MEMORANDUM OF UNDERSTANDING
BETWEEN
CALIFORNIA DEPARTMENT OF TRANSPORTATION
AND
UNITED STATES ARMY CORPS OF ENGINEERS
AND
UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

CONCERNING COMPENSATORY MITIGATION
FOR TRANSPORTATION PROJECTS
ON
NATIONAL FORESTS IN CALIFORNIA

This Memorandum of Understanding ("MOU") is entered into by the California Department of Transportation ("Caltrans"), the U.S. Army Corps of Engineers, South Pacific Division ("Corps"), and the USDA Forest Service ("Forest Service"), collectively referred to herein as the "Participating Agencies."

RECITALS

WHEREAS, it is the mission of Caltrans to provide mobility across California; and

WHEREAS, it is the mission of the Corps Regulatory Program (33 C.F.R. Parts 320-332) to protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions; and

WHEREAS, it is the mission of the Forest Service to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations; and

WHEREAS, Caltrans, on behalf of the State of California and the Federal Highway Administration ("FHWA"), operates, maintains and improves thousands of miles of highways and provides assistance to local governments with similar transportation infrastructure; and

WHEREAS, Caltrans selects projects to construct using State only funds or with Federal assistance under the Federal-aid Highway Program (23 U.S.C. § 145), and unavoidable impacts to waters of the U.S., including wetlands, resulting from those projects are offset through establishment, restoration, and/or enhancement of similar waters of the U.S., including wetlands; and

WHEREAS, sections 6001 and 6002 of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act - A Legacy for Users (P.L. 109-59) require Caltrans, pursuant

to its delegated authority, to undertake specific project development and coordination procedures that provide for advance transportation planning and early agency input; and

WHEREAS, the Corps is responsible for the administration of laws for the protection and preservation of aquatic resources pursuant to Section 10 of the Rivers and Harbors Act of 1899 ("RHA") and Section 404 of the Clean Water Act ("CWA"). Pursuant to the RHA, all work or structures in or affecting the course, condition, or capacity of "navigable waters of the U.S." require Corps authorization. The Corps authorizes, under the CWA, the discharge of dredged or fill material into "waters of the U.S.," including wetlands. Navigable waters of the U.S. and waters of the U.S. are hereinafter collectively referred to as "Aquatic Resources." Caltrans' highway projects may require one or more Department of the Army permits from the Corps under the above cited statutes; and

WHEREAS, the U.S. Environmental Protection Agency (EPA) regulations at 40 C.F.R. Part 230 implementing section 404(b)(1) of the CWA [33 U.S.C. § 1344(b)] and Corps regulations at 33 C.F.R. § 332.1 require an applicant for a Department of the Army permit to take all appropriate and practicable steps to first avoid and then minimize adverse impacts to Aquatic Resources, and then compensate for unavoidable adverse impacts remaining after all appropriate and practicable minimization has been undertaken; and

WHEREAS, Executive Order 11990 (Protection of Wetlands) directs Federal agencies to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out their responsibilities for (1) acquiring, managing, and disposing of federal lands and facilities; and (2) providing federally undertaken, financed, or assisted construction and improvements; and (3) conducting federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities; and

WHEREAS, Caltrans and the Corps, along with four other Federal signatory agencies, agreed through a Memorandum of Understanding (2006) to integrate the National Environmental Policy Act ("NEPA") and CWA section 404 processes concerning Federal-aid surface transportation projects that have five or more acres of permanent impacts to Aquatic Resources in order to provide more timely agency decisions while improving the overall quality of those decisions; and

WHEREAS, it is the State of California's wetland conservation policy ('No Net Loss' policy; Executive Order W-59-93) to ensure no overall net loss and achieve a long-term net gain in the quantity, quality, and permanence of wetland acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property, reduces procedural complexity in the administration of State and federal wetlands conservation programs, and encourages partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration; and

WHEREAS, it is the goal of the Federal Wetlands Policy (1993) to achieve no overall net loss of the Nation's remaining wetlands resource base, and a long-term goal to increase the quality and quantity of the Nation's wetlands; and

WHEREAS, the Forest Plans developed by the Forest Service for National Forests in California focus on long-term sustainability, and opportunities exist for Aquatic Resource establishment,, restoration and/or enhancement that can be realized by collaboration with Caltrans as compensatory mitigation for unavoidable impacts to Aquatic Resources associated with the construction, maintenance, or improvement of highway projects; and

WHEREAS, the Forest Service has substantial expertise and capacity for watershed management and establishment, restoration and/or enhancement of Aquatic Resources and is organized to accomplish land management and restoration and enhancement in local watersheds affected by construction, maintenance, or improvement of highway projects; and

WHEREAS, the rate of progress of Aquatic Resource establishment, restoration, and/or enhancement on National Forests is substantially below its potential due to limited Forest Service funding; and

WHEREAS, in accordance with the National Forest Management Act of 1976 (16 U.S.C. § 1600 *et seq.*) ("NFMA"), the Forest Service is responsible for the management of the National Forests to maintain the productivity of the land in perpetuity; and

WHEREAS, the Participating Agencies favor a watershed-based approach for compensatory mitigation of Aquatic Resources, and National Forests may, in some areas and in particular situations, offer the most practicable opportunity for compensation.

THEREFORE, the Participating Agencies agree as follows:

I. PURPOSE

This MOU is entered into by the Participating Agencies for the purpose of:

1. establishing a framework for integrating Caltrans' required compensatory mitigation for unavoidable impacts to Aquatic Resources, specified in a Department of the Army permit, with the Aquatic Resource and associated habitat establishment, restoration and/or enhancement needs of the Forest Service under the NFMA;

2. fostering multi-agency coordination that brings agency expertise together in the planning, approval, implementation and oversight of compensatory mitigation;

3. facilitating implementation of Caltrans' required compensatory mitigation on National Forests where Corps-approved mitigation banks or in-lieu fee

programs are not available or are determined less environmentally preferable, inappropriate, or otherwise unacceptable for highway project impacts;

4. reducing administrative and endowment costs, improving predictability, and reducing risks associated with implementing compensatory mitigation;

5. documenting that incorporation of the compensatory mitigation area into the Forest Plan will meet the long-term protection in perpetuity requirements set forth in 33 C.F.R. § 332.7.

II. RESPONSIBILITIES

A. CALTRANS INTENDS TO:

1. Serve as lead agency, as appropriate, under NEPA for Federal-aid highway projects under delegated authority of the FHWA (23 U.S.C. § 327) that are not constructed on Federal lands unless written consent is obtained from the Federal agency responsible for managing the lands.
2. Coordinate with the Forest Service to identify potential compensatory mitigation locations and opportunities as appropriate for Caltrans projects.
3. Confer with the Corps early and often in the project development process to identify potential avoidance, minimization, and compensation measures for identified impacts to Aquatic Resources.
4. Prepare preliminary wetland delineations, wetland functional assessments, habitat evaluations, and any additional studies, as necessary or as required, for the purpose of identifying and evaluating any impacts to Aquatic Resources within a proposed project area.
5. Evaluate, in collaboration with the Forest Service, the suitability of the proposed compensatory mitigation site within a National Forest in California.
6. Develop in collaboration with the Forest Service or review and approve Forest Service prepared Habitat Mitigation and Monitoring Plans ("HMMP"), which include short-term success of the mitigation, long-term and adaptive management plans, maintenance activities and financial assurances, in accordance with the Corps' regulations, policies, guidelines, and permit requirements.
7. Ensure implementation of the HMMP as approved by the Corps.
8. Transfer, unless otherwise agreed upon, after mitigation success criteria have been met, any long-term maintenance, monitoring, and adaptive management responsibilities, specified in a Department of the Army permit and as described in the HMMP, to the Forest Service, after review and approval by the Corps pursuant to 33 C.F.R. § 332.7(d).

B. CORPS INTENDS TO:

1. Utilize, to the maximum extent practicable, pre-application consultation described at 33 C.F.R. §§ 325.1(b) and 332.4(a) to provide advice concerning studies or other foreseeable information required, including potential compensatory mitigation measures and locations, to process a Department of the Army permit application submitted by Caltrans.
2. Consider opportunities, as appropriate, for developing innovative regulatory permitting approaches, including general permits, to streamline review of Caltrans' permit applications based upon lessons learned through application of this MOU.
3. Subject to availability of resources and in accordance with applicable laws, regulations and policies, upon submittal of draft HMMPs, provide advice on emerging science or other information concerning Aquatic Resources for the purpose of assisting Caltrans in developing appropriate compensatory mitigation.
4. Pursuant to 33 C.F.R. § 332.4, review draft HMMPs submitted to the Corps concerning proposed compensatory mitigation projects and provide comments within a reasonable period of time from the date the draft HMMP is received.

C. FOREST SERVICE INTENDS TO:

1. Coordinate with Caltrans and provide site lists that identify opportunities on National Forests in California that may be suitable for collaborative establishment, restoration, and/or enhancement of Aquatic Resources.
2. When requested and to the extent funded by Caltrans, provide technical expertise for designing compensatory mitigation proposals and/or assist or prepare draft HMMPs, including the long-term financial plan pursuant to 33 C.F.R. § 332.4, 332.7(d)(3) and any applicable Corps polices and guidelines.
3. Pursuant to 33 C.F.R § 332.7 (a), be responsible for providing long-term site protection to compensatory mitigation areas on National Forests by identifying such areas as "Special Designated Areas" in the Automated Lands Project (ALP) maintained by the Forest Service; amending in a timely manner the Forest Plan for each affected National Forest, each amendment will include, designating such areas as "Aquatic Resources Compensatory Mitigation Area," description of long-term management goals, and incorporating by reference the HMMP; providing advance notification to the Corps before any action is taken to further modify the Forest Plan concerning such designated areas.
4. In accordance with 33 C.F.R.§ 332.7(a)(4), be responsible for planning, implementing and fully funding alternative compensatory mitigation that is acceptable to the Corps for any loss in functions in the event of changes in statute, regulation, or agency needs or mission that results in an incompatible

use on National Forests that will impact Caltrans' compensatory mitigation sites.

5. Accept long-term maintenance, monitoring, and adaptive management responsibilities of a Caltrans compensatory mitigation site after success criteria have been met, pursuant to 33 C.F.R. § 332.7 and as provided for in the long term financial plan (II. C. 2.); share management and monitoring reports/updates with Caltrans and the Corps via web technology.

6. Upon completion of an approved HMMP enter into a signed agreement with Caltrans under the authority of the Cooperative Funds and Deposits Act of 1914.

III. GENERAL PROVISIONS

A. Nothing in this MOU is intended to require an agency to obligate or expend funds in advance of or in excess of available appropriations. In addition, this MOU cannot be used to obligate or commit funds or as the basis for the transfer of funds. Any endeavor involving reimbursement, or contribution of funds between the Participating Agencies will be handled in accordance with applicable laws, regulations, and procedures. Such endeavors, if any, will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This MOU does not provide such authority. This MOU is not intended nor shall it be construed as a legally binding agreement.

B. Corps participation in this MOU does not imply endorsement of Caltrans Federal-aid highway projects nor does it diminish, modify, or otherwise affect Corps statutory or regulatory authorities.

C. This MOU neither expands nor is in derogation of those powers and authorities vested in the Participating Agencies by applicable laws, statutes, regulations, or Executive Orders, nor does it modify or supersede any other applicable interagency agreements existing as of the date of this MOU.

D. This MOU is not a substitute for consultation with the United States Fish and Wildlife Service or National Oceanic and Atmospheric Administration under section 7 of the Federal Endangered Species Act or any other applicable law.

E. This MOU may be modified or amended upon written request of any Participating Agency hereto and the subsequent written concurrence of all of the Participating Agencies. Participation in this MOU may be terminated sixty days after a Participating Agency provides written notice of such termination to the other Participating Agencies.

F. This MOU in no way restricts the Participating Agencies from participating with other public or private agencies, organizations, or individuals. The Participating Agencies recognize the importance of continuing cooperation and participation

with non-governmental organizations and institutions in programs of mutual interest.

G. This MOU is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity, by a party against the United States, the State of California, their agencies, officers, or any person.

H. This MOU is for the purpose of establishing a framework for the Participating Agencies to integrate Caltrans' required compensatory mitigation for unavoidable impacts to Aquatic Resources, specified in a Department of the Army permit, with the Aquatic Resources establishment, restoration and/or enhancement needs of the Forest Service under the NFMA, and nothing in this MOU shall be construed to create a cause of action.

.I. Any information furnished to the Forest Service or Corps under this MOU is subject to the Freedom of Information Act (5 U.S.C. 552).

J. Any information furnished to Caltrans under this MOU is subject to the California Public Records Act (California Government Code 6250).

IV. PRINCIPAL CONTACTS

Each Participating Agency hereby designates a principal point of contact for that agency. These contacts may be changed at the Participating Agency's discretion upon notice to the other Participating Agencies.

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V. EFFECTIVE DATE

The MOU is effective as of the date of the last signature and is effective for 10 years at which time it will expire unless extended.

CALIFORNIA DEPARTMENT OF TRANSPORTATION

Randell H. Iwasaki

Name RANDELL H. IWASAKI
Director

Date: August 10, 2009

U.S. ARMY CORPS OF ENGINEERS

for SCOTT F. "ROCK" DONAHUE
Colonel, U.S. Army
Commander, South Pacific Division

Date: 1 Sep 09

USDA FOREST SERVICE

RANDY MOORE
Regional Forester
Pacific Southwest Region

Date: August 12, 2009