

**Memorandum of Agreement  
Between the  
U.S. Army Corps of Engineers  
Sacramento District  
and the  
National Fish and Wildlife Foundation**  
Concerning the Establishment and Operation  
of the Sacramento District Wetlands Conservation Fund  
(Escrow Account)

This Memorandum of Agreement (Agreement) is entered between the U.S. Army Corps of Engineers Sacramento District (District) and the National Fish and Wildlife Foundation (Foundation) (together, the Parties, and individually, a Party), as of the date of the signature of the second Party to sign (the Effective Date).

**1. PURPOSE AND OBJECTIVES**

A. The U.S. Army Corps of Engineers, South Pacific Division executed a Letter of Agreement (SPD Agreement) with the Foundation on November 20, 2000 establishing the South Pacific Wetlands Conservation Account. The Foundation is currently managing funds in the South Pacific Wetlands Conservation Account that were generated from compensatory mitigation requirements resulting from activities within the geographic boundaries of the District. The purpose of this Agreement is to establish the administration and operation of the Sacramento District Wetlands Conservation Fund (Fund) described herein and provide for the transfer of funds from the South Pacific Wetlands Conservation Account into the Sacramento District Wetlands Conservation Fund.

B. The primary purpose of the Fund shall be to accept monies generated as an in-lieu fee funding requirement under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act for authorized activities, as well as monies generated by enforcement and compliance actions initiated by the District, and to serve as a funding source for the restoration, creation, enhancement, or in exceptional circumstances preservation of wetlands, other aquatic resources, and their associated habitats. The primary objective of projects developed and funded under the Agreement will be to compensate for or replace functions and values of aquatic resources which have been degraded or destroyed as a result of activities in compliance with or in violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

C. The geographic service area for consideration for in-lieu fee mitigation, enforcement, and compliance actions that generate monies for the Fund and for projects developed under the Fund shall be the geographic boundaries of the U.S. Army Corps of Engineers, Sacramento District as shown on Exhibit 1, attached hereto. The projects will be located as close to specific impact sites as is appropriate and practicable as determined by the District in coordination with the Foundation. The Parties acknowledge that the monies in the Fund will be limited and that the purpose and objectives of the Fund will be

implemented to the extent practicable with the funds available in accordance with this agreement.

## **2. AUTHORITY**

A. This Agreement is entered into under the authority of Section 404 of the Clean Water Act of 1972 (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403).

B. The Foundation is a charitable non-profit corporation established in 1984 by the National Fish and Wildlife Foundation Establishment Act, 16 U.S.C. 3701 et seq., as amended (the Establishment Act), and is recognized as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. In the Establishment Act, the Foundation is directed to undertake activities that further the conservation and management of fish, wildlife, and plant resources for present and future generations and is authorized to accept funds from any legal source to further its mission.

## **3. SPECIFIC OBLIGATIONS OF THE PARTIES**

A. The District shall:

1. Provide oversight and technical review to the Foundation for evaluation of the individual and programmatic success of projects funded from the Fund. Ensure that projects provide maximum benefit to Federal trust resources, further the purposes and objectives of the Fund as stated in Article 1, and comply with all applicable federal statutes, regulations, and policies.
2. Appoint an individual (the District Representative) who shall represent the Agency in carrying out its obligations under this Agreement and who shall appoint sub-account representatives as necessary under Article 4.D.1.
3. Determine the required compensatory mitigation acreage for authorized actions as well as for resolution of District enforcement and compliance actions.
4. Make project funding recommendations on a periodic basis (and at least annually), to the Foundation regarding the use of this Fund in accordance with the procedures in Article 6 for the purposes set forth in Article 1 above.
5. Review and approve in writing and in a timely manner, all calls/requests for proposals prepared by the Foundation, project proposals submitted in response to calls/requests for proposals, applications for funding, and requests for disbursements of funds in compliance with Article 6 below.
6. Maintain records of authorized activities and enforcement and compliance actions including location, acres, and/or functions of lost resources by habitat type and similar information, which will be used in developing compensatory mitigation

projects.

7. Provide information to the general public as appropriate about the Fund.

B. The Foundation shall:

1. Appoint an individual (the Foundation Representative), who shall represent the Foundation in carrying out its obligations under this Agreement.
2. Establish and administer the Fund pursuant to this Agreement on behalf of the District as further described in Articles 4 and 5 below.
3. Establish and maintain separate sub-accounts when directed as described in Article 4.D. below.
4. Prepare one or more special requests or calls for proposals for projects to be financed by the Fund, at such times as are set forth in any subordinate agreement negotiated pursuant to Article 6.B below.
5. Make disbursements of monies from the Fund pursuant to Article 6.F. below.
6. Enter into contracts to implement compensatory mitigation projects pursuant to Article 6.E. below.
7. Make known to the public and any appropriate organizations or entities the availability of funds for expenditure for the purposes set forth in Article 1, as appropriate.
8. Report annually to the District regarding Fund activities in accordance with Article 5 below.

#### **4. FUNDING INFORMATION**

A. As of March 31, 2006, the Foundation is managing approximately \$2,524,809.00 in the South Pacific Wetlands Conservation Account, pursuant to the SPD Agreement, to be used for the purposes set forth in Article 1 above. Within forty five (45) days of the last signature of this Agreement, the Foundation will transfer that amount to the Fund, plus any additional monies that may have been contributed to the South Pacific Wetlands Conservation Account after March 31, 2006 as a result of compensatory mitigation requirements in the geographic boundaries of the District. These transferred monies will be used to start the Fund.

B. Pursuant to the *Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (In-Lieu Fee Guidance)*, dated November 7, 2000 (65 Federal Register 66914), the District may direct parties to pay monies directly to the

Foundation in-lieu of undertaking individual compensatory mitigation for authorized activities, non-compliance, or enforcement-related actions to be used for the purposes set forth in Article 1 above.

C. Additional monies may be directed to the Fund by the District or the Foundation, or directly paid into the Fund from other sources that intend such monies be used for the purposes set forth in Article 1 above. As the Foundation cannot place private and public funds in the same investment account because they have different accounting treatments, if both types of funds are received for the Fund, the Foundation may open a second investment account, which will also be managed in accordance with this Agreement.

D. The Foundation shall establish separate sub-accounts or pooled sub-accounts, as directed by the District Representative, for monies deposited from specific activities. Funds in these sub-accounts shall be maintained and invested as part of the Fund. Sub-accounts shall either be earmarked for specific in-lieu mitigation projects or pooled according to habitat type or location of impact. Funds that are earmarked for specific in-lieu mitigation activities shall be accounted for with a separate sub-account established for the associated authorized, enforcement or compliance action. The Foundation shall maintain no more than fifteen (15) active sub-accounts at a given time.

1. The District Representative shall appoint a representative for each sub-account established under this Agreement (the Sub-Account Representative). The District Representative may also act as a Sub-Account Representative.
2. The Sub-Account Representative shall represent the District in carrying out its obligations under this Agreement related to the sub-account for which he or she is the representative. A Sub-Account Representative may be responsible for one or more Sub-Accounts.

E. The District may direct the Foundation to enter into contracts deemed necessary by the District to carry out the purposes of the Fund, as described in Article 1, above. Contracts may support work including but not limited to providing assistance to the District for determining appropriate in lieu fee schedules and/or compensatory mitigation dollar amounts in accordance with the In-Lieu Fee Guidance.

## **5. FUND ADMINISTRATION PROCEDURES**

A. The Foundation shall maintain funds subject to this Agreement in an interest bearing or investment account (the Account) that is separate from all other Foundation accounts and that is insured by the Federal Deposit Insurance Corporation or Securities Investors Protection Corporation. The Foundation shall invest all monies held in the Account according to the current Foundation investment policy. The direct investment decisions shall be those of the depository or investment bank with which the Foundation establishes the Account. The Foundation shall not be responsible for making and executing the actual investments, but only for providing the depository or investment bank with the Foundation's then current investment policy. Investment income accruing to the Account

shall be reinvested in the Account and used to carry out the purposes of the Fund set forth in Article 1 above, except as specified in Article 5.D. below.

B. Excepting the monies described in Article 4.A above, each time funds are paid to the Foundation for deposit into the Fund, the Foundation shall pay itself an administrative fee equal to five percent (5%) of the amount deposited. The Foundation shall pay itself a five percent (5%) annual maintenance fee which shall be assessed on or about October 15th of each year the Fund is in existence, calculated on the average balance in the Fund account(s), based on that year's four Federal fiscal quarterly ending balances. In the event the five percent (5%) annual maintenance fee would be less than Fifteen Thousand Dollars (\$15,000), a minimum annual maintenance fee of Fifteen Thousand Dollars (\$15,000) will be paid.

C. In addition to the amounts specified in Article 5.A above, the Foundation shall be reimbursed from the Fund for all other reasonable expenses incurred in connection with the satisfaction of its obligations under this Agreement and for additional services provided by the Foundation in connection with the Fund, such as conducting a special request or "call" for proposals and traveling in connection with project management, either with the prior written approval of the District or pursuant to a subordinate agreement regarding such services that may be entered in the future. The Foundation shall request prior District approval for any individual reimbursement amount exceeding \$2,500. Additionally, the cumulative expense amount reimbursed to the Foundation shall not exceed \$10,000 during any fiscal year. In cases that \$10,000 is exceeded, the Foundation shall request prior District approval for any amount in excess of \$10,000. The Foundation will notify the District in writing of any reimbursement(s), the amount of each reimbursement, and reason for each reimbursement, made pursuant to this article within Forty Five (45) days of such activity.

D. Bank charges for the Fund shall be paid from investment income collected, and to the extent not covered by accrued investment income, shall be paid from the corpus of the Fund.

E. No funds disbursed from the Fund may be used by any recipient to pay for lobbying activities, litigation expenses or terrorist activities.

F. If this Fund is determined to be a taxable entity by the Internal Revenue Service, then any appropriate taxes, tax return preparation costs, and necessary audit fees shall be paid out of the accrued investment income, and to the extent not covered by accrued investment income, shall be paid from the corpus of the Fund.

G. The Foundation shall report annually, by December 15, to the District Representative, on Fund activity for the previous fiscal year (October 1 to September 30). The Foundation shall report on deposits, disbursements, fees and investment income, with a reconciliation of the remaining balance. Upon request, the Foundation also shall provide the District Representative with copies of its audited financial statements.



## 6. PROJECT SELECTION AND FUNDING PROCEDURES

A. The District may select compensatory mitigation projects to be financed by the Fund by following either process described in Articles 6.B. and 6.C below or both as deemed appropriate by the District. Compensatory mitigation projects will be prioritized for funding based on the extent to which they provide the same habitat type, are located within the same watershed, and are close to the site of impacted riparian/aquatic resources.

B. The District may enter into a subordinate agreement with the Foundation regarding the development of one or more requests or calls for proposals. The District shall review and approve, in writing and in a timely manner, all requests or calls for proposals prepared by the Foundation. The District shall not enter into subordinate agreement(s) with the Foundation for creation of a request for proposals wherein less than Two Hundred Fifty Thousand Dollars (\$250,000) is being made available from the Fund.

1. Any requests or calls for proposals prepared by the Foundation shall, at a minimum, include the following information and criteria for project submissions:

a. Proposed compensatory mitigation projects must be located within the geographic boundaries of the Corps' Sacramento District.

b. Proposed compensatory mitigation projects must provide, to the extent appropriate and practicable, the full replacement of functions of the impacted aquatic and riparian resources as described in the call or request for proposal.

c. Generally, proposed compensatory mitigation projects should focus on the acquisition, restoration, enhancement, and/or creation of wetland or other aquatic habitats. Aquatic habitat acquisition or preservation will be accepted only in exceptional circumstances and only if the proposed project includes a restoration, enhancement, and/or creation component, or the aquatic resource functions and values in a proposed preservation area are threatened and without permanent legal protection.

d. 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 District 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).

e. Proposed compensatory mitigation projects shall include provisions for operation and maintenance in perpetuity and shall provide for permanent protection of the proposed compensatory mitigation sites through a conservation easement or other appropriate mechanism to ensure the permanent protection of the site.

f. Proposed compensatory mitigation projects shall include a description of success criteria for each compensatory mitigation site and provide for a minimum of five years of site monitoring following completion of compensatory mitigation site construction.

2. The Foundation, in consultation with the District, may include any other criteria in the call or request for proposals as the parties may deem necessary in order to solicit meaningful compensatory mitigation project proposals.

C. The District may recommend projects to the Foundation for funding on a periodic basis (annually at a minimum). The District may consult or coordinate with appropriate Federal, State and local entities, including but not limited to the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and the applicable state resource agency or agencies in making these recommendations. When recommending projects to be financed by the Fund, the District shall require that those organizations applying for funds use a form application provided by the Foundation and submit their applications directly to the Foundation. Each application shall include information addressing the minimum criteria identified in Article 6.B.1. above. The Foundation will provide all completed applications to the District for review. After the District has reviewed the application(s), and with the advice of Foundation staff and appropriate Federal, State, and/or local entities, the District shall select proposals to be approved for funding.

D. After the District has selected projects and approved prospective funding recipients, Foundation staff will provide thirty (30) days' advance notification of each contract to Members of Congress in whose districts the grants will be spent, as required by the Foundation's Establishment Act. The Foundation, in consultation with the District, shall promptly resolve any concerns raised during the 30-day notice period.

E. At the end of the 30-day notice period and after all concerns have been resolved, Foundation staff will develop and enter into a contract with each recipient, utilizing a form selected in accordance with Foundation project management practices and policies. The Foundation shall ensure that each contract incorporates provisions requiring funding recipients to adhere to the minimum criteria described in Article 6.B.1.e. and 6.B.1.f. above and any other criteria the Parties deem appropriate to ensure the compensatory mitigation project meets the purpose and objectives in Article 1.

F. After the Foundation has entered into a contract(s) with the recipient(s), the Foundation shall provide the District a copy of all requests for disbursements of funds submitted by the recipient(s). The District will review such requests and the District Representative or authorized Sub-Account representative will transmit approved requests

to the Foundation for payment, together with written evidence of the District's approval. After the Foundation receives the District's written approval, the Foundation shall use the monies in the Fund to pay the approved request(s) for disbursement, in accordance with the Foundation's project management practices and policies.

## 7. TERMINATION

A. This Agreement shall terminate on the tenth (10th) anniversary of the Effective Date or earlier, when all funds subject to this Agreement have been disbursed and the Parties agree to termination of this Agreement in writing. If this Agreement is terminated pursuant to this Article, the District may request a full and complete accounting of all Fund activity, including deposits, disbursements, fees, and investment income, with a reconciliation of the remaining balance, and the Foundation shall provide such accounting within ninety (90) days after receipt of such request.

B. This Agreement may also be terminated by either Party upon sixty days (60) written notice to the other Party. If this Agreement is terminated pursuant to this Article, the Foundation shall, within sixty (60) days of receipt or delivery of such written notice: prepare a full and complete accounting of all Fund activity, including deposits, disbursements, fees, and investment income with a reconciliation of the remaining balance, and the Foundation shall provide such accounting within ninety (90) days after receipt of such request. In conjunction with such accounting, the Foundation shall submit to the District for approval any final payment requests as described for in Article 5.B. After written approval of such payments requests is received by the Foundation, it shall pay itself such payments from the Fund. In the event of termination of this Agreement prior to all monies in the Fund having been expended, the Foundation shall immediately (unless otherwise directed by the District in its notice if the District initiated the termination) undertake all reasonable steps to wind down the Fund cooperatively with the District including, but not limited to, the following:

1. Stop any portion of the Fund's work that is incomplete (unless work to be completed and a different date for termination of work are specified in the District's notice).
2. Place no further work orders or enter into any further subcontracts for materials, services or facilities, except as necessary to complete work as specified in the District's notice.
3. Terminate all pending project work orders and subcontracts for work that has not yet commenced.
4. Promptly take all other reasonable and feasible steps to minimize and/or mitigate any damages that may be caused by the failure to complete projects under contract, including but not limited to reasonable settlements of any outstanding claims arising out of termination of project work orders and subcontracts.



5. Deliver or make available to the District all data, drawings, specifications, reports, estimates, summaries, and other information and material as may have been accumulated by the Foundation under this Agreement, whether completed or in progress.

6. Return to the District (or a mutually agreeable third party) any unobligated portion of the Fund, withholding an amount of funds sufficient to pay outstanding obligations that remain after steps (1) through (5) above have been completed.

## **8. MISCELLANEOUS PROVISIONS**

A. No Assignment. Neither Party may assign this Agreement, in whole or in part, to any individual or other legal entity without the prior written approval of the other Party.

B. Entire Agreement; Amendments. This Agreement constitutes the entire agreement and understanding between the District and the Foundation regarding the Fund. This Agreement supercedes all prior and contemporaneous agreements, representations or understandings regarding the Fund, if any, whether written or oral. This Agreement can only be amended by a written amendment, signed by both parties. Counterpart originals and/or facsimile copies of amendments are acceptable, but not emails.

C. Additional Support. In establishing the Fund, the District assumes no obligation to provide further funding or support to the Foundation beyond the terms stated in this Agreement.

D. Arbitration

1. All claims, disputes, and other matters in question arising out of, or relating to this Agreement, its interpretation or breach, shall be decided through non-binding arbitration by a person or persons mutually acceptable to both the Foundation and the District. Notice of the demand for arbitration shall be made within a reasonable time after the claim, dispute, or other matter in question has arisen. The award rendered by the arbitrator or arbitrators shall not be final or binding on the parties.

2. This Agreement shall be subject to and interpreted in accordance with applicable federal laws and regulations.

3. The terms of this Article will survive termination of this Agreement.

E. Compliance with Laws; Insurance; Indemnification.

1. The Foundation agrees to contractually require that all recipients financed by the Fund comply with all applicable Federal, State, and local laws, regulations, and ordinances and secure all appropriate necessary public and/or private permits and consents.

2. The Foundation further agrees to contractually require recipients to obtain and maintain all appropriate insurance against liability for injury to persons or property from any and all activities undertaken by such recipient. Each recipient shall be required to provide the Foundation evidence that it has obtained, at a minimum, equivalent insurance coverage for Real Property and Equipment acquired with Federal funds as provided to property owned by such recipient (and obtain such evidence from any of its subrecipients and subcontractors and deliver it to the Foundation within thirty (30) days of purchase of any such Real Property or Equipment).
3. The terms of this Article will survive termination of this Agreement.

F. **Publicity.** The Foundation agrees to give appropriate credit to the District for its financial support in any and all press releases, publications, annual reports, video credits, dedications, and other public communications regarding this Agreement or any of the projects associated with this Agreement.

G. **Severability.** If any provision, or the application of any provision, of this Agreement be held to be unlawful or invalid by any court of law with duly established jurisdiction over this Agreement, the Parties intend that the remainder of this Agreement shall remain in full force and effect.

H. **Responsibility for Conduct.** Except for damage or loss resulting from willful misconduct, gross negligence, and/or breach of fiduciary obligation in connection with this Agreement, none of the Parties, their members, directors, officers, agents, or employees shall be liable to any other Party for any loss or damage in connection with this Agreement. Each Party shall be responsible for the consequences of its own willful misconduct, gross negligence, and/or breach of fiduciary obligation in connection with this Agreement, and in connection with any work undertaken in accordance with this Agreement. Determination of actions as “willful misconduct, gross negligence, and/or a breach of fiduciary obligation” shall be made by the arbiter designated pursuant to Article 7.D.1 above.

I. **Contact Information and Communications.** All notices and reports required or allowed to be given by this Agreement shall be in writing and delivered in person or by any of the following: first-class mail (postage prepaid), facsimile (with telephone call required to confirm that fax has been received), or overnight mail delivery by a nationally known courier and addressed using the contact information provided in this Article. All notices and reports may be sent by e-mail, but any final reports must be provided in hard copy as well. Each party agrees to notify the other within ten (10) days after any change in named representative, address, telephone, or other contact information. The individuals named below in this Article shall be the Representatives of the District and the Foundation for purposes of this Agreement.

**All deposits to the Fund shall be mailed to the Foundation’s headquarters office at 1120 Connecticut Avenue, NW, Suite 900, Washington, D.C. 20036, to the attention of the Controller.**

All contacts

If to the District:

Thomas J Cavanaugh  
Chief, Sacramento Valley Office  
U.S. Army Corps of Engineers:  
Sacramento District  
1325 J Street, Room 1480  
Sacramento, CA 95814  
Phone: (916) 557-5261  
Facsimile: (916) 557-6887  
Email: Thomas.J.Cavanaugh@usace.army.mil

All contacts except for deposits:

If to the Foundation:

Rebecca Kramer  
Manager, Special Funds  
National Fish and Wildlife  
Foundation  
28 Second St., 6<sup>th</sup> Floor  
San Francisco, CA 94105  
Phone: (415) 778-0999 ext. 235  
Facsimile: (415) 778-0998  
Email: rebecca.kramer@nfwf.org

J. Additional Documentation. From time to time, the District and/or the Foundation may be called upon to approve and/or execute instruments and other documents and take other actions, upon the request of the other Party, as may be reasonably necessary to carry out the terms of this Agreement. Such approval, execution, or other action as appropriate, shall not be unreasonably withheld.

K. No Discrimination. In the performance of obligations and responsibilities under this Agreement, the Parties shall not discriminate against any person because of race, color, national origin, handicap, religion, or gender.

L. Disclaimers. The Foundation or any individual or entity with whom the Foundation conducts business for the specific purpose of carrying out the responsibilities and obligations under this Agreement shall not publicize, or otherwise circulate, promotional material (such as advertisements, sales brochures, press releases, speeches, still and motion pictures, articles, manuscripts or other publications) which states or implies District or District employee endorsement of a product, service, or position which the Foundation, individual, or entity represents. No release of information relating to this Agreement may state or imply that the District approves of the Foundation's, individual's, or entity's work product or services, or considers the Foundation's, individual's, or entity's work product or services to be superior to other products or services. The Foundation shall ensure that all information, if any, submitted for publication or other public releases of information regarding this project shall carry the following disclaimer:

The views and conclusions contained in this document are those of the authors and should not be interpreted as representing the official policies or opinions of the U.S. Government. Mention of trade names or commercial products does not constitute their endorsement by the U.S. Government.

M. Appropriations not obligated. Nothing in this Agreement may be construed to obligate the United States or the District to any current or future expenditure of resources in advance of the availability of appropriations from Congress.

N. No Limitation on Enforcement Responsibilities. Nothing contained in this Agreement is intended to limit the authority of the District to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under applicable laws. This Agreement is not a substitute for compliance with applicable Federal laws.

O. No Agency/Partnership. This Agreement shall not make or be deemed to make any Party to this Agreement an agent for or the partner of any other Party. This Agreement does not create nor should it be construed to create an exclusive arrangement between the United States and the Foundation.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized representatives, intending to be bound legally.

**UNITED STATES ARMY CORPS OF ENGINEERS  
SACRAMENTO DISTRICT**

By:



Ronald N. Light  
Colonel, US Army  
District Engineer

Date: March 26, 2007

**NATIONAL FISH AND WILDLIFE FOUNDATION**

By:

  
Jeff Trandahl, Executive Director

Date: March 8, 2007

