

MEMORANDUM OF AGREEMENT

Between the

U.S. ARMY CORPS OF ENGINEERS

LOS ANGELES DISTRICT

&

_____ **(insert name of In-Lieu Fee Program administrator**

Concerning the Establishment and Operation of the

_____ **(insert appropriate title) In-Lieu Fee Program**

Section 1: INTRODUCTION

1.1 This document (the “Agreement”) establishes an in-lieu fee mitigation agreement between the Los Angeles District of the U.S. Army Corps of Engineers (Corps) and the _____ to administer the _____ In-Lieu-Fee Program (hereinafter “Program”) effective as of the last date set forth on the signatory page hereto.

Section 2: PURPOSE AND OBJECTIVES

2.1 The primary purpose of the Program shall be to accept monies generated as an in-lieu-fee funding requirement for authorized activities, as well as monies generated by enforcement and compliance actions initiated by the Corps, and to serve as a funding source for wetland and/or riparian restoration, creation, enhancement, and preservation of wetlands and other aquatic resources. The primary objective of projects developed and funded under this Agreement will be to replace functions and values of aquatic resources and associated habitats that have been degraded or destroyed as a result of activities conducted in compliance with or in violation of section 404 of the Clean Water Act of 1972 and/or section 10 of the River and Harbor Act of 1899.

2.2 In accordance with Clean Water Act Section 404(b)(1) Guidelines and the federal “no net loss” goal, the Corps often requires compensatory mitigation to offset adverse impacts associated with permitted projects. Under certain circumstances, the Corps has determined it may offer greater resource protection and conservation benefits to gather funds collected in-lieu of actual required mitigation actions, and to expend such in-lieu monies on independent conservation projects which will offset waters of the U.S. impacts caused by the authorized activity. In particular, it is anticipated that projects funded under this agreement will generally be used to mitigate for waters of the U.S. impacts authorized under the nationwide or regional general permit programs. The purpose of the Program is to provide a voluntary, alternative compensatory mitigation option that will result in better-designed and managed aquatic resource restoration projects. The Program is designed to facilitate a holistic approach to aquatic resource management in the

_____ watershed(s), allocating money to where there is the greatest opportunity for long-term ecological benefit. This approach is often superior to the creation of small, isolated compensatory mitigation projects managed by developers, homeowners associations, or other permittee-designated managers, as occurs under the traditional permitting approach.

- 2.3 Permittees will be approved by the Corps to pay monies into the Program fund to satisfy Corps compensatory mitigation requirements only after avoidance and minimization of project-related impacts to wetlands have been accomplished to the maximum extent practicable, and onsite compensatory mitigation opportunities have been evaluated and determined impracticable or ecologically less desirable. The Program will generally be limited to compensatory mitigation for unavoidable, minor impacts to aquatic resources resulting from projects authorized under a Corps General Permit or from unauthorized activities in the _____ watershed.
- 2.4 The geographic service area for consideration for in-lieu fee mitigation, enforcement, and compliance actions that generate funds for the Account and for conservation projects developed for funding under the Account (defined in Section 7.2.2) shall be _____. The projects will be located as close to specific impact sites as is appropriate and practicable as determined by the Corps in coordination with the _____ (insert name of Program administrator). In addition, the _____ (insert name of Program administrator) may use other funds to augment conservation projects.

Section 3: AUTHORITY

- 3.1 The Corps is the federal regulatory agency responsible for permitting activities under the Clean Water Act and approving associated mitigation for such activities. This Agreement is entered into under the authority of section 404 of the Clean Water Act of 1972 (33 U.S.C. 1344) and/or Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403). Under Section 404 of the Clean Water Act (33 U.S.C. 1344) a permit (Section 404 permit) is required from the Corps for discharges of dredged and/or fill material within waters of the U.S., including wetlands. Under Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403), a permit (Section 10 permit) from the Corps is required for any work and/or structure in or affecting the course, capacity, or condition of navigable waters of the U.S. The Corps is also authorized to seek administrative or civil penalties for unauthorized activities, and may enforce mitigation requirements included as permit conditions. The intent of the regulatory program is to minimize wetland and waters of the U.S. losses to the maximum extent practicable by avoiding and minimizing impacts and requiring appropriate mitigation to compensate for remaining impacts.

However, when waters of the U.S. are filled or altered without benefit of a Corps permit, or when compensatory mitigation requirements included by the Corps as a condition of Section 404/10 permits are not fulfilled, waters of the U.S. losses can occur. The intent of the Program is to offset such losses by providing a compensatory mitigation alternative to Corps permit applicants and violators in cases when onsite compensatory mitigation is impracticable or ecologically less desirable, and to improve the overall effectiveness of compensatory mitigation required by Corps permits and enforcement actions.

Section 4: CRITERIA

- 4.1 Projects developed under this Agreement are intended primarily to provide in-lieu mitigation for ecological impacts to waters of the U.S. which occur as a result of work conducted in compliance with a Section 404 and/or Section 10 permit, or mitigation required due to unauthorized activities or non-compliance with permit conditions required to mitigate adverse impacts to aquatic resources. Consistent with the goals of the Clean Water Act, the focus shall be to restore and maintain the chemical, physical, and biological integrity of the nation's waters. More specifically, emphasis will be on restoration, creation, enhancement, and preservation of riparian and aquatic habitat and waters of the U.S.
- 4.2 Habitat-based projects developed and selected for funding under this Agreement shall:
 - 4.2.1 Be located within the boundaries of the Corps Los Angeles District within _____ (Describe the geographic service area boundaries).
 - 4.2.2 Provide, to the extent appropriate and practicable, the full replacement of functions of aquatic and riparian resources impacted by the projects serving as sources of funds for the Account.
 - 4.2.3 Generally, be limited to compensatory mitigation for permanent impacts to aquatic resources of one-half (0.5) acre or less (i.e., generally those qualifying for authorization under a Corps nationwide permit) and shall not be used to mitigate for impacts to unique aquatic resources, such as vernal pools and eelgrass.
 - 4.2.4 Generally be allocated toward the restoration, enhancement, and/or creation of riparian/freshwater wetland habitats. The _____ (Insert name of Program administrator) may use Program funds for aquatic habitat acquisition or preservation, provided the projects include an explicit restoration, enhancement, and/or creation

component, or provided the proposed preservation area is under clear threat of direct loss to aquatic resource functions and values (i.e., a developer has all or most permits and entitlements to build, etc.). To ensure adherence to the federal “no net loss” goal referenced above, for proposed compensatory mitigation sites containing upland components In-Lieu Fee mitigation credit shall only be applied to waters of the U.S., including wetlands, and associated vegetated buffers as approved by the Corps with the following exception. In accordance with Corps Guidance for the Establishment and Maintenance of Compensatory Mitigation Projects (Regulatory Guidance Letter No. 02-02), credit may be given for the inclusion of upland areas occurring within a compensatory mitigation project to the degree that the protection and management of such upland areas is an enhancement of aquatic functions and increases the overall ecological functioning of the mitigation project (e.g., vegetated buffers or a mix of habitats).

- 4.2.5 Be selected, as stated in Section 7.3.2, in accordance with applicable Federal policies and guidelines.
- 4.2.6 Have provisions for long-term operations and maintenance, and require management and stewardship obligations be held by a responsible local, State, or Federal agency or non-profit conservation organization.
- 4.2.7 Be given priority to the extent they provide the same habitat type and are located within a watershed as close to the site of impacted riparian/aquatic resources as practicable.

Section 5: PROGRAM ADMINISTRATION

- 5.1 The Corps shall determine the required compensatory mitigation acreage for Corps permitted projects and for resolution of Corps enforcement actions.
- 5.2 The _____ (insert name of Program administrator) shall ensure proposed mitigation sites and compensatory mitigation plans have obtained written approval from the Corps prior to expenditure of Program funds at the mitigation site.
- 5.3 The _____ (insert name of Program administrator) shall obtain qualified wetland, riparian and aquatic resource restoration expertise and use aggregated monies from the Program fund to implement, maintain and monitor selected aquatic resource restoration, enhancement, and/or creation projects in accordance with compensatory mitigation plans approved by the Corps.

- 5.4 Prior to the expenditure of Program monies for physical improvements at any project site, the _____ (insert name of Program administrator) shall prepare a compensatory mitigation plan for that site for the review and written approval of the Corps. Compensatory mitigation plans shall describe the project area and the restoration and enhancement activities to be carried out, and shall include a delineation of existing waters of the United States prepared for the mitigation site in accordance with the Corps' 1987 Wetland Delineation Manual. The plans shall be prepared by a Corps-approved qualified restoration ecologist with experience in southern California riparian/wetland ecosystems and shall be consistent with the "Los Angeles District "Mitigation Guidelines and Monitoring Guidelines" effective January 27, 2003, or any subsequent version in effect as of the date of preparation. Compensatory mitigation plans providing for the acquisition or preservation of aquatic habitat shall demonstrate compliance with the requirements of this paragraph. Implementation of mitigation plans for approved Program mitigation sites shall not be initiated until the Corps has provided written approval of the site-specific mitigation plan and the contractors retained to implement portions of the plan.
- 5.5 Land acquisition and initial physical and biological improvements should be completed by the first full growing season following collection of funds from each Corps permittee. However, because site improvements associated with in-lieu-fee mitigation may take longer to initiate, physical and biological improvements may be completed later than the first full growing season where 1) initiation by the first full growing season is not practicable and 2) mitigation ratios are raised to account for increased temporal losses of aquatic resource functions and values and 3) the delay is approved in advance by the Corps.
- 5.6 The _____ (insert name of Program administrator) or a qualified organization designated by the _____ (insert name of Program administrator) and approved by the Corps, shall maintain and monitor each compensatory mitigation site for a minimum of five years following completion of compensatory mitigation site construction and shall be fully responsible for compensatory mitigation success in accordance with the performance criteria established in the approved compensatory mitigation plan for each site.
- 5.7 To ensure permanent protection of these compensatory mitigation sites, the _____ (insert name of Program administrator) or a qualified organization designated by the _____ (insert name of Program administrator) and approved by the Corps shall obtain and record at the _____ County Registry of Deeds in-perpetuity conservation easements or deed restrictions on each compensatory mitigation site prior to compensatory mitigation site

construction. The conservation easements and deed restrictions shall not be recorded until approved in writing by the Corps. The _____ (insert name of Program administrator) shall immediately forward to the Corps copies of the recorded conservation easements or deed restrictions.

Section 6: FINANCIAL ADMINISTRATION

- 6.1 Contributions to the Account shall be held in a bank that must be a member of the Federal Deposit Insurance Corporation (FDIC), separate from all other accounts. The monies held in the escrow account shall earn interest. The _____ (insert name of Program administrator) shall authorize the bank to invest the funds in direct obligations of the Government of the United States of America or in obligations of agencies or insurers that are guaranteed by the Government of the United States of America. The Account shall be invested in such a manner as to ensure immediate liquidity. Any instrument must be subject to redemption on or prior to the date the funds will be needed by the _____ (insert name of Program administrator). All interest and earnings accruing to the Account shall remain in the Account and shall be used for the purposes specified in Sections 2 and 4. All interest and earnings are under the authority of the Corps and can only be spent with their approval as stated in Section 7.3.
- 6.2 The _____ (insert name of Program administrator) shall determine the cost-per-acre for the required mitigation. To meet the federal goal of “no net loss” of the nation’s aquatic resource functions and values, the cost-per-acre must be sufficient to cover the expected costs of compensatory mitigation. Accordingly, the cost per acre should be based on a reasonable estimate of funds needed for land acquisition, project planning, construction, monitoring, maintenance and contingencies.
- 6.3 Disbursements from the Account shall be made upon receipt of a written authorization from the Corps Project Manager (as set forth in Section 9.1) to fund particular projects pursuant to Sections 4 and 7 herein.
- 6.4 Program funds shall generally be allocated toward the restoration, enhancement, and/or creation of riparian/freshwater wetland habitats, including preparation of restoration plans, site maintenance and monitoring.
- 6.5 The _____ (insert name of Program administrator) will furnish an annual report to the Corps detailing all income, disbursements, and interest earned with respect to the Account. The annual report shall include:
- ?? A spreadsheet of all projects for which in-lieu fees were accepted, identifying for each project the Corps file number, impact location, impact acreage,

- required mitigation acreage, in-lieu fee amount, date of Corps letter approving acceptance of in-lieu fee mitigation, date in-lieu fees were received;
- ?? A breakdown of in-lieu fee expenditures, i.e. cost of land acquisition, project planning, construction, monitoring, maintenance, contingencies and, particularly, administration;
 - ?? An accounting of owed and satisfied compensatory mitigation acreage requirements;
 - ?? Annual mitigation monitoring reports for all in-lieu fee mitigation sites in the monitoring phase required under the compensatory mitigation plans prepared in accordance with Section 5.4.

6.6 The Corps retains the right to audit all books and records of the _____ (insert name of Program administrator) pertaining to this Agreement upon reasonable prior notice to the _____ (insert name of Program administrator). All books, accounts, reports, files, and other records relating to this Agreement shall be subject at all reasonable times to inspection and audit.

Section 7: SPECIFIC OBLIGATIONS OF THE PARTIES

- 7.1 Pursuant to the criteria identified in Section 4 herein, the Corps and the _____ (insert name of Program administrator) shall jointly:
- 7.1.1 Identify aquatic resource conservation projects that meet the purposes of Section 2 of this Agreement.
 - 7.1.2 Coordinate project development directly with land management agencies, land trusts, conservation organizations, and other entities, as appropriate.
 - 7.1.3 Provide information on the Program to the general public, as appropriate.
- 7.2 The _____ (insert name of Program administrator) shall:
- 7.2.1 Assume full responsibility for compensatory mitigation success in accordance with the performance criteria established in the approved compensatory mitigation plan for each mitigation site.
 - 7.2.2 Administer the restricted account (the “Account”) pursuant to this Agreement and shall be responsible for the administration of the Account on behalf of the Corps as further described in Section 4 herein.

- 7.2.3 Make disbursements of funds upon authorization from the Corps from the Account pursuant to Sections 7.1 and 6 of this Agreement.
 - 7.2.4 Enter into contracts as approved by the Corps pursuant to Section 5.4, as the _____ (insert name of Program administrator) deems necessary, to implement riparian and aquatic resource conservation projects pursuant to Sections 2 and 7.
 - 7.2.5 Develop potential aquatic resource restoration plans in accordance with Sections 2, 5.4 and 7.1.1 and submit them in writing to the Corps.
 - 7.2.6 Maintain and monitor each compensatory mitigation site for a minimum of five years following completion of compensatory mitigation site construction.
 - 7.2.7 Obtain all federal, state and local permits required for implementation of the restoration projects carried out under the Program.
 - 7.2.8 Report annually to the Corps on the account balance in accordance with Section 6.5.
- 7.3 The Corps shall:
- 7.3.1 Provide Federal oversight by ensuring projects developed and funded under this Agreement provide maximum benefit to Federal trust resources, further the goals and objectives of the appropriate Federal statutes, and comply with all applicable Federal statutes, regulations, and policies cited in Section 3 herein.
 - 7.3.2 Select riparian and other aquatic resource conservation projects that meet the purposes of Sections 2 and 7.1.1 of this Agreement. Authorize the _____ (insert name of Program administrator) to make project disbursements in accordance with the preceding statement.
 - 7.3.3 Review and approve in writing and in a timely manner, all compensatory mitigation plans submitted by the _____ (insert name of Program administrator) under Section 7.2.5.
 - 7.3.4 Maintain records of projects, enforcement, and compliance actions including project location, acres, and/or functions of lost resources by habitat type and similar information, which will be used in developing compensatory mitigation projects.

7.3.5 Prepare an annual status summary of actions that have served as sources for the funds for the Account.

Section 8: AMENDMENT AND TERMINATION

- 8.1 Amendments to this Agreement may be proposed by any signatory party in writing and shall become effective only upon being reduced to a written instrument and being signed by a duly authorized representative of each party.
- 8.2 This agreement shall remain in effect unless amended by one of the parties herein.
- 8.3 This Agreement may be terminated by a signatory upon 30 days written notice to the other party. In the event of termination, the _____ (insert name of Program administrator) will retain such funds as necessary to meet existing project obligations made under the terms of this Agreement. The _____ (insert name of Program administrator) shall transfer all remaining funds to a restricted account dedicated to riparian/aquatic conservation as specified by the Corps in writing.

Section 9: NOTICES AND PROJECT OFFICERS

- 9.1 The individuals listed below shall be the current Project Officers for this Agreement. Notices to be given herein shall be made in writing and may be given by delivering the same in person or to their successor, by mail or by fax. Notices shall be effective only if and when received at the address of the party to be notified (or their appointees).

For the Corps: _____
Chief, _____ Section
Regulatory Branch

For the _____: _____
(insert name of _____
Program _____
Administrator) _____

- 9.2 Local points of contact for this Agreement for the Corps shall be: _____
(insert name of Corps Project Manager).

9.3 Local point of contact for this Agreement for the _____ (insert name of Program administrator) shall be: _____ (insert name of local point of contact for Program administrator).

Acceptance of the terms of this Agreement as outlined herein is indicated by signing two originals of this letter. This Agreement shall not be in effect until signed by all parties.

U.S. Army Corps of Engineers, Los Angeles District

By: _____
(insert typed name of Regulatory Branch Chief)

Title: Chief, Regulatory Branch

Date: _____

_____ **(insert name of Program administrator Organization)**

By: _____
(insert typed name of Program Administrator representative)

Title:

Date: _____

AGREED AND ACCEPTED AS OF THE DATES HEREOF