the Closure notice provided pursuant to Section IV.D.2.a. above, there are in existence any Credits that were purchased pursuant to a Pre-Transfer Credit Sale Agreement that remain not Transferred, then in such event Closure shall not occur until the following have occurred: a) a period of not less than twelve (12) months has elapsed since the date of such Closure notice, during which period Program Sponsor and the IRT agree to use reasonable efforts to identify a new Program sponsor to replace Program Sponsor under an amendment to this Instrument signed by the IRT that allows the Program to remain in operation for the purpose of Transferring such Credits and fulfilling any other obligations of the new sponsor under this Instrument associated with the Transfer of such Credits, including notifying the purchaser of such Credits and obtaining from the purchaser any proposal(s) it may choose to submit for a new sponsor and; and b) no such new Program sponsor has been identified as of the end of such 12-month period. Any such Credits may be Transferred in the period prior to the time of Closure. Any such Credits remaining not Transferred at the time of Closure shall, as of the date of Closure and thereafter, not be available for Transfer.

### 3. Withdrawal

- a. Any IRT Member may withdraw from participation in the Program and this Instrument with 90 days' advance written notice to the other Parties.

### 4. Force Majeure, Catastrophic Events, and Unlawful Acts

- a. No IRT Member may make a finding of Default as a result of any failure by the Program Sponsor to provide required Compensatory Mitigation or otherwise fulfill its obligations under this Instrument that is caused by any Force Majeure, Catastrophic Events, or Unlawful Acts. In order for such exception to apply the Program Sponsor shall bear the burden of demonstrating to the reasonable satisfaction of the applicable IRT Member(s) all of the following:
  - 1) That the noncompliance or other basis for the Default was caused by circumstances beyond the reasonable control of the Program Sponsor and any person or entity under the direction or control of the Program Sponsor, including its employees, agents, contractors (which may include property owners), and consultants, to the extent such person or entity is acting within the scope of the employment, agency, contracting or consultancy relationship, as the case may be, with Program Sponsor;
  - 2) That neither the Program Sponsor, nor any person or entity under the direction or control of the Program Sponsor, including its employees, agents, contractors (which may include property owners) and consultants, could have reasonably foreseen and prevented noncompliance or other basis; and
  - 3) The noncompliance (or other basis) was a direct result of such circumstances.

- b. The Program Sponsor shall notify the applicable IRT Member(s) within seventy-two (72) hours of detection of the occurrence of a Catastrophic Event, event of Force Majeure, or Unlawful Act that affects the conservation values of the ILF Project site. As promptly as reasonably possible thereafter, the Program Sponsor and shall meet with the applicable IRT Member(s) shall meet to discuss the course of Remedial Action in response to such occurrence as soon as possible after notification. In the meantime, Program Sponsor shall continue to manage and maintain the affected ILF Project to the extent practicable.

## 5. Dispute Resolution

The Parties agree to work together in good faith to resolve disputes concerning this Instrument, yet reserve to themselves the ability to seek available remedies under applicable State or Federal Law as necessary. Certain disputes between the IRT agencies have an established process for resolution at 33 CFR 332.8(e). Disputes related to Default are addressed in Section IV.D. For all other disputes, the Parties will first employ an informal dispute resolution process whereby:

- a. The electing Party shall notify the other Parties of the dispute, the position of the aggrieved Party, and the remedies the electing Party proposes;
- b. The notified Parties shall have 45 days (or such other time as the Parties may mutually agree) to respond. During this time, any such other Parties may seek clarification of the initial notice;
- c. Within 45 days after such notified Parties' response was provided or due, whichever is later, the Parties shall confer and negotiate in good faith toward a mutually satisfactory resolution, or shall establish a specific process and timetable to seek such resolution; and
- d. The dispute resolution process may be terminated by any Party upon written notice to all other Parties.

Thereafter, any Party may pursue legal or equitable remedies available under applicable State or Federal law (including specific performance and injunctive relief) to enforce the terms of this Instrument in a court of competent jurisdiction, such as federal district court pursuant to, among other statutes, 16 U.S.C. 1540(c), CWA, and RHA.

### *E. Reporting Protocols (33 C.F.R. 332.8(d)(6)(ii)(E) and 33 C.F.R. 332.8(i)(3))*

This Instrument establishes the following reporting protocols:

#### 1. Annual Report

Program Sponsor shall submit an Annual Report to each IRT Member and upload the report to RIBITS on or before December 31 of each year following the Program Establishment Date. Each Annual Report shall cover the period from October 1st of the preceding year (or, if earlier, the Program Establishment Date for the first Annual Report) through September 30th of the current year (the "Reporting Period"). The Annual Report shall address the following for each Service Area operating within the Program Area:

- a. ILF Project Development

The Annual Report shall summarize the progress of each ILF Project in the Service Area. The Annual Report shall describe (1) the degree to which each ILF Project is meeting its Performance Standards; (2) any deficiencies in attaining and maintaining Performance Standards and any Remedial Action proposed, approved, or performed; and (3) if Remedial Action has been completed, and the effectiveness of that action.

b. Interim Management and Long-term Management

The Annual Report shall contain an itemized account of the management tasks conducted in accordance with the Interim Management or Long-term Management Plan for each ILF Project in the Service Area during the Reporting Period.

c. Credit Ledger Report

The Annual Report shall include a Credit Ledger (**Exhibit C, Attachment B**) for each Service Area, showing the beginning and end balance of available Advance and Released Credits in such Service Area, each individual Credit Sale, each individual Credit Pre-Transfer Sale and any individual subsequent Transfer, and the number of Fulfilled Credits generated by ILF Projects in such Service Area. In addition, the Annual Report shall include a Pre-Transfer Sale Credit Subledger, if applicable.

d. Program Account

The Annual Report shall include a financial activity report for the Program Account, including all Sub-Accounts within the Program Account, which includes (1) all income received from Sale or Pre-Transfer Sale of Advance Credits and investment earnings accrued by the Program Account; (2) a description of in-lieu fee program disbursements and expenditures from the Program Account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, Adaptive Management, and administration.

e. Compensatory Mitigation Tracking

The Annual Report shall include a listing and summary for each Service Area of (1) all permits for which funds from Transfers of Credits were accepted (including applicable permit numbers), (2) the amount of authorized Impacts giving rise to such Transfers of Credits, (3) the amount of required Compensatory Mitigation, (4) the amount paid to the Program for Transfers of Advance Credits, (5) the date(s) the funds were received from applicable permittees for such Credits, and (6) the amount of corresponding compensation generated through ILF Projects within the Service Area.

f. GIS Data

The Annual Report shall include a GIS database showing: (1) the location of each permitted Impact for which a Credit is Transferred to satisfy applicable Compensatory Mitigation, and (2) each ILF Project location, size, and resource acreages Restored, Established, Enhanced, or Preserved. The database shall be updated no less frequently than quarterly. Relevant information for the GIS database and updated data layers will be made available to IRT Members upon request.

## 2. Credit Sale, Pre-Transfer Sale, and Transfer Reporting

- a. Upon the Sale (which, as defined above, includes the concurrent Transfer) of a Credit, the Program Sponsor shall provide the applicable IRT Member(s) with the Credit Transfer Agreement as set forth in Section IV.C.1.c. and enter the applicable Credit Transfer information into RIBITS.
- b. Upon the Pre-Transfer Sale of a Credit, the Program Sponsor shall provide the applicable IRT Member(s) with the Pre-Transfer Credit Sale Agreement as set forth in Section IV.C.1.c. and enter the applicable Pre-Transfer Sale information into RIBITS. Upon the subsequent Transfer of each and every such Credit, the Program Sponsor shall provide the applicable IRT Member(s) with the Pre-Transfer Sale Credit Transfer Authorization Form as set forth in Section IV.C.1.e. and enter the applicable Credit Transfer information into RIBITS.

*F. Other Information Deemed Necessary by the USACE District Engineer (33 C.F.R. 332.8(d)(6)(ii)(E))*

The Program Sponsor will also provide to USACE such other information as may be reasonably requested by USACE from time to time.

## **SECTION V: ELEMENTS REQUIRED BY 33 C.F.R 332.8(d)(6)(iv)**

In accordance with section 33 C.F.R. 332.8(d)(6)(iv), the following elements set forth below are incorporated into this Instrument and the Program.

### *A. Compensation Planning Framework (33 C.F.R. 332.8(d)(6)(iv)(A))*

The Compensation Planning Framework established under this Instrument includes the following elements: (1) the Service Areas, including a watershed-based rationale for the delineation of each Service Area; (2) a description of the threats to aquatic resources in the Service Areas, including how the Program will help offset impacts resulting from those threats; (3) an analysis of historic aquatic resource loss in the Service Areas; (4) an analysis of current aquatic resource conditions in the Service Areas, supported by an appropriate level of field documentation; (5) a statement of aquatic resource goals and objectives for each Service Area, including a description of the general amounts, types, and locations of aquatic resources the program will seek to provide; (6) a prioritization strategy for selecting and implementing Compensatory Mitigation activities; (7) an explanation of how any preservation objectives identified and addressed in the prioritization strategy satisfy the criteria for use of Preservation in the 2008 Rule; (8) a description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal, and local aquatic resource management and regulatory authorities; (9) a description of the long-term protection and management strategies for activities conducted by the Program Sponsor; (10) a strategy for periodic evaluation and reporting on the progress of the Program in achieving the aquatic resource goals and objectives for each Service Area, including a process for revising the planning framework as necessary; and (11) any other information deemed necessary for effective compensation planning by the IRT.

The Compensation Planning Framework is provided in **Exhibit D**.

*B. Initial Allocation of Advance Credits, Draft Fee Schedule, and Credit Accounting (33 C.F.R. 332.8(d)(6)(iv)(B) and 33 C.F.R. 332.8(n))*

1. Advance Credits

On the Program Establishment Date, this Instrument shall operate to automatically grant the Program Sponsor Advance Credits in each Service Area as outlined in **Exhibit C**. The number of Advance Credits that are approved for Sale or Pre-Transfer Sale was developed in coordination with the IRT and is based on (1) the percentage of the projected mitigation opportunities within the Service Area, as outlined in the compensation planning framework in **Exhibit D**, (2) the Program Sponsor's past performance for implementing Enhancement, Restoration, Establishment, and/or Preservation activities within the Service Area, and (3) the projected financing necessary to begin planning and implementation of ILF Projects.

Once the Program Sponsor has sold all of its Advance Credits in a Service Area, no additional Advance Credits may be sold until Released Credits have been generated in accordance with the approved Credit Release schedule outlined in an ILF Project Development Plan. Each Released Credit will offset the mitigation obligation of an Advance Credit; as the mitigation obligation of Advance Credits has been fulfilled, an equivalent number of Advance Credits may be made available for Sale or Pre-Transfer Sale.

Unless agreed otherwise by the applicable IRT Member(s), Program Sponsor shall complete land acquisition and initial physical and biological improvements with respect to an ILF Project by the third full growing season (generally defined as the period between October 15 and May 15) after the Sale or Pre-Transfer Sale of Advance Credits. The timing obligation for completion of physical improvements referenced in 33 C.F.R. 332.8(n) is achieved once the initial physical and biological improvements proposed in the Project Development Plan for such ILF Project are implemented, as verified by as-built drawings approved by the applicable IRT Members. Development of Released Credits to Fulfill the mitigation obligation of the Advance Credits occurs through achieving the performance standards in the Project Development Plan, according to the Credit Release schedule described in Section V.C.2. If Program Sponsor fails to meet these deadlines, the applicable IRT Members may make a determination that more time is needed to plan and implement the applicable ILF Project.

*C. Establishment and Use of Credits*

In accordance with the provisions of this Instrument, 1) Credits are available for Sale by the Program Sponsor to satisfy Compensatory Mitigation for permitted Impacts authorized by applicable IRT Members in accordance with all applicable requirements for permits or authorizations issued, or violations resolved by the applicable IRT Members; and 2) Credits are available for Pre-Transfer Sale in limited circumstances under Section IV.C. for potential future Transfer to provide Compensatory Mitigation for future Impacts or for enforcement actions if and when permitted by applicable IRT Members. The applicable IRT Members will determine the specific type, Service Area, and number of Credits required to satisfy the Compensatory Mitigation when a permit, certification, or other authorization or approval is issued, and the applicable IRT Members will determine the number of Released Credits that each ILF Project

will generate as it is completed, based on the achievement of applicable Performance Standards as reflected in the ILF Project's Credit Release Schedule.

## 1. Generation of Released Credits

Each ILF Project Development Plan approved by the applicable IRT Members will include the method for determining the Released Credits to be generated by the individual ILF Project.

The generation of Released Credits for ILF Projects entailing Preservation or the creation or maintenance of Buffers will be assessed by the applicable IRT Members on a case-by-case basis. Preservation of existing Waters of the U.S. or Waters of the State that support a significant population of rare plant or animal species, or that are a rare aquatic resource type, may be proposed to generate Released Credits. Released Credits may also be proposed for Preservation or improvements of Buffers if the resources in these areas are essential to maintain the ecological viability of a wetlands area. Released Credits generated for Preservation and Buffers will be determined by the applicable IRT Members in accordance with 33 C.F.R. 332.3(h) and (i). Preservation of vernal pool habitat may be allowed to play a larger role than in other wetland systems if these approaches address critical biotic resource needs, including species recovery.

## 2. Credit Release

Each ILF Project Development Plan approved by the applicable IRT Members will include a Credit Release schedule linked to the achievement of Performance Standards and LTMM Fund payments. As milestones in an individual ILF Project's Credit Release schedule are reached (i.e., Restoration, Establishment, Enhancement, and/or Preservation is implemented), the ILF Project will be deemed (as confirmed in writing by the applicable IRT Members) to have generated Released Credits. Generation of Released Credits shall require: (1) the applicable IRT Members' approval of the Project Development Plan for the ILF Project site; (2) achievement of the applicable milestone(s) in the Credit Release schedule; (3) submittal of a request for Credit Release to the applicable IRT Members, along with documentation substantiating achievement of the criteria for release to occur; and (4) written confirmation of Credit Release from the applicable IRT Member(s). If the ILF Project does not achieve the performance-based milestones, the applicable IRT Members will coordinate with the Program Sponsor to modify the Credit Release schedule and provide written notice of such modification to the Program Sponsor.

a. Establishment, Enhancement, Restoration Credits. In general, Released Credits for ILF Projects implementing Establishment, Enhancement, or Restoration are generated according to the following schedule:

- 1) 15% of the total Credits expected to be created by the ILF Project shall be generated as Released Credits upon IRT Member approval of the ILF Project's Development Plan and the securing of appropriate property rights with respect to the physical site of the ILF Project (such as recordation of a Conservation Easement for the purpose of implementing an ILF Project).
- 2) 25% of the total Credits expected to be created by the ILF Project shall be

generated as Released Credits upon IRT Member approval of the as-built drawings (which drawings shall describe in detail any deviation from the Project Development Plan).

- 3) 15% of the total Credits expected to be created by the ILF Project shall be generated as Released Credits upon attainment of the applicable year-two Performance Standards for such ILF Project.
  - 4) 15% of the total Credits expected to be created by the ILF Project shall be generated as Released Credits upon attainment of the applicable year-three Performance Standards for such ILF Project and, if appropriate, a verified jurisdictional determination.
  - 5) 15% of the total Credits expected to be created by the ILF Project shall be generated as Released Credits upon attainment of the applicable year-four Performance Standards for such ILF Project.
  - 6) All remaining Credits shall be generated upon attainment of the applicable year-five Performance Standards for such ILF Project and, if appropriate, a verified jurisdictional determination.
- b. Preservation Credits. In general, because Preservation does not involve meeting short-term Performance Standards, 100% of the Credits expected to be created by an ILF Project implementing Preservation shall be deemed to be generated as Released Credits upon acquisition and full legal protection of the real property to be Preserved and the achievement of the applicable milestone for funding of the LTMM Fund for such real property.
- c. Buffer Credits. Credits associated with the implementation by the Program Sponsor of Buffer areas through either preservation or restoration of applicable acreage will be defined and calculated in the Development Plan and will follow the Credit Release schedule described above for Restoration or Preservation, as the case may be.

### 3. Fee Schedule

The 2008 Rule provides that the cost per unit of Credit must include the expected costs associated with the Restoration, Establishment, Enhancement, and/or Preservation of aquatic resources in the Service Area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition (including, without limitation, options to purchase), project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or Adaptive Management activities, as well as administration of the Program. This list is not meant to be exhaustive and may include other categories, as appropriate, as determined by the Program Sponsor on a case-by-case basis. The cost per unit of Credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The contingency costs may vary by the number of Advance Credits purchased by the project applicant, if defined in the fee schedule, as it relates to the ability of the Program Sponsor to implement an ILF Project. The cost per unit of Credit must also take into account the LTMM Fund necessary for the long-term management and protection of the ILF Project, and enforcement of the long-term



protection mechanism. In addition, the cost per unit of Credit must include financial assurances that are necessary to ensure successful completion of ILF Projects. These fees shall be reviewed at least annually and updated as appropriate. The Fee Schedule is provided in **Exhibit F**.

#### 4. Transfer of Credits

- a. All activities regulated under section 404 and 401 of the Clean Water Act, section 10 of the Rivers and Harbors Act, the Porter-Cologne Water Quality Control Act, the Endangered Species Act, and other applicable laws may be eligible to use the Program as Compensatory Mitigation for unavoidable Impacts permitted or otherwise authorized or addressed by the USACE, NMFS, the State Water Board, the Central Valley Water Board, or the Lahontan Water Board, as the case may be.
- b. Credits Transferred may only be used in conjunction with a permit, certification, or other authorization or approval issued by one or more of the IRT Members, or in conjunction with an enforcement action by one or more of the IRT Members, in either case involving Impacts to aquatic resources under the jurisdiction of such IRT Member(s).
- c. The USACE, NMFS, the State Water Board, the Central Valley Water Board, and the Lahontan Water Board each will make its own respective decisions about the most appropriate Compensatory Mitigation on a case-by-case basis, during evaluation of the permit application for a proposed project. This Instrument does not guarantee that any of these Parties will accept the use of Program Credits for a specific permitted activity, and authority for approving use of the Program for Compensatory Mitigation lies with these Parties, each in its sole discretion, respectively, for Impacts subject to the jurisdiction of each such Party.
- d. The responsibility to provide Compensatory Mitigation remains with the permittee/project proponent unless and until Credits are Transferred from the Program. If USACE, NMFS, the State Water Board, the Central Valley Water Board, and/or the Lahontan Water Board, as the case may be, determine that the purchase of Credits from the Program is appropriate, the permittee/project proponent may contact the Program Sponsor to secure the necessary amount and resource type of Credits, as set forth in project applicant's permit conditions. The sale of a credit shall include all benefits assigned, whether required or not, so that no unrequired benefits may be retained by the ILF Project and sold at a later date.
- e. Upon Transfer of Credits, the Program Sponsor shall enter the pertinent Transfer information into RIBITS as provided elsewhere in this Instrument.
- f. Additional information pertaining to Transfers of Credits will be reflected in annual accounting reports as provided elsewhere in this Instrument.
- g. Subject to the limitations on any obligation on the part of the Program Sponsor to remediate as provided in Section VI.A.4., if an ILF Project site is damaged after the Program Establishment Date, and such damage materially impairs Waters of the U.S., Waters of the State, or habitat values on such ILF Project site, then the applicable IRT Members may, at its/their discretion, suspend further releases of Released Credits

from such ILF Project site unless and until the Program Sponsor has reasonably restored such damaged area, if required, pursuant to a Remedial Action plan approved by the applicable IRT Members.

*D. Methodology for Determining ILF Project Credits and Fee Schedule (33 C.F.R. 332.8(d)(6)(iv)(C))*

For each specific ILF Project proposed by the Program Sponsor to the IRT, the applicable IRT Members shall evaluate the expected aquatic resource benefits thereof and then determine the appropriate ILF Project-specific Released Credits that will be allocated to such ILF Project as reflected in the applicable Credit Release schedule. As described in Section V.C.3., costs of ILF Project development will be fully calculated and allocated from the Program Account. An assessment of funds collected in the Program Account and the Advance Credit obligation will be a primary consideration in the sizing of ILF Project(s) in each Service Area, to ensure a sufficient number of Released Credits are generated at the ILF Project.

*E. ILF Program Account (33 C.F.R. 332.8(d)(6)(iv)(D) and 33 C.F.R. 332.8(i))*

1. Program Account

As described in Section IV.B., the Program Sponsor will establish a financial account dedicated to the Program (the “Program Account”) for the management and administration of funds received from the Sale or Pre-Transfer Sale of Advance Credits and disbursed to provide Compensatory Mitigation under the Program. The Program Account shall be maintained in an interest-bearing or investment account in a financial institution that is a member of the Federal Deposit Insurance Corporation (“FDIC”), the Securities Investor Protection Corporation, or any successor organization to such organizations. All interest and earnings from the Program Account will remain in the account for the purpose of providing Compensatory Mitigation for Impacts associated with the Transfer of Advance Credit.

Sub-Accounts will be established within the Program Account for specified purposes as described in Sections V.E.2-3. The Program Sponsor shall submit Program Account financial activity reports for each Sub-Account to the IRT in accordance with Section IV.E.1.d. Upon request, the Program Sponsor shall also provide to any requesting IRT Member copies of its audited financial statements for any completed fiscal year. The IRT may inspect and review Program Account records by giving 30 days advance written notice to the Program Sponsor. When so requested, the Program Sponsor shall make available for inspection all books, accounts, reports, files, and other records relating to the Program Account.

A percentage of funds received from the Sale or Pre-Transfer Sale of Advance Credits will be assessed and collected by the Program Sponsor as an administrative and program management fee in administering the Program. The percentage of funds to be assessed and collected by the Program Sponsor from the Sale or Pre-Transfer Sale of each Advance Credit is set forth in Exhibit F.

2. Program Contingency Sub-Account

A percentage of funds received from the Sale or Pre-Transfer Sale of Advance Credits will be deposited into the Program Contingency Sub-Account to allow the Program

Sponsor, with written notice to the IRT, to respond to contingencies that may arise from time to time in implementing the Program. The percentage shall be no less than 10%, and shall be calculated using a formula for determining the amount of contingency funds to be deposited into this Sub-Account from the Sale or Pre-Transfer Sale of each Advance Credit as set forth in Exhibit F.

### 3. Service Area-Specific Sub-Accounts

A Sub-Account for each Service Area will be established to receive funds from the Sale or Pre-Transfer Sale of Advance Credits within individual Service Areas. Funds generated by each Sale or Pre-Transfer Sale of Advance Credits will be deposited into the applicable Service Area Sub-Account and disbursed from such Service Area Sub-Account for the development and implementation of approved ILF Projects within such Service Area.

### 4. Financial Investment

Pending disbursement of the funds in the Program Account, including any Sub-Accounts, the Program Sponsor shall invest the funds in accordance with the Program Sponsor's then-prevailing investment policy statement governing cash management.

Day-to-day investment decisions for the Program Account, including any Sub-Accounts, will be made by the professional investment advisor or financial institution with which the Program Sponsor has established or will establish an investment advisory relationship. The Program Sponsor may rely on the advice of any such advisor, and may delegate day-to-day investment decision-making authority, consistent with applicable State and Federal law, to such advisor with respect to management of the Program Account or any Sub-Account. Investment income accruing to each Sub-Account will be credited back thereto and shall be used to carry out the purposes of the various Sub-Accounts.

For investment purposes only, the Program Sponsor is authorized to commingle any or all of the assets existing in the Program Account, including any Sub-Accounts, with other funds held or managed by the Program Sponsor that are subject to identical investment purposes and restrictions. The intent of this authorization is to allow the Program Sponsor to pool funds subject to identical investment purposes and restrictions for collective management, such that all participating funds may benefit from efficiencies of scale. Any funds from the Program Account commingled in this manner shall at all times be distinguishable within the Program Sponsor's internal accounting system from the balances of all other accounts maintained or managed by the Program Sponsor.

### 5. Disbursements for ILF Projects

- a. Each ILF Project will be developed and implemented in accordance with a Project Development Plan, which will include a detailed budget, to be approved by the applicable IRT Members.
- b. The Program Sponsor may enter into contracts or agreements with third parties for the development, implementation, and/or long-term stewardship of individual ILF Projects. Third parties performing work to implement ILF Projects will be paid with

funds from the applicable Service Area Sub-Account in accordance with approved Project Development Plans and associated budgets. The Program Sponsor shall pay third parties for performance of ILF Projects in accordance with the terms of the contracts or other agreements governing such performance. Any proposed increase in the budget for an ILF Project in excess of 10% from the IRT-approved budget for such ILF Project (pursuant to Section V.C.) will require approval of the applicable IRT Members before such increase shall become effective.

#### *F. Long-term Management and Maintenance of ILF Project Sites*

The Program Account is separate and apart from any Long-term Management and Maintenance Funds (“LTMM Funds”) established for the long-term management and maintenance of ILF Project sites. LTMM Funds shall be held by an entity approved by the IRT to be the holder/administrator of the LTMM Funds in accordance with Section VI.B.5. of this Instrument.

### **SECTION VI: ILF PROJECT ESTABLISHMENT AND OPERATION**

This section sets forth the general framework for the establishment and operation of individual ILF Projects. Each ILF Project will be approved by the applicable IRT Member(s) individually, as detailed herein.

#### *A. Establishment*

##### **1. ILF Projects**

As funds become available within each Service Area, the Program Sponsor will identify potential ILF Project(s) within that Service Area. The Program Sponsor will evaluate potential ILF Project sites using the prioritization criteria set forth in the Compensation Planning Framework (**Exhibit D**) and the ILF Project selection process set forth in **Exhibit E**. Once a project has been identified through the ILF Project selection process, and sufficient funds have been collected within the Service Area to fully implement the ILF Project, the Program Sponsor will embark upon the process of presenting the ILF Project to the IRT for review and approval.

##### **2. ILF Project Selection and Approval**

After evaluating potential sites for mitigation implementation, and once sufficient funds have been collected within the Service area to fully implement an ILF Project, the Program Sponsor will select an individual ILF Project. An Initial Project Prospectus will be presented to the IRT detailing the site selection process and general site characteristics. Upon IRT approval of the Initial Project Prospectus, the Program Sponsor will prepare a Project Development Plan for the ILF Project, including a project budget, Project Development Plan, Interim and Long-term Management Plan, Conservation Easement, and financial securities. The Project Development Plan will be submitted to the applicable IRT Members for approval. The ILF Project selection and approval process is more fully described in **Exhibit E**.

##### **3. ILF Project Permits**

The Program Sponsor or third parties under contract or agreement with the Program Sponsor will obtain all permits and authorizations required to construct and maintain an

approved ILF Project. This Instrument does not constitute any such permit or authorization that may be required from any of the IRT Members for an ILF Project hereunder.

#### 4. Financial Assurances

The Program Sponsor's financial liability for the Program is limited as described in Section IV.C.4. Accordingly, the Program incorporates the following features to provide financial assurances that the Program Sponsor will perform the Compensatory Mitigation for Advance Credits Transferred:

- a. ILF Projects will not be undertaken until all funding has been secured to complete construction and monitoring of the ILF Project. Funds held in the applicable Service Area Sub-Account for an approved ILF Project, as set forth in the ILF Project budget, will be obligated to the ILF Project and disbursed as work is accomplished to operate and monitor the ILF Project.
- b. A financial assurance for each ILF Project in accordance with 33 C.F.R. 332.3(n). Each approved ILF Project will have a construction security, with a schedule for the release of the financial assurance as the ILF Project construction is completed and achieves its design criteria.
- c. Funds set aside in the Program Contingency Sub-Account may be used for contingencies and Remedial Actions for an ILF Project, ensuring the Performance Standards are achieved as proposed in the Project Development Plan.
- d. The Service Area Sub-Account funds collected for ILF Project implementation include monitoring costs, which will serve as a cash security to cover the costs of interim monitoring until Performance Standards are achieved and long-term monitoring is funded from the ILF Project LTMM Fund.

#### *B. Operation*

##### 1. Project Development Plans

The Program Sponsor shall be responsible for preparing Project Development Plans in accordance with **Exhibit E**. The Development Plans shall outline measurable objectives, Performance Standards, and monitoring requirements. Pre- and post-ILF Project implementation jurisdictional determination and delineations (as appropriate) and a conditional or functional assessment will be completed using the California Rapid Assessment Methodology or other USACE-approved technique. Project Development Plans must include a survey or other document acceptable to the applicable IRT Members, completed by a professional land surveyor or other qualified person or entity, defining the ILF Project site, and a property title evaluation acceptable to the IRT. Upon approval of the Project Development Plan by the applicable IRT Member(s), the Program Sponsor shall be responsible for implementing the plan.

##### 2. Interim Management and Monitoring

The Program Sponsor shall be responsible for preparing an Interim Management Plan for each ILF Project in accordance with **Exhibit F**. Upon approval of the Interim

Management Plan for an ILF Project by the applicable IRT Member, the Program Sponsor shall be responsible for conducting management and monitoring activities according to the Interim Management Plan until completion of the Interim Management Period for the applicable ILF Project.

### 3. Remedial Action Plan

If prior to the end of the Interim Management Period any Party discovers any failure to achieve the Performance Standards or any injury or adverse impact to an ILF Project site as Preserved, Established, Restored, or Enhanced, the Party making the discovery shall notify the other Parties. Subject to the limitations on any duty of the Program Sponsor to remediate outlined in Section VI.A.4., the applicable IRT Members may require the Program Sponsor to develop and implement a Remedial Action plan to remedy such condition, as described below.

Within 60 days of the date of written notice from the applicable IRT Member(s), the Program Sponsor shall develop a Remedial Action plan and submit it to such IRT Member(s) for approval. The Remedial Action plan must identify a new timeframe for achievement of Performance Standards and/or describe proposed actions to achieve the Performance Standards or ameliorate injury or adverse impact to the ILF Project site and set forth a schedule within which the Program Sponsor will implement those actions. The cost to complete any Remedial Action will be limited to the funds in the Program Contingency Sub-Account and the financial assurances established for that ILF Project. Should the Program Sponsor and IRT Members agree that it is physically or financially unviable to complete Remedial Actions on the ILF Project site, the Program Sponsor must propose an alternative site or mechanism to replace the acreage or habitat values that were impacted or did not achieve the described Performance Standards, to the extent funds for such alternative site or mechanism are available in the Program Contingency Sub-Account. The Program Sponsor shall implement the necessary and appropriate Remedial Action in accordance with the Remedial Action plan approved by the applicable IRT Members, subject to the limitations of this paragraph. In the event the Program Sponsor fails to submit a Remedial Action plan to the applicable IRT Members or fails to implement a Remedial Action plan in accordance with this section, the applicable IRT Members may notify the Program Sponsor that the Program Sponsor is in a potential Default in accordance with Section VI.D.1.a. and may identify Remedial Actions the IRT Members deem necessary to address the potential Default.

### 4. Long-Term Management and Monitoring

The Program Sponsor shall be responsible for preparing Long-term Management Plans in accordance with **Exhibit F**. ILF Projects shall be designed, to the maximum extent practicable, to be self-sustaining once Performance Standards have been achieved. Once the Interim Management Period is completed, Program Sponsor shall be obligated to arrange for the management and monitoring of the ILF Project site in perpetuity to preserve its habitat and conservation values in accordance with this Instrument, the real estate instrument (e.g., Conservation Easement), and the Long-term Management Plan. The Program Sponsor does not envision itself performing the long-term management activities. Instead, the Program Sponsor intends to contract with or otherwise transfer the responsibilities for the long-term management and monitoring of an ILF Project site to appropriate and experienced land management and monitoring partners, such as non-

profit organizations, private entities, governmental entities, and others with experience in the ILF Project site community who are willing to own the ILF Project sites, and/or hold Conservation Easements on them, and/or perform the required long-term management activities. The transfer agreement shall be approved by the IRT and may require the IRT member agencies to be third party beneficiaries, as appropriate. The applicable IRT Members and the Program Sponsor, or the designated long-term land managers, shall meet and confer upon the request of any one of them to consider revisions to the Long-term Management Plan which may be necessary or appropriate to better conserve the habitat and conservation values of the ILF Project site.

Perpetual long-term management activities shall be funded through a LTMM Fund established for each ILF Project. Funds to establish each LTMM Fund shall be drawn from the applicable Program Account Sub-Accounts, including the applicable Service Area Sub-Account and, if necessary, the Program Contingency Sub-Account.

#### 5. Long-Term Management and Maintenance Fund

The Program Sponsor shall establish an LTMM Fund for each ILF Project for the long-term or perpetual management and maintenance of the ILF Project site, if one is required. The National Fish and Wildlife Foundation, in its role as a neutral fiduciary administrator of such funds, which is separate and apart from its role as Program Sponsor, or another entity approved by the IRT may be the holder/administrator of an LTMM Fund for an ILF Project. LTMM Funds shall be held by the holder/administrator (whether it is the National Fish and Wildlife Foundation or another entity) in accordance with the terms of a long-term funding agreement approved by the applicable IRT Members in an account that, pursuant to 33 C.F.R. § 332.8(u)(3), shall be separate and independent from the Program Account, and established at an institution that is a member of the Federal Deposit Insurance Corporation or the Securities Investor Protection Corporation or any successor organization to such organizations.

#### 6. Long-term Ownership and Protection

The Program Sponsor shall be responsible for ensuring long-term protection of each ILF Project, in accordance with 33 C.F.R. 332.7(a), the details of which shall be provided in the Project Development Plan. However, as previously stated, the Program Sponsor does not contemplate owning ILF Project sites or holding Conservation Easements on them. Instead, the Project Sponsor intends to contract with or otherwise transfer the responsibilities for the long-term management and monitoring of ILF Project sites to appropriate and experienced land management and monitoring partners. Long-term land stewards could include non-profit organizations, private entities, governmental entities, and others with knowledge of the specific Service Area willing to own the ILF Project site(s) and/or hold Conservation Easements on them.

The Program Sponsor will ensure that a Conservation Easement or other protection mechanism is in place *prior to* the first release of Released Credits. In cases involving a Conservation Easement, a draft Conservation Easement shall be submitted to the applicable IRT Members for review and approval. The form of Conservation Easement shall provide for allowance of IRT member agencies to be third party beneficiaries as appropriate. A copy of the recorded Conservation Easement shall be furnished to the applicable IRT Members and become part of the official Program record. If any action is

taken to void or modify an ILF Project Conservation Easement, Program Sponsor must notify the applicable IRT Members in writing.

## 7. Inspections

With reasonable advance written notice provided to the Program Sponsor, at the request of applicable IRT Members, the Program Sponsor shall provide for access to the ILF Project site to the applicable IRT Members and their agents or designees at reasonable times as necessary to conduct inspections and compliance monitoring with respect to the requirements of this Instrument. In conducting inspections, applicable IRT Members and their agents and designees shall not unreasonably disrupt or disturb activities on the ILF Project site.

## SECTION VII: OTHER PROVISIONS

### *A. Program Establishment Date*

The Program Establishment Date occurred on October 10, 2014. Within 30 days of the Program Establishment Date, the Program Sponsor shall upload the final, signed Instrument, including all of its Exhibits, to RIBITS and provide an electronic copy to each IRT Member.

### *B. Modification and Amendment of Instrument*

This Instrument, including its Exhibits, may be amended or modified only with the written approval of the Parties. All amendments and modifications shall be incorporated into an Amended Instrument or fully set forth in a separate document signed by all Parties that shall be appended to this Instrument, except as follows: 1) any amendment to add an approved ILF Project Development Plan to the Instrument need only be executed by signature of those Parties that approved the ILF Project Development Plan in accordance with the process set forth in **Exhibit E**, and 2) any ILF Projects that are solely the purchase of credits from an approved mitigation bank may be incorporated into Exhibit G following written approval of the USACE, following coordination with the IRT, in accordance with the process set forth in **Exhibit E**, without the need for an amendment or modification to the Instrument.

The IRT may use a streamlined modification review process under 33 CFR 332.8(g)(2) for changes to the Program reflecting Adaptive Management of the Program, Credit Releases, changes in Credit Releases and Credit Release schedules, Credit fee schedule, Compensation Planning Framework updates, and changes that the IRT determines do not warrant the full amendment process.

Circumstances may arise wherein the Program Sponsor requests to incorporate a new special-purpose Service Area into the ILF Program or add a new entity such as a fish and wildlife agency, local governmental agency, or joint powers authority to enable the entity's participation in the ILF Program or an ILF Project. At the Program Sponsor's request, the IRT shall review the relevant information and identify the appropriate process for modifying or amending this Instrument.

### *C. Controlling Language*

The Parties intend the provisions of this Instrument 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 Instrument conflicts with specific language in any document that is incorporated into this Instrument by reference, the specific language of the Instrument shall be controlling. The captions and headings of this Instrument are for convenient reference only and shall not define or limit any of its terms or provisions.

#### *D. Entire Agreement*

This Instrument – and all Exhibits, appendices, schedules, and agreements referred to in this Instrument – constitute the final, complete, and exclusive statement of the terms of the agreement between and among the Parties pertaining to the Program, 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 Instrument, shall be binding or valid. No alteration or variation of this Instrument shall be valid or binding unless adjusted in writing in accordance with this Section VII.D. 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.

#### *E. Reasonableness and Good Faith*

Except as specifically limited elsewhere in this Instrument, whenever this Instrument 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 a 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 days following the request.

#### *F. Successors and Assigns*

This Instrument 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 herein. Program Sponsor shall have the right to assign or otherwise transfer the Program at any time, provided that the Program Sponsor is in full compliance with all requirements of this Instrument and subject to the prior written approval of the IRT. In addition, prior to assignment, transfer, sale or conveyance, the Program Sponsor shall provide to each member of the IRT written assurance from the proposed replacement sponsor confirming the replacement sponsor's intent to assume and perform all of the responsibilities and obligations of the Program Sponsor under this Instrument. Any such assignment, sale, transfer or conveyance made without the prior written approval of the IRT may, at the discretion of the IRT, result in the termination of this Instrument according to the Closure provisions in Section IV.D.2 of this Instrument.

#### *G. Partial Invalidity*

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

purpose of this Instrument would be defeated by loss of the invalid or unenforceable provision.

#### *H. Notices*

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

#### Program Sponsor:

National Fish and Wildlife Foundation  
90 New Montgomery Street, Suite 1010  
San Francisco, CA 94105  
Attn: Director, Impact-Directed Environmental Accounts  
Telephone: (415) 243-3103  
Fax: (415) 778-0998

#### IRT Members:

U.S. Army Corps of Engineers  
Sacramento District  
1325 J Street Room 1480  
Sacramento CA 95814  
Attn: Chief, Regulatory Division  
Telephone: (916) 557-2520  
Fax: (916) 557-6877

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

National Marine Fisheries Service  
West Coast Region  
California Central Valley Area Office  
650 Capitol Mall, Suite 8-300  
Sacramento, CA 95814-4708  
Attn: Sacramento River Basin Branch Chief  
Telephone: (916) 930-3608  
Fax: (916) 930-3629

State Water Resources Control Board  
1001 I Street, 15th Floor  
Sacramento, CA 95814  
Attn: Executive Director  
Telephone: (916) 341-5615  
Fax: (916) 341-5620

Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive, Suite 20  
Rancho Cordova, CA 95670  
Attn: Executive Officer  
Telephone: (916) 464-3291  
Fax: (916) 464-4645

Lahontan Regional Water Quality Control Board  
2501 Lake Tahoe Blvd  
South Lake Tahoe, CA 96150  
Attn: Executive Officer  
Telephone: (530) 542-5400  
Fax: (530) 544-2271

*I. Counterparts*

This Instrument 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.

*J. No Third-Party Beneficiaries*

Except to the extent expressly stated herein, this Instrument 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 Instrument. The duties, obligations, and responsibilities of the Parties to this Instrument with respect to third parties shall remain as otherwise provided by law as though this Instrument had never been executed.

*K. Availability of Funds*

Implementation of this Instrument 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 Instrument 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 Instrument to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

*L. No Partnerships*

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

*M. Governing Law*

This Instrument shall be governed by and construed in accordance with the Clean Water Act, 33 U.S.C. § 1251 et seq., and other applicable federal and state laws and regulations, including those referenced in Section I.C. However, nothing in this Instrument is intended or shall be construed as a waiver of sovereign immunity beyond that which has been granted by the United States legislature in applicable federal laws.

*N. Headings and Captions*

Any paragraph heading or captions contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Instrument.

*O. Right to Refuse Service*

IRT approval of Transfer of Credits from the Program does not signify Program Sponsor's acceptance or confirmation of Program Sponsor's offer to Transfer. Program Sponsor reserves the right to refuse to Transfer Credits from the Program for any reason.

*P. No Contract*

Any federal agency participation in and approval of the Instrument is in furtherance of its regulatory obligations under applicable federal laws and regulations. Any state agency participation in and approval of this Instrument is in furtherance of its regulatory obligations under applicable state laws and regulations. As such, the Instrument is not a "contract" between or among the Parties. Rather, the Instrument is the legal document for the establishment, operation, and use of the Program pursuant to 33 C.F.R. Part 332. Any dispute arising under this Instrument will be resolved pursuant to the dispute resolution provisions herein and will not give rise to any claim by any Party for monetary damages or other relief for alleged "breach of contract."

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## SECTION VIII: EXECUTION

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

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

\_\_\_\_\_  
Jeff Trandahl  
Executive Director and CEO  
National Fish and Wildlife Foundation

\_\_\_\_\_  
Date

\_\_\_\_\_  
Michael S. Jewell  
Chief, Regulatory Division  
U.S. Army Corps of Engineers, Sacramento District

\_\_\_\_\_  
Date

\_\_\_\_\_  
Sahrye Cohen  
Wetland Section Chief  
U.S. Environmental Protection Agency, Region IX

\_\_\_\_\_  
Date

\_\_\_\_\_  
Barry Thom  
Regional Administrator  
National Marine Fisheries Service, West Coast Region

\_\_\_\_\_  
Date

\_\_\_\_\_  
Eileen Sobeck  
Executive Director  
State Water Resources Control Board

\_\_\_\_\_  
Date

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Patrick Pulupa  
Executive Officer  
Central Valley Regional Water Quality Control Board

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Date

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Mike Plaziak  
Executive Officer  
Lahontan Regional Water Quality Control Board

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Date