

**MEMORANDUM OF UNDERSTANDING
BETWEEN
CALIFORNIA DEPARTMENT OF TRANSPORTATION,
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD,
U.S. ARMY CORPS OF ENGINEERS, SOUTH PACIFIC DIVISION, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
U.S. FISH AND WILDLIFE SERVICE, AND THE NATIONAL MARINE
FISHERIES SERVICE
REGARDING THE DEVELOPMENT AND IMPLEMENTATION OF THE
STATEWIDE ADVANCE MITIGATION INITIATIVE
FOR
CALIFORNIA DEPARTMENT OF TRANSPORTATION PROJECTS
THROUGHOUT THE STATE OF CALIFORNIA**

This Memorandum of Understanding ("MOU") is entered into by the California Department of Transportation ("Caltrans"), California Department of Fish and Wildlife ("CDFW"), California State Water Resource Control Board ("State Water Board"), U.S. Army Corps of Engineers, South Pacific Division ("Corps"), the U.S. Environmental Protection Agency ("EPA"), U.S. Fish and Wildlife Service ("FWS"), and the National Marine Fisheries Service ("NMFS") collectively referred to herein as the "Participating Agencies." Caltrans, CDFW, and State Water Board are collectively referred to herein as the "State Parties".

RECITALS

WHEREAS, it is the mission of Caltrans to provide a safe, sustainable, integrated and efficient transportation system to enhance California's economy and livability; and

WHEREAS, it is one of the goals of Caltrans to promote sustainability, livability and the economy by making long-lasting, smart mobility decisions that improve the environment, support a vibrant economy, and build communities, not sprawl; 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 and navigation capacity, while allowing reasonable development through fair, flexible and balanced permit decisions; 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 of 1972, as amended ("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.

WHEREAS, EPA regulations at 40 C.F.R. Part 230 and Corps regulations at 33 C.F.R. § 332.1 require an applicant for a CWA section 404 permit to take all appropriate and

practicable steps to first avoid and then minimize adverse impacts to the aquatic ecosystem before considering compensatory mitigation to offset unavoidable adverse impacts to waters of the U.S.. Pursuant to a Memorandum of Agreement between the EPA and the Department of the Army (August 11, 1992), EPA has certain review, elevation, and, potentially, veto obligations for permits issued by the Corps under CWA Section 404. The EPA also has review authority of proposed actions of other federal agencies in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370f, Council on Environmental Quality regulations (40 CFR Parts 1500-1508) and Section 309 of the Clean Air Act, 42 U.S.C. § 7609. The EPA may recommend corrective and/or mitigation measures to reduce environmental impacts from proposed actions; and

WHEREAS, the FWS, an agency within the U.S. Department of the Interior, has jurisdiction over the conservation, protection, restoration and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the U.S. pursuant to the federal Endangered Species Act ("ESA"), 16 U.S.C. §1531, *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f), *et seq.*, and other provisions of federal law; and

WHEREAS, it is the mission of the NMFS, under the U.S. Department of Commerce, to provide for the stewardship of living marine resources, including anadromous species, through science-based conservation and management and the promotion of healthy ecosystems;

WHEREAS, the NMFS is responsible for the administration of laws for the protection and preservation of trust species pursuant to the federal ESA, 16 U.S.C. §1531, *et seq.*, the Magnuson-Stevens Act, the Marine Mammal Protection Act and other provisions of federal law to fulfill its mission of promoting healthy ecosystems;

WHEREAS, the CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of those species pursuant to California Fish and Game Code §1802; 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, successive federal administrations since 1988 have endorsed a federal wetlands policy 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, Caltrans, on behalf of the State of California and the Federal Highway Administration, 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), which may have unavoidable impacts to regulated natural resources, which are offset through avoidance and minimization of impacts and establishment, restoration, and/or enhancement of similar regulated natural resources; and

WHEREAS, Caltrans has NEPA authority assigned through MOUs under 23 U.S.C. §§ 326 and 327 as amended by the Moving Ahead for Progress in the 21st Century Act (P.L. 112 – 141)(“MAP-21”) and the Fixing America’s Surface Transportation Act (“FAST Act”); and

WHEREAS, 23 U.S.C § 168 as amended by the MAP-21 and the FAST Act requires Caltrans, pursuant to its assigned authority, to integrate transportation planning and environmental review processes in coordination with the participating agencies; and

WHEREAS, considering biological conservation and mitigation needs early in a project’s timeline, prior to project design and development, can reduce costs and allow natural resources conservation and mitigation to enhance the sustainability of those natural resource systems; and

WHEREAS, long-range advance mitigation and conservation planning would allow Caltrans to anticipate potential mitigation and conservation needs for planned transportation projects and to meet those needs in a more timely and cost-efficient way; and

WHEREAS, advance mitigation and conservation planning would allow mitigation funding for transportation projects to be directed to agreed-upon conservation priorities and would allow for the establishment, enhancement, preservation, and/or restoration, as appropriate, of habitat reserves that enhance the sustainability of natural systems by protecting or restoring connectivity of natural communities consistent with, but not limited to the ESA §7(a)(1), California Fish and Game Code §2055, RHA §10, and CWA §404 and §401; and

WHEREAS, Caltrans, CDFW, USACE, USEPA, USFWS, and NMFS entered into a Memorandum of Understanding regarding Establishment of Statewide Advance Mitigation Initiative for California Department of Transportation Projects Throughout the State of California (“2011 SAMI MOU”) effective February 17, 2011 and expiring five years from that date; and

WHEREAS, the purpose of the 2011 SAMI MOU was to establish a mutual framework for coordinated review concerning development of the Initiative for advance mitigation and conservation planning for planned transportation projects at a landscape scale, including the establishment of mitigation banks, conservation banks, in-lieu fee programs or other appropriate mitigation or conservation measures, and

WHEREAS, since the signing of the 2011 SAMI MOU, §169 of Title 23, United States Code as created by MAP-21 and as amended by the FAST Act authorizes the creation and adoption of programmatic mitigation plans pursuant to the process defined in § 168, Title 23, United States Code; and

WHEREAS, implementation of environmental mitigation in advance of the awarding of federal funds to a project or projects through the National Highway Performance Program and the Surface Transportation Program is authorized under §§ 119 and 133, Title 23, United States Code as amended by MAP-21 and the FAST Act; and

WHEREAS, Caltrans has studied funding and finance mechanism for the Initiative and developed landscape scale mitigation needs assessment methodology and guidance, and

WHEREAS, Caltrans has funded a liaison position in CDFW to develop the Initiative; and

WHEREAS, the Initiative has been funded for implementation by Caltrans having set aside funding for advance mitigation projects by establishing the Advance Mitigation Program within the Roadside Protection and Restoration program within the State Highway Operations and Protection Program (SHOPP .240); and

WHEREAS, the Secretary of the Interior signed Secretarial Order 3330 (SO 3330) on October 31, 2013 mandating the establishing of a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure and development projects and in conserving valuable natural and cultural resources, with a central emphasis on the use of a landscape scale approach to identify and facilitate investment in key conservation priorities in a region, the early integration of mitigation considerations in project planning and design, ensuring the durability of mitigation measures over time, ensuring transparency and consistency in mitigation decisions, and focusing on mitigation efforts that improve the resilience of resources in the face of climate change; and

WHEREAS, the Department of the Interior, pursuant to SO 3330, published *A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior* in April 2014; and

WHEREAS, the President of the United States issued the *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* on November 3, 2015 to the Secretaries of the Departments of the Interior, Defense, and Agriculture, the EPA, and National Oceanic and Atmospheric

Administration directing them, in part, to develop and promote landscape-scale advance compensatory mitigation policies; and

WHEREAS, the State Water Board and Regional Water Quality Control Boards (collectively the Water Boards), within their respective areas of jurisdiction, are responsible for protecting and regulating the quality of Waters of the State, as defined in the California Porter-Cologne Water Quality Control Act, Water Code § 13000 et seq., and regulating the discharge of pollutants into the Waters of the U.S. under the Clean Water Act, 33 U.S.C. §1251 et seq.; and

WHEREAS, every applicant for a federal permit to conduct an activity that may result in any discharge into Waters of the U.S., must first obtain Clean Water Act Section 401 certification from the Water Boards that the proposed discharge will not violate applicable State water quality laws and regulations. Under the Porter-Cologne Water Quality Control Act, Water Code § 13260, the Water Boards may also issue waste discharge requirements for discharges to State Waters outside of federal jurisdiction; and

WHEREAS, it is the intent of the Participating Agencies to continue the collaboration established in the 2011 SAMI MOU and update the Purpose and Responsibilities in accord with the new developments and direction of the Initiative;

THEREFORE, the Participating Agencies agree as follows:

I. PURPOSE.

A. This MOU is entered into by the Participating Agencies for the purpose of further developing and implementing a mutual framework for coordinated review concerning the development of an Initiative in California by Caltrans and CDFW for advance mitigation and conservation planning for planned transportation projects at a landscape scale. This MOU also provides intent to develop policy, guidance and regulations, as needed, to fully implement the advance mitigation projects being funded through the SHOPP .240, or other funded programs as they arise. The Initiative may include establishment of mitigation banks, conservation banks, in-lieu fee programs, or other appropriate mitigation or conservation measures.

B. It is the intent of the Participating Agencies to develop a formalized and mutually agreeable process for implementing advance mitigation projects that will meet the needs of Caltrans for the timely approval of compensatory mitigation to improve project delivery outcomes and offset unavoidable impacts, that meets the conservation priorities and regulatory missions of the Participating Agencies, that is transparent and accountable, that assures compliance with the authorities cited in Section II of this MOU, and to provide assistance in implementing the agreed-upon process.

C. It is the intent of the Participating Agencies that the objective of the Initiative is to provide advance mitigation/conservation measures at a landscape scale in advance of impacts. Additionally, structural modifications to the transportation system that contribute to regional conservation goals or that contribute to the recovery of species,

such as wildlife crossings and fish passage barrier remediation will be considered as part of this Initiative. The preferred mitigation/conservation methods of this Initiative will be developed and considered for approval by the Participating Agencies, subject to the requirements of the authorities cited in Section II of this MOU.

II. AUTHORITIES.

The establishment of an Initiative for compensatory mitigation or conservation is governed by federal and state statutes, regulations, policies, and guidelines, including but not limited to the following:

A. Federal

1. Clean Water Act (33 U.S.C. § 1251 *et seq.*);
2. Rivers and Harbors Act (33 U.S.C. § 403);
3. National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*);
4. Endangered Species Act (16 U.S.C. § 1531 *et seq.*) (“ESA”);
5. Migratory Bird Treaty Act (16 U.S.C. §§ 703-712) (“MBTA”);
6. Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668c) (“BGEPA”);
7. Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*);
8. National Historic Preservation Act (16 U.S.C. § 470);
9. Magnuson-Stevens Fishery Conservation and Management Act (Public Law 94-265);
10. Marine Mammal Protection Act (16 U.S.C. Chapter 31) (“MMPA”);
11. Executive Order 11990; Protection of Wetlands;
12. Executive Order 11988; Floodplain Management;
13. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 C.F.R. Parts 320-332);
14. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 C.F.R. Part 230);
15. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, § 404(b)(1) Guidelines (February 6, 1990);
16. Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003);
17. 12505-SPD Regulatory Program Uniform Performance Standards for Compensatory Mitigation Requirements (USACE South Pacific Division, dated August 9, 2012);
18. Final 2015 Regional Compensatory Mitigation and Monitoring Guidelines (USACE South Pacific Division, dated January 12, 2015);
19. Memorandum of Understanding between the California Resources Agency, California Department of Fish and Game, USACE, USFWS, NMFS, EPA, USDA Natural Resources Conservation Service, and the State Water Board concerning Mitigation and Conservation Banking and In-Lieu Fee Programs in California (dated September 22, 2011);

20. Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects: 2015 Redbook (Office of Project Development and Environmental Review, Federal Highway Administration, publication number FHWA-HEP-15-047, dated September 2015); and
21. Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (The White House, dated November 3, 2015)

B. State

1. California Environmental Quality Act (“CEQA”) (Public Resources Code § 21000 *et seq.*) and State CEQA Guidelines (Tit. 14 Cal. Code Regs., Ch. 3);
2. California Endangered Species Act (“CESA”) (Fish and Game Code § 2050 *et seq.*);
3. California Natural Community Conservation Planning (“NCCP”) Act, as amended (Fish and Game Code § 2800 *et seq.*);
4. California State Office of Historical Preservation (“SHPO”) (Public Resources Code § 5020 *et seq.*) Archaeological, Paleontological and Historical Sites (Public Resources Code § 5097 *et seq.*) Native American Historical, Cultural and Sacred Sites (Public Resources Code § 5097.9); and Historical Resources (Public Resources Code § 21084.1)
5. Conservation of Wildlife Resources (Fish and Game Code § 1800 *et seq.*)
6. Lake and Streambed Alteration Program (Fish and Wildlife Protection and Conservation, Fish and Game Code § 1600 *et seq.*)
7. Porter-Cologne Water Quality Control Act (California Water Code, § 13000, *et seq.*)
8. California Native Plant Protection (Fish and Game Code §1900-1913)
9. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly; and
10. Conservation Bank and Mitigation Bank Program (Fish and Game Code § 1797 *et seq.*).

III. RESPONSIBILITIES.

A. The CDFW and Caltrans, with funding and resources, intend to:

1. Coordinate to develop statewide policies, methodologies and guidance for estimating mitigation needs from long-range transportation plans at the regional or landscape scale, for identifying landscape-scale compensatory mitigation or conservation locations in California that may be suitable for establishment, restoration, and/or enhancement, including considerations of aquatic and terrestrial habitat connectivity, and that contribute to the conservation goals and priorities of the Participating Agencies.

2. Coordinate to develop statewide policies, agreements, procedures and guidance to define the process whereby the planning, development, delivery, implementation, and crediting of advance mitigation projects result in the timely, consistent and predictable approval of the use of the mitigation by future Caltrans transportation projects, the transparent and accountable tracking of the use of mitigation established under this Initiative, and compliance with the Authorities cited in Section II of this MOU.

3. Commit staff and seek to develop the policies, methodologies, agreements and guidance described above in the Responsibilities in Section III of this MOU in accordance with the applicable laws, regulations, policies, and guidance of the Participating Agencies.

4. Explore all appropriate compensatory mitigation and conservation planning options to mitigate the impacts of planned transportation projects consistent with applicable laws, regulations, policies, and guidance, including structural modifications to the transportation system that would contribute to regional conservation priorities or contribute to species recovery, such as wildlife crossings and fish passage barrier remediation.

B. The State Water Board, Corps, EPA, FWS, and NMFS intend to:

1. Commit staff, as resources allow, and to coordinate with CDFW and Caltrans on the development and implementation of an Initiative that promotes the advance mitigation and the conservation of nationally and regionally significant biological diversity.

2. Review and provide comments on any Initiative documents submitted by Caltrans and CDFW within timeframes mutually agreed upon by the Participating Agencies.

IV. **GENERAL PROVISIONS.** It is understood by the Participating Agencies that:

A. This MOU does not authorize funding or services nor is it a legally binding contract. Any funding commitments or services will be handled in accordance with applicable laws, regulations, and procedures. Such endeavors, if any, will be covered by separate agreement(s) that shall be made in writing by representatives of the Participating Agencies and shall be independently authorized by appropriate statutory authority. This MOU does not provide such authority. As required by the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342, all commitments made by Federal signatories to this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates Federal signatories to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Nothing in this MOU shall be construed as obligating any State Parties to expend any moneys or as creating any obligations to any future

payment of money in excess of appropriations or funds authorized by law or their governing bodies.

B. Advance mitigation actions by Caltrans shall be subject to CEQA. No advance mitigation capital funds will be expended prior to the completion of the CEQA process for that advance mitigation action. This MOU does not alter the roles, responsibilities and obligations of the Participating Agencies in the environmental review of the transportation projects that may benefit from advance mitigation actions.

C. The State Water Board, Corps, EPA, FWS, NMFS, or CDFW participation in this MOU does not imply endorsement of Caltrans transportation projects nor does it diminish, modify, or otherwise affect the State Water Board, Corps, EPA, FWS, NMFS, or CDFW statutory or regulatory authorities.

D. 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.

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.

F. Participation in this MOU may be terminated, without cause, sixty days after a Participating Agency provides written notice of such termination to the other Participating Agencies.

G. This MOU in no way restricts the Participating Agencies from cooperating or coordinating 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.

H. This MOU is intended only to improve the cooperation among the Participating Agencies. It 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, its agencies, its officers, or any person.

I. This MOU does not in any manner affect statutory authorities and responsibilities of the Participating Agencies.

J. It is recognized by all Participating Agencies that the decision to issue any approval of the Initiative or approval or permit under relevant statutory authorities will remain in the sole discretion of the appropriate Participating Agency. This MOU does not guarantee or assure approval of the Initiative or the issuance of

any approval or permit required under applicable statutory authorities.

K. This MOU may be executed in several counterparts and all counterparts so executed shall constitute one MOU, notwithstanding that all of the Participating Agencies are not signatory to the original or the same counterpart.


L. This MOU supersedes the 2011 SAMI MOU in its entirety.

V. EFFECTIVE DATE AND DURATION


This MOU is effective upon the date of the last signatory and will expire five years from that date unless extended or terminated earlier by mutual agreement of the Participating Agencies.


MALCOLM DOUGHERTY
Director
California Department of Transportation


6/7/2016
Date


CHARLTON BONHAM
Director
California Department of Fish and Wildlife

May 23, 2016
Date


THOMAS HOWARD
Executive Director
California State Water Resources Control Board

6/20/16
Date


MARK TOY, P.E.
Brigadier General, U.S. Army
Division Commander

11 MAR 2016
Date



TOMAS TORRES
Director, Water Division
U.S. Environmental Protection Agency, Region IX

4/19/16

Date



REN LOHOEFENER
Regional Director, Pacific Southwest Division
U.S. Fish and Wildlife Service

march 29, 2016

Date



WILL STELLE
Regional Administrator
National Marine Fisheries Service

6/15/2016

Date