

**Memorandum of Agreement
Between the
California Department of Fish and Game
and the
National Fish and Wildlife Foundation
to establish the
Environmental Fund for Habitat and Incident-Specific Restoration Projects

Amendment No. 1**

1. This Amendment of the Memorandum of Agreement (Agreement) is entered into by the National Fish and Wildlife Foundation (the “Foundation” or “NFWF”) and the California Department of Fish and Game (CDFG), (together, the “Parties”, and individually, a “Party”) on behalf of the public as well as fish, wildlife and their habitat.

I. Definitions

2. “Habitat Restoration Projects” means restoration projects or mitigation projects developed for one of the following habitat types: (1) Wetlands (salt); (2) Wetlands (fresh and vernal pools); (3) Riverine (includes riparian corridor, in stream and near-stream); (4) Coastal (rocky intertidal, artificial reefs, dunes, and estuarine); and (5) Uplands.

3. “Habitats Restoration Committee” or “Committee” means the committee of CDFG and NFWF representatives appointed to select Habitat Restoration Projects to be funded by the Environmental Fund for Habitat and Incident-Specific Restoration Projects.

4. “Incident Specific Restoration Projects” means restoration projects or mitigation projects identified or developed for a specific release, discharge, and/or other acts that result in injuries to fish, wildlife, or their habitat.

5. “Natural Resource Damages” means the damages for injury to, destruction of, loss of, or loss of use and enjoyment of natural resources, including the reasonable costs of assessing those damages.

6. “Restoration” means to restore, replace, rehabilitate and/or acquire the equivalent of natural resources and related services that were injured, lost, or destroyed by a release or discharge of oil, hazardous substance, and/or any substance or material deleterious to fish, wildlife, or their habitat.

7. “Settlement” includes out of court settlements, Stipulated Judgments, and Court approved Settlement Agreements and Judgments.

II. Purpose

8. Pursuant to the original Agreement to establish the Environmental Fund for Habitat and Incident-Specific Restoration Projects, executed by the Parties on April 11, 2003, the Foundation did establish a fund to be known as the Environmental Fund for Habitat and Incident Specific Restoration Projects (hereafter referred to as the “Habitat Restoration Fund” or the

“Fund”¹). The amended purposes of the Habitat Restoration Fund are (a) to receive Natural Resource Damages and/or monies earmarked for Restoration projects or mitigation projects, (b) to provide funding for Restoration projects and/or mitigation projects, (c) to reimburse CDFG for costs associated with developing and implementing Restoration plans, including permitting (as necessary), monitoring and oversight; and (d) to provide funding to develop and/or implement the following: (1) Incident Specific Restoration Projects; or (2) Habitat Restoration Projects.

III. Funding

9. This Fund may be funded with Settlement funds designated as Natural Resource Damages, or earmarked for Restoration or mitigation projects; mitigation funds; and/or other funds earmarked for Restoration projects or mitigation projects. This Fund may also be funded with Court awarded Natural Resource Damages or mitigation funds. Hereafter, the monies placed into this Fund shall be referred to as “Project Funds”.

10. Project Funds shall either be earmarked for Incident Specific Restoration Projects or pooled according to habitat type to fund Habitat Restoration Projects. Project Funds that are earmarked for Incident Specific Restoration Projects shall be accounted for with a separate sub-account established for that incident. Project Funds that are not earmarked for Incident-Specific Restoration Projects shall be accounted for with one or more of the Habitat sub-accounts pursuant to paragraph 19 below. CDFG shall advise the Foundation whether Project Funds placed into the Fund should be accounted for in an incident specific sub-account or pooled with other funds in one or more of the Habitat sub-accounts. Project Funds for Incident Specific Restoration Projects may also be pooled in an incident specific sub-account when such funds are to be used for the same or similar projects.

11. Project Funds directly deposited into the Fund shall not be deemed Federal funds within the meaning of 16 United States Code section 3703(e) and shall not be deemed State moneys within the meaning of California Government Code section 16305.2.

IV. Manager

12. The Foundation shall be Manager of the Fund.

13. For purposes of enforcement of this Agreement, the Foundation submits to the jurisdiction of the Sacramento County Superior Court or alternatively, with regard to particular Project Funds, to the jurisdiction of the Court that approved the Settlement and/or entered the Stipulated Judgment.

14. In addition to the powers expressly granted to the Manager by this Agreement, the Manager shall have all other powers granted to trustees under the laws of the State of California, except as otherwise provided in this Agreement.

15. CDFG shall have the right to ask the Court to remove the Manager or to terminate

¹ The name and number assigned to the Habitat Restoration Fund within the Foundation’s database, is the “California Environmental Management Fund/ NA.1156”.

the Fund if CDFG determines that the Manager is not performing its duties in a manner that is consistent with the purposes of the Fund upon sixty (60) days written notice to the Manager. If the Foundation is removed as Manager, CDFG shall appoint another qualified foundation or entity as Manager or petition the Court to appoint another qualified foundation or entity as Manager. Within ten (10) days of removal, the Foundation shall: (1) prepare a full and complete accounting of all Project Funds received, deposited, held, disbursed, managed, expended or otherwise controlled by the Manager; (2) submit to CDFG any payment requests as provided for in paragraph 35; (3) refund the excess overhead in the event the Foundation is removed prior to the expiration of the term for which overhead has been prepaid; and (4) transfer any and all monies in the restricted account and all necessary records to the new Manager as specified by CDFG or the Court. The change in Manager shall not otherwise alter the terms of this Agreement.

16. The Foundation may resign as Manager at any time for cause upon sixty (60) days written notice to CDFG. If the Foundation resigns, CDFG shall appoint a new Manager or petition the Court to appoint a new Manager, and the Foundation shall, within ten (10) days of providing written notice to CDFG: (1) prepare a full and complete accounting of all Project Funds received, deposited, held, disbursed, managed, expended or otherwise controlled by the Manager; (2) submit to CDFG any payment requests as provided for in paragraph 35; (3) in the event the Foundation resigns prior to the expiration of the term for which overhead has been prepaid, the Foundation shall refund the excess overhead; and (4) transfer any and all monies in the restricted account and all necessary records to the new Manager as specified by CDFG or the Court. The change in Manager shall not otherwise alter the terms of this Agreement.

17. Unless otherwise agreed to by CDFG, the Foundation shall not hold an interest in any property acquired with Project Funds nor shall it acquire, manage or dispose of such property.

V. Beneficiaries

18. The People of the State of California and CDFG, on behalf of fish, wildlife and their habitat, are the beneficiaries of the Fund.

VI. Duties of Manager

19. The Manager shall maintain all Project Funds in a single segregated account (the “Account”), separate from all other Foundation accounts. Separate sub-accounts shall be established for funds deposited from Settlements for Incident Specific Restoration Projects. Five habitat sub-accounts shall be created to hold pooled funds to be used for Habitat Restoration Projects. The five habitat sub-accounts shall consist of the following: (1) a Saltwater Wetlands Habitat sub-account; (2) a Freshwater Wetlands Habitat sub-account (includes vernal pools); (3) a Riverine Habitat sub-account (includes riparian corridor, in stream and near-stream habitats); (4) a Coastal Habitat sub-account (includes rocky intertidal, artificial reefs, dunes, and estuarine habitats); and (5) an Uplands Habitat sub-account. The Manager may create additional, or adjust

existing, categories of Habitat Restoration Projects based upon habitat type and create additional, or adjust existing, habitat sub-accounts pursuant to a written Amendment of this Fund in accordance with paragraph 38.

20. All Project Funds held in the Account shall be invested according to Foundation investment policy unless otherwise directed by CDFG. Interest and earnings accruing to the Account shall be reinvested in the Account and used to carry out the purposes of the Fund.

21. The Manager shall not be required to account for more than 20 sub-accounts at any point in time, including the five habitat sub-accounts. This number may be increased pursuant to a written Amendment of this Fund in accordance with paragraph 38.

22. The Manager is authorized and obligated to make disbursements of funds from the sub-accounts pursuant to paragraphs 26, 27, 28, 29, and/or 32 below.

23. The Foundation shall appoint an individual (the “Foundation Representative”), who will represent the Foundation in carrying out its obligations as Manager under this Agreement. The Foundation shall identify to CDFG, in writing, the identity, mailing address, and phone number of the Foundation Representative. Any change in the Foundation Representative shall be communicated to CDFG within ten (10) business days of the change.

24. The Manager shall use the Project Funds to fund, subject to paragraphs 26, 27, 28, 29, and/or 32 below, Incident Specific Restoration Projects as directed by CDFG and/or Habitat Restoration projects as directed by the Habitats Restoration Committee.

25. The Manager shall submit to CDFG a bi-annual Statement of Account Activity including interest earned on the Account and an accounting of credits to and debits from each sub-account.

VII. Funding of Incident Specific and/or Habitat Restoration Projects

26. Project Funds accounted for with incident specific sub-accounts shall be used to fund Incident Specific Restoration Projects selected by CDFG representative(s) assigned to select projects for a given incident (“Incident Representatives”). Such projects must be: (1) consistent with the terms of the Settlement documents or Court Order, and/or selected in accordance with the terms of the Settlement or Court Order and the Restoration Planning Criteria specified in Attachment A; or (2) consistent with the terms specified in the mitigation agreement or other agreement, and/or selected in accordance with the terms of the mitigation agreement or other agreement and the Restoration Planning Criteria specified in Attachment A to the extent the criterion are applicable to mitigation projects.

27. The Incident Representatives shall be appointed by the Administrator of CDFG Office of Spill Prevention and Response (OSPR) and/or the Regional Manager of the region in which the spill, discharge, or acts occurred. The Incident Representative(s) shall have the authority to direct disbursements from a specified incident sub-account to facilitate Restoration

planning and implementation, or mitigation activities, for a specified incident pursuant to the terms of this Agreement. CDFG shall notify NFWF in writing of the names, addresses, email addresses, telephone numbers, and facsimile numbers of the Incident Representative(s) assigned to select and oversee projects for a given incident. The Incident Representative(s) assigned to select and oversee projects for a given incident may consult with NFWF regarding project ideas and the availability of matching funds prior to selecting the projects for a given incident.

28. Project Funds accounted for with Habitat Restoration sub-accounts shall be used to develop and fund Habitat Restoration Projects selected by the Habitat Restoration Committee. The development of Habitat Restoration Projects may consist of compiling databases that identify existing, planned, or proposed restoration and/or mitigation projects for the habitat types described in paragraph 19 above. Projects selected for funding must benefit resources similar to those injured by the discharge, release, and/or other acts and meet the Restoration Planning Criteria attached as Appendix A, to the extent such criteria are applicable.

29. The Habitats Restoration Committee shall be comprised of two CDFG/OSPR Committee representatives appointed by the Administrator of CDFG/OSPR, one of whom shall be designated as the administrative lead for the Committee. In addition, each Regional Manager for the seven CDFG Regions may appoint one CDFG Regional representative to participate on the Committee. Finally, the Foundation Representative(s) will serve on the Committee in an advisory capacity with respect to project ideas, project selection, and the availability of matching NFWF/grant funds for certain projects. The Habitats Restoration Committee shall have the authority, through the administrative lead, to direct disbursements from the five habitat sub-accounts to facilitate planning and implementation activities for Habitat Restoration Projects and/or mitigation projects pursuant to the terms of this Agreement. CDFG shall notify NFWF in writing of the names, addresses, email addresses, telephone numbers, and facsimile numbers of CDFG/OSPR and CDFG Regional representatives appointed to the Habitats Restoration Committee, and identify the administrative lead for the Committee. NFWF shall notify CDFG in writing of the name, addresses, email addresses, telephone numbers, and facsimile numbers of the Foundation Representative.

30. The Administrator of the OSPR has appointed two CDFG/OSPR Administrative representatives (the “OSPR Administrative Representatives”) for purposes of communicating with the Foundation regarding the overall management of the Fund, decisions of the Incident Representatives and/or the Habitats Restoration Committee, disbursements from the Fund to facilitate planning and implementation activities for Habitat Restoration Projects and/or mitigation projects pursuant to the terms of this Agreement, approval of extraordinary expenses, amendments to this Agreement, notifications, and termination of this Agreement. The OSPR Administrative Representatives shall be Mr. Stephen L. Sawyer, Assistant Chief Counsel, and Mr. Kenneth E. Mayer, Scientific Branch Chief. Any change in the OSPR Administrative Representative(s) shall be communicated to the Foundation in writing within ten (10) business days of the change.

31. Any action taken by the Manager in strict accordance with this Agreement and instructions from the OSPR Administrative Representatives, the Incident Representative(s), and or the administrative lead for the Habitats Restoration Committee shall be considered authorized by CDFG.

32. The Manager shall make disbursements from the Trust Fund to facilitate planning and implementation activities for Habitat Restoration Projects and/or mitigation projects only when one of the designated Incident Representative(s), or the administrative lead for the Habitats Restoration Committee have submitted a letter to the Manager authorizing disbursements approved by CDFG. The Incident Representative(s) and/or the administrative lead for the Habitats Restoration Committee shall advise the Manager regarding the sub-account from which debits are to be made.

VIII. Payment of Manager Expenses and Disbursement of Funds

33. The Manager shall receive an initial administrative overhead reimbursement equal to two percent (2%) of all Project Funds deposited into the Fund at the time of each deposit. Additionally, the Manager shall receive an administrative fee equal to three percent (3%) of all disbursements from the Fund. These fees will be collected by the Manager from the Fund on a quarterly basis in arrears and reported in writing to the OSPR Administrative Representatives at the time of collection. The uses of these funds include expenses for day-to-day management of the Fund, for personnel time for contracting, tracking, managing, and making disbursements from the Fund, and initial bank charges for establishment of the Account. All other bank charges shall be paid from accrued interest on the Account or from the corpus of the Fund to the extent not covered by accrued interest. Except as provided in paragraphs 34 and 35, the Manager shall make no additional charges or deductions against the corpus of the Fund.

34. If this Fund is determined to be a taxable entity under the Internal Revenue Code (IRC) or is required to file any returns or other documents with the Internal Revenue Service, the Manager may retain external expertise and assistance in creation and/or preparation of this information. All associated fees and costs incurred associated with these activities and any appropriate taxes, tax return preparation costs, and necessary audit fees will be paid out of the accrued interest, and to the extent not covered by accrued interest, shall be paid from the corpus of the Fund. Costs incurred pursuant to this section will be collected by the Manager from the Fund in arrears and reported in writing to the OSPR Administrative Representatives at the time of collection. Pursuant to Section 115 of the IRC, the income derived under this Agreement arises from the exercise of an essential governmental function with the benefit of accruing to the State of California, or a political subdivision thereof.

35. The Manager will also be reimbursed for necessary expenses not contemplated in paragraphs 33 or 34 provided that such expenses were approved in writing as both reasonable and necessary by the OSPR Administrative Representative(s), and were incurred in connection with the satisfaction of the Manager's obligations under this Agreement. Such expenses would generally be for extraordinary expenses. To the extent such expenses are not covered by accrued interest, such charges shall be paid out of the corpus of the Account.

36. Upon receipt of written approval by CDFG to fund Restoration planning and implementation activities pursuant to paragraph 32, the Manager is authorized and obliged to disburse funds from the Account as directed by the Incident Representative(s) and or administrative lead for the Habitats Restoration Committee.

37. Nothing in this Agreement shall create any right or benefit, substantive or procedural, enforceable at law by a party against CDFG, the Foundation, its officers, employees, or any other person.

IX. Amendments

38. This Agreement may be amended only by written agreement of the Foundation and CDFG.

X. Notices

39. Notices to CDFG under this Agreement shall be made in writing and may be given by delivery in person, by mail or by telecopy (facsimile) to:

Stephen L. Sawyer
Assistant Chief Counsel
Department of Fish and Game
Office of Spill Prevention and Response
P.O. Box 160362
Sacramento, California 95816-0362
Telephone: (916) 324-9812
Facsimile: (916) 324-5662
Email: ssawyer@ospr.dfg.ca.gov

Julie T. Yamamoto
Resource Assessment Program Supervisor
Department of Fish and Game
Office of Spill Prevention and Response
P.O. Box 944209
Sacramento, California 94244-2090
Telephone: (916) 327-3196
Facsimile: (916) 324-8829
Email: jyamamot@ospr.dfg.ca.gov

Hand deliveries only:
1700 K Street, Suite 250
Sacramento, California 95814

Hand deliveries only:
1700 K Street, Suite 250
Sacramento, California 95814

40. Notices to the Foundation under this Agreement shall be made in writing and may be given by delivery in person, by mail or by telecopy (facsimile) to:

Ms. Rebecca Kramer
Manager, Special Funds
National Fish and Wildlife Foundation
28 - 2nd Street, Sixth Floor
San Francisco, California 94105
Telephone: (415) 778-0999
Facsimile: (415) 778-0998
Email: Rebecca.kramer@nfwf.org

XI. Effective Date

41. This Agreement shall become effective upon the date of execution by the Manager.

XII. Termination


42. The Fund shall terminate when all Project Funds have been disbursed and the parties agree to termination in writing. If the Fund is terminated pursuant to this section, CDFG may request a full and complete accounting of all Project Funds received, deposited, held, disbursed, managed, expended or otherwise controlled by the Manager.

43. This Fund may also be terminated by CDFG upon thirty days (30) written notice to the Foundation. If the Fund is terminated pursuant to this section, the Foundation shall, within ten (10) days of receipt of written notice: prepare a full and complete accounting of all Project Funds received, deposited, held, disbursed, managed, expended or otherwise controlled by the Manager; submit to CDFG any payment requests as provided for in paragraphs 35; and/or in the event the Fund is terminated prior to the expiration of the term for which overhead has been prepaid, the Manager shall refund the excess overhead. Thereafter, the Manager shall transfer the funds subject to the Agreement to a restricted account specified by CDFG, which is dedicated to such funds.

IN WITNESS WHEREOF, the parties through their authorized representatives agree to be bound by the terms of this Agreement.

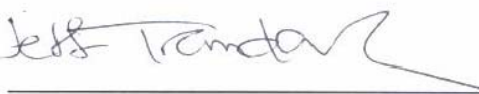
Dated: ^{August} July 18, 2006

**CALIFORNIA DEPARTMENT OF FISH AND GAME
OFFICE OF SPILL PREVENTION AND RESPONSE**

By: 
Lisa Curtis
Administrator
Office of Spill Prevention and Response

Dated: ^{August} July 7, 2006
J

NATIONAL FISH AND WILDLIFE FOUNDATION

By: 
Jeff Trandahl
Executive Director

Appendix A Restoration Project Evaluation Criteria

Phase I - THRESHOLD CRITERIA: A project must meet the following criteria in order to be further considered and evaluated using the Screening Criteria below. If any project does not meet the Threshold Criteria, it will not be given further consideration.

- A. **Consistency with Trustees' Restoration Goals**¹ Projects must meet the Trustees' intent to restore, rehabilitate, replace, enhance, or acquire the equivalent of the injured resources and resource services. In addition, projects must comply with applicable settlement documents.
- B. **Technical Feasibility**² The project must be technically and procedurally sound. Consider the level of risk or uncertainty and the degree of success of projects utilizing similar or identical techniques in the past.

Phase II - INITIAL SCREENING CRITERIA: The following initial screening criteria shall be used to determine preferred and non-preferred projects.

- C. **Relationship to Injured Resources and/or Services (nexus).**^{1 2} Projects that restore rehabilitate, replace, enhance, or acquire the equivalent of the same or similar resources or services injured by the spill are preferred to projects that benefit other comparable resources or services. Consider the types of resources or services injured by the spill, the location, and the connection or "nexus" of project benefits to those injured resources.
- D. **Avoidance of Adverse Impacts.**^{1 2} The project should avoid or minimize adverse impacts to the environment and the associated natural resources. Adverse impacts may be caused by collateral injuries when implementing, or as a result of implementing, the project. Consider avoiding future short-term and long-term injuries as well as mitigating past injuries.
- E. **Likelihood of Success.**¹ Consider the potential for success and the level of expected return of resources and resource services. Consider also the ability to evaluate the success of the project, the ability to correct problems that arise during the course of the project, and the capability of individuals or organizations expected to implement the project.
- F. **Multiple Resource [and Service] Benefits.**¹ Consider the extent to which the project benefits more than one natural resource or resource service. Measure in terms of the quantity and associated quality of the types of natural resources or service benefits expected to result from the project.
- G. **Time to Provide Benefits.** Consider the time it takes for benefits to be provided to the target ecosystem or public to minimize interim resource loss (sooner = better).
- H. **Duration of Benefits.** Consider the expected duration of benefits from the project. Long-term benefits are the objective.

¹ Required criterion under NOAA'S regulations for oil spill (15 C.F.R. § 900.54)

² Required criterion under Interior's regulations (43 C.F.R. § 11.82)

Phase III - ADDITIONAL SCREENING CRITERIA: The following additional screening criteria shall be used to further evaluate and prioritize projects for funding and implementation. These additional criteria are not considered to be of lesser importance than the initial screening criteria. However, in practice it may be difficult to apply these criteria to project concepts. These criteria are generally more appropriately applied after more detailed project plans and scopes of work are developed. If sufficient information is available, these criteria may also be used during the initial screening process.

- I. **Compliance with Applicable Federal, State, and Local Laws and Policies.**² The project must comply with appropriate laws and policies.
- J. **Public Health and Safety.**^{1 2} The project must not pose a threat to public health and safety.
- K. **Protection of Project [Maintenance and Oversight].** Consider the opportunities to protect the implemented project and resulting benefits over time through conservation easements, land acquisition, or other types of resource dedication. Long-term protection is preferable.
- L. **Opportunities for Collaboration.** Consider the possibility of matching funds, in-kind services, volunteer assistance, and coordination with other ongoing or proposed projects. External funding and support services that reduce costs or extend benefits are preferable. Funds, however, shall not be used to offset the costs of ongoing mitigation projects required pursuant to state or federal law.
- M. **Cost-Effectiveness.**² Consider the relationship of expected project costs to expected resource and service benefits. Seek the least costly approach to deliver an equivalent or greater amount and type of benefits.
- N. **Total Cost and Accuracy of Estimate.**¹ The total cost estimate should include costs to design, implement, monitor, and manage the project. Its validity is determined by the completeness, accuracy, and reliability of methods used to estimate costs, as well as the credibility of the person or entity submitting the estimate.
- O. **Comprehensive Range of Projects.** Consider the extent to which the project contributes to the more comprehensive restoration package. Evaluate the project for the degree to which it benefits any otherwise uncompensated spill injuries.

Phase IV - SUPPLEMENTAL CRITERIA: The following criteria should be considered when appropriate (e.g., in the case of more than one project being equally preferred after Phases I – III evaluations).

- P. **Ability to Document Benefits to the Public.** Consider the ability to document receipt or delivery of benefits to the public as a result of a project or other use of funds.
- Q. **Educational/Research Value.** Consider the project's potential for public education and outreach and/or clarifying restoration planning issues.
- R. **Non-Duplication.** Projects should not duplicate other efforts already ongoing at the same location.

¹ Required criterion under NOAA'S regulations for oil spill (15 C.F.R. § 900.54)

² Required criterion under Interior's regulations (43 C.F.R. § 11.82)