



# RESOURCE MANAGEMENT AGENCY

## ENGINEERING DEPARTMENT

2037 W. Cleveland Avenue  
Madera, CA 93637-8720  
(559) 675-7817  
FAX (559) 675-7639  
Kheng.Vang@madera-county.com

Ken Vang PE, County Engineer

### **MADERA COUNTY SEDIMENT REMOVAL PERMIT** **PURPOSE**

The purpose of the this permit is to not only allow the removal of sediment deposits but to further assist the Local Maintaining Agency with maintaining or restoring the dedicated Flood Way to their intended use. This permit is limited to the Chowchilla River, Ash Slough, Berenda Slough and Fresno River in which the County is the Local Maintaining Agency and has easement rights for channel maintenance. The activities permitted herein are activities that are outlined in the Clean Water Act 404 (f) and are therefore exempt from the need to obtain 404 permits. They are also in compliant with, and incorporate, the requirements of 1602 Fish and Game permit.

The County of Madera has compiled all of these provisions and permit requirements into one over the counter issued permit for the purpose of provided public education, and streamlining a process that benefits Madera County constituents.

1. Please contact the Permit Engineer at 559-675-7817 ext 3322 if you have any questions or need any additional information.
2. Permit will typically be issued **OVER THE COUNTER**.
3. There will be **NO FEE** for permit.

It is important to comply with these requirements so that State and Federal Agency can continue to trust in local government and preserve our ability work in unison and streamline.

**MADERA COUNTY SEDIMENT REMOVAL PERMIT**  
**APPLICATION**

This application is not complete until all requirements have been approved.

Site APN: \_\_\_\_\_

**Applicant:** \_\_\_\_\_ (owner or contractor)

**Owner's Name:** \_\_\_\_\_

Address: \_\_\_\_\_ City \_\_\_\_\_

Phone No: \_\_\_\_\_

**Contractor:** \_\_\_\_\_

Address: \_\_\_\_\_ City \_\_\_\_\_

**Phone No:** \_\_\_\_\_

License Number: \_\_\_\_\_ Class \_\_\_\_\_

**Site Location:** \_\_\_\_\_

**Estimated Starting/Completion Date:** \_\_\_\_\_ / \_\_\_\_\_

**Removal Method:** \_\_\_\_\_

**Estimated Volume to be removed:** \_\_\_\_\_

**Use for Sand:** Dust control  Other  \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

For official use only

\_\_\_\_\_  
(Signature) Applicant agrees to do work in accordance with information provided in application and terms and conditions set forth in this permit.

**Applicant acknowledges and understands that the County reserves the right to rescind this permit at any time without reason. The rescindment of a permit does not prohibit an applicant from being issued a new permit.**

## MADERA COUNTY SEDIMENT REMOVAL PERMIT TERMS AND CONDITIONS

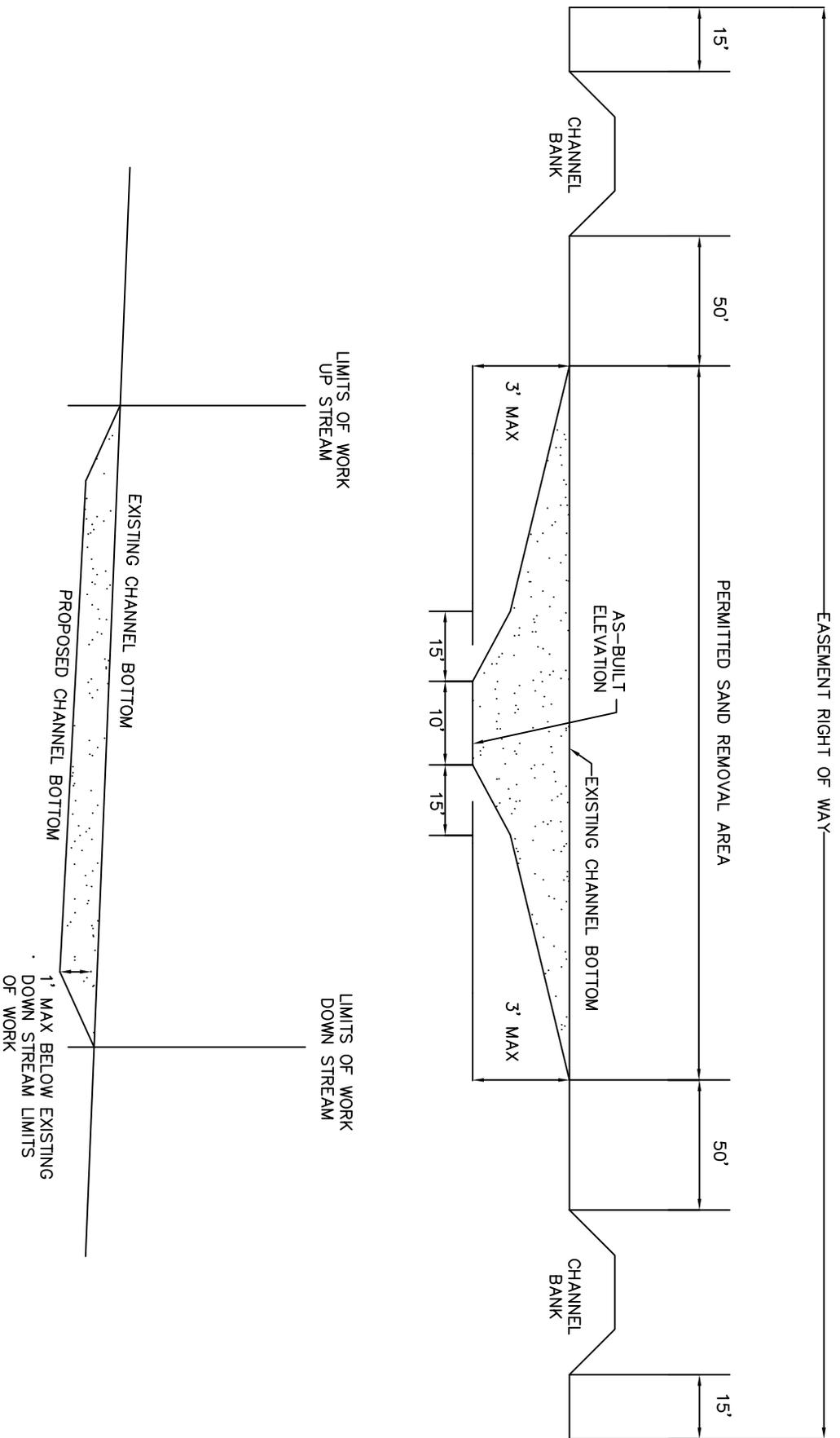
### **Terms and Conditions of this Permit:**

1. The work shall be accomplished with the accepted plans, data, and other information submitted in support of these application and the limitations, terms, and conditions.
2. Applicant shall adhere to all referenced as attachments.
3. All Equipment used within the channel shall contain oil drip collection pans as a preventive measure. No equipment showing obvious hazardous material leaks shall be used. All hazardous waste spills shall be reported to the Madera County Environmental Health Department and remediated upon their direction.
4. Sediment Removal shall be done during the dry stream conditions only.
5. No work is authorized within 100 feet of a bridge, culvert or weir without special permission. This area is can only be maintained by the agency authorized to maintain those bridges, culverts or weirs.
6. The removal of sediment deposits shall be restricted to the streambed only. The embankments shall not be altered.
7. The depth of sediment removal shall not exceed (1') one foot in any area.
8. Applicant shall comply with all other applicable local and state and federal laws.
9. This permit does not authorize the fill of material, thus all material disturbed shall be removed from channel. Failure to do so may result in penalties.
10. Adhere to all requirements in referenced documents
11. Activities that may result in an adverse effect to a threatened or endangered species, or to designated critical habitat; or is likely to jeopardize the continued existence of a species proposed for listing as endangered or threatened without prior authorization from the U.S. Fish and Wildlife Service as required.
12. Access will be limited to the areas as identified on Attachment "A" The construction of temporary access ramps is not permitted.
13. The embankments shall not be altered.
14. Failure to comply with the terms and conditions of this permit is a violation of the Madera County Flood Control and Water Conservation Agency (MCFCWCA), and may be in violation of the Clean Water Act, and/or Fish and Game 1600 permit. The County reserves the right to rescind this permit at any time without reason. The rescindment of a permit does not prohibit an applicant from reapplying and being issued a new permit.

### **REFERENCED DOCUMENTS**

- Channel Cross Section
- Elderberry survey
- Access Location Map
- Fish and Game 1602 permit
- 404 Exemption Guidelines

# MADERA COUNTY FLOOD CONTROL AND WATER CONSERVATION AGENCY CHANNEL CROSS SECTION



## TYPICAL CHANNEL CROSS SECTION

NOT TO SCALE



# LIVE OAK ASSOCIATES, INC.

an Ecological Consulting Firm

November 5, 2008

Greg Farley  
Madera County Resource Management Agency  
2037 W. Cleveland Avenue  
Madera, CA 93637

**Subject: Elderberry shrub survey results, Ash Slough, Road 13 to Road 25, Madera County, California**

Dear Mr. Farley:

On October 24 and 27, 2008 biologists Jeff Gurule and Taylor Watson of Live Oak Associates, Inc. (LOA) conducted an elderberry (*Sambucus mexicana*) survey in order to identify habitat for the federally threatened valley elderberry longhorn beetle (VELB). On October 31, 2008 Jeff Gurule conducted a burrowing owl (*Athene cunicularia*) survey, and San Joaquin kit fox (*Vulpes macrotis*) den survey. The surveys were conducted along both banks and within the bed of Ash Slough between Road 13 and Road 15 in Madera County (see Attachment A). This section of Ash Slough was relatively wide, supporting an overstory of riparian trees consisting mainly of Fremont cottonwoods (*Populus fremontii*) and red willow (*Salix lasiolepis*), with a shrubby understory of sandbar willow (*Salix exigua*) and *Arundo donax* that often created impenetrable stands. The upper banks of the slough supported an herbaceous understory of dense non-native grasses dominated by ripgut brome (*Bromus diandrus*) where tree densities were sparse. On November 4, 2008 Jeff Gurule conducted an onsite training session with four employees of the Chowchilla Water District who were contracted by the County to perform *Arundo* removal within the survey area (see Attachment B). The training reviewed the conditions of Stream Alteration Agreement #2007-0102-R4 and informed the work crew of the locations and method of flagging elderberry shrubs within the work area.

The survey methodology was as follows: The survey area was walked by Jeff Gurule and Taylor Watson, with one biologist surveying the outer bank and the other biologist surveying the inner bank and bed of the slough. It was not possible to survey within impenetrable stands of *Arundo*/sandbar willow. However, the likelihood of any elderberry shrubs surviving in these areas is extremely small. Additionally these areas would certainly not be suitable habitat for the San Joaquin kit fox or burrowing owl. When an elderberry shrub or complex of shrubs in close association with each other was encountered, the canopy of the entire shrub or complex of shrubs was mapped with a GPS unit with sub-meter accuracy. Each shrub or complex was numbered and the perimeter flagged with red flagging to assure visual identification and the extent of the shrubs growth.

No burrows of suitable dimensions for burrowing owl or kit fox dens were observed within the project area. Twenty eight elderberry shrubs/complexes were mapped, numbered and flagged with red plastic flagging (Attachment A). Elderberry shrub/complex number 27 and 28 had been

previously flagged and numbered with aluminum tags, presumably from a previous survey. LOA, mapped, reflagged and numbered these shrubs. During the October 31<sup>st</sup> survey I observed areas of *Arundo* that appeared to have been sprayed with herbicide throughout the length of the project area. Inspection of all elderberries identified within the survey area revealed that spraying had not occurred within the vicinity of any elderberry shrubs.

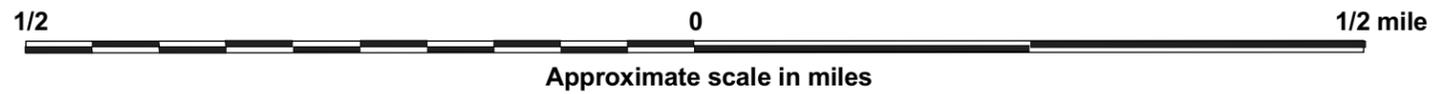
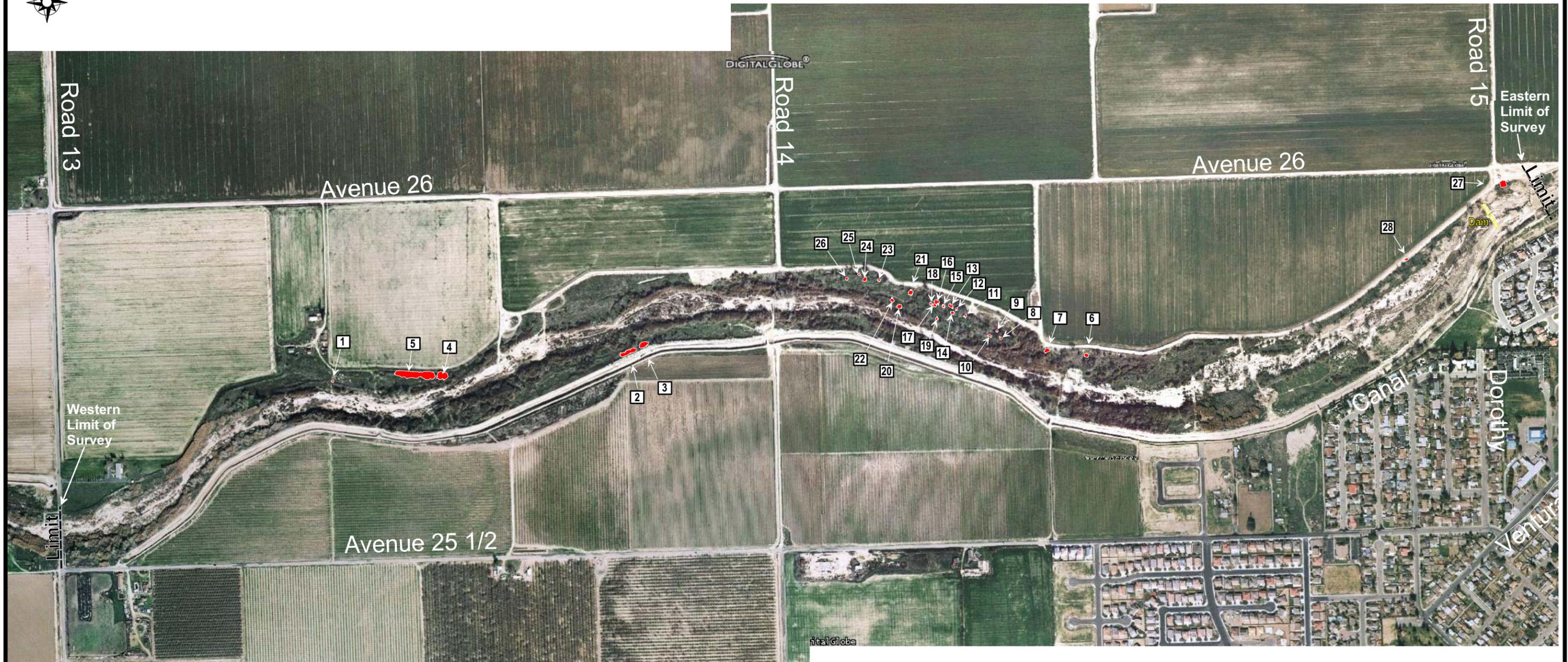
If you have any questions regarding this letter, please contact me at (559) 641-5664 at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Gurule". The signature is fluid and cursive, with the first name "Jeff" and last name "Gurule" clearly distinguishable.

Jeff Gurule  
Project Manager/Staff Ecologist

**ATTACHMENT A**



**LEGEND**

-  Elderberry canopy location
-  Elderberry identification number

Aerial photograph courtesy of Digital Globe

		
<b>Live Oak Associates, Inc.</b>		
<b>Ash Slough Elderberry Survey</b>		
From Road 13 to Flashboard Dam		
Date	Project #	Figure #
10/30/08	1261-01	1

**ATTACHMENT B**

## Ash Slough Vegetation Removal Project Preconstruction Meeting on CDFG Stream Alteration Agreement Requirements, Attendance November 4, 2008

Name (Please Print)	Company & Position	Telephone Number	Email Address
Brandon Tomlinson	Chowchilla Water Dist	559-479-6049	btomlinson@cwedwater.com
ROY E. MBEWICH	Chowchilla Water Dist	559-395-2968	
KEITH MITCHELL	Chowchilla Water District	559-479-6059	
Mark Gasaway	Chowchilla Water District	559-479-6052	



# AGREEMENT

**Stream Alteration Agreement-Routine Maintenance  
California Fish and Game Code Section 1602  
Stream Alteration Notification No. 2007-0102-R4  
Fresno River, Chowchilla River, Ash Slough, and  
Berenda Slough - Madera County**

**Parties:**

**California Department of Fish and Game**  
Central Region  
1234 East Shaw Avenue  
Fresno, California 93710

**Madera County Resource Management Agency**  
**Department of Engineering and General Services**  
Kevin Ham, P.E.  
2037 West Cleveland Avenue  
Madera, California 93637

1 **PURPOSE:**

2  
3 This Stream Alteration Agreement-Routine Maintenance (Agreement) by and between the  
4 California Department of Fish and Game, herein after called the "Department", and the Madera County  
5 Resource Management Agency Department of Engineering and General Services, hereinafter called the  
6 "Operator", for the purpose of delineating and defining routine maintenance activities within the Fresno  
7 River, Chowchilla River, Ash Slough, and Berenda Slough within the Operator's boundaries in Madera  
8 County. This Agreement identifies general and site-specific provisions and restrictions on the Operator's  
9 activities to prevent any substantial adverse impacts to fish and wildlife resources, while permitting  
10 required maintenance work to proceed.

11  
12 **GENERAL:**

13  
14 WHEREAS, by Notification No. 4-014-99, filed on January 20, 1999, the Operator notified the  
15 Department of its intent to conduct routine maintenance within the Fresno River, Chowchilla River, Ash  
16 Slough, and Berenda Slough ; and

Notification No. 2007-0102-R4  
Routine Maintenance Activities-  
Fresno River, Chowchilla River,  
Ash Slough, Berenda Slough  
Madera County Resource Management Agency  
Department of Engineering and General Services

1 WHEREAS, by Notification No. 2007-0102-R4 filed May 17, 2007, and Attachment D Routine  
2 Maintenance of the Fresno River, Chowchilla River, Ash Slough and Berenda Slough submitted on  
3 June 6, 2007, the Operator notified the Department of its intent to continue conducting routine  
4 maintenance on the Fresno River, Chowchilla River, Ash Slough, and Berenda Slough ; and  
5

6 WHEREAS, Section 1602 of the Fish and Game Code (FGC§) allows the Department to propose  
7 reasonable modifications to certain maintenance and construction projects as would allow for the  
8 protection and continuance of existing fish and wildlife resources that may be substantially adversely  
9 affected by that maintenance program; and  
10

11 WHEREAS, with regard to any project that involves routine maintenance and operation of water  
12 supply, drainage, flood control, or waste treatment and disposal facilities, notice to, and Agreement with,  
13 the Department is not required subsequent to the initial notification and Agreement, unless the work as  
14 described in the Agreement is substantially changed or conditions affecting fish and wildlife resources  
15 change, and the resources are adversely affected by the activity conducted under the Agreement; and  
16

17 WHEREAS, it is essential that the Operator perform routine maintenance activities within the  
18 Fresno River, Chowchilla River, Ash Slough, and Berenda Slough within the Operator's boundaries to  
19 maintain the designed capacity of the channel(s), to protect the Operator's investment, to prevent loss of  
20 life and property, and to promote efficient and wise use or disposal of water; and  
21

22 WHEREAS, consistent with the policies of FGC§ 1600 et seq., the protection and conservation of  
23 the fish and wildlife resources of California are of utmost public interest, and fish and wildlife  
24 conservation is a proper responsibility of the state; and  
25

26 WHEREAS, in order to avoid future conflicts, it is mutually beneficial to delineate and define  
27 routine maintenance to establish procedures to expedite maintenance activities, and to provide for the  
28 protection and continuance of the existing fish or wildlife resources during such maintenance activities;  
29 and  
30

31 WHEREAS, this Agreement is not intended to affect the Operator's right under FGC§ 1610 (a) to  
32 undertake emergency work necessary to protect life or property.  
33

34 NOW THEREFORE, the Department and the Operator agree as follows:  
35

36 **DEFINITIONS:**  
37

38 The following definitions shall govern this Agreement:  
39

40 Exhibit 1 – A map submitted by the Operator that contains a color coded map legend which  
41 indicates a) the Operator's jurisdictional boundaries, b) all Section 1602 jurisdictional watercourses  
42 where maintenance activities will be performed within the Operator's boundaries, c) all levees and/or  
43 water control structures, and d) where large scale maintenance activities will occur.

Notification No. 2007-0102-R4  
Routine Maintenance Activities-  
Fresno River, Chowchilla River,  
Ash Slough, Berenda Slough  
Madera County Resource Management Agency  
Department of Engineering and General Services

1 Fresno River, Chowchilla River, Ash Slough, and Berenda Slough - The bank, bed, channels,  
2 waterways, and areas associated with the operation of maintenance activities. These areas are defined in  
3 Exhibit 1.

4  
5 Channel banks, channel bottoms, low-flow channels, and other appurtenant features - The area(s)  
6 defined in Exhibits 2 and 3.

7  
8 Day - The work day is based on day-light hours and a five (5) day work week, unless otherwise  
9 specified.

10  
11 Diameter at breast height (DBH) - Diameter of a tree trunk at a point measured 4 ½ feet above the  
12 base of the trunk.

13  
14 Disposal site - The area(s) defined in Exhibit 1 where sand, silt, sediment, debris, rubbish,  
15 removed woody or aquatic vegetation shall be placed.

16  
17 Emergency - As defined in Section 21060.3 of the Public Resources Code Division 13, California  
18 Environmental Quality Act (CEQA). A sudden, unexpected occurrence, involving a clear and imminent  
19 danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or  
20 essential public services.

21  
22 Environmentally Sensitive Area (ESA) - The Operator's maintained list of locations that have  
23 established criteria for resource protection.

24  
25 Heavy equipment work - Work that involves the use of backhoes, front-end loaders, bulldozers,  
26 excavators, and other heavy, mechanized equipment used to control vegetation; to remove sediment, large  
27 woody debris, to place large rocks; or to grade.

28  
29 Low-flow area - Generally is the flowing portion of the channel during low flow conditions.

30  
31 Routine maintenance work - Those activities performed by the Operator's maintenance crews or  
32 contractors which are defined under Authorized Activities, Project Description below. Includes work that  
33 is performed regularly (i.e., every 1 to 5 years) in the stream zones as identified in Exhibit 2. The  
34 Operator performs routine maintenance work to maintain the functional and structural integrity of its  
35 facilities. Routine maintenance work, as described in this Agreement, includes, but is not limited to, the  
36 following: removing debris, vegetation, rubbish, downed trees, and other material that could obstruct the  
37 natural flow; controlling weeds, grasses, emergent vegetation, and woody vegetation; repairing levees;  
38 making repairs to control erosion and stabilize banks; and other work necessary to maintain the functional  
39 and structural integrity of the Operator's facilities.

40  
41 Special status species - Any species defined in CEQA Guidelines section 15380 (California Code  
42 of Regulations, Title 14, § 15380); species that are fully protected under the Fish and Game Code; species  
43 protected under the Migratory Bird Treaty Act (16 U.S.C. § 703 et seq.); and/or species identified by the

Notification No. 2007-0102-R4  
Routine Maintenance Activities-  
Fresno River, Chowchilla River,  
Ash Slough, Berenda Slough  
Madera County Resource Management Agency  
Department of Engineering and General Services

1 Department or other state and federal resource agencies as a species of special concern. Species and  
2 habitat types that could potentially be impacted are birds, mammals, fish, reptiles, amphibians,  
3 invertebrates and plants that comprise the local ecosystem. Departmental files contain lists of species that  
4 could be subject to potential generated impacts from this Project.

5  
6 Stream - Is the channel, seep, pond, waterway, or area associated with the operation of a water  
7 diversion weir where the Operator shall perform the routine maintenance Projects covered by this  
8 Agreement, all of which are identified in Exhibit 1. "Stream" includes perennial, intermittent, ephemeral  
9 and permanent body of flowing water within a natural streambed.

10  
11 Stream zone - Is that portion of the stream channel through which water and sediment flow, have  
12 flowed, or are capable of flowing. The stream zone is delineated by the top of the bank or the outer edge  
13 of any riparian vegetation, whichever is more landward. Levee slopes, channel banks, channel bottoms,  
14 low-flow channels, and other stream zone features are identified in Exhibit 2.

15  
16 Thinning - Includes the selective cutting of smaller individual trees, leaving larger individual  
17 trees to provide canopy.

18  
19 **AUTHORIZED ACTIVITIES:**

20  
21 The agreed scope of work and specific work sites are those described in the Operator's  
22 Notification of Lake or Streambed Alteration Notification No. 2007-0102-R4 (Notification). All  
23 maintenance activities shall be completed as indicated in the Notification. Any changes to the Project as  
24 described shall be submitted to the Department for review, approval and possible additional conditions,  
25 prior to the start of work.

26  
27 **Project Location:** The work authorized by this Agreement shall occur within or adjacent to the Fresno  
28 River between Hensley Lake and East Side Bypass of the San Joaquin River; Chowchilla River between  
29 Eastman Lake and East Side By Pass of the San Joaquin River; Ash Slough between Chowchilla River  
30 and East Side Bypass of the San Joaquin River; Berenda Slough between Chowchilla River and East Side  
31 By Pass of the San Joaquin River. Unless changes are submitted and approved by the Department, the  
32 maintenance activities shall be performed within the locations indicated on Exhibit I that was submitted  
33 with the Notification.

34  
35 **Project Description:** The Operator's Notification includes Department Notification Form  
36 FG2023, Exhibit 1, Attachment D Routine Maintenance Form, a Notice of Exemption that was filed with  
37 the Madera County Clerk on May 25, 2007, and a revised Notification Form FG2023 received August 23,  
38 2007. The Notification comprises the Operator's Project description, and it is used as the basis for  
39 establishing the protective Provisions that are included in this Agreement. Any changes or additions to  
40 the Project as described in the Notification shall require additional consultation and protective Provisions.  
41 The Operator proposes the following scope of work. The bulleted items comprise the activities  
42 authorized by this Agreement.

Notification No. 2007-0102-R4  
Routine Maintenance Activities-  
Fresno River, Chowchilla River,  
Ash Slough, Berenda Slough  
Madera County Resource Management Agency  
Department of Engineering and General Services

1 The Operator has proposed the following scope of work for routine maintenance activities:  
2

3 • Repair and Maintenance of Levees  
4

5 Repair to levees will include all work necessary to restore the channel levees' physical  
6 configuration that was originally constructed.  
7

8 Maintenance to levees will include all work necessary to maintain the channel levees physical  
9 configuration that was originally constructed.  
10

11 • Vegetation Management  
12

13 Activities within the channels and upper and lower half of the banks will include clearing trash  
14 and debris, removing fallen and dead trees and shrubs; limbing and/or trimming branches and tree  
15 limbs, vegetation removal under high power lines, mowing levee slopes and stream banks,  
16 mowing within stream and floodway channels, and removing emergent vegetation.  
17

18 Vegetation management in the Fresno River will be performed by mechanical equipment.  
19

20 Vegetation management in the Chowchilla River, Ash Slough, and Berenda Slough will be  
21 performed by mechanical equipment and by chemical methods.  
22

23 • Minor Erosion Repair of Existing Erosion Control Sites  
24

25 • Chemical application of Herbicides and Rodenticides.  
26

27 • Equipment used to perform the above maintenance activities will consist of heavy track-type  
28 machinery (i.e., Caterpillar D-8 with dozer ripper, and tow behind stubble disc unit), mechanical  
29 shredder, excavator, wheeled tractor, herbicide sprayer, and various hand tools.  
30

31 **Project Timing:** Maintenance activities shall be performed at a time and in a manner so that the  
32 proposed maintenance activities minimize adverse impacts and provide for the protection and  
33 continuance of the fish and wildlife resource and as follows:  
34

35 • Maintenance activities within the Project area shall be completed when the area is dry or during  
36 the lowest annual flow.  
37

38 • Maintenance activities shall be limited to periods when actively nesting birds are not present.  
39

40 • If work takes place outside of this window of time, the Operator shall consult with the Department  
41 and all other appropriate agencies for approval.

Notification No. 2007-0102-R4  
Routine Maintenance Activities-  
Fresno River, Chowchilla River,  
Ash Slough, Berenda Slough  
Madera County Resource Management Agency  
Department of Engineering and General Services

1 • Agreed activities within the streams may commence after this Agreement is signed by the  
2 Department, pre-Project protective features and Provisions are implemented, and when all  
3 pertinent permits and authorizations from other agencies are secured. This Agreement shall  
4 remain in effect until amended or terminated as described herein, and is subject to the (5) five year  
5 renewal process described below.

6  
7 **PROVISIONS:**

8  
9 **General**

10  
11 1. The Operator shall provide training and a copy of this Agreement to all contractors, subcontractors  
12 and to the Operator's Project supervisors. A Madera County Resource Management Agency Department  
13 of Engineering and General Services employee shall be on-site to oversee and verify that any work in  
14 progress by a contractor or subcontractor shall be in compliance with this Agreement. Copies of this  
15 Agreement shall be available at the Project site during all periods of active work and must be presented to  
16 the Department personnel upon demand. Department personnel shall be allowed onto the work site at  
17 any time during the period covered by this Agreement for the purposes of establishing compliance with  
18 this Agreement.

19  
20 2. This Agreement does not constitute or imply the approval or endorsement of a project, or of specific  
21 project features, by the Department, beyond the Department's limited scope of responsibility, established  
22 by FGC§ 1602.

23  
24 3. This Agreement does not exempt the Operator from complying with all other applicable local, state  
25 and federal law, or other legal obligations.

26  
27 4. To the extent that the provisions of this Agreement provide for the diversion of water, they are  
28 agreed to with the understanding that the Operator possesses the legal right to so divert such water.

29  
30 5. To the extent that the provisions of this Agreement provide for activities that require the Operator to  
31 trespass on another owner's property, they are agreed to with the understanding that the Operator  
32 possesses the legal right to so trespass.

33  
34 **Flagging**

35  
36 6. The upstream and downstream limits of the work areas, access routes, and ESA boundaries shall be  
37 identified with brightly colored flagging. All other areas within the riparian corridor shall be avoided.  
38 The work area limits shall not extend beyond the Operator's right-of-way or temporary easements and  
39 shall be confined to the minimal area needed to accomplish the proposed work.

40  
41 **Vehicles/Equipment**

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Fresno River, Chowchilla River,  
Ash Slough, Berenda Slough  
Madera County Resource Management Agency  
Department of Engineering and General Services

1 7. Vehicle access to streams and wetlands shall be limited to a predetermined ingress and egress  
2 corridor on existing roads. All other natural areas shall remain off-limits to vehicles.  
3

4 8. A dozer, excavator, or front-end loader may be used to remove vegetation, and to repair or maintain  
5 levees or existing erosion control sites.  
6

7 9. Only the bucket of the excavator/backhoe may operate in water-covered portions of the stream. At  
8 no time shall the main body of the excavator/backhoe enter water-covered portions of the stream, or  
9 where wetland vegetation, riparian vegetation, or aquatic organisms may be destroyed.  
10

### 11 Vegetation

12

13 10. No elderberry bushes shall be trimmed or removed without appropriate regulatory agency approval.  
14

15 11. Living, native, woody trees, bushes and branches, located on the upper half (1/2) of the bank(s), that  
16 are greater than or equal to four (4) inches DBH shall not be trimmed or removed without consultation  
17 with the Department. Trees greater than or equal to four (4) inches DBH that are removed shall be  
18 replaced by native species at a 3:1 ratio. Heritage trees greater than or equal to twenty-four (24) inches  
19 DBH shall be replaced at a 10:1 ratio.  
20

21 12. Flow restricting branches, hanging into the drainage from trees or shrubs rooted in the upper half or  
22 tops of banks, may be removed.  
23

24 13. No native vegetation on both sides of the drainage shall be removed or disturbed on the upper half  
25 (1/2) of the bank slope, or the top of the bank, in the same year.  
26

27 14. Vegetation on one side of the drainage of the upper half (1/2) of the bank slope, or on the top of the  
28 bank, can be removed or disturbed in alternating years. On the next alternate year, the vegetation on the  
29 opposite side of the drainage can be removed or disturbed from the upper half (1/2) of the bank slope, or  
30 the top of the bank (Exhibits 3 and 4).  
31

32 15. Cleared or trimmed vegetation and woody debris shall be disposed of in a legal manner. With the  
33 Department's written approval specific to each incident, fallen trees, tree limbs, and other woody debris  
34 may be used as part of a bio-technical bank stabilization technique or used to enhance wildlife habitat.  
35

36 16. The disturbance or removal of vegetation within the agreed work area shall not exceed the  
37 minimum necessary to complete operations. Precautions shall be taken to avoid other damage to non-  
38 target vegetation by people or equipment. Where appropriate, roots and stumps may be left to facilitate  
39 regrowth.  
40

41 17. The Operator may remove nonnative vegetation [such as giant reed (*arundo*), tree tobacco, castor  
42 bean, pampas grass, eucalyptus, and acacia], including stumps and roots from all jurisdictional areas

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Routine Maintenance Activities-  
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1 (Exhibit 5). The nonnative vegetation shall be removed in a manner so that it does not promulgate or  
2 propagate. These areas shall be revegetated with native species for erosion control.

3  
4 **Debris Removal/Spoils**

5  
6 18. All cleared debris shall be removed from the normal high-water areas of the stream or channel and  
7 shall not be redeposited within the flood plain.

8  
9 19. Emergent vegetation removal, or sand, silt, or sediment disturbance shall be limited to periods when  
10 the stream channel is dry.

11  
12 20. Spoil sites shall not be located within a stream or wetland, where spoil could be washed back into a  
13 stream, or where it may cover aquatic or riparian vegetation.

14  
15 **Repair and Maintenance of Levees**

16  
17 21. The Operator shall provide the methods to repair the levees, and activities to be performed for all  
18 work necessary to restore the channel levees' physical configuration that was originally constructed. The  
19 methods and activities to repair the levees shall be submitted to the Department for approval prior to  
20 commencement of such activities.

21  
22 22. The Operator shall provide the methods to maintain the levees, and activities to be performed for all  
23 work necessary to maintain the channel levees' physical configuration that was originally constructed.  
24 The methods and activities to maintain the levees shall be submitted to the Department for approval prior  
25 to commencement of such activities.

26  
27 **Fill**

28  
29 23. Rock, gravel, and/or other materials shall not be imported into, taken from or moved within the bed  
30 or banks of a stream or wetland, except as otherwise addressed in this Agreement. Clean rock riprap may  
31 be replenished in order to maintain bank stability in previously riprapped areas. Placement of materials  
32 shall be done with operating heavy equipment in the streambed. Fill length, width, and height  
33 dimensions shall not exceed those of the original installation or the original naturally-occurring  
34 topography, contour, and elevation.

35  
36 24. All fill shall be limited to the minimal amount necessary to accomplish the agreed activities.  
37 Except as otherwise specified in this Agreement, fill construction materials, other than on-site alluvium,  
38 shall consist of clean silt-free gravel or rock.

39  
40 25. All protruding rebar from all broken concrete shall be cut-off even with the concrete and removed  
41 before placing broken concrete pieces into the stream.

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1 **Siltation/Erosion**

2  
3 26. The Operator shall provide the methods to control erosion, and activities to be performed for minor  
4 erosion repair of existing erosion control sites. The methods and activities to repair minor erosion shall  
5 be submitted to the Department for approval prior to commencement of such activities.  
6

7 27. Maintenance activities within the Project area shall be completed when the area is dry. If unable to  
8 complete maintenance activities in the dry, work shall be done during periods of minimal flow.  
9

10 28. The Operator's ability to minimize turbidity, siltation, and erosion shall be the subject to conditions  
11 of the California Regional Water Quality Control Board Basin Plan. Water shall be free of changes in  
12 turbidity that causes nuisance or adversely affect beneficial uses.  
13

14 29. Removal of living and dead vegetation and debris in the defined area shall be performed to the  
15 extent necessary to ensure proper flow conveyance. After living and dead vegetation and debris are  
16 removed, the area topography and drainage patterns shall be returned to its designed or natural condition.  
17

18 30. Erosion control work includes repair of failed rock, failed concrete, gabions, riprap or other such  
19 devices (Exhibits 6 and 7). Maintenance activities shall be confined to the failed section and a maximum  
20 of 20 linear feet upstream and downstream of the failed area. Repairs shall not exceed the original  
21 specifications. The Operator should consult with the U.S. Department of Agriculture, Natural Resource  
22 Conservation Service (NRCS) for additional erosion control measures. Sand bags that contain a ratio of  
23 no more than 20 part sand to 1 part cement may be used. Sacked concrete shall not be used.  
24

25 31. The Operator shall have in place a Construction Period Erosion Prevention and Contingency Plan  
26 prior to commencement of activities within the stream. The Plan features shall be fully implemented  
27 prior to commencement of activities within the stream.  
28

29 **Diversion**

30  
31 32. Any temporary stream diversion shall be coordinated with the Department. Coordination may  
32 include the negotiation of additional provisions, but as a minimum includes the following. Flow  
33 diversion shall be done in a manner that shall prevent pollution and/or siltation, and which shall provide  
34 flows to downstream reaches. Flows to downstream reaches shall be provided during all times so that the  
35 natural flow shall support aquatic life. Said flows shall be of sufficient quality and quantity, and of  
36 appropriate temperature to support aquatic life both above and below the diversion. Normal flows shall  
37 be restored to the effected stream immediately upon completion of work at that location.  
38

39 33. When work in a flowing stream is unavoidable, the entire streamflow shall be diverted around the  
40 work area by a barrier, temporary culvert, new channel, or other means approved by the Department.  
41 Location of the upstream and downstream diversion points shall be approved by the Department.  
42 Construction of the barrier and/or the new channel shall normally begin in the downstream area and

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1 continue in an upstream direction, and the flow shall be diverted only when construction of the diversion  
2 is completed. Channel bank or barrier construction shall be adequate to prevent seepage into or from the  
3 work area. Channel banks or barriers shall not be made of earth or other substances subject to erosion  
4 unless first enclosed by sheet piling, rock riprap, or other protective material. The enclosure and  
5 supportive material shall be removed when the work is completed and removal shall normally proceed  
6 from downstream in an upstream direction. Upon completion of Project activities, all temporary  
7 diversion channels and the original low-flow channel shall be restored to their pre-existing elevations,  
8 gradients, and contours.

### 9 10 **Pollution**

11  
12 34. The Operator shall provide a list of chemicals proposed for use to control vegetation to the  
13 Department for approval, prior to commencement of such activities. Herbicide application and use must  
14 be conducted in a manner consistent with directed and recommended methods and the Operator must  
15 possess and be in compliance with appropriate use and handling permits, if required by local, state, and  
16 federal regulations.

17  
18 35. Vehicles shall be free of external petroleum residue. Any equipment or vehicles driven and/or  
19 operated adjacent to the stream shall be checked and maintained daily to prevent leaks of materials that, if  
20 introduced into the water, could be deleterious to aquatic life. Vehicles shall be moved away from the  
21 stream prior to refueling and lubrication.

22  
23 36. Staging and storage areas for equipment, materials, fuels, lubricants and solvents shall be located in  
24 areas where accidental spills shall not enter the stream or riparian corridor. Stationary equipment such as  
25 motors, pumps, generators, compressors, and welders located within or adjacent to the stream shall be  
26 positioned over drip-pans.

27  
28 37. The use of sacked concrete, asphalt pieces or asphalt containing pavement grindings within the bed,  
29 bank, channel or riparian corridor is prohibited.

30  
31 38. The Operator and all contractors shall be subject to the water pollution regulations found in the  
32 Department of Fish and Game Code Sections 5650 and 12015.

33  
34 39. The Operator and all contractors shall be subject to the San Joaquin Valley Air Pollution Control  
35 Districts Fugitive Dust Rule/Regulation 8.

36  
37 40. All noxious materials, chemicals, and machinery shall be contained and stored away from any  
38 riverbank, marsh, slough, lagoon, or body of standing water.

39  
40 41. Use of chemicals shall be avoided if possible. If chemicals are used, they shall be environmentally  
41 safe and be on file with Resource Management Agency County Wide Planning.

### 42 43 **Wildlife**

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1 42. If any wildlife is encountered during the course of routine maintenance, said wildlife shall be  
2 allowed to freely leave the maintenance area unharmed.

3  
4 43. All work shall be completed during daylight hours.

5  
6 44. Maintenance activities that occur between March 1 through August 1, that will disturb avian nesting  
7 habitat, shall commence after a qualified biologist conducts surveys for actively nesting birds. Survey  
8 results shall be sent to the Department for review and approval prior to commencement of the  
9 maintenance activity. Evidence of nest building, egg laying or chick rearing may cause work delays until  
10 nesting activities have been completed.

11  
12 45. If the Operator plans to remove vegetation, in order to protect nesting birds, no construction shall be  
13 completed from March 1 through August 1 unless the following surveys are completed by a qualified  
14 biologist.

15  
16 Raptors: Survey for nesting activity of raptors within a 0.5 mile radius of the construction site.  
17 Surveys shall be conducted at appropriate nesting times and concentrate on mature trees. If any active  
18 nests are observed, these nests and nest trees shall be designated an ESA and protected (while occupied)  
19 during Project construction. Trees that contain raptor nests shall not be removed without further  
20 consultation from the Department.

21  
22 Other Avian Species: Survey riparian areas for nesting activity within a 0.25 mile radius of the  
23 defined work area 2 to 3 weeks before construction begins. If any nesting activity is found, the Operator  
24 shall contact the Department and mitigation, specific to each incident, shall be developed.

25  
26 46. Swallows: The Operator shall avoid work on structures when it would disturb nesting swallows  
27 (March 1 through September 1). If such a condition cannot be met, then prior to February 15 of each  
28 year, the Operator shall remove all existing nests which would be destroyed by the Project. The Operator  
29 shall continue to discourage new nest building in places where they would be disturbed using methods  
30 developed in consultation with the Department. Nest removal and hazing must be repeated at least  
31 weekly until construction begins, or until a swallow exclusion device (netting) is installed. Swallows  
32 may be allowed to nest on portions of the structure where conflict during maintenance activities are not  
33 anticipated.

34  
35 47. Bats: Bats shall not be disturbed without specific notice to and consultation with the Department.  
36 Prior to bridge maintenance activities, surveys by an informal biologist shall be performed to determine if  
37 bat species are utilizing the bridge for roosting. If bats are using the existing bridge as a roosting site, the  
38 Operator shall contact the Department and exclusion/mitigation measures shall be developed in  
39 consultation with the Department.

40  
41 48. Maintenance activities that could disturb spawning fish shall only be approved after a qualified  
42 fisheries biologist conducts surveys for spawning fish in the work area. Survey results shall be sent to the

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1 Department for review and approval prior to the site specific maintenance activity. Evidence of spawning  
2 activities may cause work delays until spawning activities have finished.

3  
4 49. New access/egress and disposal site locations shall be selected in areas that do not have animal  
5 burrows or burrow systems.

6  
7 **Listed/Sensitive Species**

8  
9 50. The Operator affirms that no "take" (hunt, pursue, catch, capture, kill, or attempt) of listed species  
10 shall occur as a result of project activities and shall take prudent measures to ensure that all "take" is  
11 avoided. The Operator acknowledges that they fully understand that they do not have State incidental  
12 "take" authority. If any State- or Federal-listed Threatened or Endangered species occur within the  
13 proposed work area or could be impacted by the work proposed, and thus "taken" as a result of Project  
14 activities, the Operator is responsible for obtaining and complying with required State and Federal  
15 threatened and endangered species permits or other written authorization before proceeding with this  
16 Project.

17  
18 51. An informal biological survey should be conducted to determine the presence of listed species. In  
19 the event listed species are encountered, the Department shall be notified.

20  
21 52. This Agreement does not allow for the "take," or incidental "take," of any State- or Federal-listed  
22 Threatened or Endangered species. Liability for any "take," or incidental "take," of such listed species  
23 remains the responsibility of the Operator for the duration of the Project. Any unauthorized take of such  
24 listed species may result in prosecution and nullify this Agreement.

25  
26 53. In areas that may support State- or Federal-listed/sensitive species, a qualified biologist shall  
27 conduct appropriate surveys for potential rare, threatened, and endangered species. The Operator shall  
28 not begin work until a qualified biologist and the Department determines that maintenance activities shall  
29 not significantly affect any listed species. If a listed species is observed in the proposed work area, or is  
30 in a location which could be impacted by the work proposed, the Operator shall notify the Department.  
31 Additional permits and CEQA compliance may become necessary if listed species are impacted.

32  
33 54. New access/egress and disposal site locations shall be selected in areas that do not provide habitat  
34 for listed/sensitive species.

35  
36 55. A qualified biologist shall be present during any maintenance activities in areas where State- or  
37 Federal-listed, threatened and or endangered species are known to be present to ensure no impacts occur  
38 to the species. The biologist shall have the authority to suspend maintenance activities that may result in  
39 "take" of a State-listed species.

40  
41 **Restoration**

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1 56. Excess materials must be removed from the work site.

2  
3 57. The Operator assumes responsibility for the restoration of any fish and wildlife habitat which may  
4 be impaired or damaged either directly or incidental to the Project as a result of failure to properly  
5 implement or complete the protective features of this Agreement, or from activities which were not  
6 included in the Operator's notification.

7  
8 58. Any alteration of existing channel morphology not addressed in this Agreement shall be subject to  
9 Department approval. Detailed plans shall be submitted to the Department for approval and processing.

10  
11 59. Structures and associated materials not designed to withstand high seasonal flows shall be removed  
12 to areas above the high water mark before such flows occur.

13  
14 60. All exposed slopes and exposed areas on the bank shall be seeded, mulched and fertilized with a  
15 blend of a minimum of three locally native grass species. One or two non-native sterile perennial grass  
16 species may be added to the seed mix, provided that the amount does not exceed 25 percent of the total  
17 seed mix by count. Locally native wildflower and/or shrub seeds may also be included in the seed mix.  
18 The proposed seed mix shall be submitted to the Department prior to application of the seed mix.  
19 Seeding shall be completed in November of the year construction ends. Seeding shall be covered with  
20 weed free straw. At the discretion of the Department, all exposed areas where seeding is considered  
21 unsuccessful after 90 days shall receive appropriate soil preparation and a second application of seeding,  
22 mulch and fertilizer as soon as is practical on a date mutually agreed upon.

23  
24 **CHANGE IN CONDITIONS:**

25  
26 Changed conditions exist if, after execution of this Agreement, the physical conditions at the site  
27 of the proposed work change in a manner which significantly increases or decreases the risk that an  
28 existing fish or wildlife resource may be substantially adversely affected by the proposed maintenance  
29 activities. Changed environmental or physical conditions include, but are not limited to, changes in  
30 stream form and configuration caused by flooding, by substantial fluctuation and water flows, or by other  
31 substantial changes to the hydrologic regime of watercourses subject to this Agreement. Changed legal  
32 conditions include, but not limited to, change in Regulations, Statutory Law, a species becomes listed, or  
33 a Judicial or Court decision. Either the Department or the Operator may propose modifications to the  
34 above terms and conditions to better accommodate the interests of both parties under such changed  
35 conditions.

36  
37 **REPORTING REQUIREMENTS:**

38  
39 The Operator shall provide Exhibit 1 and an anticipated work schedule to the Department.  
40 Exhibit 1 and the work schedule shall be submitted for review and approval prior to commencement of  
41 maintenance activities. For new projects, unanticipated maintenance activities, and activities that are

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1 located outside the approved stream location or outside the approved work period, the Operator shall  
2 provide the Department written notice of such activities under a separate notification.

3  
4 **FEES:**

5  
6 California Code of regulations, Title 14 (CCR 14, Section 699.5) establishes fees for projects  
7 subject to Fish and Game Code 1602. Fees shall be assessed pursuant to FGC§ 1609 if performed under  
8 the Stream Alteration Maintenance Agreement with the Department of Fish and Game.

9  
10 A lump sum fee shall be paid to the Department at the end of each year based on the total  
11 number of routine maintenance projects undertaken for that year (which shall be equal to the number of  
12 projects indicated in the Annual Report submitted at the end of each year). Fees shall be assessed based  
13 upon the fee schedule that is prevailing at the time of payment.

14  
15 Renewal fees shall be based upon the fee schedule (CCR14, Section 699.5(f)) that is prevailing at  
16 the time of payment. Renewal fees shall be changed once every five years, coincident with the Stream  
17 Alteration Maintenance Agreement renewal process.

18  
19 Amendment fees shall be based upon the fee schedule (CCR 14, Section 699.5(g)) that is  
20 prevailing at the time of payment and according to the scope of change.

21  
22 **AMENDMENT AND TERMINATION:**

23  
24 This Agreement cannot be amended or modified in any way except by a written Agreement duly  
25 executed by the Department and the Operator. Any proposal for amendment or modifications must be  
26 delivered for review and approval by the Department. If the operator gives notice to additional  
27 maintenance activities, any such amended activities shall be by written amendment to this Agreement,  
28 and all Provisions of this Agreement shall apply. If the Operator gives notice to and obtains the  
29 Agreement of the Department to maintain additional specific facilities on channels, any such additional  
30 facilities shall be added to Exhibit 1 by written amendment to this Agreement, and all Provisions of this  
31 Agreement shall apply.

32  
33 FGC§ 1605 (a) states that an Agreement shall not exceed five (5) years. This Agreement may be  
34 terminated by either party. Said termination shall become effective 30 days after the party not initiating  
35 the termination has been duly notified in writing. This Agreement expires five (5) years after being  
36 signed by the Department. Before the termination of this Agreement, the Operator may seek one  
37 Agreement renewal. The Operator shall submit new attachments when requesting an Agreement renewal.

38  
39 The Department reserves the right to suspend and/or revoke this Agreement if the Department  
40 determines that the circumstances warrant. The circumstances that could require a reevaluation include,  
41 but are not limited to, the following: a) Failure to comply with the terms/conditions of this Agreement; b)  
42 The information provided by the Operator in support of the Agreement is determined by the Department

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1 to be incomplete, or inaccurate; c) When new information becomes available to the Department  
2 representative(s) that was not known when preparing the original terms/conditions of this Agreement; and  
3 d) The project as described in the notification/Agreement has changed, or conditions affecting fish and  
4 wildlife resources change.

5  
6 **ENTIRE AGREEMENT:**

7  
8 This Agreement, along with the attachments attached hereto, constitutes the entire Agreement and  
9 understanding between the Department and the Operator for routine maintenance activities. This  
10 Agreement supersedes all prior and contemporaneous routine activity agreements, representation,  
11 understanding, if any, whether oral or written.

12  
13 **OTHER ENVIRONMENTAL LAWS, STATUTES, OR REGULATIONS:**

14  
15 This Agreement does not constitute any form of authorization, permit, biological opinion, or  
16 compliance with the requirements and provisions of any other statute, regulation, requirement, or  
17 ordinance respecting the protection or conservation of fish and wildlife resources. Those statutes include,  
18 but are not limited to, the California Environmental Quality Act (CEQA), the California Endangered  
19 Species Act (CESA), or the Federal Endangered Species Act (ESA).

20  
21 **CEQA Compliance:** In approving this Agreement, the Department is independently required to  
22 assess the applicability of CEQA. The features of this Agreement shall be considered as part of the  
23 overall project description.

24  
25 Madera County Resource Management Agency Department of Engineering and General Services  
26 has filed a Notice of Exemption (Class 1 Existing Facilities, and Class 4 Minor Alterations) with the  
27 Madera County Clerk on May 16, 2007. The Department as a CEQA Responsible Agency shall submit a  
28 Notice of Exemption to the State Clearinghouse upon signing of this Agreement.

29  
30 **MONITORING AND REPORTING PROGRAM (MRP):**

31  
32 **PURPOSE**

33  
34 The purpose of the MRP is to ensure that the protective measures required by the Department  
35 are properly implemented, and to monitor the effectiveness of those measures.

36  
37 **OBLIGATIONS OF THE OPERATOR**

38  
39 The Operator shall have primary responsibility for monitoring compliance with all protective  
40 measures included in this Agreement. Protective measures must be implemented within the time periods  
41 indicated in the Agreement and the program described below.

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1 The Operator's designee shall ensure the implementation of all protective measures of the  
2 Agreement, and shall monitor the effectiveness of these measures.

3  
4 The Operator shall submit the following Reports to the Department:

- 5
- 6 • Wildlife survey techniques and results.
- 7
- 8 • Exhibit I and an annual anticipated work schedule.
- 9
- 10 • An Annual Report submitted in December of each year summarizing all maintenance activities,  
11 including any problems relating to the protective measures of this Agreement. Before and after  
12 photographs of the Project areas are required.
- 13
- 14 • An Annual Fee submitted in December of each year based on the projects performed for the year.

15  
16 In addition to the above monitoring and reporting requirements, the Department requires that the  
17 Operator:

- 18
- 19 • Immediately notify the Department in writing if monitoring reveals that any of the protective  
20 measures were not implemented during the period indicated in this program, or if it anticipates that  
21 measures will not be implemented within the time period specified.
- 22
- 23 • Immediately notify the Department if any of the protective measures are not providing the level of  
24 protection that is appropriate for the impact that is occurring, and recommendations, if any, for  
25 alternative protective measures.
- 26

#### 27 **VERIFICATION OF COMPLIANCE:**

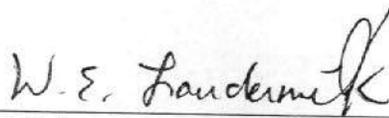
28  
29 The Department shall verify compliance with protective measures to ensure the accuracy of the  
30 Operator's monitoring and reporting efforts. The Department may, at its sole discretion, review relevant  
31 documents maintained by the Operator, interview the Operator's employees and agents, inspect the work  
32 area, and take other actions to assess compliance with or effectiveness of protective measures in this  
33 Agreement.

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1 **CONCURRENCE:**  
2  
3  
4  
5

6 **APPROVED BY THE CALIFORNIA DEPARTMENT OF FISH AND GAME**  
7

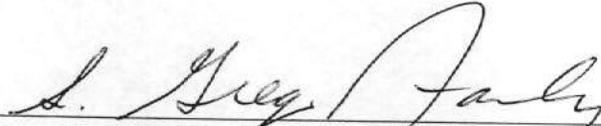
8 on 10/23, 2007.  
9

10  
11 

12 W. E. Loudermilk  
13 W. E. Loudermilk, Regional Manager  
14 Central Region  
15  
16

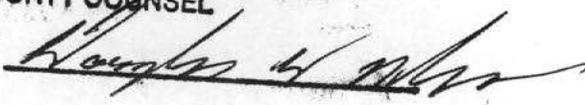
17 **ACKNOWLEDGMENT**  
18

19 The undersigned acknowledges receipt of this Agreement and, by signing, accepts and agrees to comply  
20 with all terms and conditions contained herein. The undersigned also acknowledges that adequate  
21 funding shall be made available to implement the measures required by this Agreement.  
22

23  
24  
25 By:   
26 Department of Engineering and General Services  
27 Madera County Resource Management Agency

Date: 10-1-07

**APPROVED AS TO LEGAL FORM:  
COUNTY COUNSEL**

BY 

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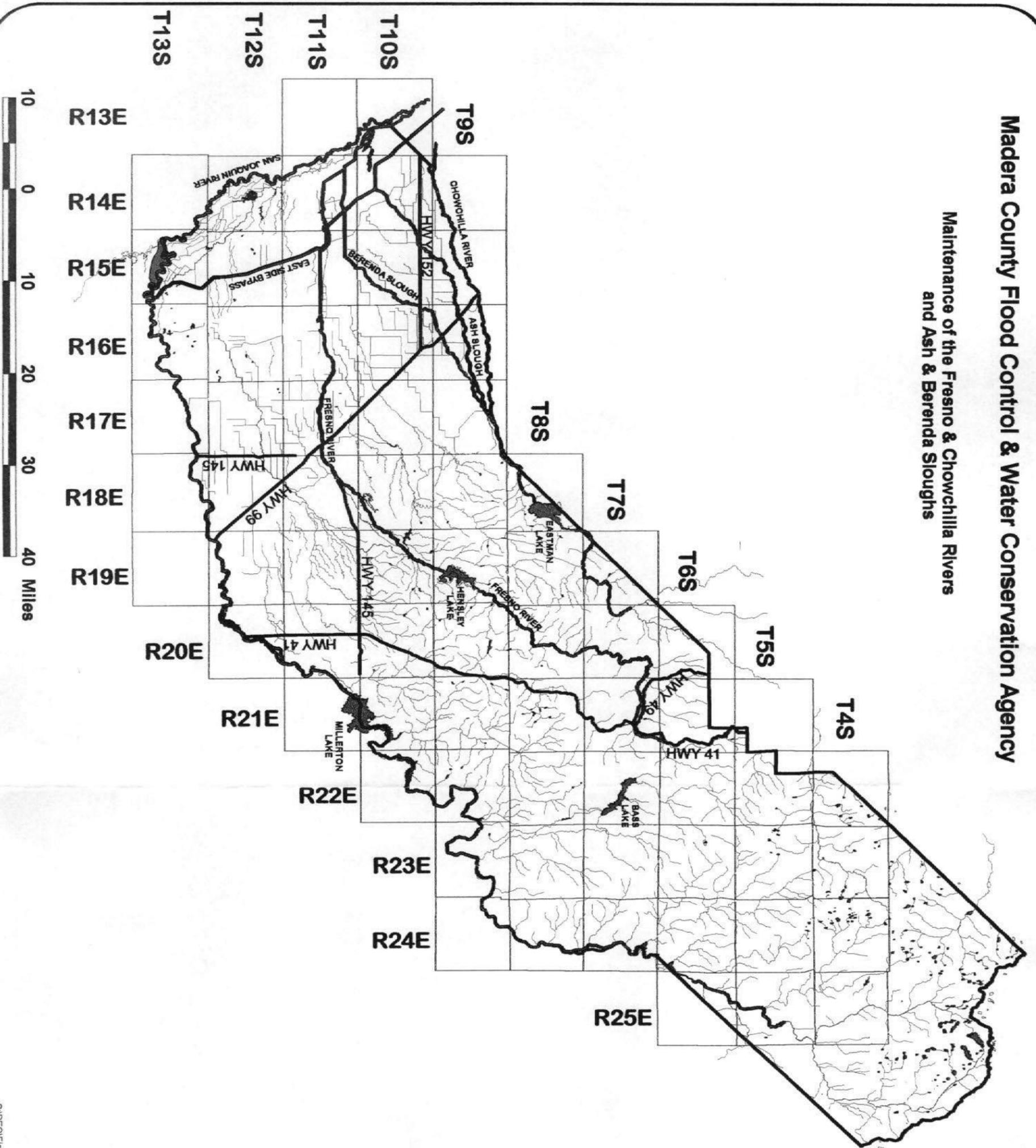
# Exhibit 1

Detailed Map(s) of Madera County Resource Management Agency  
Department of Engineering and General Services  
Indicating Madera County Boundaries and  
Locations that will Require Routine Maintenance.

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# Madera County Flood Control & Water Conservation Agency

## Maintenance of the Fresno & Chowchilla Rivers and Ash & Berenda Sloughs



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# Exhibits 2, 3, 4, 5, 6, 7

Illustrations of Specific Exhibits as Described in the  
Stream Alteration Maintenance Agreement

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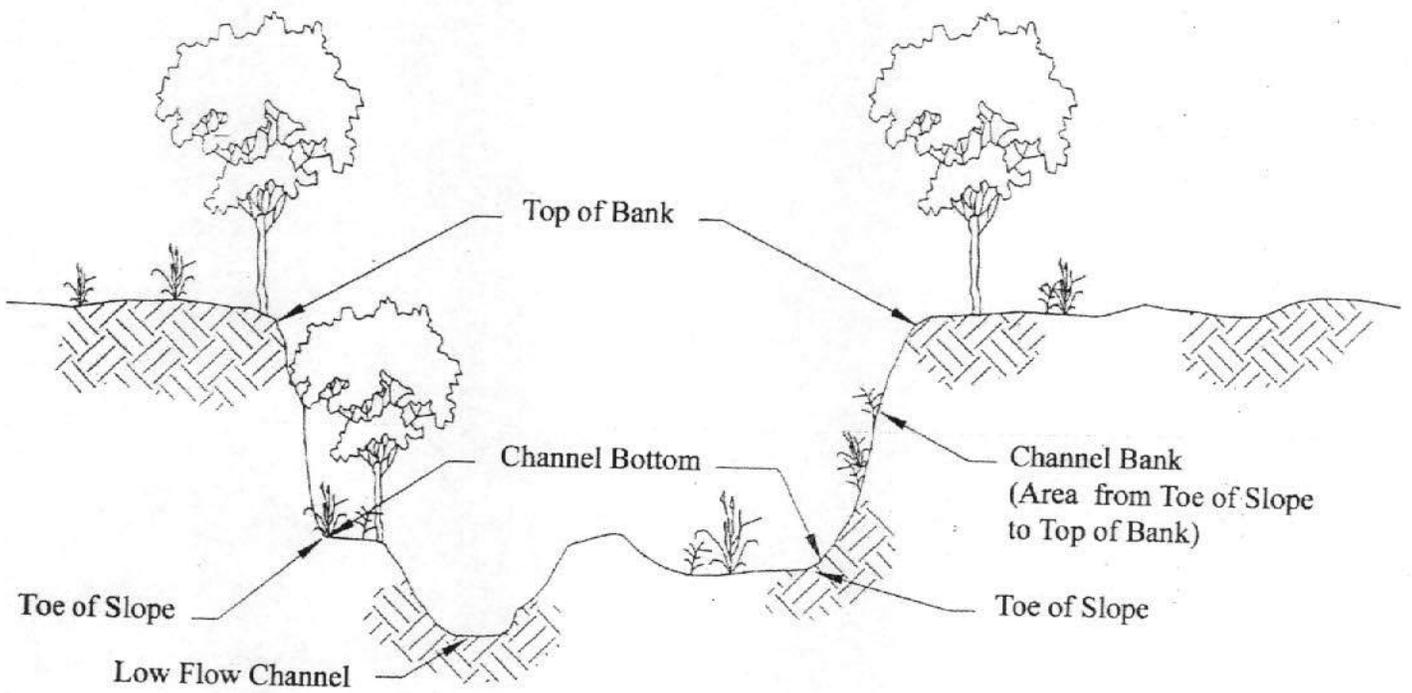


Exhibit 2 : Terms Defining Channel Structure  
(Cross-sectional view)

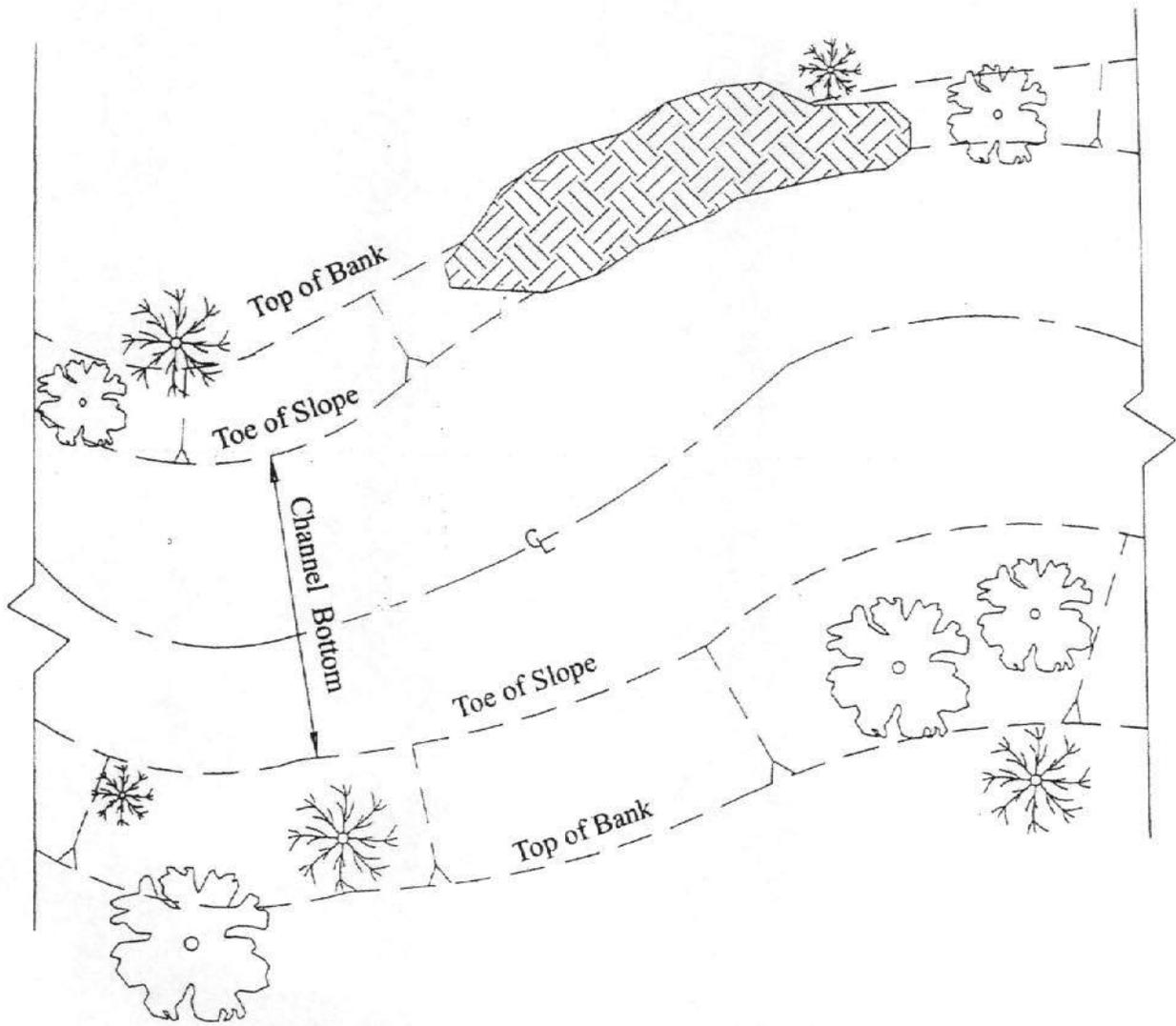


Exhibit 3: Terms Defining Channel Structure (Aerial view)

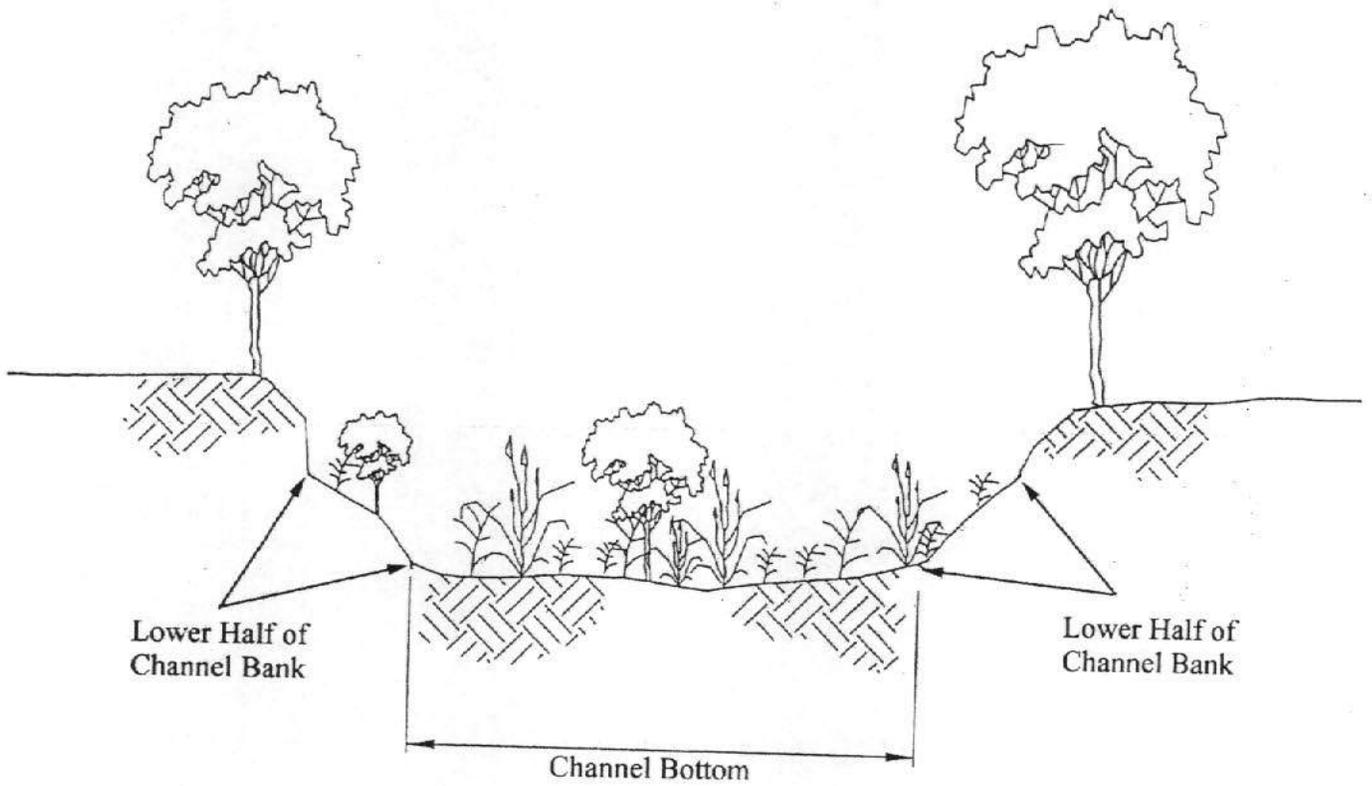


Exhibit 4: Control and Removal of Native Vegetation  
Limits of Work are Channel Bottom and Lower Half of Banks

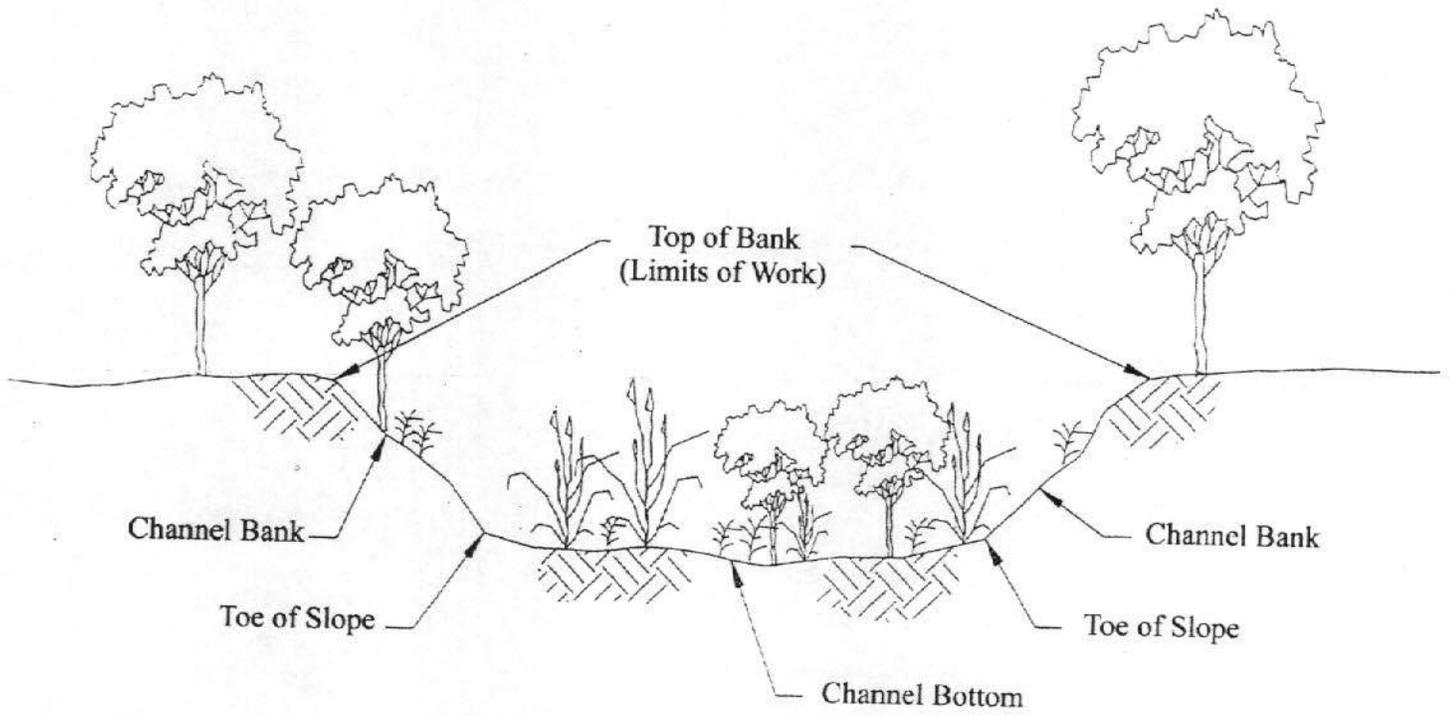


Exhibit 5: Control and Removal of Non-Native Vegetation

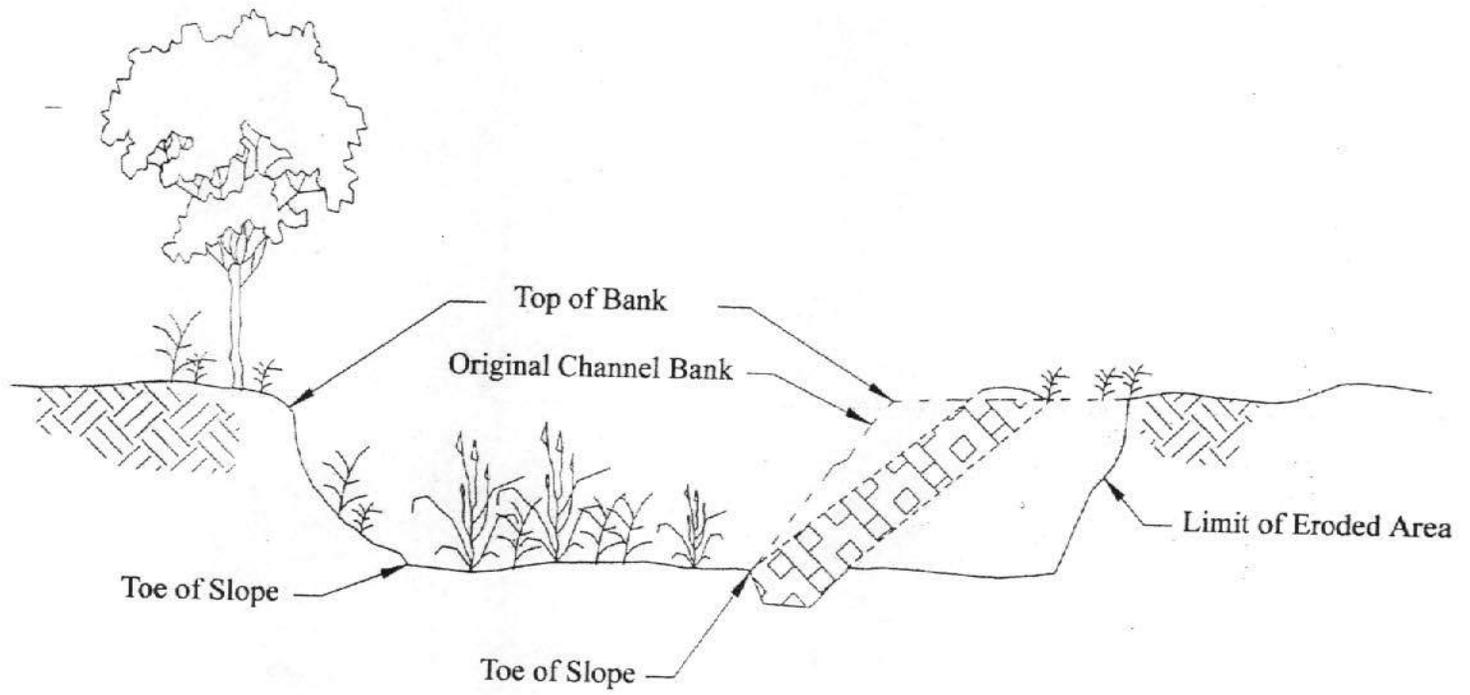


Exhibit 6: Minor Erosion Control Work

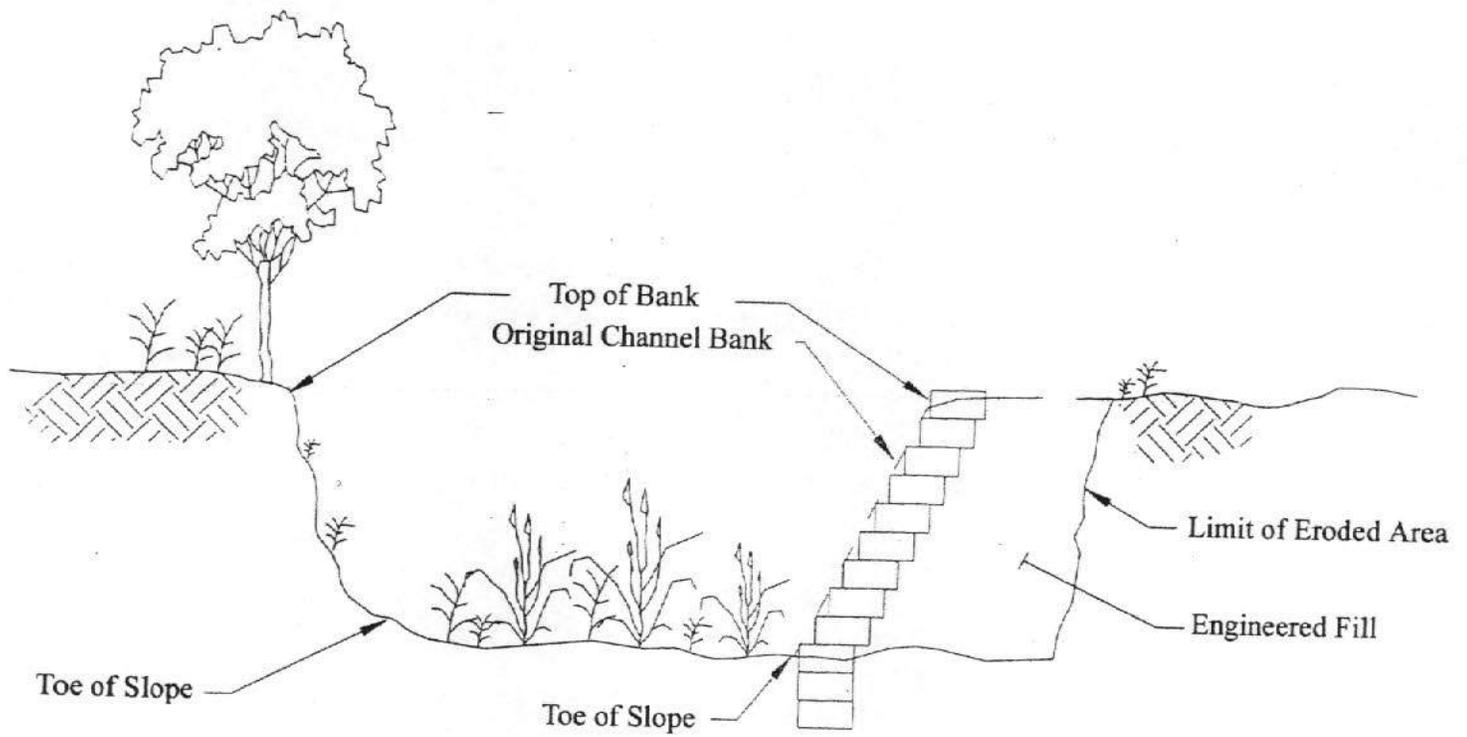


Exhibit 7: Minor Erosion Control Work



**US Army Corps  
of Engineers®**

# REGULATORY GUIDANCE LETTER

No. 07-02

Date: July 4, 2007

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SUBJECT: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act

## **1. Purpose and Applicability.**

The purpose of this Regulatory Guidance Letter (“RGL” or “guidance”) is to provide a reasonable and predictable national approach for conducting exemption determinations for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the Clean Water Act (CWA) (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, Pub. L. 100-4, Pub. L. 104-66, 33 U.S.C. § 1251, et seq., and with associated regulations (33 C.F.R. 320-330, 40 C.F.R. Part 232). This guidance is intended to clarify when 404(f) exempts from permitting requirements discharges of dredged or fill material into waters of the U.S. associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches. This RGL was developed and is endorsed by the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). EPA has the ultimate authority for interpreting the scope of exemptions under CWA Section 404(f).

This document supercedes RGL 87-07, which addresses the Section 404(f)(1)(C) Statutory Exemption for Drainage Ditch Maintenance. Other documents, such as the 1989 MOA addressing 404(f) coordination, are unaffected. As indicated above, this RGL addresses statutory exemptions for both irrigation and drainage ditches. In this effort to provide greater clarity, the following terms are defined for purposes of Subsection 404(f): irrigation ditch, drainage ditch, construction, and maintenance. This document also provides a framework for determining the applicability of the exemptions and the recapture provision. (See Figure 1). While providing greater clarity, both the framework and the definitions are consistent with the agencies’ current practice in interpreting the Section 404(f) exemption.

## **2. Background.**

a. Under Section 404(f)(1)(C) of the CWA (see also 33 CFR 323.4(a)(3) and 40 CFR 232.3(c)(3)), discharges of dredged or fill material associated with construction or maintenance of irrigation ditches, or the maintenance (but not construction) of drainage ditches, are not prohibited by or otherwise subject to regulation under Section 404 of the CWA (i.e., these activities are exempt from the need to obtain a Section 404 permit from the Department of the

Army (DA)). Discharges of dredged or fill material associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant to and functionally related to irrigation ditches are included in the exemption for irrigation ditches.

b. Section 404(f)(2) of the CWA states that “[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.” This is commonly referred to as the “recapture provision.” See Section c, below.

c. Under 33 CFR 323.4(c) and 40 CFR 232.3(b), exemptions under 33 CFR 323.4(a)(1-6) and 40 CFR 232.3(c)(1-6) do not apply if the discharge into a water of the U.S. “is part of an activity whose purpose is to convert an area of the waters of the U.S. into a use to which it was not previously subject, where the flow or circulation of waters of the U.S. may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.”

d. Under 33 CFR 323.4(a)(1)(iii)(C)(1)(i), “[c]onstruction and maintenance of upland (dryland) facilities such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the U.S., and as such never require a section 404 permit.”

The CWA Subsection 404(f)(1)(A) exemption for “minor drainage” covers “(t)he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the U.S., adequate to effect the removal of excess soil moisture from upland crops.” (See 33 CFR 323.4(a)(1)(iii)(C) (1)(i))

e. The construction and maintenance of irrigation ditches and maintenance of drainage ditches may require the construction and/or maintenance of a farm road. In those circumstances, the Subsection 404(f)(1)(E) exemption for discharges of dredged or fill material associated with the construction or maintenance of farm roads applies where such related farm roads are constructed and maintained in accordance with best management practices (BMPs), 33 CFR 323.4(a)(6) and 40 CFR 232.3(c)(6), to assure that flow and circulation patterns and chemical and biological characteristics of waters of the U.S. are not impaired, that the reach of the waters of the U.S. is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. All of the limitations and conditions mandated by the current Section 404(f) regulations relating to farm roads apply.

### **3. Guidance for Ditches.**

General Guidance: Before carrying out ditch maintenance or construction activities, the following issues should be analyzed:

**a. Is there a discharge of dredged or fill material into a water of the U.S.?** To make that determination, the statute, regulations, and guidance provided by the Corps and EPA regarding what areas constitute “waters of the United States” subject to CWA jurisdiction must be consulted and followed. Corps and EPA guidance on the extent of CWA geographic jurisdiction define certain categories of “upland ditches” and “upland swales” that generally are not subject to CWA jurisdiction. Discharges of dredged or fill material into those defined categories of upland ditches and upland swales are not subject to either CWA permitting requirements or the subsection 404(f) exemptions.

**b. Identify the type of ditch and activity, and whether the activity is eligible for the exemptions at Subsection 404(f)(1).** An analysis of the CWA statute and existing EPA and Corps regulations indicates that there are differences between irrigation ditches and drainage ditches for purposes of applying the Subsection 404(f)(1)(C) exemption. The Subsection 404(f)(1)(C) exemption applies to the *construction* and *maintenance* of irrigation ditches, but it applies only to the *maintenance* of drainage ditches.

For purposes of this RGL, wetlands include all wetlands that meet the definition in 33 CFR 328.3. Guidance for applying the regulation is contained in the 1987 Wetland Delineation Manual, and the regional supplements and supplemental guidance, as appropriate, except where the wetland plants were established as a result of the irrigation process. Wetlands established solely due to the presence of irrigation water, irrigated fields, or irrigation ditches do not qualify as wetlands for purposes of applying the 404(f) exemption for construction and maintenance of irrigation ditches and for maintenance of drainage ditches.<sup>1</sup> Where sufficient information is not available to determine the hydrological contribution of irrigation waters to a particular wetlands (i.e., whether the wetland existed at the location prior to the presence of irrigation activities), such wetlands are not removed from consideration as wetlands or waters of the U.S.

For purposes of this RGL, the following definitions apply:

**Definition of “Irrigation Ditch:”** For purposes of this RGL, an irrigation ditch is a man-made feature and/or an upland swale that either conveys water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water (e.g., “run-off” from irrigation) away from irrigated lands. Irrigation ditches may include the distribution system or parts thereof, consisting of manmade canals, laterals, ditches, siphons, and/or pipes, or pump systems. If a ditch carries only irrigation water, irrigation return flows, and overland flow (precipitation and/or snowmelt) that moves from an irrigated field either to or away from an area subject to irrigated agriculture (e.g., an irrigated field), that ditch would be considered an irrigation ditch, not a drainage ditch.

Where a natural or man-altered water body is used as part of an irrigation ditch system, such as where the water body is used to transport irrigation water between manmade ditches, that segment generally is not considered an irrigation ditch for purposes of this exemption, except

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<sup>1</sup>As stated in the preamble to the Corps’ Final Rule of November 13, 1986: “. . .we generally do not consider the following waters to be ‘Waters of the United States’ . . . (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.” 51 Federal Register 41217, November 13, 1986. Thus, waters, including wetlands, created as a result of irrigation would not be considered waters of the US even when augmented on occasion by precipitation.

where the Section 404(f)(1) exemption has been determined to apply based on a case-by-case evaluation. Following a case-by-case evaluation, such a natural or man-altered water body may be considered an irrigation ditch eligible for this exemption if it has characteristics suggesting a limited functional role in the broader aquatic ecosystem, such as infrequent or low volume flow, minimal habitat value, or small channel size.

**Definition of “Drainage Ditch:”** For purposes of this RGL, a drainage ditch is a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage<sup>2</sup> of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation. However, a ditch that diverts water from an open body of water (e.g., stream, lake, or reservoir) for irrigation purposes is an irrigation ditch, even if a substantial portion of the flow or volume is diverted.

A ditch determined to be either an irrigation ditch or a drainage ditch would then need to be evaluated on a case-by-case basis to determine if the recapture provision of Section 404(f)(2) applies (see below).

**Definition of “Construction:”** For purposes of this RGL, construction includes new work or work that results in an extension or expansion of an existing structure. Ditch construction generally includes, but is not limited to, activities such as:

- Ditch relocation.
- Ditch conversion into pipe.
- Lining, which means placing impervious material such as concrete, clay, or geotextile within the flow perimeter of an open canal, lateral, or ditch with the intent of reducing seepage losses and improving conveyance efficiency. All new lining of ditches, where the ditch had not previously been lined, is considered construction.
- Placement of new control structures.

**Definition of “Maintenance:”** For purposes of this RGL, maintenance includes a repair to an existing structure or feature to keep the ditch in its existing state or proper condition, or to preserve it from failure or decline.<sup>3</sup> Maintenance generally includes, but is not limited to, activities such as:

- Excavation of accumulated sediments back to original contours.
- Re-shaping of the side-slopes.

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<sup>2</sup>See 33 CFR 323.4(a)(1)(iii)(C)(1) and (C)(2).

<sup>3</sup>Maintenance means the physical preservation of the original, as-built configuration of the ditch and appurtenant structures, to restore the original function and the approximate capacity of the ditch. In many cases, accurate historical records are not available to determine the exact “as-built” specifications of the original ditch. In these cases, districts should work closely with the project proponent to establish an appropriate maintenance depth to restore the ditch’s original function and approximate capacity, while meeting the spirit of the exemption and ensuring adequate protection of aquatic resources. Districts should allow maintenance of ditches to be performed to the level of current engineering standards where more graduated side-slopes result in greater stability, so long as those modifications of the ditch will not result in the drainage, degradation, or destruction of additional natural wetlands or other waters of the U.S., as referenced above. Removal of material and re-contouring of the ditch should be in accordance with the historical design and function of that ditch (i.e., the ditch must not be substantially deepened so as to drain additional areas).

- Bank stabilization to prevent erosion where reasonably necessary using best management practices. For maintenance of drainage ditches as defined in this guidance, materials used for stabilization should be compatible with existing bank materials.
- Armoring, lining and/or piping. These activities qualify as maintenance only where a previously armored, lined, or piped section is being repaired and all work occurs within the footprint of the previous work.
- Replacement of existing control structures, where the original function is not changed and original approximate capacity is not increased.

Maintenance is generally viewed as involving activities that keep something in its existing state or proper condition or preserve it from failure or decline. If a drainage ditch has not been serving a drainage function for an extended period of time, drainage ditch re-establishment would be considered construction, not maintenance, and would thus be ineligible for the exemption. However, a ditch that has not been regularly maintained should not automatically be considered ineligible for the ditch maintenance exemption. Some ditches require little or no periodic maintenance to remain functional. Lack of periodic maintenance in these situations does not preclude the ditch from being maintained under the exemption.

**c. The third step is to determine if the Recapture Provision applies:**

Part 1: Is the discharge part of an activity whose purpose is to convert an area of the waters of the U.S. into a use to which it was not previously subject?

The regulations guiding implementation of CWA Section 404(f) specify that a change in use occurs when there is a “conversion of a section 404 wetland to a non-wetland” and in addition "a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion." 33 C.F.R. 323.4(c).

Part 1 of the test is met if there would be a change of use. For example, any time an irrigation ditch would cut through (or across) a natural or man-altered water body, including wetlands, this would qualify as a change in use and Part 1 of the Section 404(f)(2) test is met.

Part 2: If Part 1 of the test is met, may the activity also impair the flow or circulation of waters of the U.S. or reduce the reach of such waters?

The regulations guiding implementation of the CWA Section 404(f) specify that “(w)here the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.” “A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.” 33 C.F.R. 323.4(c).

The determination as to whether construction or maintenance of an irrigation ditch, or maintenance of a drainage ditch, would result in a significant discernible alteration in flow or circulation, or a reduction in reach, of waters of the U.S. should be made on a case-by-case basis using the factors such as the following: (1) whether the proposed construction or maintenance of the ditch would harmfully sever or fragment the wetland or water body; (2) whether the proposed construction or maintenance of the ditch would significantly and discernibly alter flow or circulation or reduce reach through sidecasting into the wetland or waterbody; (3) whether the proposed construction or maintenance of the ditch would harm the wetland or water body by substantially increasing or decreasing water levels; (4) the relative size of the ditch compared to the wetland or water body; and (5) whether the proposed construction or maintenance employs techniques and best management practices designed to minimize impacts and ensure that there is not significant discernible alteration of flow or circulation or reduction of reach.

Because the Section 404(f)(1) exemption for maintenance of irrigation or drainage ditches applies only to maintenance activities that would maintain existing capacity and functionality (not to construction activities), it is unlikely that the recapture provision in Section 404(f)(2) would apply to ditch maintenance activities as defined above. However, if a question arises as to whether ditch maintenance activities would trigger the Section 404(f)(2) recapture provision (e.g., if the maintenance is “incidental” to a larger activity that triggers the provision – see footnote 4 below), this should be evaluated on a case-by-case basis using the factors such as those listed above.

**This recapture provision is a two-part test. If the answers to both parts are “yes,” a (DA) permit is required for the activity. If one part of the test is not satisfied and that activity qualifies for an exemption under 404(f)(1), it is not “recaptured” under 404(f)(2).<sup>4</sup>**

In situations where the potential eligibility of a proposed discharge of dredged or fill material for an exemption under Section 404(f)(1)(C) has been raised to the district, and where the district cannot make a determination due to a lack of pertinent factual information, it is incumbent on those seeking exemption to provide the documentation necessary to establish the facts on a case-by-case basis.

If the proposed activity is not exempt under Section 404(f)(1), the work may be authorized under one or more Nationwide General Permits (NWP), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at: <http://www.usace.army.mil/cw/cecwo/reg/> and the RGPs can be found on the local Corps District regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office.

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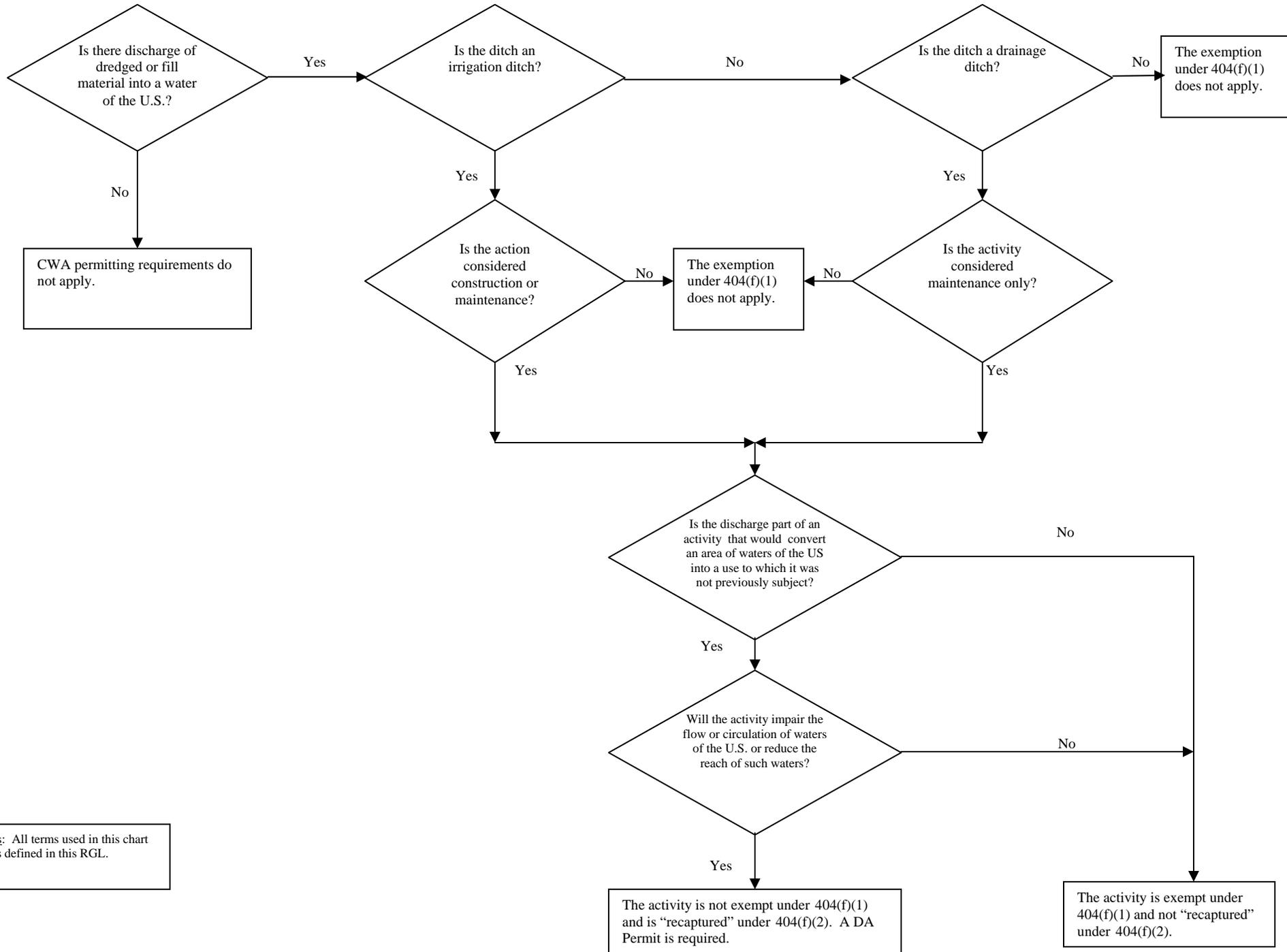
<sup>4</sup>The discharge of dredged or fill material itself does not need to be the sole cause of the destruction of the waters of the United States (e.g., wetlands) or other change in use or the sole cause of the reduction in or impairment of, reach flow, or circulation of such waters. The discharge need only be “incidental to” or “part of” an activity that is intended to or will foreseeably bring about that result.

**4. Duration.** This guidance rescinds and supersedes RGL 87-7. This guidance remains in effect unless revised or rescinded. Additional guidance may be issued in the near future to further define irrigation ditch, drainage ditch, construction, and maintenance.



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Major General, US Army  
Director of Civil Works

**FIGURE 1: FLOWCHART FOR PROCESSING EXEMPTIONS  
UNDER 404(f)(1) AND 404(f)(2)**



Notes: All terms used in this chart are as defined in this RGL.

