



January 30, 2023

California Department of Fish & Wildlife
P.O. Box 944209,
Sacramento, CA 94244-2090
Submitted electronically: rcis@wildlife.ca.gov

RE: 2022 Public Draft of Regional Conservation Investment Strategies Guidelines

Dear California Department of Fish & Wildlife staff:

The California Ecological Restoration Business Association (CalERBA) appreciates the opportunity to provide comments to the California Department of Fish & Wildlife (CDFW) on the 2022 Public Draft of Regional Conservation Investment Strategies (RCIS) Program Guidelines (the Guidelines). These comments were developed through an internal committee of CalERBA companies that collectively represent decades of experience in successful ecological restoration projects, thousands of conserved acres, and substantial private capital that is, if given the right policy incentives, prepared to invest in advance ecological outcomes.

As an association, CalERBA represents California's growing industry of businesses and jobs that specialize in full delivery of wetland, stream, water quality, habitat restoration, and other ecological restoration projects in collaboration with conservationists, NGOs, landowners, and regulators. Member businesses support job creation and bolster the state's natural infrastructure through accountable mitigation, restoration, coastal and flood resiliency, and biodiversity outcomes. Investments by the ecological restoration industry accelerate conservation and fill in gaps where public funding and public lands alone are not enough.

CalERBA members and our policy positions are informed by our *Principles for Nature-Based Solutions* (the Principles).¹ For all ecological restoration projects, including mitigation, we advocate for high standards to ensure: i) durability, i.e. perpetual land protection and stewardship of the resource, ii) science-based design and performance criteria, and iii) risk reduction mechanisms, such as financial assurances and adaptive management tools. To incentivize investment in restoration, we advocate for i) policy preferences for projects that provide ecological benefits in advance of impacts, ii) additionality requirements and policy preferences to ensure ecological uplift, and iii) equivalency in standards for restoration projects, especially when multiple forms of restoration may qualify as an offset for a permit action. We reference these fundamental principles throughout our comments.

As proponents of advance and landscape scale restoration projects, CalERBA recognizes the value of comprehensive conservation planning that the RCIS program aims to provide. Based on our years of experience siting advance conservation projects, we believe that planning is most effective for the protected resource when the plans look beyond administrative boundaries and are based on the

¹ <https://caecologicalrestoration.org/calerba-principles>

geographic needs of the resource. When regulators create more efficient review and permitting processes for projects that advance pre-approved conservation plans, then planning policies incentivize investment at high priority restoration sites. CalERBA recommends expanding the Guidelines to incorporate an expedited review pathway for conservation banking and other restoration projects if they propose to advance achievement of a conservation priority identified in an approved RCIS.

With this background, we appreciate the opportunity to share our comments organized in three parts: i) key recommendations, outlined below in this letter, ii) detailed recommendations on Section 5 “Mitigation Credit Agreements” (Appendix I), and iii) a mark-up of the MCA template (Appendix II), informed by our extensive experience implementing BEIs under the banking program.

Integration with Existing Banking Program:

While we acknowledge the planning value of the RCIS program, we are concerned that Mitigation Credit Agreements will distract from and duplicate an already arduous process to approve similar agreements, Bank Enabling Instruments (BEIs) under the conservation banking program. The proposed MCAs appear to build off of some aspects of the conservation and mitigation banking models, but also offer sponsors the option to generate new unique credit types such as wildlife connectivity or temporary credits. This option interests several CalERBA members in MCAs, but after consultation with permittee clients, members are hesitant to sponsor an MCA because of the uncertainty surrounding when an MCA credit is preferential for a permittee versus a banking credit.

To avoid creating a potentially duplicative, parallel process to the banking program, CalERBA strongly recommends following the principles of equivalency and consistency to integrate the MCA program with the existing mitigation and conservation banking programs. A goal referenced throughout the Guidelines is facilitation of opportunities for peer federal and state agencies to also sign onto an MCA Agreement. The banking program has already been through years of trial and error and learning amongst a diverse interagency team to find agreement on proven requirements for ecological restoration project success. Indeed CDFW even lobbied to participate in the banking program as a co-chair alongside federal agency peers and thus should have an interest in seeing compatibility between the programs. Ultimately maximizing equivalency with the banking program’s standards and avoiding conflicting requirements will incentivize both sponsors and agencies to pursue joint creation of BEI and MCA credits.

Considering the near matching and often higher standards of the conservation banking program, banks should be eligible to generate the same new credit types being proposed for MCAs. While we assume this is the case, CDFW should also explicitly state in the Guidelines that existing and future BEI credits (if the appropriate type for the impacted resource) are automatically eligible for the same permit actions as MCA credits.

Again, mitigation and conservation banking has proven successful after years of refinement and collaborative stakeholder efforts across state and federal agencies. In recognition of this progress and to incentivize bank and MCA sponsors, CalERBA recommends that CDFW integrate the RCIS program with the banking program, including by:

- Add to the Guidelines (potentially Section 5.2.3) a statement that credits from an approved conservation bank with a service area that overlaps an approved RCIS qualify alongside approved MCA credits for the same permit offsets (again, if the appropriate type for the impacted resource). This policy should apply to all existing conservation bank credits, allowing those to be grandfathered in without any amendment or modification process, and should apply

in the future to all credits from conservation banks with service areas that overlap the boundaries of an approved RCIS.

- Encourage expedited processing of conservation banks that propose activities that will advance an approved RCIS' objectives.
- Review MCA approval process for consistency with federal regulatory policies and conservation/mitigation bank entitlement processes and standards.
 - Relatedly, mirror terminology used in existing federal and state natural resource programs to build on stakeholders' existing understanding of terms and best facilitate integration. CalERBA also recommends adding greater specificity and descriptions to the terms in Section 2 "Standard Terminology." Several terms are vague, new, broad and open to subjective interpretation. Clarity in these terms is important, especially for consistency in understanding and applying crediting methodologies. For example, "conservation element" appears to be a crucial term based on use throughout the Guidelines, but has a vague definition that would benefit from examples or modification to another term consistent with existing federal and state programs.
- If BEI credits are of the same resource type as MCA credits, then the BEI credits should also qualify for and be considered by CDFW for the same potential permit actions as the MCA credits. A statement in an MCA that speculates on whether or not bank credits will be used is not appropriate because an MCA sponsor is not qualified to make this determination and changes in market and resource conditions may impact subsequent demand. CalERBA recommends that the Guidelines explicitly state that BEI credits may qualify for the same permit actions as MCAs within the same region if both the bank and MCA have the appropriate credit type for the resource.
- When implementing the MCA and banking programs, CDFW should have staff for both programs attend similar trainings on foundational BEI and MCA review analyses and processes. Consistency in training will translate to consistency in review standards and knowledge across programs, which will facilitate better crossover between BEIs and MCAs.

Clarify the Regulatory Demand Drivers for MCA Credits.

In the opening Section 5.1 and throughout Section 5, the Guidelines reference unique credit types that MCAs may generate such as habitat connectivity, temporary, short-term, and sub-credits. These credit terms are referenced without a definition or discussion on the specific regulatory drivers for each type. While a few categories of potential credit types are listed and examples given, CDFW seems to retain discretion to approve a wide range of activities for credit generation so long as they are ecologically appropriate. Without further clarification on the ecological standards and requirements that will underpin qualifying MCA credits, CalERBA is concerned that MCA credits could create a slippery slope that erodes standards and investments made in traditional advance offsets under the banking program, which meet well-defined standards. Permittees may be hesitant to pursue MCA credits if the credits do not meet the standards of credits typically required for permit offsets, and therefore present an uncertainty on whether the credits will offset all permit liability.

Several of the credit types described in the Guidelines have never previously been used for the permit actions that CDFW lists as eligible for MCA credits, or other federal permits that the Guidelines reference as potentially eligible. Clear regulatory demand drivers are essential as an incentive for sponsors to pursue creation of an MCA. It is unclear whether permitting regulations discern between temporary or permanent impacts to the extent that crediting methodologies can be developed to fully-mitigate those impacts. CalERBA recommends that the revised Guidelines include multiple examples of

each credit type being applied to different permit actions, especially temporary credits that deviate from the usual principle of durability.

Species and/or habitat resource impacts can vary widely in the type of activities and duration of those activities that may produce a temporary versus permanent credit. In addition, the analysis that describes temporary impacts is difficult to anticipate. For example, a temporary impact to a long-lived species may have genetic and population consequences much different from a short-lived species; how those impacts are “fully-mitigated” is not well articulated in the proposed Guidelines. Temporary can mean different time periods of disturbance or take of a species (e.g. 1 month or 4 months) and again may have very different consequences based on breeding chronology, ability to establish a territory and home range post-impact, and resiliency of the subject species or habitat. Habitat impacts may also have very different response times to “temporary” impacts. Vernal pool or climax vegetation may take years to re-establish, while a grassland or marshland may be a shorter time. CalERBA recommends that the Guidelines anticipate the variability in these impacted ecosystems and species and provide guidance.

Thus, it is important that the Guidelines discuss the criteria for temporary credits across different resource types. Any crediting examples should also discuss the crediting units behind each credit type and what specific functions and outcomes may be measured to show achievement. Learning from existing crediting scenarios, CalERBA suggests CDFW consider the following issues:

- Temporary credits implies temporary ecological benefits. However, currently many temporary impacts are offset by credits that represent permanent, durable protections and performance of ecological services. Consequently, the proposed shift to now offset those permit actions with temporary ecological benefits would be a loss for the resource. A better approach to consider is continuing to offset temporary impacts with permanent credits that are weighed on their biological value to the species or habitat against the temporal impact to the species biology or habitat. Creating temporary habitats can potentially result in a habitat/species “sink” when the protections have ended.
- The Guidelines should clarify if temporary credits can be "renewed" and applied to new projects, and address the issue of a temporary credit project site unable to return to baseline conditions, such as due to continued disturbance.
- Ecological performance at many sites requires ongoing maintenance and management activities, sometimes at multi-year intervals. If maintenance and management activities under an MCA qualify as temporary credits, then the same activities at a bank site should also qualify for temporary credits that may be applied to the same permit actions as MCA credits.

Fee-for-service approach and impact on staffing for conservation banking program:

CalERBA is concerned that the Guidelines propose an overly in-depth, fee-based review process that CDFW is not in a position to successfully administer. Without an efficient review process, sponsors will be hesitant to pursue the creation of an MCA. CalERBA members have experienced first-hand the disincentives created by an under-staffed review process. CDFW’s current administration of the conservation banking program has resulted in state-wide mitigation credit backlogs with CDFW only meeting the legislative review timelines for banks 28% of the time, and anecdotal evidence indicating

timeline compliance may be even lower than reported.² The Guidelines propose over 20 different instances of a CDFW review and approve requirement for an MCA to progress forward (not to mention the close to 100 instances of approval required throughout the overall RCIS and MCA processes). These review and decision points must be consolidated or streamlined wherever possible for a workable and predictable review process.

The Guidelines also rely heavily on CDFW discretion on a case-by-case basis for several requirements, rather than enumerating the criteria for CDFW to apply towards the decision. We have seen that when agencies have too much discretion it leads to inconsistency and a lack of discipline and predictability in the overall review process for sponsors. Sponsors will be reluctant to invest in MCAs at scale if the program is not streamlined and implemented with discipline and transparent decision-making. CalERBA recommends that CDFW incorporate some of the same project management and communication tools that have proven successful in the banking program into the Guidelines review criteria and process, particularly Section 5.5. These include tools like shared calendars, assuming concurrence, and clarity early in the process on leadership roles, scope of decisions, and expected timing. We also recommend reviewing the timelines proposed in Section 5.5 against the timelines under the federal mitigation banking process to see where there are opportunities for touchpoints, streamlining, and improving consistencies.

Lastly, as we have seen in the conservation banking program, a limited number of staff (currently 2.2) working only a portion of their hours on a program is not the most efficient approach for processing complex restoration project reviews. For both the banking and MCA programs, we urge CDFW to staff the program with dedicated, full-time employees, perhaps even covering multiple Regions, who are able to immerse themselves in their respective programs to develop expertise and trust with the sponsor community. And again, we emphasize the importance of shared, consistent training of staff across the banking and MCA programs in recognition of the programs' shared concepts, goals, and processes.

Thank You and Summary.

Thank you for your efforts and leadership on the Guidelines. While we support the advance planning benefits of the RCIS program, we have several reservations about the potential effectiveness of MCAs based on the current Guidelines. CalERBA recommends modifications and clarifications in the Guidelines on the role and requirements of MCAs. We welcome discussion with stakeholders in the RCIS community, CDFW, and other peer federal and state agencies on the unique ecological and permitting solutions of MCAs. Given the number of outstanding questions, we recommend that CDFW pursue additional workshops and public comment periods to explain these issues to stakeholders prior to finalization of the Guidelines. Please reach out to CalERBA Executive Director, Sara Johnson at sjohnson@ecologicalrestoration.org if CalERBA can provide any further information or answer questions on our recommendations.

CalERBA's CDFW-RCIS Committee

Enclosures:

Appendix I: Guidelines Section 5 Detailed Comments

Appendix II: MCA Template Mark-Up

² See <https://img1.wsimg.com/blobby/go/db964621-d130-41a2-bec9-dd5503ee92cd/downloads/CalERBA%20Recommendations%20on%20CDFW%20Banking%20Staffi.PDF?ver=1671047272873>

Appendix I: Detailed Section 5 Comments

- CalERBA notes that the fees for MCA approval appear to be staged differently than the banking program. We are interested in discussion on why CDFW believes the proposed MCA fee schedule to be a better approach for the program, and what lessons were learned from the banking program in developing this fee schedule. Specifically, we are interested in the fee “per site” requirement and fees due per credit release.

Section 5.1:

- Add more specificity and examples to the list (items (a)-(e)) of permissible conservation and habitat enhancement actions for credit generation. The current wording is broad, and ripe for subjective and creative interpretation. As proposed, CDFW has wide discretion to qualify a range of activities as permissible for MCA credit generation. This subjectivity could lead to inconsistency in the quality and types of activities qualifying for MCA credits and undermine the value of bank credits that are held to consistent qualifying standards.
- CalERBA is particularly concerned with the concept of temporary mitigation actions and recommends adding further description on the concept and scenarios when temporary mitigation credits are appropriate. Durability is one of CalERBA’s main principles for successful nature-based solutions. This principle is fulfilled in conservation standards through requirements for long term funding, stewardship, and site protection. Temporary credits may erode this understanding if not overseen with caution. Generally, conservation measures must provide ecological benefits for the life of an impact, however the needed length of restoration activities may differ per credit type. The Guidelines should provide detailed examples and discuss how different resource losses may need different approaches to mitigation.
- As emphasized in our opening comments, CalERBA recommends outlining in Section 5.1 how each of the described conservation actions matches up with the permitting requirements of CESA, CEQA, and LSA Agreements. For example, later in Section 5.3.6.2 the Guidelines reference non-focal species credits, but there is no discussion on the regulatory drivers, i.e. permit actions, that would result in the purchase of non-focal species credits. Similarly, we recommend clarifying whether MCA credits will be allowed to provide credits for Incidental Take Permits, and how those credits will meet the fully mitigated standard. Overall the Guidelines would benefit from additional details that connect permit impact requirements with MCA credit descriptions, including details on the metrics and methodologies underpinning MCA credits and how they match up with impact permits.

Section 5.2.1:

- This section of the Guidelines recognizes the value of coordination with peer agencies. Peer agencies will be in the most likely position to also sign onto MCAs and participate in the process if the Guidelines outline requirements and a process that is consistent with the existing bank approval processes. We refer back to our opening letter comments on this topic.

Sections 5.2.3 & 5.3.10.4:

- CalERBA appreciates that the Guidelines include the requirement, a “Credit Receipt,” for an MCA sponsor and entity purchasing MCA credits to outline their reasoning for bypassing established bank credits in favor of MCA credits. However, as proposed the Credit Receipt lacks substance in process and criteria to ensure the evaluation of MCA credits versus bank credits has rigor and is not just a box-checking exercise. CalERBA supports policies that match impacts

with the ecological offset that offers the protected resource the greatest ecological value. We also advocate in our *Principles* for policies incentivizing advance restoration to minimize temporal loss of the resource. To incorporate these values, CalERBA recommends modifying the Credit Receipt to:

- List specific criteria that may permissibly justify an entity’s reasoning for not purchasing the same kind of MCA credit from an approved bank. The criteria should primarily be based on ecological reasons. Cost should not be a permissible consideration. Specifically, CalERBA recommends limiting criteria to consideration of: landscape scale connectivity, long term assurances and stewardship measures backing each credit (i.e. durability), which credit represents the most advance restoration efforts to reduce temporal loss (i.e. advance), the credits’ proximity to the site of impact if that site has been identified in public documentation as critical habitat for the impacted resource, and other ecological and risk reduction factors. The Credit Receipt should require that the entity cite in writing to the specific criteria enumerated in the Guidelines that justifies their reasoning.
- Require CDFW oversight of Credit Receipt completion and establish an administrative appeal process for an interested member of the public to challenge the published Credit Receipt justifications if they differ from the acceptable criteria enumerated in the Guidelines. This administrative process should not be long and arduous, but should include a publication requirement, option for the public to challenge within a certain number of days, and generally provide accountability and transparency to ensure the Credit Receipt is serving its intended purpose.

Section 5.2.4:

CalERBA below recommends several modifications to this Section to address additionality concerns and potential disincentives for bank and MCA sponsors to site projects on non-permanently-protected private lands, which are detailed below. Generally, we recommend a rigorous analysis and high threshold for permitting MCAs on public lands or permanently protected private lands unless those specific lands have been identified as of unique high conservation value to the subject species. Otherwise, sponsors will be discouraged from siting banks or MCAs on private lands located within the RCIS, despite the automatic additionality benefits of placing private lands in conservation, especially if those private lands are largely surrounded by already protected lands that an MCA sponsor could provide MCA credits on for permit actions at a much lower cost than the sponsor on non-permanently protected lands.

- CDFW and the PDT have already deliberated and agreed upon a policy to outline lands that are generally not appropriate for banking. These include: “Department owned or conserved lands,” “Land acquired by a public entity (e.g., with State Bond Act funds) or provided to a jurisdiction for park or natural open space purposes,” among other criteria.³ Considering the similar goal of the RCIS program and this public lands policy to “maximize conservation value,” the same criteria should also apply to the RCIS program and MCA public lands analyses. CalERBA recommends matching the banking policy and adding a section to the Guidelines on “lands not appropriate for MCAs.”
- Define key terms, especially “mitigation value” and the standard of “equal or greater to,” referenced in 5.2.4(a)(1), for the comparison analysis of MCA actions on public or permanently protected private lands versus MCA actions on non-permanently protected private lands.

³ <https://wildlife.ca.gov/Conservation/Planning/Banking/Appropriate-Lands>.

- Expand the (a)(1) analysis to also account for development threats and the value of converting private land towards permanent conservation by outlining specific criteria for when an analysis of private land availability is appropriate. If documentation in the RCIS or other resource agency public document (such as the species' listing decision) identifies habitat loss as a major threat to the resource, then CDFW should first incentivize sponsors to locate mitigation on development-threatened lands with high conservation values. A development threat analysis is especially relevant for projects that are largely preservation in approach. This analysis could be implemented through a policy preference in the Guidelines for mitigation sited in an imperiled resource's last stronghold of habitat within a rapidly developing region versus a mitigation option on public or permanently protected private lands not subject to development pressures. Determination of whether one mitigation option is on a higher value conservation land for the subject resource versus another competing mitigation option should be based on publicly available documentation and reports, such as a listing decision or recovery plan. CalERBA does not intend for this to create a burdensome or discretionary analysis step, and we welcome discussion with CDFW and stakeholders on how to best develop this concept for application. At a minimum, we urge CDFW to add more details in the Guidelines on how "mitigation value" will be assessed across private versus public and permanently versus non-permanently protected lands.
- In Section 5.2.4(a)(2)'s additionality analysis, add a requirement to document that the subject resource being enhanced on already protected land is not just being traded for another resource (i.e., new fish habitat/values for existing waterbird habitat).
- We recommend including examples of the modified analyses articulated in (a)(1) and (a)(2) of this Section to provide clarity on potential application.
- The Section closes with a requirement for MCA sponsors of projects on public lands to submit a letter signed by the public agency indicating their approval to include the lands in the MCA. The same requirement should apply to MCAs on permanently protected private lands. We recommend requiring a letter from the easement holder indicating their approval to include the lands in an MCA and that the source of funding for the easement does not preclude the lands use for mitigation.

Section 5.3.4.5:

- We recommend clarifying the primary and secondary criteria that may permissibly inform the scope of a service area. As this section currently reads, it is not clear whether service areas are primarily based on ecological considerations, and then secondarily limited by administrative boundaries, or if there is more flexibility. We also recommend revising this section to state that an MCA's service area may not extend beyond the boundary of the RCIS. MCAs are based on and proposed for a specific approved RCIS' conservation planning goals. Therefore MCAs should be bound by the geographic limits of the plans and goals that established the framework for the MCA purpose.
- The service areas of mitigation and conservation banks are often limited to an eight or ten-digit HUC to ensure there is a nexus between the impact and offset. MCAs should have comparable restrictions on service area scope to ensure a connection between ecological impact and the ecological benefit represented by the MCA credit.

Section 5.3.6.3:

- To be consistent with the latest PDT-approved checklist for banks, CalERBA recommends revising this section to eliminate performance standards and monitoring from the Development

Plan, or incorporating the Interim Management and Monitoring Plan into the Development Plan. We also recommend including the credit release schedule in the Development Plan. These currently two separate plans are essentially covering the same period, i.e. the Interim Management Period, running from MCA establishment until all performance standards are met and the endowment has been fully funded for three years. Federal and state agencies on the PDT agreed to fold the Interim Management Plan into the Development Plan, as reflected in the recently released checklist. Deviating from this existing approach could create unnecessary confusion and inconsistency in plan requirements despite the intent for the project outcomes being the same under both approaches. We recommend consistency with the existing banking program approach to ease the review process for both sponsors and staff under the banking and MCA programs.

Section 5.3.7.4:

- This section references a Conservation Easement Template but such a template is not provided in the Appendix. CalERBA recommends clarifying the Conservation Easement Template referenced here, and considering use of the CDFW-specific conservation easement currently used under the banking program.

Section 5.3.7.5:

- This section references that title insurance is required for all established MCAs but does not reference who is the policy holder of the title insurance. We assume this title insurance requirement is intended for the easement holder. CalERBA recommends that the Guidelines clarify which party exactly is obligated to obtain title insurance.

Section 5.3.8:

- Item (e) references that title insurance will be provided to CDFW. Rather than requiring the full policy, the requirement should be for proof of insurance to be provided to CDFW.
- Item (d) and the second to last paragraph in this section reference a subordination agreement that prioritizes the Conservation Easement (“CE”) over other encumbrances. While possible for some properties, most large, landscape restoration sites will have linear infrastructure related encumbrances. Under the banking program those types of encumbrances (pipelines, road rights of way, power-line easements) are typically not included in the conservation values being credited. If the CE prohibits maintenance activities, then holders of those infrastructure easements are not going to subordinate their rights to maintain their utility structures. If this requirement is retained in the Guidelines, you may see MCA sponsors craft the legal description of their CE to exclude the area of these infrastructure easements, creating a non-contiguous CE within an MCA’s property boundaries. Alternatively, you could also see MCA sponsors deterred from siting projects on otherwise ideal landscape scale tracts. To avoid these negative outcomes, CalERBA recommends modifying this requirement to allow for some infrastructure encumbrances so long as the activities do not conflict with the performance objectives of the MCA, or are addressed through an adjustment to credits.

Section 5.3.9.1:

- The Performance Security and Compliance Security both reference that when no construction occurs as the basis for the security amount, then CDFW require “another amount.” The description does not go on to reference the specific factors that CDFW will consider when calculating and approving that “other amount” such as risk involved in restoration activities or sponsor track record. The current proposal is too subjective and open-ended for MCA sponsors

to be able to appropriately calculate the financials potentially required at a project site. CalERBA recommends revising both of these references to list a specific set of criteria that CDFW may use when calculating the amount to limit the scope of discretion and provide some transparency and predictability. On the Performance Security specifically, we also recommend that no Performance Security should be required for preservation sites that lack construction because there is no Development Plan required and thus no corresponding performance standards.

- The Guidelines propose “no less than 10% of the construction cost” for the Performance Security and “no less than 10% of the Construction Security” for the Compliance Security. No explanation is provided as to how CDFW came up with these particular percent metrics or what historical project cost accountings were analyzed to understand the risks involved at the applicable stages and corresponding security needs. CalERBA recommends the Guidelines explain the risks present at the relevant security stage, criteria for determining the appropriate security amount, and justification for the proposed percent metric.
- We note that the Guidelines propose to treat the Performance Security as 10% of the construction cost, which is less than the latest and prior BEI templates requirement for the Performance Security to be 20% of construction cost. The Guidelines seem to shift the balance of the security to the proposed 10% Compliance Security. While we see the benefits of breaking out these two securities, we are concerned that the approach is inconsistent with the banking program and will create confusion for sponsors seeking joint credits. If this approach is allowable for MCAs, then it should be also incorporated into the BEI template as well.

Section 5.3.9.2:

- This section references that when a state agency sponsors an MCA, then another “comparable funding mechanism” to an endowment may be proposed so long as it ensures perpetual funding. CalERBA members have not seen an instance of such a comparable funding mechanism within the banking context, and we have concerns that state agencies, by the nature of funding mechanisms available to them, will be unable to meet this necessary standard for durability and risk reduction. We recommend the Guidelines at a minimum provide examples of the type of funding arrangements that could meet the articulated standard.

Section 5.3.10.2

- We recommend including the Credit Release Schedule in the Development Plan to easily track with major project milestones.
- This section includes a statement that all credits may potentially be released in full approximately three years after the endowment is fully funded. However, the MCA could potentially still be in interim management until the endowment is fully funded for three years. This statement should be revised to reflect that final credit releases should be based only on meeting all performance standards and full funding of the endowment.
- CalERBA recommends clarifying when credit sales may be suspended based on “any fees” not paid in full; this could be interpreted to grant CDFW the ability to suspend credits sales and use if all of the fees owed over the life of the MCA have not yet been paid, even though they are not yet due. We recommend revising to state as “if CDFW fees currently owed for the applicable credit release have not been paid in full.”
- CalERBA disagrees with the proposed ability of CDFW to suspend previously released credits if an MCA is not meeting its performance-based milestones or standards. Prior credit releases were made based on earlier demonstrated achievement of performance standards. The

functions and services of those credits are still legitimate, and thus the credits should not be available for suspension.

- The Guidelines also mention that an MCA Amendment may be required if CDFW reduces subsequent credit releases due to underperformance. However, under the banking program no amendment is required for a reduction that results in a partial credit release. Adding the requirement for an amendment is unnecessarily bureaucratic and we recommend striking this reference.

Section 5.3.11.2:

- The opening sentences of this section fail to account for scenarios when the MCA may likely begin long-term management tasks prior to MCA closure, such as for habitat establishment credits or preservation credits. CalERBA recommends revising or simply deleting these first two sentences.

Section 5.3.12:

- Beginning in this section through section 5.3.13.10, the text appears to be largely copied from the MCA Template and does not read as guidance. To keep with the intent as “Guidelines,” we suggest creating a narrative text describing the significance of each section.

Section 5.5:

- CalERBA strongly supports the Guidelines’ policy that an MCA shall be based on the requirements of the Guidelines in effect at the time the draft MCA is submitted for review. If the MCA template changes during an MCA’s already commenced review process, the sponsor should not be required to update their submittal or be charged for a re-submittal fee.
- This section references review of an MCA Concept and MCA Framework. CalERBA strongly recommends development of a template, checklist, or at a minimum list of criteria that CDFW would consistently adhere to for review of the MCA Concept and Framework.
- As seen in the mitigation programs, CalERBA recommends adding a 30-day time limit on CDFW’s completeness review. If CDFW has not issued a decision within the 30-day timeframe, then the sponsor should be able to assume completeness and move forward in the review process.
- CalERBA recommends limiting CDFW’s substantive review period to the 90 days immediately following decision that the MCA package is complete. CDFW should be required to provide written reasons, based on criteria in the Guidelines, for rejection of a draft MCA package.

APPENDIX II:
CalERBA Comments and Suggested Edits on the
MITIGATION CREDIT AGREEMENT TEMPLATE

INSTRUCTIONS FOR MCA PREPARERS
(To be removed prior to final execution of the Mitigation Credit Agreement)

Guidance for the Mitigation Credit Agreement (MCA) portion of the Regional Conservation Investment Strategies (RCIS) Program is located in Section 5 of the RCIS Program Guidelines. The Guidelines provide information, suggestions, and instructions regarding MCAs, and shall be used in conjunction with this template. Section 5.3 of the Guidelines describes the required information to be included in a Mitigation Credit Agreement. The definitions of MCA terms can be found in Section 2 of the RCIS Program Guidelines.

Language that is bracketed, bold, and italicized indicates directions for items or information that the MCA sponsor must provide. This text must be replaced with information relevant to the MCA. Text that is within brackets, but not bold or italicized, is template language that must be selected based on the proposed MCA and shall not otherwise be edited.

Do not change the exhibit numbers specified in this template. If an exhibit is optional, or not required, indicate the exhibit is not applicable in the sections they are referenced. All edits, replaced text, deletions, or proposed changes to template language within this document must be made in track changes to facilitate review and approval or editing by CDFW's program staff and Office of General Counsel. Any draft MCA provided to CDFW that does not show all edits in track changes will be summarily rejected and returned to the MCA sponsor.

[MCA FULL NAME] MITIGATION CREDIT AGREEMENT

This Mitigation Credit Agreement (MCA) is made by and between the California Department of Fish and Wildlife (CDFW) and **[if any other agencies are signing the MCA as a signatory agency, insert the name of each signatory agency]** and **[Insert name of person or entity]**, as the sponsor (MCA sponsor) of the **[Insert Full MCA name]** Mitigation Credit Agreement using the **[Insert date of the RCIS Program Guidelines in effect at the time of MCA submission]** RCIS Program Guidelines. CDFW and the MCA sponsor are referred to in this MCA collectively as the "Parties" and individually as a "Party."

RECITALS

Style Definition: DocID

Commented [A1]: As seen in the PDT-approved 2021 BEI template, CalERBA recommends inserting a table of contents, list of capitalized terms, and definitions here to orient the reader and clarify terms upfront.

- A. The MCA sponsor is **[Insert the name of the person or entity that is the sponsor]**, which is an **[Insert one of the following: individual or an entity (If the MCA sponsor is an entity, specify the type of entity, and if applicable, its member agencies, and cite its enabling statute)]**.
- B. CDFW is an agency of the State of California with jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. CDFW serves as the state trustee for fish and wildlife resources and is charged with the interpretation, administration, and implementation of the Fish and Game Code.
- C. Fish and Game Code Sections 1850-1859 establish a program for voluntary species and habitat conservation at a regional scale, including mechanisms for advance mitigation through an MCA.
- D. Fish and Game Code Section 1856 authorizes CDFW, in its discretion, to enter into an MCA with an individual or entity to facilitate conservation actions and habitat enhancement actions within the area of an approved regional conservation investment strategy (RCIS) and to authorize the creation, sale, and use of mitigation credits deriving from those actions.
- E. The **[Insert the name of RCIS in which the MCA is located ([Insert the short name of RCIS])]** was approved by CDFW on **[Date of CDFW approval]**. **[Provide a one or two sentence description of the geographic location and extent of the RCIS]**.
- F. The MCA sponsor seeks to design and implement **[Insert one of the following: conservation actions, habitat enhancement actions, or conservation actions and habitat enhancement actions]** that measurably advance the conservation goals and objectives of the **[Insert the short name of RCIS]** and to create mitigation credits that can be used ~~to mitigate as~~ **compensatory mitigation** for impacts to **[Insert all applicable: focal species, non-focal species, and other conservation elements]**.
- G. The MCA sponsor and CDFW thus seek to enter into this Agreement to facilitate the design, implementation, protection, and management of **[Insert one of the following: conservation actions, habitat enhancement actions, or conservation actions and habitat enhancement actions]**, the creation of Mitigation Credits based on those actions, and to establish the terms and conditions under which those Mitigation Credits may be sold or used.
- H. The **[Insert the short name of RCIS]** includes the following components required to create this MCA: An outline for adaptive management and monitoring for the resources identified in this MCA; a process for

updating the scientific information used in the RCIS, and for tracking the progress of, and evaluating the effectiveness of its, conservation actions and habitat enhancement actions, and it identifies **[Insert the public or private entity]** as the entity that will be responsible for evaluating the effectiveness of those actions.ⁱ

- I. The **[Insert name of MCA]** site is not already permanently protected and is not currently in use, to fulfill compensatory mitigation for one or more projects.ⁱⁱ
- J. The **[Insert name of MCA]** will not be utilized to fund or offset the costs of the design, construction, or mitigation of new Delta water conveyance facilities.ⁱⁱⁱ

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, the Parties hereby agree as follows:

1. Name of the MCA

This MCA shall be known as the **[Insert the full name and, if necessary, an abbreviated name for the MCA, as indicated in the Guidelines, Section 5.3.1]**^{iv}.

2. Supporting Regional Conservation Investment Strategy

The Regional Conservation Investment Strategy on which this MCA is based is the **[Insert name of RCIS and provide a brief description of the RCIS in which the MCA is located including the number of focal species, non-focal species, and other conservation elements it addresses, as indicated in the Guidelines, Section 5.3.2]**^v.

3. Purpose of the MCA

The purpose of this MCA^{vi} is to set forth the agreement of the Parties regarding the creation, use, operation, and maintenance of the MCA. The purpose of the MCA is to design and implement **[Insert one of the following: conservation actions, habitat enhancement actions, or "conservation actions and habitat enhancement actions]** that measurably advance the conservation goals and objectives of the **[Insert the short name of RCIS]** and to create Mitigation Credits that can be used to compensate for impacts to **[insert the specific focal species, non-focal species, and/or other conservation elements]**.

To create these credits the MCA will implement the following actions: **[Insert the name(s), title(s), or number(s) of the specific action(s)]**

Commented [A2]: If the MCA is proposing to generate credits for CESA mitigation, then this should state an objective to fully mitigate rather than just advance conservation goals.

identified in the RCIS that this MCA will implement, including if it is a conservation and/or habitat enhancement action. If there are multiple actions that will be implemented in this MCA, provide the information as a list. Include how each action will measurably advance the conservation goals and objectives of the RCIS.]

The MCA sponsor **[if property owner is different from MCA sponsor, add: and property owner]** shall **[Insert one of the following as applicable: preserve, restore, establish, and/or enhance habitat]** and then manage and maintain covered focal species, non-focal species, and/or other conservation elements in accordance with this **[insert MCA name]** MCA, the Development Plan, Interim Management and Monitoring plan, and Long-term Management and Monitoring Plan.

[See the Guidelines, Section 5.3.3]

4. MCA Site and Service Area Information

4.1. Property Ownership Description

[Describe the property ownership of each proposed MCA site and indicate if any MCA site is owned by a public agency or not.]
[If the MCA occurs on public lands or lands already protected by a conservation easement or deed restriction, the MCA sponsor shall submit, with the draft MCA package, a letter or document signed by the public agency landowner or easement grantee indicating its approval to include those lands in the MCA. Include the following statement: The MCA occurs on publicly owned land [or land under conservation easement or deed restriction]; see the attached letter that indicates **[Enter the name of the public agency landowner or easement grantee]** has approved the inclusion of their land in this MCA and which allows CDFW and the conservation easement grantee to enforce all terms and conditions of the MCA on its lands.]

[If the MCA sponsor and the property owner are the same, include the following statement: For this MCA, the MCA sponsor and property owner are the same entity. Throughout the document, the roles and responsibilities of the MCA sponsor and the property owner are referenced separately to highlight their different capacities.]

4.2. Contact Information

Attached is the name and contact information for each of the following: MCA sponsor, property owner, land manager, conservation easement grantee or long-term durability agreement entity, endowment holder **(if applicable/optional)**, and any contractors or consultants (if applicable/optional), as indicated in the Guidelines,

Commented [A3]:

Commented [A4]: Rather than having a separate Interim Management and Monitoring Plan, CalERBA recommends folding interim management and monitoring tasks into the Development Plan for two reasons: i) to be consistent with the recent 2021 PDT-approved BEI template and ii) to avoid duplication of performance standards and monitoring in both the Development Plan and the IMMP.

Commented [A5]: Having an endowment holder and providing their contact information should not be optional.

Section 5.3.4.2, and attached as Exhibit A, and incorporated herein by this reference.^{vii}

4.3. Qualifications

[Describe the qualifications of the following, separately as applicable, as indicated in the Guidelines, Section 5.3.4.3.^{viii} For each entity proposed as the land manager or conservation easement grantee, indicate their status under CDFW's due diligence process (i.e., approved, ~~initiated, or has not yet initiated due diligence review~~). The sponsor and property owner are not subject to CDFW's due diligence review unless they are also designated as the land manager or conservation easement grantee as allowed. Please see CDFW's Due Diligence Process website for more information. Due diligence must be completed prior to MCA establishment.

Commented [A6]: CalERBA recommends revising to just "approved." Both the land manager and conservation easement grantee should have to be approved prior to approval of MCA, therefore there should be no need for any status other than approved to be listed in the MCA.

When describing the endowment holder (if applicable), indicate if they have provided a self-certification letter to CDFW that indicates they meet the requirements of Government Code Section 65968, subdivision (e)(1-5).^{ix}

Commented [A7]: Again, an endowment should be required and not optional. Accordingly, the self-certification letter should be required prior to any approval of the MCA. Therefore this section should not qualify the endowment holder as "if applicable;" there should be no optional/alternative language references.

- A. Land manager**
- B. Conservation easement grantee (if applicable)**
- C. Endowment holder (if applicable, include status of self-certification letter)**
- D. Any contractors or consultants (if applicable)]**

4.4. Location Information

[Describe the MCA location. Provide separately a KMZ file of the location.] Maps of the general vicinity and of the site are included in Exhibit B which is attached to this MCA and incorporated herein by this reference. Photographs are included in Exhibit C, which is attached to this MCA and incorporated herein by this reference. **[See the Guidelines, Section 5.3.4.4.]^x**

4.5. Service Area

[Describe the proposed MCA Site service area and an ecologically based justification for how the service area was determined; see Guidelines, Section 5.3.4.5.]^{xi}

A map of the service area is included in Exhibit D, which is attached to this MCA and incorporated herein by this reference.

[Provide separately a KMZ file of the service area. If an MCA and established bank(s) have service areas that overlap, describe the

following: the MCA must identify the established bank(s) approved by CDFW that have similar credit types. The MCA shall explain how available mitigation credits at those established banks are similar or different, and under which circumstances an entity may choose to purchase existing bank credits over MCA credits. If those available mitigation credits from the established banks will not be purchased or used, the MCA shall outline when or why they will not be purchased or used.]

Commented [A8]: An MCA sponsor is not a final decision maker or affirmative predictor on when or if existing bank credits will not be purchased or used. As discussed in our comment letter on integration with the banking program, existing similar bank credits should always be an option for the same permit actions as MCA credits.

5. MCA Site Declarations and Review

5.1. Land Use Consistency Declaration

The MCA site **[Insert one of the following: is/is not]** currently being used for temporary mitigation, **[Insert one of the following: is/is not]** designated or dedicated for park or open space use, and **[Insert one of the following: is/is not]** designated for purposes that may be inconsistent with habitat preservation.^{xii} **[See the Guidelines, Section 5.3.5.1][If an MCA site is located within the boundary of an existing Natural Community Conservation Plan, include the following statement:** The creation of MCA credits has been approved in writing by the implementing entity of the existing Natural Community Conservation Plan within which the MCA is located. This written approval is attached as Exhibit E and incorporated herein by this reference.]

5.2. Public Funding

No public funding or grants were received for planning, acquisition, restoration, or other purposes related to the MCA that conflict with the creation of this MCA.

[Describe any public funding received for planning, acquisition, restoration, or other purposes related to the MCA, as indicated in the Guidelines, Section 5.3.5.2.]^{xiii}

Commented [A9]: Public funds are often conflicted from application towards mitigation activities or properties.

5.3. MCA Site Inspection by CDFW

[See Guidelines, Section 5.3.5.3] Representatives of CDFW have inspected the MCA site property and have evaluated the MCA Sponsor's proposed development. With proper notice, the MCA Sponsor and Land Manager shall allow representatives of CDFW to inspect the MCA site to evaluate the actions being implemented for credits as described in Section 3: Purpose of the MCA, throughout the life of the MCA, and during long-term management to ensure the habitat is maintained in perpetuity.

5.4. Tribal Resources

[See Guidelines, Section 5.3.5.4] [A Tribal Resources Summary that describes the results of the cultural resources records search conducted for each MCA site is attached as Exhibit F,^{xiv} and incorporated herein by this reference.] **[If the MCA sponsor chooses to conduct field surveys or collects additional information regarding cultural resources on site, any information that is available for the public, should be included in the Tribal Resources Summary exhibit.]**

5.5. Approvals

[See Guidelines, Section 5.3.5.5] **[List all permits, authorizations, and other approvals necessary or appropriate to survey, develop, construct, operate, or maintain the MCA, including the name and contact of each agency requiring the permit, permit numbers or other preliminary identifiers, agency contact and their status at the time the draft MCA package is submitted]** Once obtained, copies of all permits, authorizations, and other approvals shall be provided to CDFW.

5.6. Compliance with the California Environmental Quality Act

[See Guidelines, Section 5.3.5.6] CDFW's approval of this MCA is a discretionary act subject to CEQA. CDFW is a responsible agency pursuant to CEQA with respect to this MCA because of prior environmental review of the Project by the lead agency, [name of Lead Agency]. (See generally Pub. Resources Code, §§ 21067, 21069.) The lead agency's prior environmental review of the Project is set forth in the [Name of Mitigated Negative Declaration and Initial Study/Name of EIR, [SCH No.: 0000000000]] dated [date of Mitigated Negative Declaration/EIR] that the [name of Lead Agency] **[Insert one of the following: adopted (for an MND)/certified (for an EIR)]** for [name of Project] on **[insert date adopted/certified]**. At the time the lead agency **[Insert one of the following: adopted/certified]** the **[Insert one of the following: Mitigated Negative Declaration/EIR]** and approved the Project it also adopted various mitigation measures for the Covered Species as conditions of Project approval.

This MCA, along with CDFW's related CEQA findings, which are available as a separate document, provide evidence of CDFW's consideration of the lead agency's **[Insert one of the following: Mitigated Negative Declaration/EIR]** for the Project and the environmental effects related to approval of this MCA (CEQA Guidelines, § 15096, subd. (f)). CDFW finds that approval of this MCA will not result in any previously undisclosed potentially significant effects on the environment or a substantial increase in the severity of any potentially significant environmental effects previously disclosed by the lead agency. Furthermore, to the extent the potential for such effects

exists, CDFW finds adherence to and implementation of the Conditions of Project Approval adopted by the lead agency, and that adherence to and implementation of the Conditions of Approval imposed by CDFW through the approval of this MCA, will avoid, or reduce, to below a level of significance, any such potential effects. CDFW consequently finds that approval of this MCA will not result in any significant, adverse impacts on the environment.

6. MCA Site Development, Management, and Operations

6.1. Natural Resources Evaluation

[See Guidelines, Section 5.3.6.1] A current natural resources evaluation is attached as Exhibit G,^{xv} and incorporated herein by this reference for each MCA site. The natural resources evaluation outlines the requirements included in the [Guidelines](#).

6.2. Development Plan

[See Guidelines, Section 5.3.6.2] [If a development plan is needed, include: A Development Plan is attached as Exhibit H, and incorporated herein by this reference.] **[If a development plan is not needed, include:** This MCA does not propose restoration or other development of the MCA site; therefore, a [Development Plan](#) is not included.]^{xvi}

6.3. Interim Management and Monitoring

[See Guidelines, Section 5.3.6.3] An Interim Management and Monitoring Plan is attached as Exhibit I and incorporated herein by this reference. The MCA sponsor shall be responsible for conducting management, monitoring, and maintenance activities according to the Interim Management and Monitoring Plan until the end of the [Interim Management Period](#).^{xvii}

Commented [A10]: Per the comment above, for consistency with the BEI template, CalERBA recommends either folding all Interim Management and Monitoring tasks into the Development Plan (and deleting this exhibit) or deleting performance standards, monitoring and management from the Development Plan to avoid duplication and possible confusion during the Interim Management Period.

6.4. Long-term Management and Monitoring

[See Guidelines, Section 5.3.6.4] At the end of the interim management period, the property owner shall be obligated to manage, monitor, and maintain the MCA site in perpetuity, or until the end of the durability agreement term (depending on which real estate instrument is prepared for the MCA), to preserve its habitat and conservation values in accordance with this MCA, the Conservation Easement, and the Long-term Management and Monitoring Plan which is attached as Exhibit J and incorporated herein by this reference. Such activities shall be funded with funds disbursed from the endowment fund according to Section 9.2.1. During the long-term management period, the

property owner shall be responsible for submitting annual reports to CDFW, in accordance with Section 11.xviii

6.5. Remedial Action Plan

[See Guidelines, Section 5.3.6.5]

- A. Prior to MCA closure, if any Party discovers any failure to achieve the performance standards or any injury or adverse impact to the MCA site as preserved, restored, or enhanced, the Party making the discovery shall notify the other Parties within five (5) business days of such discovery. After the Parties are notified CDFW shall follow the enforcement provisions described under Section 13.1. Unless CDFW determines that such damage is the result of extraordinary circumstances as described under Section 13.2, CDFW shall require the MCA sponsor to develop and implement a remedial action plan to correct such condition, as described below. The annual report required under Section 11.2 shall identify and describe any remedial action proposed, approved, or performed and, if the remedial action has been completed, evaluate its effectiveness.
- B. After MCA closure, if any Party discovers any injury or adverse impact to the MCA site as preserved, restored, or enhanced, the Party making the discovery shall notify the other Parties within five (5) business days of such discovery. After the Parties are notified CDFW shall follow the enforcement provisions described under Section 13.1. Unless CDFW determines that such damage is the result of extraordinary circumstances as described under Section 13.2, CDFW shall require the Property Owner to develop and implement a remedial action plan to correct such condition, as described below. The annual report required under Section 11.2 shall identify and describe any remedial action proposed, approved, or performed and, if the remedial action has been completed, evaluate its effectiveness.
- C. Within 30 calendar days of the date of written notice from CDFW, or earlier if CDFW declares that emergency action is necessary, the MCA sponsor shall develop a remedial action plan and submit it to CDFW for written approval. The remedial action plan must identify and describe proposed actions to achieve the performance standards or remedy injury or adverse impact to the MCA site and set forth a schedule within which the MCA sponsor will implement those actions. The MCA sponsor shall, at MCA sponsor's cost, implement the necessary and appropriate remedial action in accordance with the remedial action plan approved by CDFW.

Commented [A11]: This sentence could lead to unnecessary confusion and CalERBA recommends deleting. Section 13.1 assumes that the MCA sponsor is in default for the performance of an obligation under the terms of this MCA, stating that "...CDFW shall send a written notice (Notice of Default)." However, the action of CDFW sending a notice after discovery of a failure does not meet the definition of an MCA sponsor default.

- D. If (a) the MCA sponsor fails to develop a remedial action plan and submit it to CDFW or to implement remedial action identified by CDFW, in accordance with this section, or (b) a remedial action plan is agreed upon and implemented, but the conditions do not satisfy the plan's objective and measurable performance standards by the dates specified in the plan, then CDFW shall find the MCA sponsor in default pursuant to Section 13.1 and take action accordingly.
- E. If CDFW determines there is damage to the MCA site as a result of extraordinary circumstances, the provisions of Section 13.2 shall apply.

6.6. MCA Site Closure

See Guidelines, Section 5.3.6.61 Procedures for closing an MCA site are as follows:^{xix}

- A. Upon MCA closure, no further credit sales or returns shall occur.
- B. MCA closure shall be deemed effective when CDFW provides written confirmation that all of the following have occurred:
 - i. All performance-based milestones and performance standards have been met and all remedial action required under Section 6.5 have been completed as evidenced by:
 - a. Submission of all required annual reports in accordance with Section 11.
 - b. The completion of all remedial action, if any, in accordance with the applicable remedial action plan(s).
 - c. An on-site inspection by CDFW.
 - ii. Either: (1) the last authorized credit has been sold; or (2) the MCA sponsor requests MCA closure by written notice to CDFW and CDFW provides written approval of the closure.
 - iii. All financial responsibilities of the MCA sponsor have been met, including full funding of the endowment amount for no less than three years, if applicable, and full payment of the CDFW implementation fee.

7. MCA Site Evaluation

7.1. Phase I Environmental Site Assessment

See Guidelines, Section 5.3.7.11 A Phase I Environmental Site Assessment dated no more than six months prior to submittal is attached as Exhibit K and incorporated herein by this reference.

7.2. Legal Description and Plat Map

See Guidelines, Section 5.3.7.21 Legal description, and plat maps are attached as Exhibit L, and incorporated herein by this reference.

7.3. Property Assessment and Warranty

See Guidelines, Section 5.3.7.31 A property assessment and warranty, including a Preliminary Title Report dated no more than one year prior to submittal and a Boundary Improvements and Encumbrances (BIE) Map, is attached as Exhibit M, and incorporated herein by this reference.

7.4. Real Estate Instrument

See Guidelines, Section 5.3.7.41 **Insert one of the following:** template Conservation Easement for a conservation action or another real estate instrument that has been approved by CDFW for a habitat conservation action **1** is attached **1** as Exhibit N,^x and incorporated herein by this reference.

[If the MCA site includes habitat enhancement actions that will be protected by a real estate instrument other than a conservation easement (excluding deed restrictions and restrictive covenants), explain how that instrument will function and how it will adequately protect the habitat enhancement actions and ensures the long-term durability of those actions.]

7.5. Title Insurance

See Guidelines, Section 5.3.7.51 **If it is determined that title insurance is required, include the following:** Proof of title insurance shall be provided upon recordation of the Conservation Easement and prior to MCA establishment, and is attached as Exhibit O, and incorporated herein by this reference. **1** **If it is determined that title insurance is NOT required, include the following:** Title insurance is not required, because **state reason that title insurance is not needed.** **1**

8. MCA Establishment

See Guidelines, Section 5.3.81 The MCA will be established, and the credit sale or use may begin only when CDFW confirms that all of the following actions have occurred:

A. The MCA has been approved by all of the Parties;

B. One of the following real estate instruments is in place, as applicable:

1. A Conservation Easement that has been (1) executed by the Grantor; (2) accepted by a Grantee that has been approved by CDFW; and (3) recorded in the Official Records of the county in which the MCA is located;
2. A long-term durability agreement approved by CDFW that has been properly processed;

C. The MCA sponsor has complied with its obligation to furnish all necessary financial securities in accordance with Section 9;

D. Any subordination agreement(s), required to prioritize the Conservation Easement over other encumbrances, has been executed and recorded;

E. A copy of the title insurance policy has been provided to CDFW upon recordation of the required real estate instrument according to Section 7.4, if required;

F. Sufficient long-term management funding is in place to cover any credits released. For endowments, the funding shall be in accordance with Section 9.2.1 below;

G. All reporting requirements necessary since MCA approval have been met according to Section 11 below.

9. Financial Securities and Funding

9.1. Securities

[See Guidelines, Section 5.3.9.1^{xxi}] [List all types of securities that will be needed (e.g., construction, performance, interim management, and compliance), describe which securities are not needed and why, describe what period each type of security will cover (e.g., construction phase, interim management phase), and the tasks or performance standards to be completed within each period. State whether they will be in the form of an irrevocable standby letter of credit with CDFW as the beneficiary, (to be held by CDFW) or cash, and their estimated values.] A Securities Analyses is attached as Exhibit P

and is incorporated herein by this reference. The MCA sponsor is responsible for providing security for the performance and completion of MCA site construction, management, monitoring, and remedial action in accordance with this MCA, as set forth in this Section.

The amount of each security shall be reviewed and approved by CDFW, and it shall be an irrevocable standby letter of credit or cash. The MCA sponsor shall ensure the security shall remain available in the full amount until released by CDFW.

Commented [A12]: CalERBA recommends adding a carve out or other option to meet the intent of this requirement but accommodate sites that may have long established linear infrastructure or access easements bisecting the site, which is particularly common at larger sites. Those bisecting easement holders are not likely to subordinate their easements to the Conservation Easement (CE) because that would compromise their rights to maintain the infrastructure or use the access routes. Alternatively, to meet the requirement as written the CE legal description would have to exclude those bisecting areas, creating discontinuous portions of the CE and access issues for the CE holder to areas separated by the encumbrance areas.

9.1.1. Construction Securities

[If credits are to be released prior to all phases of construction to be completed include the following:

The MCA is releasing credits prior to completing all construction described in the Development Plan.

The MCA sponsor shall furnish a Construction Security based on the amount specified in **Exhibit P** ~~which is based on the cost to the remaining Covered Habitat to be constructed for construction and/or enhancement activities~~ in accordance with the Development Plan ~~(specified in Exhibit H)~~.

Commented [A13]: This appears to be the first time the term "Covered Habitat" is mentioned. Unless a definition is added earlier incorporating the term, we recommend deleting and reworking as suggested here.

[If credits will not be released prior to all phases of construction to be completed include the following:

The MCA sponsor is not seeking credits to be released prior to construction, ~~and therefore, shall furnish a Construction Security based on the amount specified.~~ And therefore, **Exhibit P** is not applicable.]

For CDFW to release the Construction Security or to determine that construction is completed, as-built drawings of the MCA site, with accurate maps of the constructed habitats, must be submitted to CDFW no later than 90 calendar days following the completion of all construction activities. The as-built drawings shall consist of full-size construction plans, with as-built conditions clearly shown. The as-built drawings and any attachments must describe in detail any deviation from the Development Plan.

9.1.2. Performance Security

[If credits are to be released prior to meeting all performance standards described in the Development Plan include the following:

The MCA is releasing credits prior to meeting all performance standards described in the Development Plan.

Prior to MCA establishment, the MCA sponsor shall furnish the Performance Security. ~~The cost is based on a measure of expected costs associated with project management, monitoring, and reporting. It shall remain in place from the time construction is completed. MCA establishment to until completion of~~ all performance-based milestones and/or ~~meeting all~~ performance standards. This cost shall be no less than 10% of the construction cost and ~~will be designated to account for any foreseeable remedial action to the constructed habitats, or when there is no construction, be based on another amount approved by CDFW.~~ This security guarantees the MCA sponsor's

Commented [A14]: For consistency with BEI requirements, recommend increasing to 20% unless the compliance security is intended to provide assurance for the outstanding 10%. CalERBA would appreciate discussion and consideration of revisions to the securities to better match and integrate with the BEI securities.

Commented [A15]: CalERBA recommends defining remedial actions.

Commented [A16]: CalERBA recommends deleting this clause because if there is no construction, then there are no performance standards to be met, and therefore no performance security should be required.

obligations to meet performance standards. After CDFW determines the MCA sponsor has satisfied all performance standards, CDFW shall release the Performance Security.

If credits will not be released prior to meeting all performance standards described in the Development Plan include the following:

The MCA is not ~~releasing-requesting~~ credit ~~releases~~ prior to meeting all performance standards described in the Development Plan, and therefore, will not furnish a Performance Security.]

9.1.3. Interim Management Security

[If credits are to be released prior to completing the interim management period, including all performance standards described in the Development Plan and prior to fully funding the endowment for three years include the following:

The MCA is ~~releasing-requesting release of~~ credits prior the end of the interim management period.

Prior to MCA Establishment, the MCA sponsor shall furnish the Interim Management Security in the amount specified in Exhibit P. The amount of the Interim Management Security shall be equal to the estimated cost to implement three years of interim management (as described in the Interim Management and Monitoring Plan), as set forth in Exhibit I. This security guarantees the MCA sponsor's obligations ~~for management and monitoring~~ under this MCA while ~~performance standards are being met and~~ the endowment is maturing ~~past full funding~~ (approximately three years). Once the interim management period is completed ~~[all performance standards are met and the endowment is fully funded for three years] and accepted by CDFW~~, the Interim Management Security ~~will-shall~~ be released back to the MCA sponsor ~~CDFW~~.

9.1.4. Compliance Security

Prior to ~~MCA establishment~~~~the end of the Interim Management Period~~, the MCA sponsor shall furnish the Compliance Security in the amount not less than 10% of the Construction Security ~~and account for any foreseeable remedial action, or another amount approved by CDFW when no construction occurs~~. This security guarantees the MCA sponsor's obligations under this MCA through MCA closure. This security covers any ~~remedial actions~~ needed until MCA closure. Upon MCA closure, the Compliance Security will be released back to the MCA sponsor.

Commented [A17]: CalERBA recommends establishing the compliance security for the long-term management period, and not duplicating its purpose with the performance security, which is already in effect for the interim management period.

Commented [A18]: CalERBA recommends deleting unless more clarity is provided on the specific factors that CDFW will consistently consider to determine the amount. Otherwise, this discretion is too vague and uncertain.

Commented [A19]: Again, need to define remedial actions.

9.2. Long-term Management Funding

[See Guidelines, Sections 5.3.9.2 and 5.2.4(d)]^{xxii} [Explain how the implementation of the conservation action(s) or habitat enhancement action(s) proposed in the MCA will be adequately funded and how long-term protection and management of each site will be funded. If the MCA sponsor is a state agency, they may utilize other comparable funding mechanism(s) approved by CDFW in accordance with an adopted statewide policy regarding funding for long-term management and operations of mitigation sites. Describe the funding mechanism selected and its estimated value]. An Endowment Fund Analysis is attached as Exhibit Q and incorporated herein by this reference.

9.2.1. Endowment Fund

- A. The endowment fund shall be an amount sufficient to fully provide for the financial requirements of the long-term management of the MCA in accordance with the Long-term Management and Monitoring Plan (Exhibit J) and the endowment fund analysis (Exhibit Q) and schedule (Exhibit R). The endowment fund shall be held in trust for the benefit of the resources to be protected and shall be held, managed, invested, and disbursed solely for, permanently restricted to, the stewardship and management of the MCA site in accordance with the MCA. The MCA sponsor shall fully fund the endowment amount through endowment deposits according to the Endowment Fund schedule attached as Exhibit R, and incorporated herein by this reference [See Guidelines, Section 5.3.9.2]. If the MCA sponsor intends to release a portion of the MCA credits prior to fully funding the endowment, the same or greater portion of the endowment's principalle must be funded. The endowment fund shall be held by the endowment holder.
- B. Until the Endowment is fully funded, the Each deposit for endowment funding-principal will be adjusted annually for inflation for the adjustment year (July 1-June 30)-until the Endowment is fully funded. The MCA sponsor shall calculate inflation based on changes in the Annual-Consumer Price Index (CPI) for California, for All Urban Consumers, published by the California Department of Industrial Relations, Division of Labor Statistics and Research, and shall adjust the endowment amount-principal proportionally with the April_1st-inflation rate CPI which is published mid-June of each year. The MCA sponsor shall measure inflation by calculating the percent change between the annual average CPI value published for the year the MCA was established and the CPI value published for April of the adjustment year. The MCA sponsor shall multiply thise inflation ratepercentage increase in CPI by the endowment amount in

Commented [A20]: CalERBA recommends consistent use of this term as a capitalized defined term.

Commented [A21]: CalERBA recommends these edits to account for the typical CPI schedule. CPI values are only published for even-numbered months (February, April, June, etc.), and are published approximately six weeks after the end of each even-numbered month.

Exhibit Q. The product will be the increase in the endowment ~~amount~~principal for the adjustment year. If deflation occurs (April CPI of the adjustment year is less than the April CPI of the previous year), then the MCA sponsor shall not adjust the endowment ~~amount~~principal for the adjustment year, until the Annual CPI exceeds the value from the most recent inflation year. This information shall be included in the annual reporting.

- C. The MCA sponsor shall provide to CDFW confirmation of each endowment deposit within 30 calendar days of such deposit.
- D. D. The endowment deposits that the endowment holder receives are to be held in the endowment fund.

9.2.2. Endowment Fund Management:

- A. The endowment fund should be governed by an investment policy statement that is designed to generate investment returns, over long periods of time, sufficient to keep pace with inflation and pay the costs of long-term management and monitoring, net of any financial investment and administrative fees.
- B. Disbursements shall not be made from the endowment fund until three years after the date on which the endowment amount is fully funded.
- C. The Parties anticipate that disbursements from the endowment fund will be made available by the endowment holder to the property owner to fund annual long-term management of the MCA as anticipated in the Long-term Management and Monitoring Plan and estimate of costs.
- D. Notwithstanding Probate Code Sections 18501-18510, the property owner and the endowment holder shall consult with CDFW in the event that either (a) the value of the endowment fund has decreased to levels that may threaten its continued existence as a source of perpetual funding for long-term management and monitoring, whether due to unexpected investment performance or otherwise; or (b) long-term management expenses exceed those estimated in the endowment fund analysis and schedule. Property owner shall submit a proposed temporary revised Long-term Management and Monitoring Plan and endowment fund analysis in writing to CDFW and grantee within 60 calendar days after completion of property owner's consultation with CDFW and grantee. Upon written approval of the temporary revised Long-term Management and Monitoring Plan by CDFW and any required notification to the endowment holder, the property owner shall

Commented [A22]: CalERBA recommends reconsidering this requirement, which could have a high administrative and time burden especially on private entities sponsoring MCAs. The requirement would seemingly set up a MCA sponsor to need, even to address temporary budget over-runs, to continually augment the endowment.

implement the approved revised management measures and tasks. The original Long-term Management and Monitoring Plan shall be restored in full force and effect upon expiration of the temporary revised Long-term Management and Monitoring Plan or sooner if the circumstances in Subsections (a) or (b) above cease to exist.

9.2.3. Financial Records and Auditing

A. MCA sponsor and property owner are required to maintain complete and accurate financial records relating to the operation of the MCA, using generally accepted accounting principles (GAAP), developed by the Federal Accounting Standards Advisory Board. At the request of CDFW, no more frequently than annually, the MCA sponsor and property owner shall each have its financial records relating to the operation of the MCA audited by an independent licensed Certified Public Accountant and shall submit the auditor's report to CDFW upon completion.

B. CDFW shall also have the right to review and copy any records and supporting documentation pertaining to the performance of this MCA. MCA sponsor and property owner agree to maintain such records for possible audit for a minimum of three years after MCA closure, or three years after the date of performance, whichever is later. MCA sponsor and property owner agree to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employee or representative who might reasonably have information related to such records. Further, MCA sponsor and property owner agree to include a similar right of State and federal auditors to audit records and interview employees and representatives in any contract related to the performance of this MCA.

10. Credit Type, Release, Sale and Use, and Reporting

10.1. Credit Type and Quantity

[See Guidelines, Section 5.3.10.1.]^{xxiii} Fully describe the proposed type(s) of mitigation credits, the quantity of credits created including unit of measurement for each credit and reference the credit evaluation and credit table.] The credit evaluation and credit table are attached as Exhibit S and Exhibit T, respectively and incorporated herein by these references.

10.2. Credit Release Schedule

[See Guidelines, Section 5.3.10.2.1] A Credit Release Schedule is attached as Exhibit U and incorporated herein by this reference. It

Commented [A23]: CalERBA recommends reevaluating this requirement. It may be problematic for most private entities sponsoring MCAs. Private entities typically do not disclose their full accounting and financial records to public agencies. The current wording of the requirement also is not clear on the extent of finances that would need to be disclosed, such as complete records, including credit pricing and costs.

includes a credit release schedule for each credit type included in Section 10.1 (see Exhibit T). **[Describe the number of releases, the standards or triggers that must be met for each release, including when and how many are intended to be released, and which performance standards must be met prior to each credit release.]**^{xxiv}

10.3. Credit Sale and Use

See Guidelines, Section 5.3.10.3.1 The terms of sale and use that apply to this MCA are attached as Exhibit V and incorporated herein by this reference.^{xxv}

If the MCA service area overlaps with any CDFW-approved bank service areas, the Credit Receipt shall include a section for each entity purchasing credits to outline their reasoning for not purchasing from an established bank with the same credits available.^{xxvi}

The MCA must include terms of sale and use as indicated in the Guidelines, Section 5.3.10.3.1

- A. The Credit sale and use may begin only after CDFW has approved the release of credits. MCA sponsor shall have the exclusive right to determine the price for any and all MCA credits it offers for sale.
- B. In no case shall the number of credits of any particular type sold or used exceed the total number of credits of that type which have been released for sale or use, as evidenced by written approval by CDFW.
- C. Approval of a credit as a mechanism for satisfying a mitigation requirement is determined on a case-by-case basis by the regulatory agency that imposed the mitigation requirement to ensure the use is appropriate to compensate for the impacts of the specific project to which the credits are proposed to be applied. Mitigation or compensation requirements for individual project impacts may or may not align with MCA credits. The purchaser or user of the credits should seek written approval from the applicable regulatory agency prior to purchase.
- D. Once a credit is sold by the MCA sponsor, that credit may not be sold or transferred to another entity. Sold credits that have not been used may only be returned back to the MCA sponsor at the MCA sponsor's discretion. In order to add the unused and returned credits back to the ledger the following conditions must be met:
 - i. The MCA is open;

Commented [A24]: Per our letter comments, the Credit Receipt substantive and process requirements need to be further developed. CalERBA recommends adding to the Guidelines and Credit Receipt template a list of the specific criteria that qualify as permissible reasons for not purchasing credits from an established bank.

- ii. The original purchaser of the unused credits obtains written documentation of MCA sponsor's conditional approval to return credits and provides a copy to CDFW for CDFW review and written approval;
- iii. MCA sponsor enters the returned credits in the ledger.
- iv. Upon the return of the credits specified above, the MCA sponsor shall submit to the Parties listed in the notices section of the MCA, and approving/regulatory agency(ies)/authorities associated with those credits copies of the following:
 - a. Credit Receipt.
 - b. Payment receipt.
 - c. An updated ledger.

10.4. Credit Reporting

[See Guidelines, Section 5.3.10.4.]

10.4.1. Credit Receipt

A template Credit Receipt is attached as Exhibit W and incorporated herein by this reference.

10.4.2. Credit Ledger

[Explain how the proposed mitigation credits will be accounted for, including the specific methods proposed for reporting and maintaining a record of credit creation, release, sale, or use.] A template credit ledger is attached as Exhibit X and incorporated herein by this reference.^{1xxvii}

11. Reporting

11.1. Annual Inflation Adjustments to Endowment Inflation Report

[See Guidelines, Section 5.3.11.1.1] By April 1st of each year following the first endowment deposit, until the endowment amount is fully funded, the MCA sponsor shall provide an Endowment Inflation Report to CDFW and the endowment holder, in both Word and PDF electronic format that includes the following:

Commented [A25]: Following comment above on CPI, recommend this date is adjusted to July 1st.

- A. The adjusted endowment amount determined in accordance with Exhibit Q Section 9.2.1.B;
- B. The resulting adjusted endowment deposit amounts.

If the MCA sponsor fails to submit complete reports on time, the MCA sponsor is in default per Section 13.1.

11.2. Annual Report

[See Guidelines, Section 5.3.11.2.1 The MCA sponsor or property owner, as specified below, shall submit an annual report to CDFW and the RCIS implementing entity, editable electronic format, on or before January 31st of each year following the approval of the MCA. If MCA sponsor or property owner, as applicable, fails to submit complete reports on time, the MCA sponsor or property owner, as applicable, is in default pursuant to Section 13.1. Each annual report shall cover the period from January 1 through December 31 ~~of the current year~~ (the "Reporting Period"). Prior to MCA closure, the MCA sponsor shall be responsible for annual reporting of the MCA development and interim management tasks as described in the Interim Management and Monitoring Plan (Exhibit I). After ~~MCA closure~~ the Interim Management Period is over, the property owner shall be responsible for annual reporting of the MCA long-term management tasks described in the Long-term Management and Monitoring Plan (Exhibit J).

A. Each annual report shall include:

- i. An updated credit ledger (Exhibit X) showing all credits sold and used since the first credit release and an accounting of remaining credits.
- ii. An itemized account of all applicable activities pertaining to the Construction Security, Performance Security, Interim Management Security, short-term securities if applicable, and the Endowment Fund.
- iii. A statement of the amount/balance of the Endowment Fund at the beginning and end of the Annual Reporting Period.

B. During MCA Development – The report shall include data, documentation, and discussion of the MCA's progress toward meeting performance standards described in this MCA and its exhibits. The annual report shall describe any deficiencies in attaining and maintaining performance standards and any remedial action proposed, approved, or performed. If remedial action has been completed, the annual report shall also evaluate the effectiveness of that action.

C. During Interim management and long-term management – The Interim and Long-term Management and Monitoring Plans contain

reporting requirements that are separate from, and in addition to, the requirements listed above for the annual report.

During the interim management period, the annual report shall also contain an itemized account of the management tasks in accordance with the Interim Management and Monitoring Plan and any remedial actions conducted during the Reporting Period. During the long-term management period, the annual report shall contain an itemized account of the management tasks in accordance with the Long-term Management and Monitoring Plan and any remedial actions conducted during the Reporting Period. Each annual report shall also include the following:

- i. The time period covered, i.e., the dates "from" and "to."
- ii. A description of each management task conducted, the dollar amount expended, and time required.
- iii. The total dollar amount expended for management tasks conducted during the Reporting Period.
- iv. A description of the management and maintenance activities proposed for the next reporting year.
- v. A description of the overall condition of the MCA site(s), including photos documenting the status of the MCA site(s) during the Reporting Period and a map documenting the location of the photo points.

11.3. Credit Sale and Use Reporting

[See Guidelines, Section 5.3.11.3.1 Upon every transaction of credits, the MCA sponsor shall submit to CDFW, ~~in an editable electronic format,~~ the following:

- A. A copy of the executed credit receipt.
- B. An updated credit sale and use ledger in the form provided in Exhibit U.

12. Responsibilities

[See Guidelines, Section 5.3.12.1

12.1. Responsibilities of the MCA Sponsor and Property Owner

- A. Without limiting any of its other obligations, including without limitation, those described in the Conservation Easement, the MCA sponsor and property owner each hereby agrees and covenants the following responsibilities during the time the MCA is in operation:

- i. The MCA sponsor and property owner shall, prior to the execution of the Conservation Easement included as Exhibit N, provide CDFW with satisfactory evidence that the proposed conservation easement grantee is authorized to hold conservation easements pursuant to California Civil Code § 815.3 and Government Code §§ 65966-65967, has a primary purpose of long-term land stewardship for conservation purposes consistent with the purpose of the MCA, and has agreed to be the conservation easement grantee.
- ii. The MCA sponsor shall be responsible for all activities and costs associated with the establishment and operation of the MCA, including but not limited to construction, planting, remedial action, documentation, maintenance, management, monitoring, and reporting, until completion of the interim management period. Some responsibilities and costs, including but not limited to remedial action and actions specified in subparagraphs iii and vii, below, will extend past the Interim Management Period until Bank closure.
- iii. The MCA sponsor shall perform the actions described in this MCA and its exhibits to support all credits that project proponents/action agencies secure. The MCA sponsor shall provide CDFW with the credit receipt (Exhibit W) for all credits secured by project proponents/action agencies that confirms that the MCA sponsor will continue to perform the aforementioned actions.
- iv. The MCA sponsor or property owner shall not discharge or release on, to or from the MCA site, or permit others to discharge or release on, to or from the MCA site, any material, waste, or substance designated as hazardous or toxic or as a pollutant or contaminant under any Federal, state, or local environmental law or regulation (each a hazardous substance).
- v. The property owner shall not create or suffer any lien or encumbrance upon the property included in the MCA other than as set forth in the property assessment and warranty approved by CDFW. The property owner shall not execute, renew, or extend any lien, lease, license, or similar recorded or unrecorded right or interest on any property included in the MCA without the prior written consent of CDFW and the grantee, if a conservation easement has been granted.
- vi. The MCA sponsor or property owner shall not construct or install any structure or improvement on, or engage in any activity or use of, the MCA site, including mineral exploration or development, excavation, draining, dredging, or other alteration of the MCA site that is prohibited by, or not consistent and in accordance with this MCA and its exhibits.
- vii. The MCA sponsor shall ensure that the MCA is managed and maintained in accordance with the Development and Interim

Commented [A26]: CalERBA recommends adding an exception to this prohibition if the right or interest is detailed in and consistent with the Management plan. Many properties have grazing leases, hunting leases, and access agreements renewed on an annual basis. If these activities are detailed in and consistent with the Management Plan, then written permission from CDFW should not be required.

Management and Monitoring Plan, this MCA and its exhibits prior to MCA closure.

- viii. The property owner shall allow, or otherwise provide for, access to the MCA site by MCA sponsor, CDFW, CE grantee or any third-party beneficiary to the CE, as described in the conservation easement.
- ix. The property owner shall grant to MCA sponsor all rights and authority necessary, and shall not limit the MCA sponsor, in performing its responsibilities and obligations pertaining to the MCA site in accordance with this MCA and its exhibits.
- x. The property owner shall ensure that the MCA is managed and maintained in accordance with the Long-term Management and Monitoring Plan, this MCA, and its exhibits.
 - B. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this MCA or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this MCA or extensions for the performance of the requirements of this MCA.
 - C. An extension of one compliance date based upon or related to a single incident shall not extend any subsequent compliance dates.

12.2. Responsibilities of CDFW

- A. CDFW will make a good faith effort to review the annual reports and remedial action plans within sixty calendar days from the date of receipt of complete submittal. If CDFW is unable to complete its review within the time specified in this section, this fact will be reflected in any schedule established for performance of remedial action and any evaluation of timely performance of remedial action by MCA sponsor.
- B. CDFW shall conduct compliance inspections for any purpose(s) it determines as necessary to assess compliance with this MCA.

Commented [A27]: CalERBA recommends either defining "good faith effort" or using a different standard here for describing CDFW's commitment to timely completing the review.

13. Other Provisions

[See Guidelines, Section 5.3.13.]

13.1. Enforcement Provisions^{xxviii}

- A. If CDFW determines that the MCA sponsor has defaulted in the performance of an obligation under the terms of this MCA, CDFW shall send a written notice (Notice of Default) to the MCA sponsor describing the violation and requesting to meet and confer to determine the appropriate action(s) to take to cure the default.

CDFW and the MCA sponsor shall meet and confer within thirty days of the MCA sponsor's receipt of such Notice of Default.

- B. If CDFW and the MCA sponsor fail to resolve the issue through the meet-and-confer process, CDFW shall send a written notice (Notice of Violation) to the MCA sponsor describing the violation and instructing the MCA sponsor to cure the violation within thirty days. If the cure reasonably requires more than thirty days, the MCA sponsor shall so inform CDFW in writing and shall indicate how many days it will take to cure the violation. CDFW may, in its reasonable discretion, determine in writing whether to extend the cure period beyond the initial thirty days.

- B. If the MCA sponsor fails to cure the violation within thirty days after receipt of the Notice of Violation, or if CDFW grants a longer cure period and the MCA sponsor fails to begin the cure within thirty days of receipt of the Notice of Violation and to continue diligently to pursue and complete the cure in good faith, CDFW may, in its sole discretion, suspend credit sale and/or use, reduce the amount of available credits, utilize financial securities, or suspend or terminate this MCA. Any suspension or revocation of this MCA pursuant to this section shall be made in writing and shall be signed by the Director, Chief Deputy Director, or Deputy Director for Ecosystem Conservation of CDFW.

- C. In the event of suspension or termination of this MCA pursuant to this section the MCA sponsor shall remain liable for the implementation, maintenance, and management of any conserved lands or habitat enhancements for which mitigation credits have been ~~released~~ [sold](#).

- D. If CDFW determines that the MCA is operating at a credit deficit (i.e., that credit sales made exceed the credits authorized for release, as adjusted in accordance with this MCA), CDFW shall send a Notice of Default. Upon receipt of notification, MCA sponsor shall cease credit sales and credit use immediately. It is the MCA sponsor's responsibility to meet with CDFW to determine how to resolve the deficit or if credits must be sold back to the MCA sponsor. All credit sales or use can only resume with CDFW review and notice that the default has been resolved.

E. If the MCA sponsor fails to submit or complete required annual reports in a timely manner, the MCA sponsor is in default resulting in an automatic suspension of credit sale and use effective 30 days after the report is due. The suspension will be lifted within 10 calendar days after CDFW receives a complete annual report. If the Property Owner fails to submit complete required annual reports in a timely manner, the Property Owner is in default. CDFW will notify the Property Owner of the date by which the annual report must be made complete.

13.2. Extraordinary Circumstances

In the rare event (an extraordinary circumstance) in which the MCA can no longer serve its intended purpose as compensatory mitigation, in whole or in part, for the specific resources for which it was established, CDFW may determine that the MCA sponsor is relieved of some or all of its obligations under this MCA if the failure or delay in the performance of its obligations is caused by, directly or indirectly, forces beyond its control, including, accidents, acts of war or terrorism, civil or military disturbances, natural catastrophes or acts of God; it is understood that the MCA sponsor shall use reasonable efforts which are consistent with accepted practices to resume performance as soon as practicable under the circumstances. CDFW will determine whether extraordinary circumstances exist that will excuse performance. This may result in CDFW limiting or suspending the creation of undeveloped credits and/or the sale any previously released credits.

Commented [A28]: This provision is less prescriptive and detailed than the extraordinary circumstances section outlined in the PDT approved 2021 BEI template. CalERBA recommends incorporating aspects of the BEI extraordinary circumstances section into the MCA provision here to provide more certainty and clarity on the events that qualify as extraordinary circumstances and respective party expectations in such an event.

13.3. Controlling Law

This MCA shall be governed by the provisions of California Fish and Game Code Sections 1850-1858, as amended, and CDFW's Regional Conservation Investment Strategies Program Guidelines (Guidelines), as amended. In the event of any conflict, Sections 1850-1861 govern the interpretation of the Guidelines and the MCA, and the terms of the Guidelines also govern the interpretation of the MCA.

13.4. No Limitation of Authority

This MCA is not intended, nor shall it be construed, to limit CDFW's authority to fulfill its statutory or regulatory responsibilities or to otherwise limit the powers afforded to either Party by applicable law.

13.5. Modification and Amendment

This MCA, including its exhibits, may be amended or modified only with the written approval of CDFW and the MCA sponsor or as required by law.

13.6. Termination of Agreement

The MCA sponsor may terminate this MCA upon ninety (90) days written notice to CDFW; provided, however, that the obligation to ensure the perpetual protection and management of conservation actions and the long-term durability of habitat enhancement actions resulting in the creation of mitigation credits shall survive termination of this MCA. CDFW may terminate this MCA pursuant to Section 13.1. Once terminated, any unsold credits are void. The MCA sponsor must give the same ninety (90) day written notice to anyone who has purchased unused credits. The purchaser shall either use the credits immediately or they may return the credits to the MCA sponsor.

13.7. Entire Agreement

This MCA, including its exhibits, constitutes the complete, final, and exclusive terms and conditions governing the establishment of the MCA and the creation, sale and use of mitigation credits and supersedes all prior and contemporaneous discussions, negotiations, understandings, or agreements of the Parties.

13.8. Successors and Assigns

This MCA, and each of its covenants and conditions, will be binding on and will inure to the benefit of the Parties and their respective successors and assigns, subject to the limitations on transfer set forth in this MCA. The MCA sponsor may assign or otherwise transfer the MCA only with the prior amendment approval by CDFW. Any assignment or transfer made without the prior written approval of CDFW may, at the sole discretion of CDFW, result in the termination of this MCA and the invalidation of any credits created or sold after the date of the assignment or transfer.

13.9. Partial Invalidity

If a court of competent jurisdiction holds any term or provision of this MCA to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining terms and provisions, or portions of them, will not be affected unless an essential purpose of this MCA would be defeated by loss of the invalid or unenforceable provision.

13.10. Notices

Any notice, demand, approval, request, or other communication permitted or required by this MCA will be in writing first via electronic mail with read receipt and if necessary, via certified U.S. mail, postage prepaid. Addresses for purposes of giving notice are set forth below.

Either Party may change its notice address by giving notice of change of address to the other Party in the manner specified in this section at least thirty (30) days prior.

To CDFW:

Landscape Conservation Planning Program Manager
Habitat Conservation Planning Branch
California Department of Fish and Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090
rcis@wildlife.ca.gov

To MCA sponsor:

[Insert name, mailing address, and email address for MCA sponsor]

To Property Owner:

[Insert name, mailing address, and email address for property owner]

13.11. Counterparts

This MCA may be executed in multiple counterparts, each of which will be deemed an original and all of which together will constitute a single executed agreement.

13.12. No Third-party Beneficiaries

Except as expressly stated herein, this MCA is not intended to nor shall it be construed to create any third-party beneficiaries. The duties, obligations, and responsibilities of the Parties to this MCA with respect to third parties will remain as otherwise provided by law.

13.13. MCA Program Fees

Approval and implementation of this MCA by CDFW is subject to the payment of MCA fees in accordance with the fee schedule included in CDFW's Regional Conservation Investment Strategies Program Guidelines.

13.14. Liability

All terms and conditions of this MCA shall be binding upon both the MCA sponsor and the property owner. Notwithstanding California Civil Code Section 1431 or any other provision of law, the MCA sponsor and the property owner shall be jointly and severally liable for performance of all terms, conditions, and obligations of this MCA and shall be jointly and severally liable for any unauthorized take or other violations of this MCA, whether committed by the MCA sponsor or the property owner,

or any person acting on behalf of one or more MCA sponsor or the property owner, including their officers, employees, representatives, agents or contractors and subcontractors. Any failure by one or more of the MCA sponsors or the property owner to comply with any term, condition, or obligation herein shall be deemed a failure to comply by both the MCA sponsor and the property owner.

This Mitigation Credit Agreement becomes effective on the date of the last signature below (Approval Date).

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE**

[Name]

[Position]

[Date]

MCA SPONSOR

[Name]

[Position]

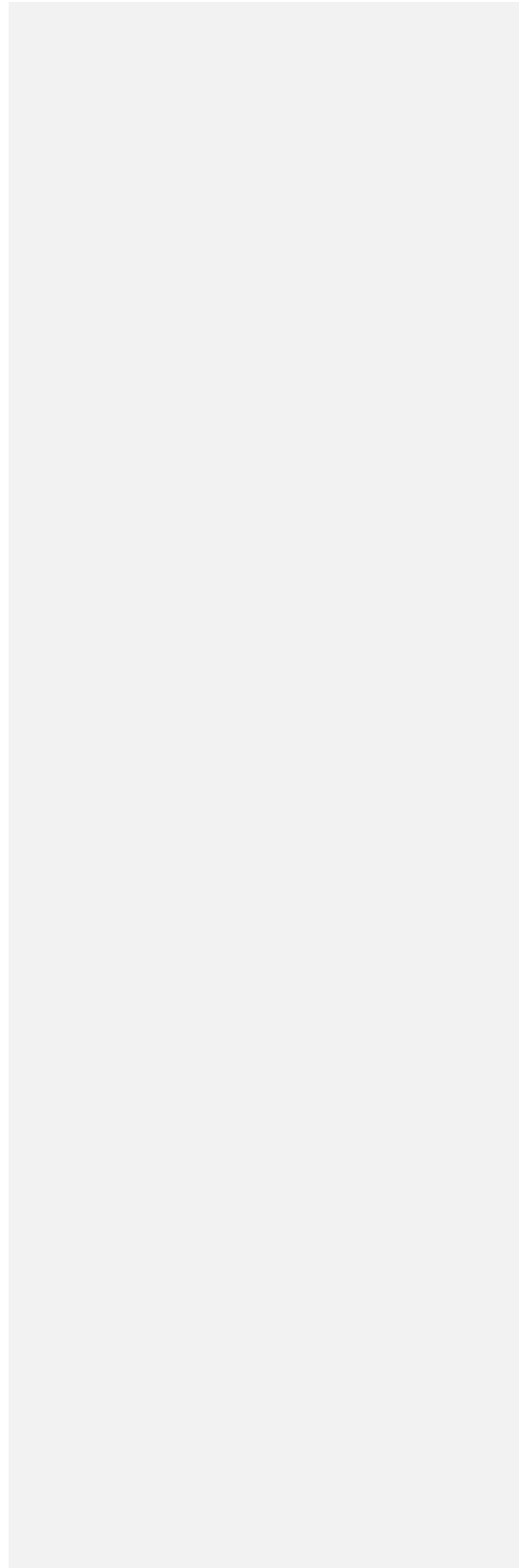
[Date]

MCA PROPERTY OWNER

[Name]

[Position]

[Date]



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- i Fish & G. Code, § 1856(b)
 - ii Fish & G. Code, § 1856(f)
 - iii Fish & G. Code, § 1855(d)
 - iv Fish & G. Code, § 1798, subdivision (b)(2)(A)
 - v Fish & G. Code, § 1856, subdivision (a)
 - vi Fish & G. Code, § 1856, subdivision (d)
 - vii Fish & G. Code, §§ 1856, subdivision (g)(1) and 1798, subdivision (b)(2)(B)
 - viii Fish & G. Code, §§ 1856, subdivision (g)(1) and 1798, subdivision (b)(2)(G)
 - ix Fish & G. Code, § 1856(g)(13)
 - x Fish & G. Code, §§ 1856, subdivisions (g)(3), (g)(4), (g)(8) and 1798, subdivisions (b)(2)(C), (b)(2)(D), (b)(2)(E)
 - xi Fish & G. Code, §§ 1798, subdivision (b)(2)(I) and 1798.5, subdivision (a)(2)(D)
 - xii Fish & G. Code, § 1798, subdivision (b)(2)(M)
 - xiii Fish & G. Code, § 1798, subdivision (b)(2)(N)
 - xiv Department of Fish and Wildlife Bulletin: Tribal Communication and Consultation Policy. Available:
<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=122905&inline>
 - xv Fish & G. Code, §§ 1856, subdivision (g)(7) and 1798, subdivision (b)(2)(H)
 - xvi Fish & G. Code, §§ 1856, subdivision (g)(5) and 1798, subdivision (a)(2)(B)
 - xvii Fish & G. Code, § 1798.5, subdivision (a)(2)(B)
 - xviii Fish & G. Code, §§ 1856, subdivision (g)(14) and 1798.5, subdivision (a)(2)(B)
 - xix Fish & G. Code, § 1798.5, subdivision (a)(2)(B)
 - xx Fish & G. Code, §§ 1856, subdivision (g)(12) and 1798.5, subdivision (a)(2)(C)
 - xxi Fish & G. Code, § 1798.5, subdivision (a)(2)(G)
 - xxii Fish & G. Code, §§ 1856, subdivision (g)(13) and 1798.5, subdivision (a)(2)(F)
 - xxiii Fish & G. Code, § 1856, subdivisions (f) and (g)(9)
 - xxiv Fish & G. Code, §§ 1856, subdivision (g)(18) and 1798.5, subdivision (a)(2)(E)
 - xxv Fish & G. Code, § 1856, subdivision (g)(15)
 - xxvi Fish & G. Code, § 1856, subdivision (g)(6)
 - xxvii Fish & G. Code, §§ 1856, subdivision (g)(18) and 1798.5, subdivision (a)(2)(E)
 - xxviii Fish & G. Code, § 1856, subdivision (g)(16)

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