

**Memorandum of Understanding for Early Mitigation Planning for Transportation Improvements
in the Elkhorn Slough Watershed**

**MEMORANDUM OF UNDERSTANDING
Early Mitigation Planning for
Transportation Improvements in the Elkhorn Slough Watershed**

**California Coastal Commission
California Department of Fish and Game
California Department of Transportation
Central Coast Water Quality Control Board
Elkhorn Slough Foundation
Federal Highway Administration
Monterey County Planning Department
National Marine Fisheries Service
Transportation Agency for Monterey County
United States Environmental Protection Agency
United States Fish and Wildlife Service**

A. PREAMBLE

The Elkhorn Slough Early Mitigation Partnership (ESEMP) Memorandum of Understanding (MOU) recognizes the importance of thorough and coordinated planning for California's future, and the need to balance watershed-based protection of valuable resources with needed improvements in transportation development. Good transportation programming means supplying improvements which support the short and long-term economic, environmental and societal goals. Effectively planning for these goals necessitates early and frequent consultation with stakeholders, as is required under section 6001 of SAFETEA-LU.¹ Nine Federal resource agencies have further memorialized this commitment in a 2006 report that encourages ecosystem approaches to developing infrastructure projects.² In recognition of the delicate balance required to honor environmental, agricultural, economic, safety and social interests in transportation planning, and to implement the provisions of SAFETEA-LU at a local watershed level, the ESEMP signatories are developing a collaborative advanced mitigation process to be available for transportation projects in the Elkhorn Slough Watershed. The ESEMP also holds out this effort as an example for other jurisdictions.

¹ The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) was enacted in 2005. Section 6001 (codified as 23 USC 134 and 135) of the law requires transportation agencies to identify future mitigation needs and future mitigation sites in long-range transportation plans through coordination with State and Federal agencies early in the planning process as well as a requirement to consider any available conservation plans, land-use plans, maps, or resource inventories.

² "*Eco-logical: An Ecosystem Approach to Developing Infrastructure Projects*" (2006) encourages Federal, State, Tribal and Local partners involved in infrastructure planning, design, review, and construction to use flexibility in regulatory processes. Specifically, *Eco-Logical* puts forth the conceptual groundwork for integrating plans across agency boundaries, and endorses ecosystem-based mitigation - an innovative method of mitigating infrastructure impacts that cannot be avoided. The Steering Team for the report included Bureau of Land Management, Federal Highway Administration, National Marine Fisheries Service, National Park Service, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Forest Service and U.S. Fish and Wildlife Service.

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B. PURPOSE

The purpose of the ESEMP is to support concerted, cooperative, effective and collaborative work among the transportation and resource/regulatory agencies in the transportation planning and environmental mitigation processes. This MOU establishes a process for identification and evaluation of valuable biological resources, habitats and agricultural resources at the earliest stage of transportation improvement planning, and provides a framework to implement coordinated mitigation planning at the beginning of the project development process. The MOU facilitates compliance with Local, State and Federal environmental regulations and requirements established for the protection of biological and agricultural resources, but does not replace review of the action at the appropriate time as required by environmental laws or regulations, or assure permit issuance or project endorsement.

Early coordination should mean more efficient and effective planning, a high degree of cooperation among involved agencies and successful resolution of conflicts. Some of the advantages of early coordination and mitigation planning for impacts to biological and agricultural resources include the opportunity to eliminate the lag time between loss and replacement of resource values; more efficient and effective conservation of ecological values; the establishment of more efficient and effective monitoring and evaluation procedures; the swift utilization of diminishing opportunities for habitat conservation and preservation; and fewer delays in project delivery due to permit processing.

The signatories recognize that avoiding and minimizing biological and agricultural impacts onsite are always the first priorities before compensating impacts due to transportation improvements. These priorities are in place from the earliest design and planning stages and continue to be in place as maintenance and monitoring occurs. As required under SAFETEA-LU, environmental compliance should be integrated into these early planning efforts.

Establishing early and continual coordination and cooperation among the signatories in developing mitigation plans should provide more cost effective and efficient mitigation, and ultimately, a higher level of protection and conservation of our valuable biological and agricultural resources.

C. GOALS

In the spirit of cooperation and collaboration, and with the mutual understanding that this is a flexible working agreement among the respective signatories, we hereby commit to advancing the following goals of the ESEMP:

1. Facilitate the delivery of environmentally sound transportation projects that meet the identified transportation needs for the region;
2. Strive for the greatest ecosystem conservation possible within the Elkhorn Slough Watershed rather than regulatory minimums;
3. After avoidance and minimization of impacts, ensure compensatory mitigation efforts comply with Federal, State and Local regulations and where possible, include preservation and restoration opportunities;
4. Strive for the efficient use of agency and non-governmental organization resources to maximize mitigation efforts;

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5. Create a long-term institutional framework for the Elkhorn Slough Early Mitigation Pilot Project;
6. Address biological resource impacts as well as agricultural impacts;
7. Strive for no net loss of habitat resources and functions, and achieve the goal of no net loss of wetlands;
8. Protect biological resources and minimize habitat fragmentation;
9. Maintain and enhance habitat connectivity and biological diversity;
10. Conserve and maintain the values and functions of mitigation sites in perpetuity; and
11. Promote the concept of advance mitigation to Federal, State and Local resource agencies; transportation and regulatory agencies; and other stakeholders.

D. AUTHORITY / SIGNATORIES

This MOU is intended to enhance the individual signatories' abilities to meet their respective regulatory and/or administrative obligations through early and frequent collaborative discussions on the transportation, biological and agricultural resource concerns in the Elkhorn Slough Watershed. This MOU constitutes the entire understanding among the signatories for the purposes of interpreting the matters set forth herein, whether oral or written.

All provisions of this MOU are intended and shall be interpreted to be consistent with all applicable provisions of Federal, State and Local laws. Nothing in the MOU will be construed as binding any signatory agency beyond their respective authorities or to require the participants to obligate or expend funds in excess of available resources.³ This MOU does not eliminate or diminish in any manner, any and all immunities to which any signatory is entitled in any State, and/or Federal action. Any transaction involving transfers of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements. This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are or are not a signatory party to this agreement against any signatory, their officers, their employees or any other person. This MOU does not direct nor apply to any person outside the signatories of this MOU. This MOU shall be governed by, and construed in accordance with the laws of the United States and the laws of the State of California as applicable.

This agreement does not delegate to any agency, or the collective group of agencies, the authority to: 1) control another agency's final decision on a project; 2) modify or halt an agency's project; or 3) limit the discretion of the signatory agencies in carrying out their statutory and regulatory obligations, including the agencies' discretion to pursue projects according to their individual legal authorities. It is further recognized that the decision to issue approvals or permits remains within the sole discretion of the appropriate resource/regulatory agency.

³ As required by the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342, all commitments made by Federal signatories to this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates Federal signatories to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations.

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The signatories recognize that the MOU applies at the regional and staff level only. Signatories governed by an appointed body (including but not limited to California Coastal Commission, California Department of Fish and Game and Regional Water Quality Resource Control Board) recognize that the MOU is not binding as to their respective boards or commissions, and instead applies only to their staff. Furthermore, as noted in this section, this MOU does not alter, abridge or limit any authority of any signatory agency. This MOU has been jointly negotiated and drafted. The language of this MOU should be construed as a whole according to its fair meaning, and not strictly for or against any of the signatories. This MOU should be liberally construed to accomplish its purpose.

The following parties agree to the terms of this MOU:

The California Coastal Commission's (Commission) primary mission is to protect, conserve, restore and enhance environmental and human-based resources of the California coast and ocean for environmentally sustainable and prudent use by current and future generations. Guided by the policies⁴ of the Coastal Act of 1976 (PRC 30000 et seq.), the Commission plans and regulates the use of land and water in the coastal zone in partnership with coastal cities and counties. The Commission also implements the Coastal Zone Management Act (16 U.S.C. 1451 et. seq.) through its Federally-certified coastal program, including the regulation of activities inside or outside of the coastal zone that are funded, permitted or conducted by Federal entities and that have the potential to adversely affect coastal resources. The Commission is responsible for overseeing the implementation of Local Coastal Programs by local governments and for reviewing development projects applying for coastal development permits within its original and appeal jurisdictions.

The California Department of Fish and Game's (DFG) mission is to manage California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public. This responsibility is accomplished, in part, by the review of projects in accordance with the California Environmental Quality Act (CEQA) and recommendations of avoidance, minimization, and mitigation measures to CEQA Lead Agencies; through implementation of the California Endangered Species Act (CESA) via Incidental Take Permits issued pursuant to Fish and Game Code Sections 2081(b), Consistency Determinations issued pursuant to Fish and Game Code Sections 2080.1, or through an adopted Natural Community Conservation Plan (NCCP) pursuant to Fish and Game Code Sections 2800 et seq.; and through measures developed to minimize impacts to biological resources agreed to a Lake and Streambed Alteration Agreement (LSSA) pursuant to Fish and Game Code Sections 1600 et seq. CESA requires that take of State endangered, threatened, or candidate species be incidental to an otherwise lawful activity, that the impacts are minimized and fully mitigated, that the mitigation measures are roughly proportional to the taking, that adequate funding to implement the required monitoring and mitigation measures is insured, and that the continued existence of the covered species is not jeopardized by the permitted activity.

⁴ As a general matter, Coastal Act policies and corresponding Local Coastal Program standards do not permit new roads in wetland areas and limited expansions of existing roads are permitted only where necessary to protect existing capacity.

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The California Department of Transportation (Caltrans) and the Federal Highway Administration (FHWA)⁵ have the primary mission to plan, develop, manage, and maintain a safe, effective, and efficient transportation system that provides safety and mobility to the general public. FHWA is responsible for administering the Federal-aid Highway Program. This is a contract-authority program where Caltrans is reimbursed from the Highway Trust Fund for expenses resulting from transportation projects. Statutory and regulatory authorities for the Federal-aid Highway Program are found in Title 23, United States Code and Title 23, Code of Federal Regulations. Associated with this is implementation of appropriate mitigation measures to offset unavoidable adverse impacts and to demonstrate committed environmental stewardship. This stewardship is reflected in strict adherence to environmental laws/regulations and extensive inter- and intra-agency guidance and policy.

The Central Coast Water Quality Control Board (Water Board) is a regulatory board within the California Environmental Protection Agency. The Water Board has the primary responsibility to protect surface, ground, and coastal waters throughout the Central Coast Region. The Water Board makes critical water quality decisions for the region, including setting standards, issuing permits which govern and restrict the amount of pollutants that can be discharged into the ground or a water body, determining compliance with those permits, and taking appropriate enforcement actions. The Water Board requires mitigation to compensate for loss of wetland habitat through its issuance of the Clean Water Act (CWA) Section 401 Water Quality Certifications and Waste Discharge Requirements for projects impacting wetlands.

The Elkhorn Slough Foundation (ESF) has the primary responsibility to conserve and restore Elkhorn Slough and its watershed by acquiring and managing property as a land trust. Regarding this MOU, ESF's responsibility is to assist in the identification and quantification of unprotected habitat on property in the watershed which may be evaluated by resource agencies as appropriate mitigation for transportation project impacts. ESF also has the responsibility to consider accepting mitigation property or easements and managing them to maintain and enhance habitat value consistent with agency mitigation requirements.

The Monterey County Planning Department (County) has the primary responsibility to plan and regulate land uses in the coastal zone. Local Coastal Programs have been certified by the Coastal Commission with the overall goal to protect, conserve, restore and enhance environmental and human-based resources of the California coast for environmentally sustainable and prudent use by current and future generations. As a lead agency under CEQA, the County prepares studies and documents to identify and assess impacts of land use and development activities to ensure that they are properly addressed and mitigated.

The Transportation Agency for Monterey County (Transportation Agency), as the Regional Transportation Planning Agency, is responsible for the development and maintenance of a multimodal transportation system that enhances mobility, safety, access, environmental quality, and economic activities in Monterey County. The Transportation Agency programs and distributes state and federal money for local and regional transportation projects and is responsible for distributing money for public transit, rail, local street and road maintenance, highway, bicycle

⁵ Pursuant to Sections 6004 and 6005 of SAFETEA-LU (23 USC 326 and 327), most National Environmental Policy Act and associated environmental responsibilities have been assigned to Caltrans. FHWA's role in the ESEMP is limited to any remaining non-assigned projects. FHWA will, however, continue to be a full participant in developing programmatic processes and procedures.

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and pedestrian facilities. As a responsible agency under CEQA, the Transportation Agency reviews, comments, and coordinates with land use jurisdictions on region-wide land use development activities to ensure that impacts to the regional transportation system are properly addressed and mitigated.

The U.S. Fish and Wildlife Service (FWS) and NOAA's National Marine Fisheries Service (NMFS) provide regulatory oversight regarding the conservation, protection and enhancement of Federally threatened and endangered species, in accordance with the Endangered Species Act of 1973, as amended (ESA)(16 USC 1531-1544) and the Fish and Wildlife Coordination Act (16 USC 661-667e). This is accomplished, in part, through consultations with other Federal agencies on prospective agency actions, providing technical assistance on biological resources and their values, assessing the impacts of various projects on those resources and by providing terms and conditions to avoid or minimize unavoidable impacts to existing fish and wildlife habitat resulting from land and water developments.

The U.S. Environmental Protection Agency (EPA) has review authority of proposed actions of other federal agencies in accordance with the National Environmental Policy Act (NEPA) and makes those reviews public under Section 309 of the Clean Air Act. As a part of the Section 309 review process, EPA may recommend corrective and/or mitigation measures to reduce environmental impacts from proposed actions. With the U.S. Army Corps of Engineers (Corps), EPA co-administers the CWA Section 404 Program which regulates the discharges of dredged or fill material into waters of the United States, helping to protect wetlands and other aquatic resources. CWA Section 404 permit decisions must comply with the CWA Section 404(b)(1) Guidelines which require taking all appropriate and practicable steps to first avoid and then minimize adverse impacts to the aquatic ecosystem before considering compensatory mitigation to offset unavoidable adverse impacts to wetlands, streams, and other aquatic resources.

E. PRINCIPLES OF AGREEMENT

The signatory agencies agree to actively participate in a program that places high priority on early coordinated planning of transportation improvements to insure the protection of biological and agricultural resources and take advantage of opportunities for their conservation, restoration and enhancement while providing the needed transportation facilities. Furthermore, to the extent staff and resources are available, signatories agree to:

1. Attend regular meetings to accomplish the early planning and coordination goals of this MOU, and update one another on planning and project development activities;
2. Work together to evaluate potential impacts of future transportation improvement projects in the Elkhorn Slough Watershed during the early planning stages of the transportation project lifecycle;
3. Identify biological resources of concern within the area of potential impact and recommend measures to avoid impacts to these resources;
4. Identify agricultural resources of concern within the area of potential impact and recommend measures to avoid impacts to these resources;
5. Identify opportunities to minimize the unavoidable impacts to identified biological and agricultural resources of concern;

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6. Use all feasible and reasonable features of project design which avoid and minimize adverse project impacts before employing compensation measures;
7. Where there are unavoidable impacts, achieve in-kind, in-watershed compensation whenever feasible unless alternatives are more beneficial to the biological and agricultural resources;
8. Address mitigation for unavoidable impacts to waters of the United States⁶ with the EPA and Corps through the Interagency Review Team (IRT) process⁷ and assure consistency with State and Federal programs regulating wetland resources. Consider the use of mitigation banks when appropriate opportunities exist to integrate work done through this MOU;
9. Explore opportunities for biological and agricultural resource enhancement during project development;
10. Resolve potential conflicts in a cooperative manner;
11. Utilize the best available data, information and watershed plans to evaluate mitigation needs and potential sites for compensatory mitigation;
12. Identify a tracking system to manage multiple compensatory mitigation sites;
13. Identify funding partnerships with clear parameters of how funding can be utilized;
14. Consider larger-sized properties or bundle multiple sites to meet mitigation needs and maximize success; and
15. Convey the success of this effort to others.

F. MITIGATION SITES

The following minimum criteria should be applied to any site identified as available to be a compensatory mitigation site for the ESEMP:

1. A completed habitat/resource survey with an evaluation of mitigation values and appropriateness of the site;
2. A mitigation plan that supports the ecosystem functions and preservation/restoration goals/needs of current conservation plans for the watershed;
3. A management and monitoring plan with clear, realistic and measurable success standards and objectives. The plan also needs to identify adaptive management options to address any remedial actions that may need to be implemented;
4. Evaluation and determination that information for the site is consistent with best available information;

⁶ Jurisdictional limits of the authority of the Corps of Engineers under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Appropriation Act of 1899 are identified at 33 CFR 328.3 and 40 CFR 230.3. Waters considered to be inside and outside the jurisdiction of the Corps of Engineers may still fall under the permitting jurisdiction of other regulatory agencies in California.

⁷ The April 10, 2008 Compensatory Mitigation for Losses of Aquatic Resources Final Rule establishes the title "Interagency Review Team (IRT)" for an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.

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5. A program to capture/predict management costs;
6. An acceptable methodology for determining mitigation opportunities on the site; and
7. An identified site manager and Conservation Easement holder (when appropriate), and assurances of financial commitments for in-perpetuity monitoring and management of the mitigation sites.

G. DISPUTE RESOLUTION

As noted in Section E, decisions on mitigation for waters of the United States for transportation projects will be addressed through the IRT and Section 404 permitting process. These decisions are not subject to the consensus process of this MOU. Similarly, decisions on mitigation for fill of aquatic resources listed in Coastal Act Section 30233 associated with transportation projects will be addressed through the regulatory processes of the Coastal Act, and decisions on what specific elements are necessary to meet the full mitigation requirement of CESA will be addressed through DFG's CESA permitting process.

The decision-making process for the ESEMP is consensus. Consensus decisions shall be defined as decisions that all the meeting participants can live with, with no meeting participant adamantly opposed. Each person at the meetings agrees to make every reasonable effort to hear and accommodate the concerns of those not in agreement. Once a decision has been reached by consensus, each signatory agrees to abide by it to the full extent of the authority available to its representatives.

A consensus decision can later be revisited only through agreement of the signatories. If new information becomes available that was not available when consensus was previously reached, and would cast serious doubt on an agency's original decision to join the consensus opinion, there shall be an attempt to reach a new consensus. If a new consensus cannot be achieved, then each signatory agency has the right to withdraw from consensus decisions that were based on the older information. The signatory agencies agree to make good faith efforts to limit such withdrawals from consensus decisions.

If consensus is not reached on a decision, signatories agree first to work with each other informally to resolve the inability to reach consensus. If signatories cannot resolve the inability to reach consensus informally, the participants are encouraged to elevate the discussion to appropriate mid-level management who are authorized to speak for their respective agency, asking the mid-level staff person to review the dispute. As part of the elevation process, the participants agree to describe the context of the dispute.⁸ If the mid-level review fails to resolve the inability to reach consensus, the participants may raise the issue to senior management. This elevation process is intended to resolve issues quickly and to maintain constructive working relationships. In keeping with the spirit of the integration process, nothing in this section precludes any other

⁸ The steps in this dispute resolution process mirror those agreed to in the April, 2006 Memorandum of Understanding on the National Environmental Policy Act and Clean Water Act Section 404 Integrated Process for Federal Aid Surface Transportation Projects in California. Signatories to this MOU were the Federal Highway Administration, the California Department of Transportation, the United States Environmental Protection Agency, the United States Army Corps of Engineers, the United States Fish and Wildlife Service and the National Marine Fisheries Service. The MOU outlines the elevation process for dispute resolution in both the body of the MOU and more specifically in an appendix to the MOU.

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traditional or nontraditional approaches to dispute resolution, such as having a facilitated meeting with participants who have been unable to reach consensus.

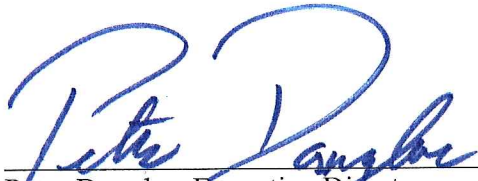
Consensus decisions reached under this MOU do not affect the jurisdictional authority of the signatory agencies. While signatory staff hereby commit to full participation in the consensus process of this MOU, on a good faith basis, governing boards of signatory staff are required by law to act on their own independent authority. Thus, such board decisions may be *informed* by the consensus process of this MOU, but are not legally *bound* by the consensus process of this MOU.

H. MODIFICATION AND TERMINATION OF THE MEMORANDUM OF UNDERSTANDING:


1. This agreement and the operating procedures may be modified, which must be in writing, with the written approval of all signatories to the Memorandum of Understanding.
2. A signatory may terminate its participation in this agreement upon written notice to all other signatories. This termination will be effective 30 days from the date of the written notice in order to provide an opportunity for discussion on any issues that may have led up to the termination decision.
3. This agreement is intended to supplement, not replace, any existing agreements between any of the parties.
4. Signatory agencies and entities may be added to this MOU. Additional signatory agencies and entities shall first be approved by all existing signatories.
5. The signatories can jointly modify the terms as needed for continuous improvement of this agreement. Review and associated revisions to the MOU shall occur at least every ten years or sooner upon consensus of the signatory representatives.
6. Should any term of this MOU be deemed unlawful, that provision shall be severed and the remaining terms shall continue to be valid.
7. When all the signatories have signed this MOU, the MOU becomes effective as of the date of the most recent signature.

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Signatories, Page 1


Peter Douglas, Executive Director
California Coastal Commission

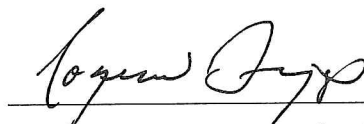
6/18/09
Date


Jeffrey R. Single, Ph.D., Regional Manager
California Department of Fish and Game

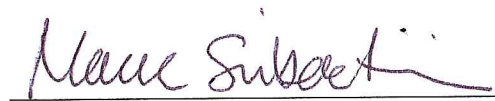
6/23/09
Date


Richard Krumholz, District Director
California Department of Transportation

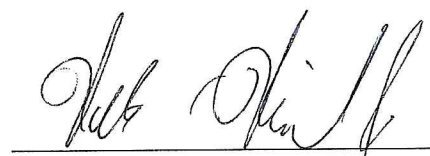
6/9/09
Date


Roger W. Briggs, Executive Director
California Regional Water Quality Control Board
Central Coast Region

6-10-09
Date


Mark Silberstein, Executive Director
Elkhorn Slough Foundation


6/18/09
Date


Walter C. Waidelich, Jr., Division Administrator
Federal Highway Administration

6/17/09
Date

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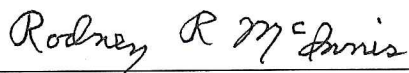
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Lew C. Bauman, County Administrative Officer
County of Monterey

7/9/09


Date



Rodney R. McInnis, SWR Regional Administrator
National Marine Fisheries Service

6-15-09


Date



Debra L. Hale, Executive Director
Transportation Agency for Monterey County

7/9/09


Date



Enrique Manzanilla, Director of Communities &
Ecosystems Division
Environmental Protection Agency, Region 9

6/18/09

Date



Diane Noda, Field Supervisor, Ventura
U.S. Fish and Wildlife Service

6/15/09

Date

