

SANTA CLARA VALLEY HABITAT PLAN IN-LIEU FEE PROGRAM

ENABLING INSTRUMENT

April 2023



ICF. 2023. Santa Clara Valley Habitat Plan In-Lieu Fee Program Enabling Instrument. April. San Francisco, CA. Prepared for Santa Clara Valley Habitat Agency.

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1. Santa Clara Valley Habitat Plan In-Lieu Fee Program

This In-Lieu Fee Program Enabling Instrument (Instrument) for the Santa Clara Habitat Plan In-Lieu Fee Program (ILF Program), dated _____, is made by and among the Santa Clara Valley Habitat Agency (Habitat Agency or Sponsor as defined in 33 Code of Federal Regulations [CFR] 332.2), the San Francisco 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), San Francisco Bay Regional Water Quality Control Board (SFBRWQCB), Central Coast Regional Water Quality Control Board (CCRWQCB), U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Wildlife (CDFW). The USACE, USEPA, NMFS, SFBRWQCB, CCRWQCB, USFWS, and CDFW comprise and are referred to jointly as the Interagency Review Team (collectively, the IRT, and each individually, an IRT Member). The Sponsor and the signing IRT Member agencies are hereinafter referred to jointly as the "Parties." This Instrument sets forth the agreement of the Parties regarding the establishment, use, operation, and maintenance of the ILF Program.

1.1 Recitals

A) The Sponsor is the Habitat Agency, one of seven Permittees of the Santa Clara Valley Habitat Plan (Habitat Plan). In addition to the Habitat Agency, the other six Permittees include: City of Gilroy, City of Morgan Hill, City of San José, County of Santa Clara, Valley Water (previously Santa Clara Valley Water District), and Santa Clara Valley Transportation Authority. The Habitat Agency is a Joint Powers Authority (JPA) composed of the City of Gilroy, City of Morgan Hill, City of San José, and County of Santa Clara. The JPA is limited to the four participating local jurisdictions because the Joint Exercise of Powers Act requires that a JPA can only exercise powers held by its participating agencies. Of all the Permittees, only the four jurisdictions have the authority to adopt the Habitat Plan fees.

The Habitat Agency is governed by two decision-making bodies: a Governing Board and an Implementation Board. The Governing Board is composed of two representatives of each of the four participating jurisdictions, for a total of eight members. Each representative is an elected official from the participating jurisdiction. The Governing Board is responsible for the governance and administration of the Habitat Agency. It may delegate its authority to the Implementing Board except for two duties that must remain with the Governing Board: adoption and modification of Habitat Plan fees, and the approval of the Habitat Agency's annual budget. The Implementation Board is represented by all Permittees. The 11-member Implementation Board has two representatives each from the Permittees except for Santa Clara Valley Transportation Authority, which, per its request, has one representative. For the Permittees with two representatives, one must be an elected official. Under the guidance of the Governing Board and Implementing Board, the Habitat Agency holds the primary responsibility for overseeing implementation of the Habitat Plan's conservation strategy (comprising a mix of mitigation and non-mitigation conservation) and annual compliance reporting.

B) The Habitat Plan is both a habitat conservation plan (HCP) under the federal Endangered Species Act (FESA) and a natural community conservation plan (NCCP) under the California Natural Community Conservation Planning Act (NCCP Act). The Habitat Plan is a 50-year regional plan to protect covered species and other natural resources—including natural

communities, Aquatic Resources, and native biodiversity—while allowing for future development in Santa Clara County. The conservation and mitigation requirements of the Habitat Plan are included in Table D-3 of Exhibit D, *Compensation Planning Framework*. Development of the Habitat Plan initiated in 2005, the document was finalized in 2012, and permits were issued by USFWS and CDFW in 2013.

- C) The Sponsor has elected to establish and operate an ILF Program, as provided in 33 CFR 332, and will be responsible for establishing and operating the ILF Program for that purpose in accordance with the terms of this Instrument.
- D) 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)(Clean Water Act), 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 2006 issue of the Federal Register (71 *Federal Register* [FR] 15520). In the preamble to the March 2006 proposal, the 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. In April 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 325 and 332; 40 CFR 230)(Compensatory Mitigation Rule). Among other things, the Compensatory Mitigation Rule sets forth requirements governing the establishment, use, operation, and maintenance of ILF Programs as a means of providing Compensatory Mitigation for unavoidable adverse Impacts on wetlands, streams, and other Aquatic Resources authorized by Clean Water Act Section 404. The development of an “instrument” by prospective ILF Program sponsors is a requirement of the Compensatory Mitigation Rule. The Sponsor has developed this Instrument in satisfaction of that requirement.
- E) The Santa Clara Valley Habitat Agency will serve as the Sponsor, and will be responsible for overseeing the establishment, use, operation, and maintenance of the ILF Program. The role of Sponsor has been selected for the Santa Clara Valley Habitat Agency because of the similar programs they are currently responsible for, including the Santa Clara Valley Habitat Plan (Habitat Plan), the Santa Clara Valley Habitat Plan Regional General Permit, and a programmatic biological opinion that is currently under development.
- F) 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, 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, 33 U.S.C. § 403.
- G) 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.*
- H) NMFS has jurisdiction over the conservation, protection, Restoration, and management of certain living marine resources and the habitat necessary for biologically sustainable populations of these resources within the United States pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, FESA, 16 U.S.C. § 1531, *et seq.*, the Magnuson-Stevens Fishery Conservation and Management Act, as amended, 16 U.S.C. § 1801, *et seq.*, and the Marine

Mammal Protection Act of 1972, as amended, 16 U.S.C. § 1361, *et seq.*, and other provisions of federal law.

- I) SFBRWQCB and CCRWQCB, within their respective areas of jurisdiction, are responsible for protecting and regulating the quality of Waters of the State under the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 *et seq.*, and ensuring the discharge of pollutants into the Waters of the U.S. under the Clean Water Act are consistent with State water quality standards, 33 U.S.C. § 1251 *et seq.*
- J) USFWS has jurisdiction over the conservation, protection, Restoration, and management of certain living terrestrial and fish resources and the habitat necessary for biologically sustainable populations of these resources within the United States pursuant to FESA and other provisions of federal law.
- K) CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species under various California laws, including but not limited to the California Endangered Species Act, the NCCP Act, the Native Plant Protection Act (Cal. Fish & G. Code §§ 1900 *et seq.*), fully protected species statutes (Cal. Fish & G. Code §§ 3511, 4700, 5050, and 5515) and California Fish and Game Code Sections 1600 *et seq.*, 1802, and 3500.
- L) The IRT is the interagency group that oversees the establishment, use, operation, and maintenance of the ILF Program.

2. Enabling Instrument Agreement

In consideration of the foregoing recitals, the Parties hereby agree as follows:

2.1 Purpose, Framework, and Authorities

2.1.1 Purpose

The two purposes of this Instrument are:

- to establish guidelines, responsibilities, and standards for the establishment, use, operation, and maintenance of the ILF Program; and
- to coordinate implementation of the ILF Program with implementation of the Habitat Plan.

The ILF Program will be used to compensate for unavoidable Impacts on, and for conservation and protection of, Waters of the U.S., FESA-listed anadromous fish¹ under the jurisdiction of NMFS, and Waters of the State. The Sponsor shall Preserve, restore, Establish, and/or enhance and then manage and maintain Aquatic Resources and Listed Fish Mitigation Projects in accordance with this Instrument.

The intent of the Sponsor in establishing the ILF Program is to provide streamlined mitigation for Habitat Plan covered activities that affect Aquatic Resources. Use of the ILF Program by non-covered activities will be considered on a case-by-case basis and allowed if agreed to by all Parties.

2.1.2 Framework

This Instrument establishes the Program Area and two Service Areas (Exhibit A), intended to compensate for permitted Impacts on Aquatic Resources and Listed Fish. The ILF Program establishes the following credit types in each Service Area:

- Wetland (Palustrine) Credits
 - Seasonal Wetland
 - Rehabilitated
 - Established²
 - Enhanced
 - Preserved
 - Freshwater Marsh
 - Rehabilitated
 - Established

¹ South-central California coast (SCCC) steelhead (*Oncorhynchus mykiss*), central California coast (CCC) steelhead (*Oncorhynchus mykiss*), and Central Valley fall-run Chinook salmon (*Oncorhynchus tshawytscha*).

² “Established” credits include both established (where no Aquatic resource historically existed) and re-established aquatic resources.

- Enhanced
- Preserved
- Riparian – Waters of the U.S.
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
- Stream (Riverine) Credits
 - Perennial
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
 - Intermittent
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
 - Ephemeral
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
 - Riparian – Non-Waters of the U.S.
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
- Stream (Riverine) with Listed Fish Credits
 - Perennial with Listed Fish Credits
 - Rehabilitated
 - Established
 - Enhanced

- Preserved
- Intermittent with Listed Fish Credits
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
- Pond (Lacustrine) Credits
 - Rehabilitated
 - Established
 - Enhanced
 - Preserved
- Buffer Credits
 - Preserved

As noted above, within each credit type, the Sponsor will track the area rehabilitated, established, enhanced, and preserved. This Instrument also establishes the process for the sale of these Credits, for receipt and accounting of funds from credit sales, and for use of such funds to identify, prioritize, develop, and implement Mitigation Projects under the ILF Program.

2.1.3 Federal Authorities

The following statutes, regulations, policies, and guidelines apply to Compensatory Mitigation for Impacts on Waters of the U.S.:

- Clean Water Act (33 U.S.C. § 1251 *et seq.*).
- National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*).
- Federal Endangered Species Act (16 U.S.C. § 1531 *et seq.*).
- Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*).
- Magnuson-Stevens Fishery Conservation and Management Act, Essential Fish Habitat for Chinook salmon in Amendment 14 of the Pacific Salmon Fishery Management Plan pursuant to such Act (16 U.S.C. § 1801 *et seq.*).
- National Historic Preservation Act (16 U.S.C. § 470).
- Regulatory Program of the USACE (33 CFR 320–332).
- Rivers and Harbors Act (33 U.S.C. § 401 *et seq.*).
- Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR 230).
- Compensatory Mitigation for Losses of Aquatic Resources (33 CFR 325 and 332; 40 CFR 230).
- Executive Order 11990—Protection of Wetlands.
- Executive Order 11988—Floodplain Management.

- Memorandum of Agreement between the U.S. Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation under the Clean Water Act, § 404(b)(1) Guidelines (February 6, 1990), as amended.

2.2 Definitions

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

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

“Advance Credits” means any program Credits that are available for Transfer by the Sponsor prior to being Fulfilled in accordance with an approved Mitigation Plan.

“Aquatic Resources” mean Waters of the U.S. and Waters of the State, including riparian zone and wetlands and associated ecological values, that are supported by the hydrology of the Waters of the U.S. or Waters of the State.

“Closure” means termination of the Program.

“Compensation Planning Framework” means the Compensation Planning Framework established in Section 2.9, *Compensation Planning Framework* and attached as Exhibit D.

“Compensatory Mitigation” means the Restoration (Re-Establishment or Rehabilitation), Establishment (Creation), enhancement, and/or in certain circumstances Preservation of Aquatic Resources for the purposes of offsetting unavoidable adverse Impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

“Compensatory Mitigation Rule” means 33 CFR 325 and 332, and 40 CFR 230.

“Conservation Easement” means a perpetual Conservation Easement, as defined by California Civil Code § 815.1, in the form of Exhibit C attached to and made a part of this Instrument.

“Creation.” See “Establish” or “Establishment.”

“Credits” are units of measure representing the accrual, attainment, or protection of aquatic Functions and/or Listed Fish habitat. Credits are defined in detail in Exhibit B.

“Credit Release” means an action by the agency that has jurisdiction over specified Credits available for Transfer pursuant to this Instrument, as set forth in Section 2.10, *Generation and Release of Credits*.

“Default” means a failure on behalf of the Sponsor to provide Compensatory Mitigation in a timely manner or to comply with this Instrument.

“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.

“Establish” or “Establishment” (also called “Creation”) means, with regard to Aquatic Resources, 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.

“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 Program and over which the Sponsor does not have control.

“Freshwater marsh” means an aquatic resource that contains hydrophytic vegetation, hydric soils, and perennial wetland hydrology, being inundated or saturated for at least nine months in an average rainfall year. For the purpose of this definition, an average rainfall year receives an annual precipitation of at least 100% of the 30-year rolling average for Santa Clara County, California.

“Fulfill” and “Fulfillment” mean the Sponsor’s matching of a Released Credit with an Advance Credit, as notified in writing to the IRT Member, 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.

“Functions” mean the physical, chemical, or biological processes that occur in ecosystems.

“Habitat Plan” means the Santa Clara Valley Habitat Plan.

“HCP and NCCP” means both a habitat conservation plan (HCP) intended to fulfill the requirements of the FESA and a natural community conservation plan (NCCP) to fulfill the requirements of the California Natural Community Conservation Planning Act.

“ILF Annual Report” means the annual report provided by the Sponsor pursuant to Section 2.8, *Reporting* of this Instrument.

“Impacts” means adverse effects.

“Interagency Review Team” or “IRT” means the USACE, USEPA, NMFS, SFBRWQCB, CCRWQB, USFWS and CDFW, which together are responsible for overseeing the establishment, use, operation, and maintenance of the Program.

“IRT Member” means an interagency review team member agency and refers to the agency itself, not a specific staff person representing the agency on the interagency review team.

“Interim Management Period” means the period beginning on the date of approval of the Mitigation Plan for a Mitigation Project and ending when the IRT Members have determined that the Performance Standards in the Mitigation Plan for that Mitigation Project have been met.

“Interim Management Plan” means a document that describes the management, monitoring, Adaptive Management, reporting, and other activities to be implemented by the Sponsor during the interim management period.

“Listed Fish” means those fish present in the Program Area that are listed as Threatened or Endangered under the FESA and under the jurisdiction of NMFS.

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

“Long-Term Management Plan” means a plan that provides measures intended to ensure the Mitigation Project property is managed, monitored, and maintained in perpetuity to conserve and protect its Waters of the U.S., Waters of the State, and Listed Fish.

“Mitigation Plan” means the document required for each Mitigation Project pursuant to 33 CFR 332.4(c)(1)(iii) of the Compensatory Mitigation Rule.

“Mitigation Project” or “Project” means Compensatory Mitigation implemented by the Program Sponsor, its consultants or contractors, for the purpose of creating Credits for the Program. Compensatory Mitigation Projects are Projects that Preserve, create, restore or enhance Waters of the U.S., Waters of the State, and/or Listed Fish habitat in accordance with the Compensation Planning Framework.

“Party” or “Parties” means signatories of this agreement.

“Performance Standards” means the minimum standards set forth to define the successful development of a credit.

“Permittee” means a person or entity that has a legal obligation to provide Compensatory Mitigation under a permit, approval, or authorization issued by an IRT Member.

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

“Program Account” means the 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, as provided in Exhibit E.

“Program Area” means the geographical boundary of the Program, as depicted and described in Exhibit A.

“Program Establishment Date” is the date determined pursuant to Section 2.15.1, *Program Establishment Date*, on which the Program is established and after which Credits may be released and transferred.

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

“Re-Establishment” 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. For the purpose of tracking net gains in an Aquatic Resource area, Re-Establishment is tracked as Establishment.

“Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS)” is a web-based application that provides information to the IRT, the Sponsor, agencies, and the general public on mitigation banks and ILF Programs, associated documents, credit availability, Service/Program Areas, and

information on policies and procedures that affect mitigation bank and ILF development and operation.

“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.

“Released Credits” means the Credits that have been produced by the Sponsor’s successful implementation of a Mitigation Project and have been authorized for Transfer by the IRT Members in accordance with the Credit Release schedule included as part of the Mitigation Plan for the Mitigation Project.

“Remedial Action” means a corrective measure associated with a failure to achieve the Performance Standards for a Mitigation Project site that the Program Sponsor is required to take under the terms of a Mitigation Plan for that Mitigation Project, as provided in Section 2.13.2.2, *Remedial Action Plan*.

“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 an Aquatic Resource area, Restoration is used synonymously with Rehabilitation.

“Seasonal wetland” means an aquatic resource that has hydrophytic vegetation, hydric soils, and seasonal wetland hydrology, being inundated or saturated for at least 14 consecutive days in an average rainfall year. For the purpose of this definition, an average rainfall year receives an annual precipitation of at least 100% of the 30-year rolling average for Santa Clara County, California.

“Section” means a Section of this Instrument.

“Service Area” means the geographical boundary of each of the two areas for which Credit will be managed within the Program Area, as depicted and described in Exhibit A.

“Transfer” means the use, sale, or conveyance of Credits by the Sponsor as outlined in Section 2.4.3, *Sponsor’s Responsibility for Providing Compensatory Mitigation after Transfer of Advance Credits*.

“Unlawful Act” means an event or series of events, such as the intentional release 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 Mitigation Project site.

“Waters of the State” means any surface water or groundwater, including saline waters, within the boundaries of the State of California as defined under the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 *et seq.*

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

2.3 Stipulations

2.3.1 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.

2.3.2 Exhibits

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

- Exhibit A – Program Area and Service Areas
- Exhibit B – Credit Release, Transfer, and Tracking
 - Attachment 1 – Credit Transfer Agreement
 - Attachment 2 – Credit Ledger
- Exhibit C – Conservation Easement Template
- Exhibit D – Compensation Planning Framework
- Exhibit E – Program Account Terms and Procedures
- Exhibit F – Mitigation Project Development Process
- Exhibit G – Mitigation and Monitoring Plan Template
- Exhibit H – Coordination with Other Habitat Agency Programs
- Exhibit I – Habitat Agency Fee Schedule
- Exhibit J – Five-Year Review of the Santa Clara Valley Habitat Plan Costs, Funding & Developments Fees

2.4 Program Structure

2.4.1 Geographic Program Area

In accordance with 33 CFR 332.8(d)(6)(ii)(A), this Instrument establishes the Program Area and two Service Areas as the credit areas of the ILF Program (see Exhibit A). The Program Area is divided into two Service Areas: the Coyote Watershed Service Area and the Pajaro Watershed Service Area. The Coyote Watershed Service Area aligns with areas that are both within the Habitat Plan permit area and the Coyote HUC-8 (HUC 18050003) boundary. The Pajaro Watershed Service Area aligns with the Habitat Plan permit area where it overlaps with the Pajaro HUC-8 (HUC 18060002) boundary. The Habitat Plan permit area is almost entirely contained within the ILF Program Area with the exception of approximately 3,500 acres in the north and northeast portions of the Habitat Plan permit area where the Habitat Plan permit area extends into the Alameda Creek watershed. These areas are not part of the ILF Program. Credits are available within each Service Area for permitted impacts on wetlands, other Waters of the U.S., Waters of the State, Listed Fish, and other Aquatic Resources.

2.4.2 Accounting Procedures

As described in Section 2.12, *Program Account*, the Sponsor will establish a designated interest-bearing Program Account, as set forth in Exhibit E, to fund the ILF Program. In accordance with 33 CFR 332.8(d)(6)(ii)(B), funds generated by each credit sale will be tracked comprehensively in the Sponsor's accounting systems and allocated to the appropriate credit type.

With these systems, the Sponsor can readily ascertain:

- the IRT Member or other public agency authorizing the impact for which a credit is transferred;
- the Program Account balance;
- deposits to the Program Account during any period;
- disbursements from the Program Account during any period; and
- investment earnings accrued to the Program Account.

The Sponsor will apply generally accepted accounting principles (GAAP) to the 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 and the American Institute of Certified Public Accountants (AICPA) are authorized to establish these standards and guidelines. Under the AICPA Code of Professional Conduct, accountants such as the 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 Sponsor's conformance with GAAP will be reviewed on an ongoing basis as part of the Sponsor's annual independent financial review.

2.4.3 Sponsor's Responsibility for Providing Compensatory Mitigation after Transfer of Advance Credits

In accordance with 33 CFR 332.8(d)(6)(ii)(C), once the Advance Credits are transferred, the Sponsor will assume legal responsibility for providing Compensatory Mitigation with respect to the Advance Credits in accordance with this Instrument. Unless and until such Transfer occurs, the responsibility to provide Compensatory Mitigation will remain with the Permittee.

2.4.3.1 Assumption of Responsibility

The Sponsor will assume the legal responsibility for providing Compensatory Mitigation with respect to an Advance Credit when both of the following have occurred:

- The Sponsor has received written authorization or confirmation from the IRT Members that the Permittee is authorized to comply with some or all of its Compensatory Mitigation obligation through purchase of Credits from the Program, along with a written description of the specific type and number of Credits the Permittee needs for purposes of compliance; and
- The IRT Members have received a credit transfer agreement (see Exhibit B) signed by both the Sponsor and the Permittee.

2.4.3.2 Satisfaction of Responsibility

The Sponsor will fully satisfy its responsibility to provide Compensatory Mitigation with respect to Advance Credits that have been transferred to a Permittee by generating Released Credits of the same type and at least the same number as such transferred Advance Credits. The Sponsor will have satisfied its responsibility to provide Compensatory Mitigation with respect to transferred Advance Credits on the date that either of the following has occurred:

- the type and number of Credits necessary to satisfy the responsibility to provide Compensatory Mitigation obligation are released; or
- the responsibility to provide Compensatory Mitigation has been assigned to a third party approved by the Parties (i.e., to an approved mitigation bank through purchase of Credits).

2.4.3.3 Limitation of Responsibility

Notwithstanding any other provision of this Instrument, the Sponsor's financial liability for providing Compensatory Mitigation will be limited to the funds in the Program Account.

2.4.4 Default

The Sponsor shall be in default if it fails to observe or perform any obligations or responsibilities required of it by this Instrument. An IRT Member may determine that the Sponsor has defaulted in the performance of an obligation under this Instrument only after all of the following have occurred:

- the IRT Member has provided written notice of the alleged default to the Sponsor and other IRT Members;
- the Sponsor has been afforded a period of not less than 90 days to remedy the alleged default, or, if not capable of being remedied within 90 days, then to begin remedying the alleged default; and
- the Sponsor and the IRT Member has engaged in a good faith effort to resolve the alleged default through reasonable means including, but not necessarily limited to:
 - meeting and conferring to identify the specific deficiencies, performance failures, or other issues giving rise to the allegation of default, and
 - meeting and conferring to determine the appropriate actions that could or should be taken by the Sponsor to remedy the applicable deficiencies, performance failures, or other issues.

Any determination by an IRT Member that a default has occurred must be communicated in writing immediately to the Sponsor and other IRT Members by the IRT Member making such determination.

2.4.4.1 Remedies for Default

If, after following the default procedure described above, an IRT Member issues a written determination of default, the IRT and the Sponsor will, thereafter, agree upon one or more of the following actions, as appropriate, as the remedy for the default:

- the Sponsor may enforce the applicable performance guarantees that the Sponsor will require of each contractor undertaking work on a Mitigation Project to correct a deficiency in a Mitigation Project that is the subject of a default;

- the Sponsor may expend available contingency funding in the Program Account to correct a deficiency in a Mitigation Project that is the subject of a default;
- the Sponsor may modify a Mitigation Project that is the subject of a default (including, but not necessarily limited to, its scope, objectives, Performance Standards, or Credit Release schedule) as determined by the IRT, in a manner that allows a deficiency to be corrected;
- the Sponsor may, with approval of the IRT, abandon a Mitigation Project that is the subject of a default and initiate a new Mitigation Project;
- if, on the date an IRT Member issues a written determination of default, the Program has Released Credits that are not required to satisfy the Sponsor's responsibility to provide Compensatory Mitigation with respect to Advance Credits (Section 2.10.1, *Advance Credits*), and such Released Credits have not otherwise been transferred, the IRT may require the Sponsor to apply such Released Credits to remedy the applicable default, after which time such Released Credits would be deemed transferred;
- the Sponsor may take some other Remedial Action that is mutually acceptable to the Sponsor and the IRT; and/or
- the Sponsor may close the Program in accordance with Section 2.4.5, *Closure of Program*.

Remedies for default shall not affect the validity or limit the use of transferred Credits. Once program Credits are transferred in accordance with this agreement, the responsibility for providing Compensatory Mitigation associated with such transferred Credits shall remain with the Sponsor, and shall not revert to the Permittee that received the transferred Credits, in the event of a default. Remedies for default shall account for any temporal loss of ecosystem services within the Service Area.

2.4.4.2 Force Majeure and Unlawful Acts

No IRT Member may determine that the Sponsor has defaulted in the performance of an obligation under this Instrument where such failure to perform is caused by an event of Force Majeure or an Unlawful Act. The Sponsor will bear the burden of establishing that a Force Majeure or Unlawful Act has occurred by demonstrating to the reasonable satisfaction of the IRT all of the following:

- that the alleged default was caused by circumstances beyond the reasonable control of the Sponsor and any person or entity under the direction or control of the Sponsor, including its employees, agents, contractors (which may include Property Owners), and consultants, to the extent such person or entity was acting within the scope of the employment, agency, contracting or consultancy relationship, as the case may be, with Sponsor;
- that neither the Sponsor, nor any person or entity under the direction or control of the Sponsor, including its employees, agents, contractors (which may include Property Owners) and consultants, could have reasonably foreseen such circumstances and avoided the alleged default; and
- the alleged default was a direct result of such circumstances.

Force Majeure

A 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 Program and over which the Sponsor does not have control. This definition applies to the Sponsor's overall operation of the Program; an individual Mitigation Project will be subject to the definition of Force Majeure that is provided in the Mitigation Plan for the Mitigation Project.

Unlawful Act

An Unlawful Act of any person or entity other than the Sponsor or any person or entity under the direction or control of the Sponsor, including its employees, agents, contractors (which may include a Property Owner), and consultants, to the extent such person or entity was acting within the scope of the employment, agency, contracting or consultancy relationship, as the case may be, with the Sponsor, includes an event or series of events, such as the intentional release within a Mitigation Project site, 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 Mitigation Project site.

Notice of Force Majeure or Unlawful Act

The Sponsor will notify the IRT within 72 hours of detection of the occurrence of an event of Force Majeure or Unlawful Act that is likely to result in a default. As promptly as reasonably possible thereafter, the Parties will meet to discuss what Remedial Action, if any, is needed in response to such occurrence as soon as possible after notification. In the meantime, the Sponsor will continue to manage and maintain the affected Mitigation Project to the extent practicable.

2.4.5 Closure of Program

The Sponsor may, at its election, terminate or "close" the Program upon 90 days advance written notice to the IRT. The IRT may close the Program only if the Sponsor fails to remedy a default in the performance of an obligation under this Instrument in accordance with Section 2.4.4.1, *Remedies for Default*, in which event all IRT Members will jointly provide the Sponsor 90 days advance written notice of the Closure. The Program will be closed on the date after which both of the following have occurred.

- The Party closing the Program has provided 90 days' written notice.
- The Sponsor has satisfied any outstanding responsibility to provide Compensatory Mitigation for transferred Advance Credits in accordance with Section 2.10.4.1, *Requirements Following Transfer of Credits*.

2.5 Transferred Credits Not Affected

Closure of the Program shall not affect the validity of—or limit the use of—transferred Credits. Once Program Credits are transferred in accordance with this agreement, the responsibility for providing Compensatory Mitigation associated with such transferred Credits shall remain with the Sponsor, and shall not revert to the Permittee that received the transferred Credits, if the Program is closed.

2.6 IRT Member Participation

IRT Member participation in the Program and this Instrument is voluntary and shall not limit the authority of any IRT Member to fulfill its statutory or regulatory responsibilities or otherwise limit the powers afforded to any IRT Member by applicable law.

2.7 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 among the IRT Members have an established procedure for resolution at 33 CFR 332.8(e). For all other disputes, the Parties will first employ an informal dispute resolution procedure described below. 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.

2.7.1 Dispute Resolution Procedure

The Party initiating the dispute resolution procedure will notify the other Parties of the dispute, the position of the aggrieved Party, and the remedies the initiating Party proposes. The notified Parties will 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. Within 45 days after such notified Parties' response is due, the Parties will confer and negotiate in good faith toward a mutually satisfactory resolution, or will establish a specific process and timetable to seek such resolution.

2.7.2 Elevation of Dispute

If the Parties do not resolve a dispute after completing the dispute resolution procedure above, any one of the Parties may elevate the dispute to a meeting of the chief executives of the involved Parties. For purposes of this provision, "chief executive" means the executive of the Sponsor, the USACE Regulatory Branch Chief, the USEPA Wetlands Office Supervisor, and the NMFS Assistant Regional Administrator for Protected Resources, Southwest Region. Each Party will be represented by its chief executive in person or by telephone at the meeting, and the meeting will occur within 45 days of a request by any Party following completion of the dispute resolution procedure.

2.8 Annual Reporting

In accordance with 33 CFR 332.8(d)(6)(ii)(E) which requires the instrument to establish reporting protocols and 33 CFR 332.8(i)(3) which dictates the minimum information to be included in the annual report for the ILF Program Account, the Sponsor will prepare an ILF Annual Report for the ILF Program as provided in this Section.

The Sponsor will submit an ILF Annual Report summarizing Program implementation for the previous calendar year to each IRT Member, and will upload the report to RIBITS, on or about March 15 following the reporting year. No ILF Annual Report will be required for the first partial calendar year; instead, the first ILF Annual Report will include both the first partial calendar year of

implementation and the first full year of implementation. The ILF Annual Report will include information described below.

In addition to ILF Program annual reporting, this ILF Instrument addresses other reporting requirements in the following Sections.

- Exhibit D Section D.10.1 *Annual Reporting* describes the reporting requirements of 33 CFR 332.8(c)(2)(x) for the Compensation Planning Framework.
- Exhibit G includes guidance for Mitigation Project reporting consistent with 33 CFR 332.4(c)(10) and 33 CFR 332.6(a)(1).

2.8.1.1 Mitigation Project Development

The ILF Annual Report will summarize the progress of each Mitigation Project by Service Area, including:

- the degree to which each Mitigation Project is meeting its Performance Standards;
- any deficiencies in attaining and maintaining Performance Standards and any Remedial Action proposed, approved, or performed; and
- any Remedial Actions that have been completed, and the effectiveness of such actions.

2.8.1.2 Interim Management and Long-Term Management

The ILF Annual Report will contain an itemized account of the management tasks conducted in accordance with the Interim Management or Long-Term Management Plan for each Mitigation Project.

2.8.1.3 Credit Ledger Report

The ILF Annual Report will include a current credit ledger (see Exhibit B), showing the beginning and end balance of available advance and Released Credits, the individual credit Transfers, and the total number of Released Credits generated by Mitigation Projects. The annual credit ledger report will also include individual ledgers that track the production of Released Credits for each in-lieu fee project (33 CFR 332.8(p)(2)).

2.8.1.4 Program Account

- The ILF Annual Report will include a financial activity report for the Program Account, which includes: all income received from Transfers of Released Credits and investment earnings accrued by the Program Account; and
- a description of disbursements and expenditures from the Program Account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, Adaptive Management, and administration.

In addition, the Habitat Agency understands Parties have authority to audit the ILF Program Account at any time.

2.8.1.5 Compensatory Mitigation Tracking

The ILF Annual Report will list and summarize:

- A list of all permits (including the USACE permit number);
- the amount of authorized Impacts giving rise to such Transfers of Credits;
- the amount of required Compensatory Mitigation;
- the amount paid to the Program for Transfers of Released Credits;
- the date(s) the funds were received from applicable Permittees for such Credits; and
- the amount of Released Credits generated by Mitigation Projects.

If the IRT determines that the Habitat Agency is failing to provide Compensatory Mitigation by the third full growing season after the first advance of credit is secured, funds may be directed to alternative Compensatory Mitigation Projects.

2.8.1.6 GIS Data

The ILF Annual Report will include a GIS database showing:

- the location of each permitted impact for which a credit was transferred; and
- each Mitigation Project location, size, and resource acreages rehabilitated, established, enhanced, or preserved.

The database will 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.

2.8.2 Credit Transfer Reporting

Upon the Transfer of each credit, the Sponsor will provide the IRT with the applicable credit Transfer agreement (see Exhibit B) and will enter the applicable credit Transfer information into RIBITS.

2.8.3 Other Information Deemed Necessary by the USACE District Engineer

As required by 33 CFR 332.8(d)(6)(ii)(F), the draft instrument must include “[a]ny other information deemed necessary by the district engineer.” This Section is reserved for additional information requested by the USACE District Engineer.

2.9 Compensation Planning Framework

In accordance with 33 CFR 332.8(c)(2), the Compensation Planning Framework established under this Instrument and attached as Exhibit D includes the following elements:

- i. The geographic Service Area(s), including a watershed-based rationale for the delineation of each Service Area;
- ii. A description of the threats to Aquatic Resources in the Service Area(s), including how the in-lieu fee program will help offset Impacts resulting from those threats;
- iii. An analysis of historic Aquatic Resource loss in the Service Area(s);

- iv. An analysis of current Aquatic Resource conditions in the Service Area(s), supported by an appropriate level of field documentation;
- v. 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;
- vi. A prioritization strategy for selecting and implementing Compensatory Mitigation activities;
- vii. An explanation of how any Preservation objectives identified in paragraph (c)(2)(v) of this Section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of Preservation in §332.3(h);
- viii. 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;
- ix. A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;
- x. A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this Section, including a process for revising the planning framework as necessary; and
- xi. Any other information deemed necessary for effective compensation planning by the district engineer.

2.10 Generation and Release of Credits

In accordance with 33 CFR 332.8(d)(6)(iv)(B) and (C), Program Credits are available for Transfer by the Sponsor as provided in this Instrument to satisfy Compensatory Mitigation requirements set forth in permits, recommendations, or violations issued by the IRT Members. The IRT will determine the number of Credits necessary to Fulfill a Permittee's, project proponent's, or violator's Compensatory Mitigation requirements, and will also determine the number of Released Credits that each Mitigation Project will generate as it is completed, based on the achievement of applicable Performance Standards as reflected in the Mitigation Project's Credit Release schedule.

2.10.1 Advance Credits

Per 33 CFR 332.8(n), this Instrument will make a limited number of Advance Credits available to the sponsor when the instrument is approved. Advance Credits will be specified for each Service Area. The number of Advance Credits will be based on the following considerations:

- The Compensation Planning Framework;
- The sponsor's past performance for implementing Aquatic Resource Rehabilitation, Establishment, enhancement, and/or Preservation activities in the proposed Service Area or other areas; and
- The projected financing necessary to begin planning and implementation of in-lieu fee projects.

Each of these three topics is addressed individually in the following Sections.

2.10.1.1 Compensation Planning Framework

The Compensation Planning Framework (Exhibit D) identifies goals and objectives for Aquatic Resources as well as priority acquisition areas. Under this framework, the Habitat Agency is continually working to identify sites for Preservation that meet and provide opportunities to meet the goals and objectives of the Compensation Planning Framework. Once the Sponsor has preserved a site consistent with the Compensation Planning Framework, it begins evaluating preserved lands for Restoration, Establishment, and enhancement opportunities. Actual Mitigation Projects are selected based on available options, the Sponsor's progress on mitigation site development to date, and anticipated mitigation need (i.e., near-term projections for projects seeking coverage under the Habitat Plan).

2.10.1.2 Sponsor's Past Performance

The Sponsor, the Habitat Agency, is a JPA composed of the City of Gilroy, City of Morgan Hill, City of San José, and County of Santa Clara, and is governed by two decision-making bodies: a Governing Board and an Implementation Board. The Governing Board is composed of JPA elected officials. The Implementation Board is represented by all Habitat Plan Permittees, including the JPA Member jurisdictions plus Valley Water and Santa Clara Valley Transportation Authority.

The Habitat Agency is led by an Executive Officer and supported by staff including—but not limited to—a Program Manager, Land Management Specialist, Senior Conservation Biologist, and Management Budget Analyst. The Habitat Agency also engages the part-time services of support staff and consultants. The Habitat Agency oversees implementation of all aspects of the Habitat Plan, including planning, design, construction, monitoring, and reporting of Restoration activities undertaken in support of the Habitat Plan, and will oversee implementation of the ILF Program.

Because the Habitat Agency is a relatively new entity (formed in 2013), as an agency, it has only a modest track record of Aquatic Resources mitigation accomplishments. Nonetheless, it has planned and implemented three Restoration projects in the past 5 years and is currently in planning for two additional projects to be in construction by 2023. In addition, the Habitat Agency has successfully implemented the Habitat Plan over the last 7 years, maintaining an annual budget of approximately \$5M and tracking and reporting annually on countless criteria as required by the HCP/NCCP.

Furthermore, the individuals comprising the Habitat Agency have extensive experience planning, designing, managing, and implementing Mitigation Projects. The Habitat Agency will operate the ILF Program, including the maintenance of site-specific ledgers and annual reporting requirements. The Sponsor will utilize its own experienced staff along as well as contract with experienced contractors to design, permit, construct, monitor, and maintain the mitigation sites enrolled in this ILF Program.

2.10.1.3 Projected Necessary Financing

The Sponsor anticipates initiating amendment of the ILF Instrument immediately upon final approval to include—at a minimum—the San Felipe Creek Restoration Project. The Sponsor understands that these Credits would be used to Fulfill a portion of the Advance Credits issued for the Coyote Watershed Service Area.

The Habitat Agency has funding available for financing subsequent Mitigation Projects. The Habitat Agency has been collecting fees under the Habitat Plan fees since 2013. As some of the collected fees have not yet been allocated to other mitigation requirements, they remain available for planning and

implementing Mitigation Projects under the ILF Program. While a portion of this start-up financing will be used to plan and implement Mitigation Projects under the ILF Program, it is insufficient to cover all costs and there is still a need to request Advance Credits.

2.10.1.4 Requested Advance Credits

On the Program Establishment Date, this Instrument shall operate automatically to grant the Sponsor the following Advance Credits. To ensure accuracy, stream Credits will be tracked in square feet and linear feet. However, because RIBITS requires tracking in acres, stream Credits will also be converted to acres and tracked consistent with RIBITS.

Table 1. Requested Advance Credits by Credit Type and Service Area

Credit Type	Unit	Coyote Service Area	Pajaro Service Area
seasonal wetland	rehabilitated	ac	
	established	ac	2.40
	enhanced	ac	1.50
	preserved	ac	
freshwater marsh	rehabilitated	ac	
	established	ac	1.00
	enhanced	ac	1.16
riparian WOUS	rehabilitated	ac	
	established	ac	1.0
	enhanced	ac	2.0
	preserved	ac	
perennial stream	rehabilitated	ac	
	rehabilitated	lf	
	established	ac	
	established	lf	
	enhanced	ac	
	enhanced	lf	
	preserved	ac	
intermittent stream	preserved	lf	
	rehabilitated	ac	
	rehabilitated	lf	
	established	ac	2.46
	established	lf	8,645
	enhanced	ac	0.32
	enhanced	lf	1,000
ephemeral stream	preserved	ac	
	preserved	lf	
ephemeral stream	rehabilitated	ac	

Credit Type	Unit	Coyote Service Area	Pajaro Service Area
	rehabilitated	lf	
	established	ac	
	established	lf	
	enhanced	ac	
	enhanced	lf	
	preserved	ac	
	preserved	lf	
riparian non-WOUS	rehabilitated	ac	7.00
	established	ac	1.24
	enhanced	ac	0.40
	preserved	ac	50.00
perennial stream w/ Listed Fish	rehabilitated	ac	0.57
	rehabilitated	Lf	2,500
	established	ac	
	established	Lf	
	enhanced	ac	0.57
	enhanced	Lf	2,500
	preserved	ac	
intermittent stream w/ Listed Fish	rehabilitated	ac	
	rehabilitated	lf	
	established	ac	0.34
	established	lf	1,000
	enhanced	ac	0.34
	enhanced	lf	1,000
	preserved	ac	
	preserved	lf	
pond	rehabilitated	ac	
	established	ac	
	enhanced	ac	0.78
	preserved	ac	
buffer	preserved	ac	

Beginning on the Program Establishment Date, this initial allocation of Advance Credits shall be available for Transfer in accordance with Section 2.10.4, *Transfer of Credits*.

Advance Credits are proposed for this ILF Program based on the projects assumed to be amended to the ILF Instrument shortly after Program establishment (as discussed in Section 2.10.1.3, *Projected Necessary Financing*), the assumption that some covered activities under the Habitat Plan will require Compensatory Mitigation (i.e., desire to purchase Credits), and that the Sponsor will be in a position to Fulfill these credit sales by the third growing season. The Sponsor must complete land

acquisition and initial physical and biological improvements for a Mitigation Project that will Fulfill Advance Credits by the third full growing season after the first such Advance Credit was Transferred. If the Sponsor fails to meet these deadlines, the USACE, in consultation with the IRT, must either make a determination that more time is needed to plan and implement a Mitigation Project or, if doing so would not be in the public interest, direct the Sponsor to disburse funds from the Program Account to provide alternative Compensatory Mitigation to Fulfill the Compensatory Mitigation obligations associated with the Advance Credit Transfers.

Therefore, Advance Credits are proposed based on the requirements of 33 CFR 332.8(n), but also based on anticipated need and Mitigation Projects completed or currently in planning. The assessment of mitigation needs is based upon how the Habitat Plan has accrued Impacts to Aquatic Resources over the past 7 years of implementation; most projects have relatively small mitigation needs. For the Pajaro Watershed Service Area, Advance Credits are requested based on current planning for Mitigation Projects that could be implemented within the approximately 3-year timeline for completing “initial physical and biological improvements,” as required by the Compensatory Mitigation Rule. The primary project that would meet this standard is phase 1 of the Pacheco Creek Restoration Project for which a feasibility analysis was completed in October 2020. This project calls for the Restoration and enhancement of approximately 1.25 miles of Pacheco Creek, a tributary to the Pajaro River. Key features of the project include enhancing the main channel to support steelhead migration, reconnection to the floodplain through re-establishing remnant side-channels, restoring or enhancing three different types of riparian land cover types, and establishing and enhancing seasonal wetland.

2.10.2 Generation of Released Credits

Each Mitigation Plan approved by the IRT will include the method for determining the Released Credits to be generated by the individual Mitigation Project.

2.10.3 Credit Release

Each Mitigation Plan approved by the IRT will include a Credit Release schedule linked to the achievement of Performance Standards. As milestones in an individual Mitigation Project’s Credit Release schedule are reached (i.e., as Performance Standards for Rehabilitation, Establishment, enhancement, and/or Preservation are achieved), the Mitigation Project will generate Released Credits as set forth in the Mitigation Project’s Credit Release schedule. If the Sponsor is unable to reach one or more such milestones for a Mitigation Project, the IRT will coordinate with the Sponsor to modify the Credit Release schedule accordingly and will provide written notice of such modification to the Sponsor.

2.10.3.1 Timing of Credit Release

Released Credits will be generated once all of the following have occurred:

- the IRT has approved the Mitigation Plan for the Mitigation Project;
- applicable milestone(s) in the Credit Release schedule have been reached;
- the Sponsor has submitted a request for Credit Release to the IRT, along with documentation substantiating that the relevant milestones have been reached; and
- the IRT have provided written confirmation of Credit Release.

IRT Members will provide written confirmation of Credit Release, or will explain in writing why a confirmation of Credit Release will not be provided, within the time lines stipulated in 33 CFR 332.8(o)(9) which are forty-five (45) days of the Sponsor's submittal of a request for Credit Release.

2.10.3.2 Establishment, Enhancement, and Restoration Credits

The Sponsor will propose a project-specific Credit Release schedule for each Mitigation Project submitted to the IRT. Credit release schedules may vary based on the details and circumstances of individual Mitigation Projects.

2.10.3.3 Fulfilling Advance Credits

As Released Credits are produced by in-lieu fee projects, they must be used to Fulfill any Advance Credits that have already been provided within a Service Area before any remaining Released Credits can be sold or transferred to Permittees. Once previously provided Advance Credits have been fulfilled, an equal number of Advance Credits is re-allocated to the sponsor for sale or Transfer to Fulfill new mitigation requirements. The number of Advance Credits available to the sponsor at any given time to sell or Transfer to Permittees in a given Service Area is equal to the number of Advance Credits specified in the instrument, minus any that have already been provided but not yet fulfilled.

Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first Advance Credit in that Service Area is secured by a Permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project. If the district engineer determines that there is a Compensatory Mitigation deficit in a specific Service Area by the third growing season after the first Advance Credit in that Service Area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee Program Account to provide alternative Compensatory Mitigation to Fulfill those compensation obligations.

The sponsor is responsible for complying with the terms of the in-lieu fee program instrument. If the district engineer determines, as a result of review of annual reports on the operation of the in-lieu fee program, that it is not performing in compliance with its instrument, the district engineer will take appropriate action, which may include suspension of credit sales, to ensure compliance with the in-lieu fee program instrument. Permittees that secured Credits from the in-lieu fee program are not responsible for in-lieu fee program compliance.

2.10.3.4 Fee Schedule

The Compensatory Mitigation Rule (33 CFR 332.8 (d)(6)(iv)(B)) requires a draft fee schedule for Advance Credits, by Service Area, including an explanation of the draft fee schedule. The Sponsor intends to use the Habitat Plan fee schedule as the fee schedule for the ILF Program. This is appropriate because the Habitat Plan, as an NCCP, ensures the conservation of natural communities and their component parts, including Aquatic Resources. The requirements of NCCPs, as well as specific biological goals and objectives for Aquatic Resources, are described in detail in Section D.5, *Aquatic Resource Goals and Objectives*. Furthermore, a required regulatory finding for both HCPs (50 CFR 17.32(b)(2)(i)(C)) and NCCPs (California Fish and Game Code Section 2820(a)(10)) is that funding for implementation of the conservation strategy is ensured. To that end, the Habitat Plan

includes a detailed and robust cost estimate and funding strategy that ensures costs for mitigating Aquatic Resources are sufficiently met by Habitat Plan fees.

The Sponsor also proposes to use the same fee schedule for the two Service Areas. This is appropriate because the anticipated distribution of Mitigation Projects throughout the Program Area will be roughly evenly split and the costs of implementing Mitigation Projects are the same in the northern portion of the Program Area as in the southern portion. Furthermore, the Habitat Plan is being implemented with a consistent fee schedule throughout the Program Area and the cost and funding model (Exhibit J) was developed for the Program Area.

The Compensatory Mitigation Rule (33 CFR 332.8 (o)(5)(ii)) provides that the cost per unit of credit must include the expected costs associated with the Rehabilitation, Establishment, enhancement, and/or Preservation of Aquatic Resources in the Program 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.

The Program's fee schedule is provided in Exhibit I. The fee schedule is based on the analysis included in Exhibit J and was first established in 2013 when the Habitat Plan was approved and permitted. Exhibit J reflects a recent revision to the initial Habitat Plan cost calculations and provides detailed information on how the Habitat Plan costs, including those for Restoration and Creation, are established and how fees are updated in response to costs that change over time. As described in Exhibit J, the Habitat Plan identifies land acquisition costs associated with the following.

- The cost of land acquisition in fee title or easement.
- Due diligence:
 - Appraisal,
 - Title report,
 - Phase 1 site assessment,
 - Legal description,
 - Boundary survey, and
 - Monumentation.
- Pre-acquisition surveys.
- Site improvements (e.g., demolition or repair of unsafe facilities; repair of boundary fences; repair and replacement of gates; installation of boundary and landmark signs; road repair and/or removal; and repair and replacement of creek crossings).
- Endowment to fund management and maintenance costs in perpetuity.

The Habitat Plan identifies Restoration and Creation costs associated with the following.

- The cost of identifying and prioritizing potential Restoration and Creation sites.
- Design of Restoration/Creation projects.
- Development of plans, specifications, and engineering documents.

- Bid assistance.
- Pre-construction surveys for projects within the Reserve System³.
- Environmental compliance (covers permitting for Impacts to federal and state jurisdictional waters, and streambed alteration agreements).
- Construction within the Reserve System.
- Construction oversight and monitoring within the Reserve System.
- Post-construction monitoring and maintenance.
- Restoration and Creation repair necessary to meet success criteria specified in each reserve unit management plan (monitoring component) and site Restoration plans.
- Costs associated with using contractors to assist or do any of the Restoration/Creation components identified in the bullets above.
- Costs associated with the habitat Restoration/Creation employees.
- Monitoring and maintenance during and after the permit term.
- Contingency of 15% to account for the greater uncertainty in these costs (contingency costs for Restoration and Creation actions are independent of, and higher than, costs assumed for the general contingency fund described in Habitat Plan Section 9.3.6 *Contingency*).

The purpose of Exhibit J was to re-evaluate the cost assumptions initially developed for the Habitat Plan in 2012 and ensure that fees collected are meeting the actual mitigation costs of implementing the Habitat Plan. Exhibit J calculates the proportion of the cost of implementing the Habitat Plan conservation strategy allocated to mitigating the Impacts covered by the Habitat Plan and assigns these costs to appropriate cost centers (e.g., land acquisition, wetland Restoration). Exhibit J also meets the requirements of California’s Mitigation Fee Act which requires local agencies adopting impact fees to show that there is a reasonable relationship—or “nexus”—between the type of Impacts, the use of fee revenue, and the development projects upon which the fee is imposed. The Mitigation Fee Act also requires local agencies to show that the amount of the fee is roughly proportional to the impact of a development project.

Exhibit J explains and documents the basis for the fee schedule as of 2020. Acknowledging the dynamic nature of costs associated with implementation regional HCP/NCCPs, the Habitat Plan includes two mechanisms for adjusting fees: automatic annual adjustments and 5-year assessments. Habitat Plan fees are automatically updated on an annual basis based on a combination of the House Price Index (HPI) and the Consumer Price Index (CPI). In addition, every 5 years, the Habitat Agency conducts a fee assessment to review the actual costs of implementing Habitat Plan to ensure that fees collected are funding the mitigation requirements of the Habitat Plan. The current fee schedule (Exhibit I) reflects changes in fees that have been made since the time the Habitat Plan was permitted, including changes made based on the recent 5-year review.

2.10.4 Transfer of Credits

The Sponsor may Transfer Released Credits only to Fulfill the Compensatory Mitigation requirements of Permittees or the requirements of enforcement actions by one or more IRT Member

³ Defined as, “All Habitat Plan reserves considered collectively.”

involving Impacts on Aquatic Resources under the jurisdiction of such IRT Member. Each IRT Member retains the discretion to determine appropriate Compensatory Mitigation requirements for Permittees, including whether Program Credits may be used to Fulfill such requirements, in accordance with applicable laws and regulations. This Instrument does not guarantee that any IRT Member will accept the use of Program Credits for a proposed project. The responsibility to provide Compensatory Mitigation remains with each Permittee unless and until Program Credits are transferred to the Permittee. If an IRT Member determines that Program Credits may be used to Fulfill Compensatory Mitigation requirements for a proposed project, the Permittee may contact the Sponsor to secure the necessary amount and resource type of Credits, as set forth in the Permittee's permit conditions. IRT approval of Transfer of Credits from the Program does not signify the Sponsor's acceptance or confirmation of the Sponsor's offer to Transfer.

A credit Transfer agreement executed by the Sponsor substantively in the form attached hereto as Exhibit B shall be required to Transfer Program Credits. The Sponsor reserves the right to refuse to Transfer Credits from the Program for any reason. Once a Program credit is transferred, the Sponsor may allow a Permittee to relinquish or return such credit, subject to an administrative fee, if the Permittee's project is not approved or implemented, or if the project is modified so as to avoid the Impacts for which such credit was transferred.

Each Program credit may be used only once, for one project.

2.10.4.1 Requirements Following Transfer of Credits

Following the Transfer of a Program credit:

- proceeds from the Transfer will be deposited into the Program Account;
- the Sponsor will enter the pertinent Transfer information into RIBITS and include it in ILF Annual Reports; and
- subject to the limitations on any obligation on the part of the Sponsor, if a Mitigation Project site is damaged after the Program Establishment Date, and such damage materially impairs Aquatic Resources on such Mitigation Project site, then the IRT may, at its discretion, suspend further releases of Released Credits from such Mitigation Project site unless and until the Sponsor has reasonably restored such damaged area, if required, pursuant to a Remedial Action plan approved by the IRT.

2.10.5 Reservation of Credits

The Sponsor may enter into agreements with public or private individuals or entities to reserve Program Credits for their use (credit reservation agreements). Credit reservation agreements shall not provide or constitute an assurance or guarantee that any IRT Member will accept the use of such Program Credits for a proposed project. Regardless of such agreements, each IRT Member retains the discretion to determine appropriate Compensatory Mitigation requirements for Permittees, including whether Program Credits may be used to Fulfill such requirements, in accordance with applicable laws and regulations. However, credit reservation agreements may be used to establish financial and contractual terms and conditions under which the Sponsor will option, sell, or assign Program Credits prior to the Transfer of such Credits. For example, anticipating a need to Fulfill Compensatory Mitigation requirements for a proposed project, a project proponent may wish to reserve Program Credits to ensure that they are available if and when an IRT Member determines that Program Credits may be used to Fulfill such Compensatory Mitigation requirements. Credit

reservation agreements do not replace, or obviate the need for, a credit Transfer agreement to effectuate the Transfer of Program Credits.

2.11 Determination of Future Mitigation Project-Specific Credits

In accordance with 33 CFR 332.8(d)(6)(iv)(C), for each Mitigation Project proposed by the Sponsor to the IRT, the Sponsor will both propose the amount of each credit type and the Credit Release schedule based on the specifics of the Mitigation Project. The IRT will evaluate the expected Aquatic Resource benefits and proposed Credit Release schedule, and then determine the appropriate Credits and Credit Release schedule.

2.12 Program Account

In accordance with 33 CFR 332.8(d)(6)(ii)(B) and 33 CFR 332.8(i), the Sponsor will establish a Program Account, as set forth in Exhibit E, upon establishment of the Program.

The Sponsor maintains a detailed accounting system (Black Mountain Software) to track all financial debits and Credits. The Sponsor will establish a unique identifying code for each Mitigation Project and, using that code—along with various sub-codes—the Sponsor will track all costs associated with implementing each Mitigation Project.

Funding for mitigation activities is provided by fees obtained by the Sponsor from Habitat Plan applicants. These funds pay for the full cost of mitigating project effects on covered species and natural communities. The Sponsor charges fees based on the Impacts associated with each project. The Habitat Plan has six fee categories, four of which have subcategories. These include the following.

- Land Cover Fees (charged for covered activities that result in permanent land conversion)
 - Zone A: Ranchlands and Natural Lands
 - Zone B: Mostly Cultivated Agricultural Lands
 - Zone C: Small vacant sites between 0.5 and 10 acres surrounded by urban development
- Serpentine Fee (charged for projects converting serpentine land cover types)
- Nitrogen Deposition Fee
 - Charge either based on new vehicle trips created, OR
 - per new single-family home construction
- Burrowing Owl Fee (charged for projects converting occupied burrowing owl habitat)
- Wetland Mitigation Fees (charged for projects converting aquatic land cover types)
 - Willow Riparian Forest and Mixed Riparian
 - Central California Sycamore Woodland
 - Freshwater Marsh

- Seasonal Wetlands
- Pond
- Stream
- Temporary Impact fees (charged as a percentage of the full fee for projects with Impacts lasting less than one year)
 - Zone A: Ranchlands and Natural Lands
 - Zone B: Mostly Cultivated Agricultural Lands
 - Zone C: Small vacant sites between 0.5 and 10 acres surrounded by urban development
 - Serpentine
 - Burrowing Owl
 - Wetland (applies to all wetland subcategories)

Of these six fee categories, two apply to projects seeking Credits under this ILF Program. These fees include:

- **Land Cover Fees** – Land cover fees are assessed based on permanent land conversion of a project site and represent the average per-acre cost to mitigate Impacts on a land cover before additional costs associated with other types of mitigation (e.g., wetland Restoration) are considered. Land cover fees are designed to cover costs of Preservation (acquisition) and subsequent management and monitoring of preserved lands in perpetuity (endowment funding is built into the fees).
- **Wetland Mitigation Fees⁴** – Wetland mitigation fees are additive to land cover fees and represent the average per-acre cost to mitigate Impacts on wetland and waters land cover types. Unique fees apply to the above-listed fee subcategories. The wetland mitigation fees are intended to cover the full cost of the habitat Restoration or Creation needed to mitigate for Impacts, including design, implementation, post-construction monitoring, and remedial measures. The fee also covers the cost of environmental compliance, management in perpetuity, and biological monitoring on restored wetlands in perpetuity. Wetland mitigation fees vary by wetland type to account for the different costs of Restoration.

Exhibit D provides a crosswalk explaining how these aquatic habitats align with the ILF Wetland and Other Water credit types.

Under the ILF Program, wetland fees will be deposited into the designated ILF Program Account. These funds will provide a revenue source to fund site selection, design, implementation, and management of Mitigation Projects through the ILF Program. Land cover fees and post-permit (after 2063) management endowment will continue to be tracked in Habitat Plan accounts.

Upon request, the Sponsor will provide to any requesting IRT Member copies of any audited financial statements for any completed fiscal year. The IRT may inspect and review Program Account records by giving thirty (30) days advance written notice to the Sponsor. When so

⁴ The Habitat Plan uses the term “wetland fee” or “wetland mitigation fee” to refer collectively to all impact fees required for impacts to Aquatic resources including wetlands, ponds, streams, and riparian land cover types. The term is retained in the ILF Instrument for consistency.

requested, the Sponsor will make available for inspection all books, accounts, reports, files, and other records relating to the Program Account.

A percentage of funds received from the Transfer of Released Credits will be used by the Sponsor to cover the cost of administering the Program. The percentage of funds to be used by the Sponsor to cover administrative costs is set forth in Exhibit E.

2.12.1 Fund Disbursement for Implementing Mitigation Projects

The Sponsor may disburse funds from the Program Account to cover the costs of implementing Mitigation Projects. Each Mitigation Project will be implemented in accordance with a Mitigation Plan approved the IRT. Each Mitigation Plan will include a detailed budget, and the Sponsor's disbursements from the Program Account will be made in accordance with the budget. Any proposed increase in excess of ten percent (10%) of the Mitigation Project's budget will require the advance approval of the IRT.

The Sponsor may enter into contracts with third parties for the development, implementation, and/or long-term stewardship of individual Mitigation Projects. The Sponsor will pay third parties performing work to implement a Mitigation Project in accordance with the budget included in the approved Mitigation Plan for the Mitigation Project.

2.12.2 Fund Disbursement for Long-Term Management and Maintenance of Mitigation Project Sites

Funds for long-term management and maintenance of Mitigation Projects will be held in the Program Account for management during the Habitat Plan 50-year permit term (through 2063). Management funds required for management after 2063 will be held in the Sponsor's endowment management account. The Sponsor will establish an accounting code for funds within the Program Account for each Mitigation Project for the long-term management and maintenance of the Mitigation Project site. Funding for each Mitigation Project will be tracked and reported separately in each ILF Annual Report. The Sponsor will disburse funds from the Program Account to the land manager for its performance of land management activities on the Mitigation Project site in accordance with the Long-Term Management Plan for the site.

2.13 Mitigation Project Establishment and Operation

The Sponsor will Establish and operate Mitigation Projects as provided in this Section. All Mitigation Projects will require the approval of the IRT, and each Mitigation Project will be proposed by the Sponsor and reviewed by the IRT as provided in this Section. The steps that will be required for review of Mitigation Projects are illustrated in Exhibit F.

2.13.1 Establishment of Mitigation Projects

The Sponsor will evaluate potential Mitigation Project sites using the prioritization criteria set forth in the Compensation Planning Framework (Exhibit D). If Advance Credits have been transferred, and the Sponsor has not yet satisfied its responsibility to provide Compensatory Mitigation with respect to such Advance Credits, Mitigation Project sites that would help to satisfy that responsibility will be prioritized. Once the Sponsor has identified a site, it will identify a proposed Mitigation Project that

would measurably advance one or more objectives identified in the Compensation Planning Framework and will prepare a conceptual Mitigation Plan that describes the proposed Mitigation Project, explains the general Mitigation Project site characteristics, and explains the Compensation Planning Framework criteria that led the Sponsor to select the site. Upon approval of the conceptual Mitigation Plan by the IRT, the Sponsor will prepare a Mitigation Plan for the proposed Mitigation Project that includes the items in 33 CFR 332.4(c)(2) through (c)(14) and an Interim Management Plan, and will submit the Mitigation Plan to the IRT for review in accordance with 33 CFR 332.8(g) and *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State* (Procedures) Subpart J, Section 230.93(d)(1) (State Water Resources Control Board 2019). In particular, Mitigation Projects along creek channels should be designed with a sinuosity, channel gradient, bank full channel width and depth, and floodplain elevation that are in geomorphic equilibrium with the watershed. A mitigation and monitoring plan template is attached as Exhibit G. As provided in 33 CFR 332.8(g), the review process for Mitigation Plans will follow the steps outlined for ILF Program instrument modifications set forth in 33 CFR 332.8(d) or, if the IRT determines that a streamlined review process is warranted, the steps outlined in 33 CFR 332.8(g)(2).

2.13.1.1 Mitigation Project Permits

The Sponsor or third parties under contract or agreement with the Sponsor will obtain all permits and authorizations required to construct and maintain an approved Mitigation Project. This Instrument does not constitute any such permit or authorization that may be required from any of the IRT Members for a Mitigation Project.

2.13.2 Operation of Mitigation Projects

Upon approval of a Mitigation Plan for a Mitigation Project, the Sponsor will be responsible for implementing the Mitigation Plan in accordance with this Section.

2.13.2.1 Interim Management and Monitoring

The Sponsor will conduct management and monitoring activities according to the Interim Management Plan until completion of the Interim Management Period for the applicable Mitigation Project.

2.13.2.2 Remedial Action Plan

If, prior to the end of the interim management period, any Party discovers any failure to achieve the Performance Standards within applicable time periods or any injury or adverse impact to a Mitigation Project site as established, restored, enhanced, or preserved, the Party making the discovery will notify the other Parties. Subject to the limitations on any obligation on the part of the Sponsor, the IRT may require the Sponsor to develop and implement a Remedial Action plan to remedy such condition, as described in this Section.

Within sixty (60) days of the date of written notice from the IRT, the Sponsor will 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 Mitigation Project site and set forth a schedule within which the Sponsor will implement those

actions. The cost to complete any Remedial Action will be limited to Program contingency funds and the financial assurances established for that Mitigation Project. Should the Sponsor and IRT agree that it is physically or financially unviable to complete Remedial Actions on the Mitigation Project site, the Sponsor must propose an alternative site or mechanism to replace any acreage or habitat values that were impacted or did not achieve the described Performance Standards, to the extent Program contingency funds are adequate for such alternative site or mechanism. The Sponsor will implement the necessary and appropriate Remedial Action in accordance with the Remedial Action plan approved by the IRT, subject to the limitations of this Section. In the event the Sponsor fails to submit a Remedial Action plan to the IRT or fails to implement a Remedial Action plan in accordance with this Section, the IRT may notify the Sponsor of a potential default in accordance with Section 2.4.4, *Default* and may identify Remedial Actions the IRT Member(s) deem necessary to address the potential default.

2.13.2.3 Long-Term Management and Monitoring

The Sponsor will be responsible for preparing Long-Term Management Plans for Mitigation Projects in accordance with 33 CFR 332.4(c)(11). Mitigation Projects will be designed, to the maximum extent practicable, to be self-sustaining once Performance Standards have been achieved. Once the Interim Management Period is completed, the Sponsor will be obligated to arrange for the management and monitoring of the Mitigation Project site in perpetuity to Preserve its habitat and conservation values in accordance with this Instrument, the Conservation Easement, and the Long-Term Management Plan.

The Sponsor itself might not perform long-term management activities. Instead, the Sponsor may contract with or otherwise Transfer the responsibilities for the long-term management and monitoring of a Mitigation Project site to appropriate and experienced land management and monitoring partners, such as nonprofit organizations, private entities, governmental entities, and others with experience in the Mitigation Project site community who are willing to own the Mitigation Project sites, and/or hold Conservation Easements on them, and/or perform the required long-term management activities. The Transfer agreement will be approved by the IRT and may require the IRT Members to be third party beneficiaries, as appropriate.

The IRT and the Sponsor, or the designated long-term land managers, will meet and confer upon the request of any one of them to consider mutually agreeable revisions to the Long-Term Management Plan that would better conserve the habitat and conservation values of the Mitigation Project site.

2.13.2.4 Long-Term Ownership and Protection

The Sponsor will be responsible for ensuring long-term protection of each Mitigation Project, in accordance with 33 CFR 332.7(a), the details of which will be provided in the Mitigation Plan for each Mitigation Project. However, as previously stated, the Sponsor itself might not own Mitigation Project sites or hold Conservation Easements on them. Instead, the project Sponsor may contract with or otherwise Transfer the responsibilities for the long-term management and monitoring of Mitigation 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 project site willing to own the Mitigation Project site(s) and/or hold Conservation Easements on them.

The Sponsor will ensure that a Conservation Easement or other protection mechanism is in place prior to the first release of Released Credits. A draft Conservation Easement will be submitted to the IRT for review and approval (see Exhibit C). The form of Conservation Easement will provide for IRT Members to have third-party enforcement rights, as appropriate. A copy of the recorded Conservation Easement will be furnished to the IRT upon request and will become part of the official Program record. If any action is taken to void or modify a Mitigation Project Conservation Easement, the Sponsor must notify the IRT in writing.

2.13.2.5 Inspections

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

2.14 ILF Coordination with Other Habitat Agency Programs

The Habitat Agency will implement the ILF Program in concert with other existing and future programs (see Exhibit H).

2.15 Other Provisions

2.15.1 Program Establishment Date

The Program Establishment Date will occur on the date this Instrument is executed by the USACE district engineer and, per 33 CFR 332.8(i)(1), after the Program Account is established. Within thirty (30) days of the Program Establishment Date, the Sponsor will upload the final, signed Instrument, including all of its exhibits, to RIBITS and provide an electronic copy to each IRT Member.

2.15.2 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 will be fully set forth in a separate document signed by all Parties that will be appended to this Instrument, except that any amendment to add an approved Mitigation Plan need only be executed by signature of those Parties that approved the Mitigation Plan.

The IRT may use a streamlined modification review process under 33 CFR 332.8(g)(2) for changes to the Instrument 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 are not significant and therefore do not warrant the full amendment process, such as making a non-signatory IRT Member a signatory to this Instrument.

2.15.3 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 will 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 within the Instrument will control. The captions and headings are for convenient reference only and will not define or limit any of terms or provisions.

2.15.4 Entire Agreement

This Instrument, including its exhibits and documents incorporated by reference, constitutes the final, complete, and exclusive statement of the terms of the agreement between and among the Parties pertaining to the Program, and supersedes 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, will be binding or valid. No alteration or variation of this instrument will be valid or binding unless made in writing in accordance with Section 2.15.2, *Modification and Amendment of Instrument*. 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.

2.15.5 Reasonableness and Good Faith

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

2.15.6 Successors and Assigns

This Instrument and each of its covenants and conditions will be binding on and will inure to the benefit of the Parties and their respective successors and assigns, subject to the limitations on Transfer set forth herein. The Sponsor will have the right to assign or otherwise Transfer the Program at any time, subject to the prior written approval of the IRT, provided that the Sponsor is in full compliance with this Instrument. In addition, prior to assignment, Transfer, sale or conveyance, the Sponsor will 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 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 2.4.5, *Closure of Program*.

2.15.7 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, will not be affected unless an essential purpose of this Instrument would be defeated by loss of the invalid or unenforceable provision.

2.15.8 Notices

Any notice, demand, approval, request, or other communication permitted or required by this Instrument will be in writing and deemed given when delivered personally, transmitted electronically with verified receipt, or sent by recognized overnight delivery service, addressed as set forth below, or five (5) days after deposit in the U.S. mail, postage prepaid, and addressed as set forth below.

Notice by any Party to any other Party will be given to all Parties. Such notice will not be effective until it has been received by all Parties.

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.

Sponsor:

Santa Clara Valley Habitat Agency
535 Alkire Avenue
Morgan Hill, CA 95037
Attn: Executive Officer
Telephone: (408) 779-7261

Parties:

U.S. Army Corps of Engineers
San Francisco District
450 Golden Gate Avenue, 4th Floor
San Francisco, CA 94102
Attn: Chief, Regulatory Division
Telephone: (415) 503-6702

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

National Marine Fisheries Service
West Coast Region
777 Sonoma Ave., Rm 325
Santa Rosa, CA 95404
Attn: Chief, San Francisco Bay and Central Coast Branches
Telephone: (707) 575-6050

San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
510-622-2300

Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906
805-549-3147

U.S. Fish and Wildlife Service
2800 Cottage Way, Suite W-2605
Sacramento, CA 95825
Attn: Coast-Bay Division Chief
916-414-6464

2.15.9 No Third-Party Beneficiaries

Except to the extent expressly stated herein, this Instrument will not create any third-party beneficiary hereto, nor will 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 will remain as otherwise provided by law as though this Instrument had never been executed.

2.15.10 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 IRT Member 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.

2.15.11 No Partnerships

This Instrument will not make or be deemed to make any Party an agent for or the partner or joint venture of any other Party.

2.15.12 Governing Law

This Instrument will 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 1.1, *Recitals*. However, nothing in this Instrument is intended or will be construed as a waiver of sovereign immunity beyond that which has been granted by the United States legislature in applicable federal laws.

2.15.13 Headings and Captions

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

2.15.14 Legal Document

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 or local agency participation in and approval of this Instrument is in furtherance of its regulatory obligations under applicable state laws and regulations. The Instrument is the legal document for the Establishment, operation, and use of the Program pursuant to 33 CFR 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.”

2.16 Execution

Each of the undersigned certifies that he or she has full authority to bind the Party that he or she represents for the purpose of entering into this Instrument. This Instrument may be executed in multiple counterparts, each of which will be deemed an original and all of which together will constitute a single executed agreement. 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:



Edmund Sullivan
Executive Officer
Santa Clara Valley Habitat Agency

4/21/23

Date



Kevin P. Arnett, P.E.
Lieutenant Colonel, U.S. Army
District Commander and Engineer
U.S. Army Corps of Engineers, San Francisco District

 Date: 2023.05.04 18:48:27
-07'00'

Date



Sahrye Cohen
Director, Water Division
U.S. Environmental Protection Agency, Region IX

 Digitally signed by SAHRYE COHEN
Date: 2023.05.15 18:02:58 -07'00'

Date



Jennifer Quan
Regional Administrator
National Marine Fisheries Service West Coast Region
U.S. Department of Commerce

June 12, 2023

Date

Eileen White
Executive Officer, San Francisco Bay Region (Region 2)
San Francisco Bay Regional Water Quality Control Board

Date

Executive Officer, Central Coast Region (Region 3)
Central Coast Regional Water Quality Control Board

Date

Michael Fris
Field Supervisor, Sacramento Fish and Wildlife Office
U.S. Fish and Wildlife Service

Date

Exhibit A

Program Area and Service Areas

Exhibit B

Credit Release, Transfer, and Tracking

Exhibit C

Conservation Easement Template

Exhibit D

Compensation Planning Framework

Exhibit E

Program Account Terms and Procedures

Exhibit F

Mitigation Project Development Process

Exhibit G

Mitigation and Monitoring Plan Template

Exhibit H

Coordination with Other Habitat Agency Programs

Exhibit I

Habitat Agency Fee Schedule

Exhibit J

**Five-Year Review of the Santa Clara Valley Habitat Plan
Costs, Funding & Development Fees**
