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MEMORANDUM OF AGREEMENT **REGULATORY BRANCH**
REGARDING THE ESTABLISHMENT, OPERATION AND USE OF
THE BARRY JONES WETLAND MITIGATION BANK
(Formerly proposed as the Skunk Hollow Mitigation Bank)

THIS AGREEMENT REGARDING THE ESTABLISHMENT, OPERATION AND USE OF THE BARRY JONES WETLAND MITIGATION BANK ("Agreement") is made and entered into this _____ day of December, 1997 by and among the U.S. ARMY CORPS OF ENGINEERS ("Corps"), the U.S. FISH AND WILDLIFE SERVICE ("USFWS"), the CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG") and PACIFIC BAY HOMES, a California corporation ("Property Owner") (collectively the "Parties").

RECITALS:

Whereas, Property Owner is the owner of the Property which consists of approximately 140 acres of unimproved real property commonly known as "Skunk Hollow" and its surrounding watershed, located in western Riverside County, California, within the sphere of influence of the City of Temecula, and more completely described in Exhibit A attached hereto.

A. Whereas, the Property supports one of the single largest vernal pools remaining in California, along with approximately 90 percent of the pool's currently functioning watershed. The pool and its surrounding environs support a high number of sensitive plant and animal species including, without limitation, Riverside fairy shrimp (a federally Endangered Species), and California Orcutt grass. The pool site and its watershed provide habitat which may be suitable for a variety of other endangered, threatened and sensitive species. Because of its size, depth and presence of sensitive resources, the Skunk Hollow vernal pool is considered an aquatic resource of exceptional conservation importance.

B. Whereas, the Parties believe that a watershed-oriented strategy is necessary to ensure the long-term viability of the Skunk Hollow Vernal Pool and that incorporating the watershed into a mitigation bank is not only consistent with the intent of current state and federal banking guidelines, but essential to the conservation of the vernal pool system.

C. Whereas, discharge of dredged or fill material into waters of the U.S. including wetlands is regulated under the provisions of section 404 of the Clean Water Act and administered through a permit program under the auspices of the Corps.

D. Whereas, under the California Endangered Species Act, (California Fish and Game Code § 2050 et. seq. ["CESA"]), California Fish and Game Code sections 1600 et. seq., 1802, and other State laws, CDFG has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species, and the alteration of streambeds.

F. Whereas, this MOA does not in any manner affect statutory authorities and responsibilities of the signatory Parties.

G. Whereas, mitigation credits from the Barry Jones Wetland Mitigation Bank will be available to be used for off-site compensatory mitigation for unavoidable impacts to wetlands and waters of the U.S. subject to the terms and conditions contained of this Agreement.

H. Whereas, the Parties hereto desire by this Agreement to ensure the long-term preservation of the Skunk Hollow vernal pool system, including the pool's watershed and adjacent buffer, through the establishment of a mitigation bank over the entire 140 acres of Property (referred to herein as the "Barry Jones Wetland Mitigation Bank", or, alternatively, the "Bank") and to provide for the sale of mitigation credits by the Property Owner to Credit Purchasers in need of mitigation under the Section 404 Permit requirements as determined by the Corps.

I. Whereas, the Parties enter into this Agreement to set forth the terms and conditions pursuant to which the Barry Jones Wetland Mitigation Bank will be established and implemented.

DEFINITIONS

Capitalized terms used herein shall have the following meanings:

Approved Holding Entity -- Also called the Manager, the entity approved in writing by the Mitigation Bank Review Team ("MBRT") to (i) take fee simple absolute title to the Property as perpetual open space, and (ii) assume the duties of the Manager upon taking such title. (E.g., Center for Natural Lands Management).

Approved PTR -- The preliminary title report attached hereto as Exhibit E which shows all existing easements, encumbrances, leases, licenses, agreements and rights-of-way on the Property as of the date of said report.

Barry Jones Wetland Mitigation Bank or Bank -- A wetland mitigation bank over the entire 140 acres of the Property established pursuant to the terms of this Agreement.

Credits or Mitigation Credits -- Credits established by this Agreement that may be acquired by Credit Purchasers for various projects within the Credit Area or used by the Property Owner for its projects within the Credit Area and used on the terms and conditions set forth herein to meet Debits.

Conservation Easement Deed -- The conservation easement deed substantially in the form attached hereto as Exhibit F executed by the Property Owner and recorded against the Property preceding recordation of the Dedication Grant Deed pursuant to this Agreement.

Credit (Service) Area -- The geographical area as more specifically defined in Exhibit D within which Credit Purchasers may purchase Mitigation Credits from the Barry Jones Wetland Mitigation Bank.

Credit Purchaser -- A person or entity who purchases Mitigation Credits subject to approval of the Corps and CDFG to satisfy Debits caused by a development project located within the Credit Area.

Debits -- A unit of measure representing the loss of aquatic functions at an impact or project site.

Dedication Grant Deed -- The grant deed executed by Property Owner transferring fee title to the Property to the Approved Holding Entity in accordance with Section I.H.2 of this Agreement.

Endowment Account -- An account to be maintained by the Manager as a repository for the Endowment Deposits.

Endowment Deposits -- Funds to be deposited pursuant to the terms of this Agreement to provide for the long-term costs of maintaining and operating the Bank.

Management Account -- An account to be maintained by the Manager as a repository for the Management Deposits.

Management Deposits -- Funds to be deposited pursuant to this Agreement to be used to provide for short-term costs of establishing and maintaining the Bank.

Manager -- The person or entity obligated to manage and maintain the Property pursuant to this Agreement.

Mitigation Bank Management Plan -- The management plan, approved by the MBRT and attached hereto as Exhibit B, which shall provide for the perpetual maintenance and preservation of the Property after the transfer thereof to the Approved Holding Entity pursuant to this Agreement.

MBRT -- Mitigation Bank Review Team responsible for overseeing establishment and implementation of the Bank and comprised of representatives of all signatory agencies to the Agreement.

Net Proceeds -- The gross proceeds from the sale of the Mitigation Credits, less the sum of (1) the Endowment Deposits paid by Property Owner with respect to the conveyance of such Mitigation Credits and (2) all transactional expenses incurred by Property Owner in effecting such conveyance, including, without limitation, any brokerage commissions or finders' fees, property or transfer taxes (if any), escrow charges, and reasonable attorneys' fees actually incurred in documenting the sale.

Parties -- The signatory parties to this Agreement, or their successors and assigns.

Property -- Real property consisting of approximately 140 acres as more specifically described in Exhibit A attached hereto.

Property Owner -- Pacific Bay Homes, a California corporation, or its permitted assignee or successor.

NOW, THEREFORE, for and in consideration of the mutual terms and provisions herein set forth, the Parties hereby agree to the following:

I. IT IS MUTUALLY AGREED:

A. This Agreement establishes the Barry Jones Wetland Mitigation Bank. Its purpose is to preserve the unique Skunk Hollow vernal pool system and watershed which supports a number of sensitive plant and animal species, including the endangered Riverside fairy shrimp. The area incorporated into the Bank consists of approximately 140 acres as depicted in Exhibit A.

B. Mitigation Credits shall be made available as provided for in Exhibit C to Pacific Bay Homes or its successors in accordance with the terms and conditions of this Agreement. Property shall be formally included in the Barry Jones Wetland Mitigation Bank when Property Owner dedicates and transfers the Property for conservation purposes in accordance with section H below. Property Owner may initiate the sale of Mitigation Credits (as provided for and defined in section G), prior to dedication and conveyance of the Property; provided however, that no Mitigation Credits will be deemed created hereunder and recognized by the Corps until such time as the Property has been dedicated and conveyed pursuant to section H and becomes part of the Barry Jones Wetland Mitigation Bank and the proposed Credit Purchaser has been approved by the Corps to utilize Bank Credits to mitigate impacts.

C. Additional acreage may be incorporated into the Bank upon written agreement of all Parties.

D. The following exhibits are incorporated as appendices to this Agreement:

“Exhibit A”, Location Map and Site Description of Barry Jones Wetland Mitigation Bank.

“Exhibit B”, Mitigation Bank Management Plan.

“Exhibit C”, Crediting and Debiting Procedure for the Barry Jones Wetland Mitigation Bank.

“Exhibit D”, Description of Barry Jones Wetland Mitigation Bank Credit (Service) Area.

"Exhibit E", Approved Preliminary Title Report and Location of Existing Easements.

"Exhibit F", State of California Conservation Easement Deed Form.

"Exhibit G", Sample Account Statement.

E. The Mitigation Bank Review Team ("MBRT") shall consist of the U.S. Army Corps of Engineers, Los Angeles District (Chair); U.S. Fish and Wildlife Service, Carlsbad Office; and California Department of Fish and Game. The role of the MBRT is to monitor establishment and implementation of this Agreement and the Barry Jones Wetland Mitigation Bank Management Plan (Exhibit B), including the sale of Mitigation Credits from the Bank.

F. The Parties have evaluated the Property for purposes of determining its biological values in connection with the sale of Mitigation Credits. On the basis of such evaluation, the Parties acknowledge and agree that, subject to Crediting and Debiting procedure in Exhibit C, the Property possesses biological values that support the Mitigation Credits identified below, and may serve as off-site compensatory mitigation for unavoidable impacts to wetland habitats within the Credit (Service) Area identified in Exhibit D.

G. Mitigation Credits. As a result of the benefits accruing to wetland resources including endangered, threatened, and sensitive species and their habitats, upon the establishment of the Bank and the dedication of land by Property Owner for mitigation purposes pursuant to this Agreement, Mitigation Credits shall be established as follows:

1. Availability of Credits.

a. The credits certified through this Agreement shall be available for withdrawal for projects requiring compensation under the Section 404 permit requirement both in-kind and out-of-kind impacts to aquatic habitats as determined by the Corps, in consultation with the USFWS. The credits certified through this Agreement shall be available for withdrawal for projects requiring compensation under the California Endangered Species Act, Fish and Game Code § 2050, *et seq.*, and under Fish and Game Code §§ 1600-1607, as determined by CDFG. Availability of credits shall be according to the procedures specified in Exhibit C.

The Parties acknowledge that establishment of the Bank is not phased and that upon recordation of the Conservation Easement Deed, the Property Owner is precluded from using the property for any purposes other than those set forth in the Conservation Easement and this Agreement. The Parties further acknowledge that Property Owner's primary compensation for establishment of the Bank and dedication of the Property is the sale and/or use of mitigation credits. Accordingly, in the event that a multi-species habitat conservation plan (MSHCP) is

approved in the geographical area that encompasses Skunk Hollow, and the MSHCP contains a provision that defines a process for acceptance of the sale of multi-habitat mitigation and/or conservation credits from banks such as the Barry Jones Wetland Mitigation Bank, such sales will be allowed. Should multi-species compensation be applied at the Bank, the Parties agree that no credit or partial credit previously sold for wetland mitigation may be sold for multi-species mitigation, and no credit or partial credit previously sold for multi-species mitigation may be sold for wetland mitigation. Accounting statements shall clearly differentiate between credits sold for wetland mitigation and credits sold for multi-species mitigation.

b. Projects using credits from the Bank for compensation of unavoidable impacts to waters of the U.S., or to the bed, channel, or bank of any river, stream or lake, must be located within the Credit (Service) Area as defined in Exhibit D.

c. Credits may not be utilized to mitigate for unavoidable impacts to coastal/tidally influenced wetlands, oak woodlands, or vernal pools within San Diego County under any condition.

2. A total of 136 Mitigation Credits are created and approved by this Agreement, subject to adjustment in connection with the alignment of the proposed Murrieta Hot Springs Road extension. As set forth in the CEMP, the ultimate alignment of the road extension may vary from the currently indicated right-of-way and thereby avoid the impacts to the watershed. In the event the road extension is relocated to avoid the impact fully, 136 Mitigation Credits will be created and approved. If, however, the road extension is built in its present right-of-way (as of December 1997), 1½ Credits will be deducted from the 136 Credits created and approved by this Agreement. Property Owner may sell credits upon execution of this Agreement and delivery of all conveyance documents referred to in Section I.H; provided, however, that unless and until the Conservation Easement Deed is recorded, Property Owner shall assume the liability for full and complete mitigation for any environmental impacts for which mitigation credits are used. "Full and complete mitigation" as used in this paragraph shall be deemed to require acquisition of either an equivalent number of appropriate mitigation credits from a mitigation bank (as determined by the MBRT) or acquisition of replacement habitat acceptable to the MBRT at a ratio of one acre for each credit sold, but not less than ten (10) acres of replacement habitat. The Crediting and Debiting procedure for the Barry Jones Mitigation Bank is described in the attached Exhibit C.

3. Upon approval of specific project mitigation by the Corps, and/or CDFG, as appropriate, Property Owner shall be entitled from time to time to (i) sell all or some of the Mitigation Credits to Credit Purchasers, or (ii) buy all or some of the Mitigation Credits to satisfy any wetland mitigation Debits for the

benefit of other development projects owned by Property Owner within the Credit Area. Sale or use of credits to offset impacts to aquatic resources shall be subject to approval by the Corps. Subject to Property Owner's obligations under Section II.A. below, Property Owner shall have the exclusive right to determine the price of any and all Mitigation Credits.

4. Once all Mitigation Credits have been used to satisfy Debits, no further Mitigation Credits shall be recognized by the MBRT.

H. Conveyance of Property.

Required Documents from Parties. An Approved Preliminary Title Report (Approved PTR) for the Property is attached as Exhibit E of this Agreement. Concurrently with the sale of the first Mitigation Credit from the Bank, Property Owner shall dedicate the Property for conservation purposes as set forth herein and the Parties shall coordinate the delivery and recordation of the documents through an escrow established at First American Title Company or such other reputable escrow company as mutually acceptable to the Parties ("Escrow Holder") as follows:

1. The Property Owner shall deliver to the Escrow Holder, with a copy to the MBRT, a duly executed and acknowledged original Conservation Easement Deed designating the State of California as grantee substantially in the form of Exhibit F. Escrow Holder shall deliver to CDFG a certified copy of the Conservation Easement Deed. Upon approval of the Fish and Game Commission, CDFG shall execute a certificate accepting the Conservation Easement Deed on behalf of the State of California. CDFG shall then submit the certified copy of the Conservation Easement Deed and the Certificate of acceptance to the California Department of General Services for review. Upon the approval of the Department of General Services, CDFG shall submit to the Escrow Holder the certified copy of the Conservation Easement Deed and the certificate of acceptance with written direction to Escrow Holder to attach same to the original executed Conservation Easement Deed prior to recordation in accordance with Section I.H.3 below.
2. The Property Owner shall deliver to Escrow Holder, with a copy to the MBRT, the original Dedication Grant Deed duly executed and acknowledged by Property Owner conveying fee title of the Property to the Approved Holding Entity which document shall contain provisions stating (i) that the Property is subject to the Conservation Easement Deed as well as all easements, encumbrances, leases, licenses, agreements and rights-of-way of record, and (ii) requiring the Property be held in perpetuity as open space lands.
3. The Escrow Holder shall be instructed as follows:

- a. Concurrently with the transfer of the first Mitigation Credit(s) to a Credit Purchaser(s), Escrow Holder shall:
 - (1) record the Conservation Easement Deed;
 - (2) deliver any Management Deposits and Endowment Deposits to the Approved Holding Entity for deposit in the Management and Endowment Accounts; and
 - (3) record the Dedication Grant Deed upon the earlier of (i) written direction to do so by the Property Owner, or (ii) concurrently with the sale or transfer of the final Mitigation Credit from the Bank.
4. Property Owner shall pay all transfer taxes and recording charges associated with the recordation of the documents effecting the dedication of the Property as set forth herein above, provided, however, that the Parties shall use their best efforts to minimize or eliminate any such taxes or fees. In addition, Property Owner agrees to reimburse CDFG for reasonable expenses incurred for title and documentation review and expenses incurred from other state agency reviews and overhead in connection with approval and acceptance of the Conservation Easement, which reimbursement shall not exceed a total of \$3,000.
5. All Parties shall use their reasonable efforts to cooperate in the expeditious delivery of all of the documents specified above to Escrow Holder upon written request and to promptly execute and deliver any other documents reasonably necessary to effect the transaction contemplated in this Agreement.
6. All conveyances by Property Owner under this Agreement shall be subject to any and all existing easements, encumbrances, leases, licenses, agreements, rights-of-way and other matters reflected in the Approved PTR, and to any other encumbrances consented to by the MBRT, except that any encumbrances affecting the Conservation Easement must be approved by CDFG. The Property shall be conveyed in an "AS IS" condition, "WITH ALL FAULTS" as of the date of such conveyance. No representations or warranties have been, are or will be made and no responsibility has been, is, or will be assumed by the Property Owner as to the condition of the Property or the conservation value thereof.

I. Notwithstanding anything to the contrary contained in this Agreement, once the Conservation Easement Deed has been recorded, Property Owner shall be entitled to the certification and acceptance of the number of Mitigation Credits created hereby and subsequent diminution of habitat values due to natural causes shall not effect the Mitigation Credits;

provided, however, that Property Owner shall remain liable only for the delivery of the Management Deposits and Endowment Deposits to the Approved Holding Entity in connection with the conveyance of any such remaining Mitigation Credits.

II. PROPERTY OWNER AGREES:

A. Management of the Barry Jones Wetland Mitigation Bank will require the carrying out of both initial (within the first 2-3 years) management activities (e.g., fence repair, patrolling, development of the long-term management plan, etc.) and in perpetuity activities. Funding for these activities will be provided through the establishment of two dedicated interest bearing accounts, a Management Account and an Endowment Account, each to be funded with fees collected from the sale or use of each Conservation Credit consistent with this Section. The Management Account and the Endowment Account shall be held in trust by the Approved Holding Entity for the purposes specified in this Agreement. The MBRT shall be the beneficiary of the trust. The parties agree that this provision does not require the creation of a separate, taxable entity. The Management Account shall be used to fund initial management activities, and the accrued interest and earnings from the Endowment Account shall be used exclusively to fund the permanent management of the mitigation bank in accordance with the approved Management Plan. The basis for determining the following management costs and the endowment amount is the Property Analysis Record (PAR) completed by the Center for Natural Lands Management, which is attached as Appendix A of the Mitigation Bank Management Plan (Exhibit B).

1. Until such time as Property Owner shall have deposited the total cumulative sum of \$33,455 (except as otherwise provided in Sections II.A.4 below, or to the extent activities identified in the PAR have been paid for by Property Owner), all net proceeds from the sale of Mitigation Credits shall be deposited in a dedicated interest bearing Management Account managed by the Approved Holding Entity as described in Sections II.A.5 and III.E below and as approved by the MBRT specifically for the purpose of managing the Mitigation Bank. The sum deposited pursuant to this Section A.1, shall be referred to hereinafter as "Management Deposits." Notwithstanding the foregoing, Property Owner shall not be obligated to make such Management Deposits to the extent provided in Section II.A.4 below. All Management Deposits shall be used to pay for certain initial habitat management activities as set forth in the Management Plan. Once Property Owner has deposited the full amount of the Management Deposits as specified herein above (i.e., \$33,455), Property Owner shall have no further obligation to make any further Management Deposits or to pay for the short-term maintenance, management, and operation of the Bank. Upon the sale of the last Mitigation Credit or the Target Date, whichever is first, the Manager may transfer any remaining balance in the Management Account into the Endowment Account. This section is separate from the immediately following section below and Property Owner shall also be required to make Endowment Deposits as provided below.

2. Until such time as Property Owner shall have deposited the total cumulative sum of \$497,766, Property Owner shall deposit a total of \$3,660 for each mitigation credit sold into an interest bearing account (the "Endowment Account") managed by the Approved Holding Entity. Deposits ("Endowment Deposits") into the Endowment Account shall be made concurrently with the conveyance of each Mitigation Credit. Notwithstanding the foregoing, Property Owner shall not be obligated to make such Endowment Deposits to the extent provided in Section II.A.4 below. The Endowment Deposits shall be accumulated in the Endowment Account and shall be used to defray the costs of managing the Mitigation Bank in accordance with the requirements of the Management Plan. Once Property Owner has deposited the full amount of the Endowment Deposits as specified herein above (i.e., \$497,766), Property Owner shall have no further obligation to make any further Endowment Deposits or to pay for any costs of the Bank. This section is separate from the immediately preceding section regarding Management Deposits, and Property Owner shall also be required to make Management Deposits.

3. In the event as of the date five (5) years from the date of the conveyance of the Property to the Approved Holding Entity (the "Target Date"), the aggregate amount of all Management Deposits and Endowment Deposits made to that date does not equal or exceed the sum of \$531,221 (the "Target Amount"), Property Owner shall deposit into the Endowment Account the difference between the Target Amount and the total of all Management Deposits and Endowment Deposits previously made (the "Target Deficit Final Deposit") within sixty (60) days following the Target Date. [E.g., Target Amount - (Management Deposits + Endowment Deposits) = Target Deficit Final Deposit.] Upon deposit of the Target Deficit Final Deposit, notwithstanding anything to the contrary contained herein, Property Owner shall have no obligations in any way with respect to the Management or Endowment Accounts or the management thereof and shall not be obligated in any way to make any further Management Deposits and/or Endowment Deposits.

4. The Property Owner may elect, in its discretion, either (i) to serve as "Interim Manager" for the Bank consistent with the terms of this Agreement and the Management Plan and perform the duties of the Manager during the period that Mitigation Credits are being sold or (ii) defer funding of the Endowment Account during the period that Mitigation Credits are being sold. If the Property Owner exercises either option under this subsection, payment of funds into the Endowment Account shall be suspended until the time of sale or transfer of the last Mitigation Credit or the Target Date, whichever is first. Notwithstanding any other provision of this Agreement, deferral of funding of the Endowment Account shall be on condition the Property Owner post with the Approved Holding Entity a form of security acceptable to the Corps (e.g., letter of credit, performance bond, certificate of deposit, guaranty agreement) that ensures the required Endowment Deposits will be available at the expiration of any deferral period. If the Property Owner elects not to serve in any

management capacity, then Property Owner's sole obligations with respect to the management and funding of the Bank shall be its obligation to make the Management Deposits and/or Endowment Deposits as set forth herein and to account for the Mitigation Credits as set forth herein.

5. Subject to Section II.A.4, upon each conveyance of a Mitigation Credit(s) by Property Owner, the requisite Management Deposits and Endowment Deposit(s) shall be delivered to the Approved Holding Entity, and Property Owner shall deliver to the MBRT a copy of the acknowledgment of receipt of such Endowment Deposit(s) executed by the Approved Holding Entity.

B. Property Owner will maintain accurate written records of all transactions of the Bank. Each time Credits are withdrawn, Property Owner shall provide the Corps and CDFG (with a copy to Approved Holding Entity) with a current report as shown in the Sample Account Statement (Exhibit G). Upon the sale of the last credit from the Bank, Property Owner shall provide a final accounting of the sales as set forth above, and will not thereafter be responsible for maintaining its records of sales.

C. Property Owner hereby agrees and covenants so long as this Agreement has not been terminated and until the Dedication Grant Deed has been recorded, that Property Owner shall not:

1. Use or authorize the use of the areas proposed for dedication within the Bank for any purpose that interferes with its use as a mitigation bank, or interferes with or compromises the ecological functions of the bank site.
2. Erect any permanent structures within or upon the areas proposed for dedication within the Bank unless required or permitted by the approved Management Plan.
3. Create any easements, encumbrances, leases, licenses, agreements or right-of-ways on the title of the Property other than those set forth in the Approved PTR without the written consent of the CDFG and the Corps.
4. Construct any structures or engage in any development activities on the Property. Development activities shall mean only actions that may change the biological, hydrological or physical characteristics of the land but specifically do not include entry upon the land for other purposes such as investigation, measurement, surveying, or as may be required by law or lawful order. This Agreement is not intended to limit or preclude in any way development and related activities undertaken on the lands adjacent to, or in the vicinity of, the Bank and the Parties recognize and acknowledge such development is contemplated and consistent with implementation of the Bella Vista Comprehensive Environmental Management Plan and the establishment and maintenance of the Bank.

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5. Types of uses not permitted unless authorized or specifically identified in the Management Plan include but are not limited to:

- a. Recreational off-road vehicle or equestrian use. (Property Owner may enter upon the Property by vehicle until fee title is transferred.)
- b. Grading, excavation, or any other construction activities, except for grading, excavation, or construction necessary to implement the Management Plan, or necessary to restore habitat values.
- c. Grazing or other agricultural activities.

D. Notwithstanding anything to the contrary contained in this Agreement, in the event that the MBRT reasonably determines that portions of the Property have been substantially damaged subsequent to the date of this Agreement and prior to the recordation of the Conservation Easement and (i) the effect of such activity has been to eliminate the habitat values on such damaged portion of the Property, and (ii) the damage could reasonably have been prevented by Property Owner, Property Owner shall take reasonable steps to restore habitat value to such damaged area or provide the MBRT with evidence that habitat value will be restored unless Property Owner terminates this Agreement pursuant to Section VII.A.

III. THE MANAGER AND/OR ITS SUCCESSOR AGREES:

- A. To maintain and manage the Property in accordance with the Management Plan.
- B. To notify the MBRT in the event a threatened or endangered species is found to be using the Bank. After such notification, the MBRT shall review and if necessary, request a modification of the Management Plan. Neither the Manager nor the Property Owner shall be required to fund any additional costs associated with preparation or implementation of such a modification.
- C. To provide in perpetuity management consistent with the annually appropriated funds from the Endowment Account.
- D. Manager shall not:
 1. Use or authorize the use of the areas proposed for dedication within the Bank for any purpose which interferes with its use as a mitigation bank, or interferes with or compromises the ecological functions of the bank site.
 2. Erect any permanent structures within or upon the areas proposed for dedication within the Bank unless required or permitted by the Management Plan.

3. Create any easements, encumbrances, leases, licenses, agreements or right-of-ways on the title of the Property, without the written consent of the CDFG and the Corps.
4. Construct any permanent structures on the Property.
5. Types of uses not permitted unless authorized to implement the Management Plan include but are not limited to:
 - a. Off-road vehicle use.
 - b. Grading, excavation, or any other construction activities, except for grading, excavation, or construction necessary to implement the Management Plan, or necessary to restore habitat values.
 - c. Grazing or any other agricultural activity.

E. To receive and hold in trust the Endowment Deposits, Management Deposits, and the resulting Endowment Account. Such funds shall be invested in a reasonable and prudent manner to generate sufficient income to meet projected costs of management for the term of this Agreement. If Manager ceases to exist, the MBRT shall meet to determine a successor. Each year during the term of this Agreement, Manager shall provide a financial statement (including the beginning and ending balances of the Endowment Fund and all expenditures for that year) and a report on the biological status of the Bank (including any remedial measures taken during the year), to the MBRT through the Corps for review. Manager shall be solely responsible for management of the Management and Endowment Accounts, and Property Owner shall have no responsibilities for replenishing the Management Account or the Endowment Account after having made the required Management Deposits and Endowment Deposits.

F. Manager shall be solely responsible for success of mitigation and under no circumstances shall any Credit Purchaser be responsible for any further mitigation after purchase of a Mitigation Credit approved for use for mitigation by the Corps.

IV. THE CORPS AGREES:

A. To reasonably cooperate with Property Owner and Manager in the implementation of this Agreement. Such cooperation by the Corps shall include, without limitation:

1. Confirming in writing from time to time delivered in a prompt manner to prospective Credit Purchasers that Mitigation Credits are available to offset Debits.
2. To make every effort to review, approve, or disapprove the use of Mitigation Credits by prospective Credit Purchasers and to provide a written

certification letter in a timely manner (not to exceed 60 days for a Nationwide Permits or 120 days for a Standard Individual Permit).

3. Acknowledging the delivery of Management Deposits and/or Endowment Deposits when proof of delivery is given.
4. Acknowledging, to the extent applicable, that this Agreement remains in full force and effect.
5. Acknowledging that the Barry Jones Wetland Mitigation Bank is a mitigation bank approved by the Corps as suitable for off-site mitigation of unavoidable wetlands impacts within the Credit Area.
6. To perform annual compliance visits along with USFWS and CDFG representatives (if they are available) to assess implementation of the Management Plan and to recommend corrective measures, if any.
7. To audit the Endowment Account at its own costs and expense, upon reasonable notice to the Manager.

V. THE USFWS AGREES:

A. To perform consultations pursuant to Section 7 of the Endangered Species Act (ESA) in accordance with the time line and guidelines set forth in 50 CFR Part 402, when initiated by the Corps for any necessary permits or approval required to implement the Management Plan.

B. If available, to perform annual compliance visits with the Corps and CDFG representatives, subject to staff availability, to assess implementation of the Management Plan and to recommend corrective measures, if any.

C. To review monitoring reports for the Bank and provide written comments in a timely manner (within 60 days from receipt of a complete report).

D. To review and provide comments in a timely manner on Public Notice and Pre-Construction Notifications for proposed projects using the Bank.

VI. THE CDFG AGREES:

A. To review monitoring reports for the Bank and provide written comments in a timely manner (within 60 days from receipt of a complete report).

B. To review and provide comments in a timely manner on Public Notice and Pre-Construction Notifications for proposed projects using the Bank.

C. If available, to perform annual compliance visits with the Corps and the USFWS representatives, subject to staff availability, to assess implementation of the Management Plan and to recommend corrective measures, if any.

D. To include the Barry Jones Wetland Mitigation Bank on any list to be maintained by the State of California of all such approved mitigation banks and making such lists available to prospective Credit Purchasers at such time as the need for any Credit Purchaser's wetland mitigation is disclosed to the CDFG.

VII. OTHER PROVISIONS.

It is further mutually agreed:

A. **Termination.** Unless sooner terminated in accordance with the provisions of this Section, this Agreement shall terminate on the first to occur of: (i) the date thirty (30) years from the date of this Agreement; or (ii) election by Property Owner or the MBRT to terminate this Agreement as allowed herein. Notwithstanding the foregoing, it is the intent that the preservation and management of the Property, by the terms of this Agreement and through the Conservation Easement, the Management and Endowment Accounts, and the implementation of the approved Mitigation Bank Management Plan, shall be in perpetuity.

1. In the event that either (1) no Mitigation Credits have been sold to Credit Purchasers or applied against any wetland mitigation Debits for the benefit of other development projects owned by Property Owner within eighteen (18) months from the date of execution of this Agreement; or (2) after execution of this Agreement but before the Conservation Easement Deed is recorded, the MBRT determines that all or any portion of the Property has been substantially damaged and the habitat values of the damaged portion of the Property have been eliminated, Property Owner or the MBRT shall have the right in its sole and absolute discretion to terminate this Agreement, whereupon all other terms and provisions of this Agreement shall no longer be in force and effect.

2. The MBRT may unanimously elect to terminate this Agreement on the condition that each of the following has occurred: (i) the Property Owner has breached one or more of the covenants set forth above; (ii) the Property Owner has received written notice of such breach from the MBRT; and (iii) the Property Owner has failed to cure such breach within 30 days after such notice; provided, however, in the event such breach cannot reasonably be cured within such 30 day period, the MBRT shall not have the right to terminate this Agreement so long as the Property Owner has commenced the cure of such breach and is diligently pursuing such cure to completion.

3. Property Owner shall have the right to convey or transfer all of the Property to third parties prior to its conveyance to Approved Holding Entity, with the consent of CDFG and the Corps. Any transferee shall be deemed to have accepted the terms and conditions of this Agreement. If Property Owner

requests the written consent of a transfer, the determination to not give consent must be conveyed in writing by the CDFG or the Corps within forty-five (45) days after request therefor, which consent will not be unreasonably withheld, and in the event denial of consent is not communicated within that time, consent is deemed given.

4. In the event of the transfer of the Property prior to its dedication and conveyance in accordance with the immediately preceding paragraph and the transferee's assumption of the obligations of Property Owner with respect to the Property having been approved by the MBRT, such transferee shall be deemed the "Property Owner" for all purposes, and the original Property Owner shall have no further obligations or liabilities under this Agreement. Should such transfer take place subsequent to the execution of the Conservation Easement, the transfer would then be subject to the Conservation Easement. CDFG and the Corps shall have the right to prevent subsequent transfers of the Property in which prospective subsequent claimants or transferees are not given notice of the covenants, terms, conditions and restrictions of the Conservation Easement.

B. Force Majeure Clause.

1. The Manager shall be responsible to maintain and remediate the Bank except on the occurrence of certain Catastrophic Events, events of Force Majeure, or Unlawful Acts, as defined below.

2. Definitions:

a. "Catastrophic Event" shall mean an event, such as a spill of hazardous or toxic substance, the impact of a vehicle or failing aircraft, or a fire, which has a material and detrimental impact on the quality of native vegetation, soils, or wildlife of the Bank and over which Approved Holding Entity had no reasonable control.

b. "Force Majeure" shall mean war, insurrection, riot or other civil disorders, flood, earthquake, fire, governmental restriction or the failure by authority, or any injunction, which has a material and detrimental impact on the Bank; provided, however, that (1) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank or its immediate locale, (2) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where "flood" refers to a runoff event, (3) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank is greater than that presently projected from an earthquake with a return period of 475 years, (4) disease shall constitute an event of Force

Majeure only if such event has broad regional impact and is not endemic to the Bank and its immediate locale, and (5) governmental restriction or the failure by any governmental party to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure unless there is no other feasible means of remediation.

c. "Unlawful Act" shall mean the unlawful act of another and shall include, an event or series of events, such as the intentional dumping within the Bank or its watershed of a hazardous or toxic substance, or the discharge of such a substance by any person or entity other than Approved Holding Entity in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the water quality, native vegetation, soils or wildlife of the Bank, and which event or series of events could not reasonably have been prevented by Property Owner.

3. Notwithstanding the foregoing, subject to the availability of funds in the Endowment Account, the Manager shall not be relieved from the obligation to maintain and remediate the Bank by reason of any such discharge which occurs as a result of normal, non-catastrophic activities. In case of occurrence of a Catastrophic Event, events of Force Majeure, or Unlawful Acts, the Manager and the MBRT shall meet and discuss the future course of action and management of the Bank and shall continue their obligation to the extent practicable using the remaining funds in the Endowment Account. In this case, sale of credits shall be suspended until the Manager and MBRT agree on a new course of action and agree to resume sale of credits.

C. Unless otherwise specified in this Agreement, resolution of disputes between the members of MBRT over appropriate use of the Bank or over interpretation of the Agreement will occur according to the procedures outlined in Section II.C.6. of the Federal Guidelines for the Establishment, Use, and Operation of Mitigation Banks, dated November 28, 1995.

D. This Agreement shall not make or be deemed to make any party to this Agreement the agent or the partner of any other.

E. The language in all parts of this Agreement shall in all cases be simply construed according to its fair meaning and not strictly for or against any party. Headings of the paragraphs of this Agreement are for the purposes of convenience only and the words contained in such headings shall in no way be held to explain, modify, amplify, or aid in the interpretation, construction, or meaning of the provisions of this Agreement.

F. All notices, demands, or requests from one party to another may be personally delivered, sent by facsimile, sent by recognized overnight delivery service, or sent by mail, certified or registered, postage prepaid, to the addresses stated in this paragraph and shall be effective at the time of personal delivery, facsimile transmission, or mailing.

Property Owner: PACIFIC BAY HOMES
4041 MacArthur Blvd, #500
Newport Beach, Ca 92660
Attn: Karin Krogius
Fax No. (714) 833-7557

with a copy to: Ms. Liz Jackson
PACIFIC BAY HOMES
2300 Boswell Road, Suite 209
Chula Vista, CA 91914
Fax No. (619) 656-4306

Corps: Col. Robert L. Davis
District Engineer
U.S. ARMY CORPS OF ENGINEERS
911 Wilshire Blvd.
Los Angeles, CA 90017
Fax No. (213) 452-4196

with a copy to: Mark Durham, Chief
Regulatory Branch
South Coast Section
U.S. ARMY CORPS OF ENGINEERS
911 Wilshire Blvd.
Los Angeles, CA 90017
Fax No. (213) 452-4196

USFWS: U.S. FISH AND WILDLIFE SERVICE
911 N.E. 11th Ave.
Portland, Oregon 97232-4181
Attn: Regional Director

with a copy to: U.S. FISH AND WILDLIFE SERVICE
2730 Loker Avenue West
Carlsbad, California 92008
Attn: Field Supervisor

CDFG: Regional Manager
STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME
330 Golden Shore, Suite 50
Long Beach, California 90802
Fax No. (562) 590-5193

with a copy to: General Counsel
STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME
1416 9th Street
Sacramento, California 94236
Fax No. (916) 654-3805

Any party may change the address to which such notices, payments, or other communications may be sent by giving the other parties written notice of such change, which notice shall be effective immediately upon receipt. The parties agree to accept facsimile transmitted signed documents and agree to rely upon such documents as if they bore original signatures. Each party agrees to provide to the other parties, within seventy-two (72) hours after transmission, such documents bearing the original signatures.

G. This Agreement may be executed by the Parties in any number of duplicate and counterpart originals. A complete original of this Agreement containing original signatures of each of the Parties shall be circulated to each of the Parties by Property Owner, and a complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

H. This Agreement shall not create the public or any member thereof as a third party beneficiary hereof, nor shall it authorize anyone not an express Party (or successor to a Party) to maintain an action for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the parties to this Agreement with respect to third parties shall remain as otherwise provided by law.

I. This Agreement has been executed on the day set by each signature attached hereto and shall become effective on the day and year first above written.

J. No amendment, change or modification of this Agreement shall be valid unless in writing and executed by all the Parties hereto.

K. This Agreement and its related Exhibits contain the entire agreement of the parties with respect to the matters covered by this Agreement, and no other agreement, statement, or promise made by any party, or to any employee, officer, or agent of any party, which is not contained in this Agreement shall be binding or valid.

L. Implementation of the federal and State commitments in this Agreement shall be subject of the availability of appropriated funds.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, this Barry Jones Wetland Mitigation Bank Memorandum of Agreement has been duly executed by each of the Parties upon due authorization as of the year and date specified herein above.

"Property Owner"

PACIFIC BAY HOMES, a California corporation

By: *Karin J Kroger*
Authorized Signatory

Date: _____

"Corps"

UNITED STATES ARMY CORPS OF ENGINEERS

By: *Paul Vandy* DEPUTY DISTRICT ENGINEER
Authorized Signatory LTC, EN

Date: 16 MAR 98

"USFWS"

U. S. FISH AND WILDLIFE SERVICE

By: *Gail C. Kobetich*
Authorized Signatory

Date: 12.23.97

"CDFG"

STATE OF CALIFORNIA, DEPARTMENT OF FISH AND GAME

By: *Al Lamb*, Regional Manager
Authorized Signatory

Date: 12/22/97