**MODEL AMENDMENT TO INCORPORATE ADVANCE MITIGATION LANGUAGE FOR B E I’s THAT UTILIZED THE 2008** [If B E I does not include Credit Release Fee or Implementation Fee, preparer should consult CDFW] **or 2017 B E I TEMPLATE**

# **AMENDMENT NUMBER \_\_\_**

# **TO THE BANK ENABLING INSTRUMENT**

# **[BANK NAME] [choose one: MITIGATION or CONSERVATION] BANK**

This Amendment #\_\_\_ to the Bank Enabling Instrument [Bank Name] [**choose one**: Mitigation or Conservation] Bank (“Amendment”) is made by and among the [Sponsor Name] (“Bank Sponsor”), [Property Owner Name] (“Property Owner”) **[delete name(s) of any of the following agencies which is not a party]**: the\_\_\_\_\_\_\_\_\_ District of the U S Army Corps of Engineers (“U S A C E”), Region IX of the U S Environmental Protection Agency (“U S E P A”), the U S Fish and Wildlife Service (“U S F W S”), the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“N M F S”), State Water Resources Control Board (“State Water Board”), California Regional Water Quality Control Board, Region\_\_\_\_\_\_\_(“Regional Water Board”), and the California Department of Fish and Wildlife (“CDFW”). **[Choose one:** These agencies comprise and are referred to jointly as the Interagency Review Team (“IRT”) **or** **in the event some IRT members are not a party use:** These agencies comprise and are referred to jointly as the “Signatory Agencies” or individually “Signatory Agency”.**]** The Bank Sponsor and the **[choose one**: IRT or Signatory Agencies] are hereinafter referred to jointly as the “Parties.” [**Note: The terminology in this Amendment should be consistent with the terminology utilized in the B E I.**]

## R**ECITALS**

WHEREAS, the Parties entered into the Bank Enabling Instrument [Bank Name] [choose one: Mitigation or Conservation] Bank (“B E I”), effective [Date] [If the B E I has been previously amended add: and amended on [Date]]. All capitalized terms used herein and not otherwise defined shall have the meanings set forth in the B E I.

WHEREAS, the Bank Sponsor, wishes to modify the B E I to allow the Sale of Credits before a purchaser obtains any permits, approvals, or other authorizations for a particular project’s impacts.

[Include if CDFW is signatory to the B E I] WHEREAS, CDFW has determined that Bank Sponsor has complied with the requirements of California Fish and Game Code Section 1798.6, which sets forth requirements to formally modify and amend the B E I.

[Include this recital, including subparts 1 through 3 if the Corps is signatory to the B E I; otherwise delete]

WHEREAS, Federal regulations at 33 CFR 332.8(g) and 40 CFR 230.98(g) set forth procedures for the U S A C E and U S E P A to formally modify and amend the B E I. In accordance with the regulations:

1. On [Date], U S A C E notified the IRT and the Bank Sponsor of its determination to use the streamlined review process described in the regulations and provided them copies of this B E I Amendment #.\_\_\_. U S A C E [**choose**: did or did not] receive any substantive comments during the 30-day review period.
2. On [Date], U S A C E notified the IRT that it intended to approve this B E I Amendment #\_\_\_. The IRT did not object to this B E I Amendment #\_\_\_ within 15 days of receipt of the notification or the dispute resolution process was initiated in accordance with 33 CFR 332.8(e) and concluded on [Date].
3. On [Date], U S A C E notified the Bank Sponsor of its final decision to approve this B E I Amendment #\_\_\_.

[For recitals below that reference a specific section or exhibit of the B E I, Sponsor’s will need to insert the appropriate provision in their approved B E I, which may differ from the Sections in the B E I template.]

WHEREAS Section XII.D.1 of the B E I states that the B E I, including its Exhibits, may be amended or modified only with the written approval of the Parties, which approval may be withheld or denied, and that all amendments and modifications shall be fully set forth in a separate document signed by all Parties that shall be appended to the B E I.

Now THEREFORE, in consideration of the foregoing facts, the Parties hereby agree as follows:

## AGREEMENTS

1. Section II (“Definitions”) of the B E I shall be revised in part to replace the definitions for “Bank Establishment Date”, “Credit Release”, “Performance Security”, “Service Area”, and “Transfer” in their entirety with the following:

“Bank Establishment Date” is the date determined pursuant to Section V.

“Credit Release” means an action by the agency with authority to make specified Credits available for Sale and/or Transfer pursuant to this B E I, as set forth in Section VII.

“Performance Security” means the financial assurance specified in Section VI.B and Exhibit C-3, to be provided by the Bank Sponsor to guarantee the Bank Sponsor’s obligations under this B E I through Bank closure.

[**Delete if B E I is based on the 2008 B E I template**] “Service Area” means the geographic area(s) within which impacts to Waters of the U S , Waters of the State, Covered Species, or Covered Habitat that occur may be mitigated or compensated at the Bank.

“Transfer” means the use or application of Credits to mitigate for a particular project’s impacts.

1. The following definitions shall be added to Section II (“Definitions”) of the B E I:

“Permittee” means a person or entity seeking a Transfer.

[**Delete if used in the original B E I**]. “Regulatory In-lieu Fee and Bank Information Tracking System (R I B I T S)” is a web-based application that provides information to the IRT, Bank Sponsors, agencies, and the general public on mitigation banks and in-lieu fee (ILF) programs, associated documents, Credit availability, service areas, and information on policies and procedures that affect mitigation bank and ILF development and operation.

“Sale” means the sale of Credits by the Bank Sponsor. A Sale without a Transfer does not confer legal responsibility for providing compensatory mitigation to the Bank Sponsor.

“Sub-Ledger” means an entry under an individual ledger transaction created at the time of the first Transfer of Credits sold as a Sale without a Transfer of Credits that tracks the use of those Credits, including the time of Transfer and associated permit(s), authorizations, and/or approvals.

1. Section III.C.6 of the B E I shall be revised in part to:

a. Replace entirely the "F-2 Credit Purchase Agreement and Payment Receipt Templates" exhibits with the following "F-2: Credit Sales and Transfer Agreements and Payment Receipt Templates" exhibits attached hereto and incorporated herein:

F-2a: Credit Sales Agreement;

F-2b: California Department of Transportation (Caltrans) Standard (STD) 213/Credit Sales Agreement;

F-2c: Combined Credit Sale and Transfer Agreement;

F-2d: Caltrans Combined Credit Sale and Transfer Agreement/STD 213;

F-2e: Credit Transfer Agreement; and

F-2f: Caltrans STD 213/Credit Transfer Agreement

 b. [**Choose appropriate language: Delete if exhibit was not included in the B E I**]. Replace entirely the " R I B I T S Conservation Bank Transactions" exhibit with the exhibit as follows: F-4: Instructions for Species Credits Transfers Using R I B I T S,” attached hereto and incorporated herein.

 [**Delete if the exhibit below is already included in the B E I or if not applicable**]. Amend the B E I to add the following reference and exhibit:“F-4: Instructions for Species Credits Transfers Using R I B I T S”, attached hereto and incorporated herein.

c. [**Delete if the exhibit is already included in the B E I or if not applicable**]. Amend the B E I to add the following reference and exhibit: “Exhibit F-5: Credit Release Schedule and Funding Schedule for Covered Species and Covered Habitat,” attached hereto and incorporated herein.

1. Section V (“Bank Establishment Date”) of the B E I shall be revised in part to replace the first sentence with: The Bank Establishment Date is the date when the [**Choose one**: IRT or Signatory Agencies] has received documentation confirming that all of the following actions have occurred:
2. Section VI.B. (“Performance Security”) of the B E I shall be replaced in its entirety as follows:

1. Concurrent with the Sale of the first Credit, Bank Sponsor shall furnish the Performance Security in the amount of 20% of the Construction Security in the amount specified in **Exhibit C-3**. The Performance Security shall be in the form of **[Choose one**: an irrevocable standby letter of credit, check or a cashier’s check (check or cashier’s check may only be used if CDFW is holding the security)]. The Bank Sponsor shall ensure the Performance Security shall remain available in the full amount, until cancelled, in accordance with Section VIII.E.1.b.

2. Following the final Credit Release, the Bank Sponsor may request the reduction of the Performance Security by a maximum of 50%. The Bank Sponsor must submit a letter to the [choose one: IRT or Signatory Agencies] requesting the reduction of the Performance Security and identifying how the Bank Sponsor has met its obligations under the B E I. At a minimum, the letter must include the following:

1. A risk assessment identifying the reasonably foreseeable Remedial Action needs on the Bank during the Long-Term Management Period through Bank Closure.
2. A statement that the Bank Sponsor has met their obligations under the B E I, including but not limited to all reporting requirements, financial obligations, performance standards and remedial actions, as applicable.
3. The first sentence of Section VI.C. (“Interim Management Security”) of the B E I shall be revised in part to replace the phrase “Transfer of the first Credit” with “Sale of the first Credit.”
4. Section VII (“Credit Release”) of the B E I shall be revised in part to replace all references to the word “Transfer” with “Sale and/or Transfer.”
5. Section VIII.B. [If 2008 BEI use: **(**“Transfer of Credits”)] [If BEIs based on 2017 template use: (“Transfer and Use of Credits”)] of the B E I shall be renamed “Sale and/or Transfer of Credits” and shall be replaced in its entirety as follows:

“B. Sale and/or Transfer of Credits

1. The Sale and/or Transfer of released Credits may begin only upon the Bank Establishment Date. Bank Sponsor shall have the exclusive right to determine the price for any and all Credits it offers for Sale. The minimum Credit unit that may be Transferred is 0.01 Credit.]

2. In no case shall the number of Credits offered for Sale and/or Transfer exceed the total number and type of released Credits, as evidenced by written approval by the [**Choose one**: IRT agency or Signatory Agency] with jurisdiction over those Credits.

3. The Sale of Credits without a Transfer does not guarantee that the Credits purchased will be acceptable compensatory mitigation for any particular project. Legal responsibility for providing the compensatory mitigation is not transferred from the Permittee to the Bank Sponsor until there is a Transfer associated with a specific permit, approval, or authorization made pursuant to a written Credit Transfer Agreement in the form of Exhibit F-2e or Exhibit F-2f, by the [Choose one: IRT or Signatory Agencies].

4. Transfer to compensate for unavoidable impacts to Waters of the U S Waters of the State, Covered Species, or Covered Habitat under any permit, biological opinion, approval(s), or authorization(s) issued by an agency approving use of the specified Credits as compensatory mitigation, can only occur after approval by the agency or agencies executing such permit(s), approval(s), or authorization(s) or issuing such an opinion. Approval is determined on a case-by-case basis to ensure the use is appropriate to compensate for the impacts of the specific project to which the Credits are proposed to be applied. Mitigation or compensation requirements for individual project impacts may or may not be compatible with the use of mitigation banks, generally, or any particular mitigation bank, specifically.

5. A Transfer may occur only if the Bank Sponsor has received all of the following: (A) a copy of the permit(s)/approval(s)/authorization(s) by the agency approving the use of the specified purchased Credits; (B) written notice from the Permittee that it is electing to use the specified purchased Credits toward the permit(s)/approval(s)/authorization(s) obligation; and (C) confirmation that the Bank Sponsor has accepted the legal responsibility for providing the required compensatory mitigation of such permit(s)/approval(s)/authorization(s).

6. Each Sale of Credits without a Transfer shall be made pursuant to a written Credit Sale Agreement in the form of Exhibit F-2a, Exhibit F-2b, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion. Subsequent Transfer of Credits shall be made pursuant to a written Credit Transfer Agreement in the form of Exhibit F-2e, Exhibit F-2f, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion.

7. Each combined Sale and Transfer of Credits to a Permittee shall be made pursuant to a written Combined Credit Sale and Transfer Agreement in the form of Exhibit F-2c, Exhibit F-2d, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion. [Remove if U S F W S is not a party: Prior to Transfer, Bank Sponsor shall upload pending Covered Species and Covered Habitat Combined Credit Sales and Transfer Agreements into R I B I T S for approval by U S F W S, per Exhibit F-4.]

8. Bank Sponsor shall notify the [**Choose one**: IRT or Signatory Agencies, with a courtesy copy to the IRT,] upon any Credit Sale and/or Transfer in accordance with Section IX of this B E I. [**Remove if U S F W S is not a party: Bank Sponsor shall enter pending Covered Species and Covered Habitat Credit Sales and/or Transfers into R I B I T S for approval by U S F W S, per Exhibit F-4**.]

9. If the Bank Property is damaged after the Bank Establishment Date and such damage materially impairs any or all Waters of the U S, Waters of the State, or habitat related to Covered Species or Covered Habitat on such damaged Bank Property, the Bank Sponsor and/or Property Owner shall implement the provisions of Section VIII.F or Section XII.A. Failure to comply with either Section shall constitute default, and the [**Choose one**: IRT or Signatory Agencies] will take action accordingly.

10. This B E I applies only to those Credits released by agencies that are signatory to this B E I and set forth in Exhibit F-1.”

1. Section VIII.D.1. (“Bank Closure Plan”) of the B E I shall be revised in its entirety as follows: “Upon Bank closure, no further Credit Sale or Transfer shall occur.”
2. Section IX.B.3. (“Transfer of Credits”) of the B E I shall be renamed “Sale and/or Transfer of Credits” and shall be replaced in its entirety as follows:
3. “The Bank Sponsor shall submit an annual report that includes an updated ledger (Exhibit F-3) showing all Sales and Transfers since the Bank Establishment Date including Credits available for Sale and/or Transfer, along with an updated Sub-Ledger(s), if applicable.
4. The Bank Sponsor shall submit an annual report that documents the [Based on the approved B E I, use: Implementation Fee or Credit Release Fee] payment status, if applicable.
5. Section IX.C. “Credit Transfer Reporting” of the B E I shall be renamed “Reporting of Credit Sales without a Transfer” and shall be replaced in its entirety as follows:

“Upon each Sale without a Transfer, the Bank Sponsor shall enter the Sale information into the R I B I T S ledger, upload an electronic copy of the Credit Sale Agreement into the appropriate R I B I T S folder, and submit to each member of the [**Choose one**: IRT or Signatory Agencies, with courtesy copy to the IRT]:

1. A copy of the fully executed Credit Sale Agreement in the form of Exhibit F-2a or Exhibit F-2b, as applicable, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion.

2. A Sub-Ledger, in editable electronic format, in the form of Exhibit F-3.”

1. The following new section is added to the B E I as Section IX.D “Credit Sale and/or Transfer Reporting”:

“Upon Sale and/or Transfer of each and every Credit, the Bank Sponsor shall enter the Sale and/or Transfer into the R I B I T S ledger, upload an electronic copy of the finalized Credit Sales and/or Transfer agreement into the appropriate R I B I T S folder. For a Transfer of a Credit that was sold in a Sale without a Transfer, the Bank Sponsor shall create or update a Sub-Ledger in R I B I T S under the individual ledger entry for the Sale without a Transfer. The Banks Sponsor shall submit the following to the [**Choose one**: IRT or Signatory Agencies, with courtesy copy to the IRT]:

1. A copy of the fully executed Credit Sale Agreement in the form of Exhibit F-2a or Exhibit F-2b, as applicable, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion, the fully executed Credit Transfer Agreement in the form of Exhibit F-2e or Exhibit F-2f, as applicable, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion, or a copy of the fully executed Combined Credit Sale and Transfer Agreement in the form of Exhibit F-2c or Exhibit F-2d, as applicable, or substantially similar form approved in writing by the [**Choose one**: IRT or Signatory Agencies] in its sole and absolute discretion.

2. An updated Credit ledger, in electronic format, in the form of Exhibit F-3.

3. An updated Sub-Ledger in electronic format, in the form of Exhibit F-3, if applicable.”

1. [For B E I’s based on the 2017 B E I template:] Section IX.D. (“Reporting Compliance Measures”) shall be renumbered and renamed Section IX.E. “Reporting Compliance Measures” and shall be replaced in its entirety as follows: [For B E I’s based on the 2008 B E I template: Section IX shall be revised in part to add a new section, “Section IX E. Reporting Compliance Measures” that shall read as follows].
2. “If Bank Sponsor fails to submit complete reports on time, the Bank Sponsor is in default.
3. Annual reports not received by the [**Choose one**: IRT or Signatory Agencies] will result in automatic Credit Sale and Transfer suspension effective the 30th day that the report is past due. The suspension will be lifted within 10 calendar days after the [**Choose one**: IRT or Signatory Agencies]receives a complete annual report.
4. If the Bank Sponsor has been notified by the [**Choose one**: IRT or Signatory Agencies] of an incomplete report, the [**Choose one**: IRT or Signatory Agencies] will notify the Bank Sponsor of the date by which the report must be made complete.
5. If Property Owner fails to submit complete reports on time, the Property Owner is in default. If the Property Owner has been notified by the [**Choose one**: IRT or Signatory Agencies] of an incomplete annual report, the [**Choose one**: IRT or Signatory Agencies] will notify the Property Owner of the date by which the annual report must be made complete.”
6. [**Choose one**: For the 2017 B E I: Section X.A.3 (“Responsibilities of the Bank Sponsor and Property Owner”) of the B E I or for the 2008 B E I: Section X.1.c\_\_\_ (“Responsibilities of the Bank Sponsor and Property Owner”)] shall be replaced in its entirety as follows:

“Bank Sponsor shall assume responsibility for compensatory mitigation requirements of U S A C E permits for which it Transfers Credits once a U S A C E Permittee has secured the appropriate number and type of Credit(s) from the Bank Sponsor. Bank Sponsor shall provide U S A C E with the written Credit Transfer Agreement or Combined Credit Sale and Transfer Agreement (**Exhibit F-2**) confirming the Bank Sponsor has accepted the responsibility for providing the required compensatory mitigation requirements of such Department of the Army permit.”

1. [**Choose one**: For the 2017 B E I: Section X.A.4 (“Responsibilities of the Bank Sponsor and Property Owner”) of the B E I shall be replaced in its entirety as follows: or for the 2008 B E I: Section X (“Responsibilities of the Bank Sponsor and Property Owner”) of the B E I shall be revised in part to add a new section, Section X.1.\_\_, that shall read as follows:]

“The Bank Sponsor shall perform the actions described in this B E I and its Exhibits to support all Credits. The Bank Sponsor shall provide [**Choose one**: IRT or Signatory Agencies] with the written Credit Transfer Agreement or Combined Credit Sale and Transfer Agreement (**Exhibit F-2**) for all Credits secured by project proponents/action agencies that confirms that the Bank Sponsor will continue to perform the aforementioned actions.”

1. Section XII.D.2.b (“Termination”) of the B E I shall be replaced in its entirety as follows: “If this B E I is terminated or the Bank is closed prior to the Sale of all authorized Credits, any remaining Credits, including, without limitation any Credits sold without a Transfer, shall be extinguished and will no longer be available for Sale and/or Transfer.”
2. Section XII.D.2.g (“Termination”) of the B E I shall be replaced in its entirety as follows:

“Termination by any [**Choose one**: IRT agency or Signatory Agency]of its participation in this B E I shall not terminate this B E I or affect the relationship between the remaining [**Choose one**: IRT agencies or Signatory Agencies]toward each other or the Bank Sponsor or Property Owner under this B E I. Remaining Credits, including unused Credits sold without a Transfer, under the authority of the terminating [**Choose one**: IRT agency or Signatory Agency]will no longer be available for Sale and/or Transfer. Consistent with Section VIII.E.1., in the event [**Choose one**, as applicable: CDFW or U S A C E], as the holder of the Construction Security, Interim Management Security, and Performance Security, terminates its participation in this B E I, the Bank Sponsor shall provide replacement Construction Security, Interim Management Security, and Performance Security in the amount specified in this B E I within 20 calendar days after receiving written notice of termination from [**Choose one**, as applicable: CDFW or U S A C E]. In the event the remaining [**Choose one**: IRT agencies or Signatory Agencies]are unable to hold the Construction Security, Interim Management Security, and Performance Security specified in Section VI, the remaining Parties agree to modify the B E I to name a third-party holder of each of these securities;” and

1. [**Choose the applicable attachments**]. The following exhibits referenced in this Amendment are attached hereto and incorporated herein:

Attachment 1- Exhibit F-2 Credit Sales and Transfer Agreements and Payment Receipt Templates

Attachment 2- Exhibit F-3 Instructions for Species Credits Transfers Using R I B I T S

Attachment 3- Exhibit F-5: Credit Release Schedule and Funding Schedule for Covered Species and Covered Habitat

1. All other terms and conditions contained in the B E I, as amended, are unchanged and shall remain in full force and effect.

By signing below, each of the undersigned approves the foregoing modification proposed by Bank Sponsor and certifies that they have full authority to bind the Party that they represent for purposes of amending the B E I.

This Amendment to the B E I shall be deemed executed on the date of the signature by the last applicable Party to sign below.

IN WITNESS WHEREOF, the Parties approve the foregoing Amendment to the B E I, as follows:

**Bank Sponsor**

By:

[Name] Date

[Title, if applicable]

**Property Owner**

By:

[Name] Date

[Title, if applicable]

**U S Army Corps of Engineers, District**

By: [Name] Date

[Correct title as necessary] District Engineer

**U S Fish and Wildlife Service, Office**

By: [Name] Date

Field Supervisor

**National Marine Fisheries Service, West Coast Region**

By:

[Name] Date

Regional Administrator

**California Department of Fish and Wildlife, Region**

By:

[Name] Date

Regional Manager

**State Water Resources Control Board**

By:

[Name] Date

Executive Director

**California Regional Water Quality Control Board, Region**

By:

[Name] Date

Executive Officer

**U S Environmental Protection Agency, Region IX**

By: [Name] Date

Supervisor, Wetlands Section