

IMPLEMENTING AGREEMENT/CESA MOU

by and between

UNITED STATES FISH AND WILDLIFE SERVICE

CALIFORNIA DEPARTMENT OF FISH AND GAME

CITY OF POWAY, CALIFORNIA

TO ESTABLISH THE POWAY SUBAREA HABITAT CONSERVATION PLAN/

SUBAREA NATURAL COMMUNITY CONSERVATION PLAN

FOR THE CONSERVATION OF

THREATENED, ENDANGERED AND OTHER PLANT AND ANIMAL SPECIES

FOUND WITHIN THE JURISDICTION OF

CITY OF POWAY, CALIFORNIA

JUNE, 1996

This Implementing Agreement/California Endangered Species Act Memorandum of Understanding (CESA MOU) ("Agreement") is entered into as of the 19<sup>th</sup> day of July, 1996 by and among the UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), an Agency of the United States Department of the Interior, the CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG"), a Subdivision of the California Resources Agency, and the CITY OF POWAY ("City"), a municipal corporation situated in the County of San Diego, State of California, hereinafter collectively called the "Parties."

#### AGREEMENT

Based upon the recitals, definitions, mutual covenants and obligations, and other provisions set forth below, and other valuable consideration, the Parties agree as follows:

#### 1.0 DEFINITIONS AND EXHIBITS

DEFINITIONS The following terms as used in this Agreement shall have the meanings set forth below:

1.1 "Additional Covered Species" means those species included within the City's Section 10(a) Permit and Management Authorization and identified on Exhibit C attached to this Agreement, for which incidental take shall be authorized through incremental implementation of the MSCP as provided in this Agreement.

1.2 "Agreement" means this Implementing Agreement/CESA MOU.

1.3 "CDFG" means the California Department of Fish and Game, a subdivision of the California Resources Agency.

1.4 "CEQA" means the California Environmental Quality Act (Cal. Public Resources Code §§ 21000 - 21177), including all regulations promulgated pursuant to that Act.

1.5 "CESA" means the California Endangered Species Act (California Fish and Game Code §§ 2050 - 2098), including all regulations promulgated pursuant to that Act.

1.6 "Management Authorization" means any authorization issued by CDFG under CESA (specifically, California Fish and Game Code § 2081) or the NCCP Act (specifically, California Fish and Game Code

§§ 2825 or 2835), to permit the Management Take of a species listed under CESA as threatened or endangered, or of a species which is a candidate for such a listing, or of a species listed as an identified species under § 2835.

1.7 "City" means the City of Poway, City of Poway City Council, and City of Poway Redevelopment Agency, which may act independently and/or jointly as the applicant, lead agency, or decision-maker concerning the planned development of public and private projects within the City.

1.8 "Covered Species" means the plant and animal species identified on Exhibit B attached to this Agreement, the incidental take/management take of which is authorized under the Section 10(a) Permit, Section 4(d) Special Rule, and/or Management Authorization in accordance with this Agreement.

1.9 "Effective Date" means the date following execution of this Agreement by all Parties on which the Section 10(a) Permit is issued.

1.10 "ESA" means the federal Endangered Species Act (16 U.S.C. §§ 1531 - 1544), including all regulations promulgated pursuant to that Act.

1.11 "Incidental Take" means the take of an animal or plant species listed as threatened or endangered pursuant to the ESA that would otherwise be prohibited under Section 9 of the Act or pursuant to a special rule issued under Section 4(d) of the Act, where such take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

1.12 "Management Take" means the take of a plant or animal species listed as threatened or endangered pursuant to the CESA, or any species which is a candidate species under the CESA, where such take is for management purposes in accordance with a Management Authorization.

1.13 "Multi-Habitat Planning Area" or "MHPA" means the area within the MSCP Area within which preserve planning is focused and where permanent preservation of habitat lands will be accomplished. The MHPA will conserve sufficient habitat to enable the Covered and Additional Covered Species to be self-sustaining within the MSCP

Area and to protect the Covered and Additional Covered Species as if listed under the ESA and CESA.

1.14 "Multiple Species Conservation Program" or "MSCP" means the "Public Review Draft Multiple Species Conservation Program MSCP Plan" prepared by the City of San Diego on behalf of itself and eleven other general purpose agencies of government, including the City of Poway, and dated March 1, 1995, as may be modified in the final MSCP Plan.

1.15 "MSCP Area" consists of the land in the greater San Diego region which is encompassed by the MSCP, as depicted on Figure 1-1 of the Public Review Draft MSCP Plan.

1.16 "NCCP Act" means the California Natural Community Conservation Planning Act of 1991, enacted by Chapter 765 of the California statutes of 1991 (A.B. 2172) (codified in part at California Fish and Game Code §§ 2800, et seq.), including all regulations promulgated pursuant to that Act.

1.17 "Parties" mean the signatories to this Agreement, namely the USFWS, the CDFG, and the City.

1.18 "Permit Area" means the area, as depicted on Pocket Map 3 attached to the PSHCP, in which the Incidental Take and/or Management Take of Covered Species is allowed by virtue of the Section 10(a) Permit, Section 4(d) Special Rule, and/or Management Authorization in accordance with this Agreement.

1.19 "Permittee" shall mean the City as defined in Section 1.7 above.

1.20 "Planned Development" shall mean public and private development projects anticipated under the Poway General Plan and Paguay Redevelopment Plan as described in Section 1.3 of the PSHCP.

1.21 "PSHCP" means the Poway Subarea Habitat Conservation Plan/Subarea Natural Community Conservation Plan (PSHCP) dated \_\_\_\_\_.

1.22 "Mitigation Area" means the geographic area of the City within which preserve planning is focused and where permanent preservation of habitat lands will be accomplished. The Mitigation Area will

conserve sufficient habitat to protect the Covered Species as if they were listed under the ESA and CESA.

1.23 "Section 4(d) Special Rule" means the regulation concerning the coastal California gnatcatcher, published by the USFWS on December 10, 1993 (58 Federal Register 65088) and codified at 50 C.F.R. § 17.41(b), which defines the conditions under which the take of the coastal California gnatcatcher incidental to land use activities will not be considered a violation of Section 9 of ESA.

1.24 "Section 10(a) Permit" means the permit issued by the USFWS to the City under Section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)) to allow the incidental take of the Covered Species.

1.25 "Take" and "Taking" shall mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

1.26 "Take Authorization" means a Section 10(a) Permit and/or a Management Authorization, or incidental take allowed in accordance with the Section 4(d) Special Rule.

1.27 "Third Party Beneficiaries" means proponents of planned development projects proposed in accordance with the Poway General Plan, Paguay Redevelopment Plan, the PSHCP, and this Agreement within the jurisdictional limits of the City, that are subject to the control of the City through the City's land use regulations and permitting authorities.

1.28 "Unforeseen Circumstances" refers generally to any significant adverse change that was not foreseen by the Parties as of the Effective Date, in the population of Covered Species, or in the habitat or natural resources of lands preserved pursuant to the PSHCP and this Agreement, or in the anticipated impacts of planned development within the City, or other factors upon which the PSHCP is based. A finding of unforeseen circumstances shall be governed by the "Assurances Policy" released by the Secretaries of the Interior and Commerce dated August 9, 1994, a copy of which is attached hereto as Exhibit D, which further defines the factors to be considered in the determination of whether extraordinary circumstances exist such that a finding of "unforeseen circumstances" is warranted.

1.29 "USFWS" means the United States Fish and Wildlife Service, an agency of the United States Department of the Interior.

EXHIBITS The following Exhibits are attached to this Agreement and incorporated by reference herein.

1.30 Exhibit A - City of Poway Final Signed Approval Documents.

1.31 Exhibit B - Covered Species List

1.32 Exhibit C - Additional Covered Species List

1.33 Exhibit D - August 11, 1994 "Assurances Policy" issued by the Secretaries of the Interior and Commerce.

## 2.0 RECITALS

This Agreement is based on the following facts:

### 2.1 CITY

The City of Poway is a municipal corporation located within the County of San Diego. The City is authorized to enter into this Agreement pursuant to statutes and the Constitution of the State of California, including without limitation Article 11 thereof, authorizing the City to regulate the use of land, approve open space and conservation easements, create assessment districts, enact conservation and open space elements for general plans, preserve natural resources including plants and wildlife, and exercise general planning and zoning powers, and enter into contracts and take other actions to conserve wildlife and plant resources and reconcile such concerns with economic development. See e.g. California Government Code §§ 50060.5, 51205, 51070, 50575, 65302, 65560, 65864.

### 2.2 USFWS

USFWS is the agency of the Department of the Interior of the United States of America authorized and empowered by Congress to enforce the terms of the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (ESA) and to issue permits to allow the incidental take of endangered and threatened species pursuant to the terms of Section 10 of the ESA. The Service is authorized to enter into this

Agreement pursuant to the ESA, Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq., and the Fish and Wildlife Act of 1956, 16 U.S.C. § 742f.

In connection with the enactment of Section 10(a) of the ESA, the United States Congress expressed its intent that USFWS cooperate in the development of conservation plans that protect both listed and unlisted species over the long term while providing assurances regarding the limits of any mitigation required, stating that:

[T]he Secretary [of the Interior] may utilize this provision [concerning habitat conservation plans] to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan.

In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act.

It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances.

H.R. Rep. No. 97-835, 97th Cong., 2d Sess. 30-31 (1982) (Conference Report on 1982 Amendments to the ESA). The USFWS routinely approves habitat conservation plans that address both listed and unlisted species.

### 2.3 CDFG

The California Department of Fish and Game is a subdivision of the California Resources Agency authorized and empowered by the

State of California to enforce the terms of the California Endangered Species Act, California Fish and Game Code §§ 2050 - 2098, and to issue management authorizations to allow the take of endangered and threatened species pursuant to the terms of Section 2081 and Section 2835 of the California Fish and Game Code.

#### 2.4 PERMIT AREA

The Poway Subarea Habitat Conservation Plan (PSHCP) covers all land within the jurisdictional boundaries of the City of Poway (Permit Area). The Plan also discusses the land area and associated habitat within the Poway Sphere of Influence (SOI) and the Poway General Plan Planning Area (GPPA), which are adjacent to the City and under the planning jurisdiction of the County of San Diego. The SOI and GPPA areas are shown on Pocket Maps 1 through 3 attached to the PSHCP. As portions of the SOI and GPPA area are included within the jurisdictional boundaries of the City through future annexations, the City intends to incorporate those areas into the PSHCP through amendment of the PSHCP.

The City shall work with the City of San Diego and the County of San Diego to cooperatively plan for the conservation of biological resources in those areas within the respective jurisdictions that surround the City of Poway to ensure the realization of viable MSCP and MHCP subregional preserve systems.

#### 2.5 POWAY SUBAREA HABITAT CONSERVATION PLAN

The Poway Subarea Habitat Conservation Plan/Natural Community Conservation Plan (PSHCP) describes a cooperative federal, state and local program of conservation for a number of "Covered Species" of plants and animals, within the jurisdictional limits of the City of Poway, in the County of San Diego, California. The PSHCP has been prepared as a "multiple habitat and species" plan pursuant to federal and state law to meet local and regional biological resource conservation objectives. The PSHCP is a comprehensive, long-term habitat conservation plan for the Covered Species which addresses multiple species needs and the preservation of natural communities. The PSHCP addresses the potential impacts of development, natural habitat loss and species endangerment and creates a plan to mitigate for the loss of Covered Species and their habitats due to the direct and indirect impacts of future development of both private and public lands within the PSHCP area.



A goal of the PSHCP is to conserve biodiversity in the PSHCP area and to achieve certainty in the land development process for both private and public sector development projects anticipated under the Poway General Plan and Paguay Redevelopment Plan. The terms and requirements of the Plan shall be applicable to all public projects and to all private projects where the private property owner seeks to rely on the permits granted to the City in conjunction with the Plan and its associated documents.

## 2.6 SPECIES COVERED UNDER THE PSHCP

The Covered Species are those species that use, occupy or are associated with the Permit Area and are: 1) listed as threatened or endangered under ESA or CESA; 2) proposed or candidates for such listing; 3) of special concern in California; 4) rare or declining regionally; or 5) of local concern. Certain Covered Species, for example, the coastal California Gnatcatcher, are currently listed under the ESA and it is anticipated that one or more of the other Covered Species may become listed in the future under ESA and/or CESA. A list of the Covered Species is attached as Exhibit B to this Agreement.

## 2.7 RELATIONSHIP OF PSHCP TO THE NCCP PROGRAM AND THE SECTION 4(D) SPECIAL RULE

The State of California enacted the NCCP Act effective January 1, 1992, for the conservation of natural communities. Pursuant to the NCCP Act, the State promulgated the NCCP Program, which is a pilot project under the NCCP Act that provides for the preparation of the NCCPs for coastal sage scrub habitat and the species that inhabit and use coastal sage scrub habitat, including the gnatcatcher. The California Resources Agency, CDFG, and USFWS have entered into the "MOU REGARDING COASTAL SAGE SCRUB NATURAL COMMUNITY CONSERVATION PLANNING IN SOUTHERN CALIFORNIA," executed December 4, 1991, providing for a policy of coordination and cooperation between FWS and CDFG in the development of plans for the conservation of coastal sage scrub natural communities.

FWS has adopted the Section 4(d) Special Rule, which defines those conditions under which incidental take of the gnatcatcher under the ESA, that is not otherwise excepted under Section 7 or permitted under Section 10(a), will not be considered a violation of the ESA. Those conditions are: 1) if the incidental take

results from activities conducted in accordance with an NCCP for the protection of CSS habitat prepared consistent with the State of California's NCCP Conservation and Process Guidelines, provided that (a) the NCCP has been prepared, approved and implemented pursuant to the NCCP Act; and (b) the FWS has issued written concurrence that such plan meets the standards set forth in 50 C.F.R. § 17.32 (b) (2); or 2) during the period that an NCCP is being developed, the incidental take occurs within an area under the jurisdiction of a local government that is enrolled and actively engaged in the preparation of such a plan and such take results from activities conducted in accordance with the NCCP Conservation and Process Guidelines. Section 2835 provides that CDFG may permit the taking, as provided elsewhere in the California Fish and Game Code, of any identified species whose "conservation" and "management" is provided for in a CDFG approved NCCP.

The PSHCP has been prepared as a subarea plan under the Multiple Species Conservation Program (MSCP) in Southwestern San Diego County and the Multiple Habitat Conservation Program (MHCP) planning effort in Northwestern San Diego County. The MSCP and MHCP are recognized under the State of California's Natural Community Conservation Planning Act of 1991 (NCCP Act) as on-going multiple species planning programs. While the PSHCP independently meets the requirements of ESA and CESA, the City has actively participated in the development of the MSCP and MHCP, to ensure that the PSHCP is consistent with and will be a completed component of those NCCP subregional plans. Upon acceptance of the MSCP and/or MHCP by the California Department of Fish and Game and the United States Fish and Wildlife Service, respectively, as viable multiple species and habitat conservation plans, the Poway HCP shall also be considered an approved NCCP Plan under the NCCP Act and the Section 4(d) Special Rule for the gnatcatcher promulgated by the USFWS.

As additional subarea plans developed to implement the MSCP are approved by the CDFG and USFWS, the Covered Species for which incidental take is authorized under the Section 10(a) Permit and management take is authorized under the Management Authorization issued to the City will be incrementally expanded beyond the Covered Species identified on Exhibit B to include those additional species adequately covered under the MSCP subregional plan through the approved subarea NCCP Plans (Additional Covered Species). Upon USFWS and CDFG approval of a particular MSCP subarea plan, those

Additional Covered Species identified on Exhibit C that the Service and CDFG determine are adequately covered under the MSCP through the subarea plan will be concurrently deemed included within the take authorization issued to the City. While the 10(a) Permit and Management Authorization issued to the City shall identify each Additional Covered Species, the 10(a) Permit and Management Authorization shall specifically condition authorization to take each such Additional Covered Species on approval of the particular MSCP subarea plan(s) that ensures adequate coverage for the species. The Service and CDFG shall provide written notice to the City of the approval of each MSCP subarea plan and those Additional Covered Species the incidental take of which is authorized under the City's 10(a) Permit and Management Authorization. As to each Additional Covered Species, the take authorization shall be effective upon the listing of each such species.

## 2.8 RELATIONSHIP OF PSHCP TO SCRIPPS POWAY PARKWAY EXTENSION PROJECT

The PSHCP has been prepared to satisfy the regional biological resource impact mitigation measures required for the approved Scripps Poway Parkway Extension Project, as identified in the Final Environmental Impact Report (SCH # 93091118) prepared by the City for the Project.

## 2.9 SUMMARY OF THE POWAY SUBAREA HABITAT CONSERVATION PLAN

In consideration of the issuance of the Section 10(a) Permit and Management Authorization it is the intention of the PSHCP and this Agreement to obligate the City to provide interim protection of and, ultimately, permanent conservation of approximately 10,800 acres of habitat within the jurisdictional boundaries of the City, as more particularly described in Sections 5, 6, and 7 of the PSHCP. When the PSHCP is fully implemented, these lands shall be permanently set aside and maintained for the conservation, preservation, restoration and enhancement of the Covered Species and their habitats. The PSHCP provides for the establishment of a Mitigation Area which includes most of the remaining habitat for the Covered Species within the jurisdictional limits of the City, including 5800 acres of coastal sage scrub (82% of the total coastal sage scrub habitat within the City). Within the Mitigation Area, which totals 13,300 acres, approximately 91% (10,800 acres) of natural habitat will be permanently conserved under the PSHCP.

Approximately 4620 acres of land within the Mitigation Area are currently dedicated as permanent open space. The City will permanently conserve approximately 6180 additional acres of habitat lands through future dedications, local land use controls on development, and acquisition.

### 3.0 PURPOSES

The purposes of this Agreement are:

A. To permit incidental/management take of the coastal California gnatcatcher in connection with the construction of the City's approved Scripps Poway Parkway Extension Project;

B. To assure implementation of each of the terms of the PSHCP;

C. To contractually bind each of the Parties to fulfill and faithfully perform the obligations, responsibilities and tasks assigned to it pursuant to the terms of the PSHCP;

D. To provide remedies and recourse should any party fail to perform its obligations, responsibilities and tasks as set forth in this Agreement;

E. To provide assurances to the City that as long as the terms of the PSHCP and Section 10(a) Permit/Management Authorization applicable to the City are fully and faithfully performed, no additional land restrictions or financial compensation pursuant to the ESA and CESA will be required of the City or any Third Party Beneficiary within the jurisdiction and control of the City in the event of unforeseen or extraordinary circumstances; and

F. To implement a program to conserve, protect, restore and enhance the Covered Species and their habitats.

### 4.0 LEGAL REQUIREMENTS

In order to fulfill the requirements for issuance of the Section 10(a) Permit and Management Authorization, the PSHCP sets forth measures that are intended to assure that any take occurring will be incidental, that the impacts of the take will, to the

maximum extent practicable be minimized and mitigated, that adequate funding for the implementation of the PSHCP will be provided, and that the take will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild.

The USFWS finds that the PSHCP as implemented pursuant to this Agreement does provide such measures and that it does satisfy the legal requirements necessary for the USFWS to issue a Section 10(a) Permit. Likewise, the CDFG finds that the PSHCP satisfies the legal requirements necessary for it to issue a Management Authorization.

## 5.0 MUTUAL ASSURANCES

The primary purpose of this Agreement is to provide for the long-term reconciliation of planned development within the City with the conservation and protection of the Covered Species. Based on and in consideration of this Agreement and the PSHCP, the parties hereby agree and extend the following mutual assurances.

### 5.1 USFWS

The USFWS agrees that:

A. Implementation of the PSHCP, and dedication of conservation easements on lands specified for mitigation, fulfills the regional biological resource impact mitigation identified for the approved Scripps Poway Parkway Extension Project, and that additional mitigation is not required for impacts to Covered Species.

B. Compliance with the terms of this Agreement and the PSHCP constitutes compliance with the provisions of the ESA. Upon acceptance of a viable MSCP preserve design by USFWS and CDFG, the PSHCP shall be recognized as an NCCP Plan under the Section 4(d) Special Rule.

C. Implementation of this Agreement and the PSHCP will provide for the conservation and protection of the Covered Species and their habitat within the Permit Area, as if each of the Covered species were listed under ESA.

Covered Species and their habitats;

4. The mitigation will foster the incremental implementation of the HCP in an effective and efficient manner; and,

5. The mitigation will not result in a negative fiscal impact with regard to the successful implementation of the PSHCP.

Mitigation requirements may include compensation with "in kind" vegetation communities or "out of kind" vegetation communities, consistent with Section 6.4 of the PSHCP, except for impacts to wetlands regulated under Section 404 of the Clean Water Act, 33 U.S.C. § 1344 and impacts to other species and habitats that may in the future be regulated in a like manner by the state or federal governments.

On an annual basis, the City will redesignate the land use and zoning for all onsite and offsite mitigation compensation habitat lands included within a conservation easement or acquired in fee or by dedication to the Open Space - Resource Management (OS-RM) designation.

C. Management Plans

1. Cornerstone Lands

The City shall implement the management actions identified in Section 6 of PSHCP for the cornerstone lands and other publicly owned open space lands within the Mitigation Area. Such actions include fire management, habitat restoration and revegetation, erosion control, recreation and public access, and fencing, signing and lighting guidelines.

2. Other Lands Within and Outside of Mitigation Area

As to each separate category of land within the City of Poway identified in Section 6 of the PSHCP, the City shall implement, to the maximum extent practicable, those management actions identified in Sections 6 and 7 that are applicable to that category of land.

D. Agreements with Other Jurisdictions and Entities

In order to assist in full implementation of the PSHCP, the

City will pursue offsite mitigation agreements with other jurisdictions and entities who desire to purchase suitable offsite mitigation lands to mitigate for the impacts of their public or private projects. Such agreements, shall be subject to the approval of the USFWS and CDFG, who may also require separate compliance with the regulatory provisions of the ESA and CESA as a condition precedent to the issuance of a take authorization for the particular project.

E. Interim and Permanent Protection of Mitigation Area

The City shall implement the PSHCP incrementally through its General Plan, Redevelopment Plan, and Zoning and Grading Ordinances until permanent protection of the Mitigation Area lands is secured through acquisition or other equivalent means. Once the City has amended its General Plan, Redevelopment Plan, and Zoning and Grading Ordinances to fulfill the requirements of the PSHCP, the City shall confer with USFWS and CDFG before amending either of the Plans or Ordinances in a manner that would impede the implementation of the PSHCP. Amendment of the Plans or Ordinances in a manner that, in the judgement of USFWS or CDFG, would impede implementation of the PSHCP may provide a basis for suspension and/or termination of the 10(a) Permit and Management Authorization. Notwithstanding the term of this Agreement or the Section 10(a) Permit or Management Authorization, the City shall be obligated to fully implement the PSHCP by securing the protection in perpetuity of the Mitigation Area habitat lands.

6.2 USFWS

USFWS will use its best efforts to assist the City of Poway in implementing the provisions of the PSHCP. Responsibilities of the USFWS shall include providing timely advice and guidance on future planned development within the Mitigation Area and those proposed amendments to the General Plan, Redevelopment Plan or Ordinances subject to Section 6.1.E, above, to avoid and/or minimize impacts to habitat; working with the City to enable other jurisdictions and entities to carry out mitigation requirements within the Mitigation Area, as appropriate; reviewing and providing timely comments on all reports required to be submitted to USFWS under the Plan; and monitoring the implementation of the Plan.

6.3 CDFG

CDFG will use its best efforts to assist the City of Poway in implementing the provisions of the PSHCP. Responsibilities of the CDFG shall include providing timely advice and guidance on future planned development within the Mitigation Area and those proposed amendments to the General Plan, Redevelopment Plan or Ordinances subject to Section 6.1.E, above, to avoid and/or minimize impacts to habitat; working with the City to enable other jurisdictions and entities to carry out mitigation requirements within the Mitigation Area, as appropriate; reviewing and providing timely comments on all reports required to be submitted to CDFG under the Plan; and monitoring implementation of the Plan.

## 7.0 FUNDING

### 7.1 CITY

It is anticipated that most of the PSHCP will be implemented through mitigation and/or habitat protection requirements imposed on planned development as described in Sections 6 and 7 of the PSHCP and will not require significant additional direct funding. Implementation of the Plan will be carried out through the following means:

A. Mitigation compensation and application of mitigation ratios approved by the City for planned public and private development projects;

B. Offsite mitigation agreements entered into with other jurisdictions, as determined appropriate by USFWS and CDFG;

C. Contribution of federal and state lands and funds, to the extent such lands and funds are available to assist in implementation of the PSHCP

D. Compensation mitigation within the Mitigation Area contributed by planned development projects located in the jurisdiction of the City and sponsored by local special districts, public agencies, and regional public utility and facility providers;

E. Establishment of a Mitigation Area Acquisition Fund Account by the City to receive all "in-lieu" mitigation compensation fees contributed by planned development projects.



Approximately ten percent of the fund balance shall be used each year to carry out the management actions, future studies and biological monitoring measures provided for in the Agreement and the Plan. The remaining account monies shall be used to acquire important habitat within the Mitigation Area, with acquisition priorities focused within the Potential Resource Protection Areas (PRPA) of the Mitigation Area;

F. Contribution of habitat lands within the Mitigation Area by public and private owners by donation;

G. Utilization, as appropriate, of remaining habitats within development parcels that are not included within a conservation easement, as "banked" mitigation land by the private owners of the parcels;

H. Application by the City for Federal and/or State grants or funds;

I. Use of appropriate non-financial methods of land acquisition established on a regional level, as identified in Section 3.3.6, Acquisition and Financing, of the Public Review Draft MSCP Plan;

J. As a participating local jurisdiction in the City of San Diego's subregional MSCP/NCCP planning program, the City will participate in a subregional cooperative effort to identify potential funding sources for the acquisition of habitat within the MSCP/NCCP Plan Multi-Habitat Preserve Area (MHPA). An equitable portion of such funds shall be made available to the City to assist in implementing the PSHCP; and

K. The offering of grants, as appropriate and financially feasible, to interested universities, in conjunction with undergraduate and graduate degree programs, to carry out the recommended future studies discussed in Section 6.5 of the PSHCP, including specific research programs and periodic surveys. City grants would be established to foster the implementation of the recommended studies, and through the university administration would be tailored to the completion of thesis projects or other required programs related to ecology, biology, botany, geography, environmental management, and other programs that focus on the terrestrial sciences.

## 7.2 USFWS

The USFWS shall include in its annual budget requests sufficient funds to fulfill its obligations under the PSHCP and this Agreement.

## 7.3 CDFG

The CDFG shall include in its annual budget requests sufficient funds to fulfill its obligations under the PSHCP, this Agreement, and all Management Authorizations it issues pursuant to the PSHCP, and its statutory requirements to protect the Covered Species.

## 8.0 MONITORING AND REPORTING

### 8.1 Implementation Monitoring

During the term of this Agreement, the City will continuously monitor and maintain a written record (by habitat type) of the amount of habitat lands within its jurisdictional boundaries a) preserved within the Mitigation Area and b) disturbed by planned development both within and outside of the Mitigation Area.

### 8.2 Annual Monitoring

The City will prepare and submit to the USFWS and the CDFG by June 1 of each year, a single annual report which 1) describes (by habitat type) the amount of habitat lands within the Permit Area (a) preserved within the Mitigation Area by the City and (b) disturbed by planned development both within and outside of the Mitigation Area; and 2) maps the footprint of all development impacts and all easements, dedications or other acquisitions within the Mitigation Area.

### 8.3 Biological Monitoring

The Parties agree that biological monitoring, using species surveys and other data collection methods, is necessary to assess the success of the HCP in conserving Covered Species. The Parties further agree that to the extent funds are available for this purpose, USFWS and CDFG should contribute to the City's biological monitoring effort. The specific biological monitoring obligations

of the Parties are as follows:

A. Obligations of the USFWS

USFWS shall participate in the City's monitoring effort in accordance with either of the NCCP subregional plan(s) of which the PSHCP is a component subarea plan.

B. Obligations of the CDFG

CDFG shall participate in the City's monitoring effort in accordance with either of the NCCP subregional plan(s) of which the PSHCP is a component subarea plan.

C. Obligations of the City

The City will conduct biological monitoring on an ongoing basis and provide a written report of the results of the monitoring to the USFWS and CDFG in consistent with the reporting requirements developed either of the NCCP subregional plans of which PSHCP is a component subarea plan. Biological monitoring will be accomplished through the following methods.

1. The potential biological resource impacts of planned public or private development projects will be addressed in the required environmental assessment documentation, which will include a biological resource survey technical report prepared by a qualified biologist. The report will be prepared in accordance with monitoring guidelines set forth in the PSHCP. It will identify existing onsite and adjacent offsite biological conditions, unavoidable onsite and offsite impacts of the project to sensitive plant and animal resources (including the Covered Species and supporting habitats), recommended mitigation measures, and mitigation monitoring and reporting requirements.

City consideration and approval of such projects will include a final Mitigation Monitoring and Reporting Program (MMRP). The approved MMRP document will be provided by the City to USFWS and CDFG. Such documents will be maintained as a database by the City.

2. On a fiscal year basis, the City will hire a qualified biologist to conduct periodic and annual surveys, in accordance with Section 6.5 of the PSHCP. Potential grants offered by the

As a condition precedent to making a finding of Unforeseen Circumstances, CDFG shall comply with the following procedure.

A. Except where jeopardy to a Covered Species is imminent, at least sixty (60) days prior to making a finding, CDFG shall provide written notice to USFWS and the City of its intention to make an Unforeseen Circumstances finding, together with a statement of the facts underlying the proposed finding.

B. Except where jeopardy to a Covered Species is imminent, CDFG shall meet with the City at least thirty (30) days prior to making a finding of Unforeseen Circumstances, to discuss the proposed finding and to provide the City with an opportunity to submit information to rebut the proposed finding.

C. The CDFG shall have the burden of demonstrating that Unforeseen Circumstances exist using the best scientific and commercial data available. Any CDFG finding regarding Unforeseen Circumstances must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

D. Any additional mitigation requirements recommended by CDFG to redress the finding of Unforeseen Circumstances shall not involve the payment of additional financial compensation or land restrictions without the consent of the City.

## **10. ISSUANCE OF TAKE AUTHORIZATIONS**

### **10.1 Findings - USFWS**

The USFWS has found, following opportunity for public comment, that (a) the taking of Covered Species requested by the City in the PSHCP in its application for a Section 10(a) Permit will be incidental to the carrying out of otherwise lawful activities; (b) the PSHCP and this Agreement will, to the maximum extent practicable, minimize and mitigate the impacts of such incidental taking; (c) the funding sources identified and provided for herein will ensure that adequate funding for the PSHCP will be provided; (d) the requested taking of Covered Species will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild; (e) the PSHCP and this Agreement satisfy and fulfill all measures required by the USFWS as being necessary or

appropriate for the purposes of the PSHCP (including any measures determined by the Parties to be necessary to deal with Unforeseen Circumstances).

A. Issuance of Section 10(a) Permit

As a result of the findings specified in this Section 10.1, on the Effective Date the USFWS has issued a Section 10(a) Permit to the City authorizing the Incidental Take of Covered Species, that are listed or that may be listed in the future under ESA, which Permit requires compliance with the PSHCP and this Agreement as conditions thereof. As to each Covered Species that is not currently listed under ESA, the Section 10(a) Permit shall become effective as to such Covered Species upon its listing under the ESA.

B. Additional Covered Species

The Section 10(a) Permit also authorizes the incidental take of the Additional Covered Species identified on attached Exhibit C but, as to each such Additional Covered Species, conditions the authorization to take on the issuance of a take authorization by USFWS in connection with approval of one or more MSCP subarea plans, provided that at the time of such approval, USFWS determines that the Additional Covered Species is adequately covered under the MSCP subarea plan(s). The Section 10(a) Permit shall become effective as to each Additional Covered Species on the latter of 1) the effective date of the take authorization(s) issued in connection with approval of the subarea plan(s) applicable to such Additional Covered Species or 2) the listing of such Additional covered Species under the ESA. USFWS shall provide written notice to the City of the approval of each MSCP subarea plan and those Additional Covered Species the incidental take of which is authorized under the City's 10(a) Permit.

C. Further Permits with Respect to Unlisted Covered or Additional Covered Species

Notwithstanding Section 10.1.A and B, in the event that it is judicially determined that USFWS was not authorized to issue a Section 10(a) Permit for unlisted Covered Species and Additional Covered Species, USFWS shall expeditiously issue a Section 10(a) Permit for the Covered Species, and subject to the fulfillment of

the precondition specified in Section 10.1.B, for one or more Additional Covered Species, in accordance with this Section 10.1.C.

On application by the City for further Section 10(a) Permits, subject to compliance with the ESA and applicable statutes and regulations, after public review and subject to Unforeseen Circumstances, ~~USFWS~~ shall issue further Section 10(a) Permits for the remaining term of this Agreement allowing the incidental take of one or more Covered Species and Additional Covered Species by the City in accordance with the PSHCP and this Agreement and shall not require further financial compensation or land restrictions under the ESA or any other statute directed at the conservation of such Covered Species or Additional Covered Species, without the consent of the City.

To the extent appropriate, in any Section 7 consultation with regard to the issuance of the Section 10(a) Permits for the Covered Species or Additional Covered Species, the USFWS shall adopt the biological opinions issued in connection with the PSHCP and NCCP MSCP subarea plans applicable to such species as the biological opinion issued pursuant to Section 7(b) of the ESA, 16 U.S.C. § 1636(b).

## 10.2 Findings - CDFG

The CDFG has found, following opportunity for public comment, that the HCP and this Agreement satisfy all legal requirements necessary for the CDFG to issue a Management Authorization for Covered Species that are listed under CESA.

### A. Issuance of Management Authorization for Listed Species

As a result of the findings specified in this Section 10.2, concurrent with the Effective Date the CDFG has issued a Management Authorization which authorizes the Management Take of Covered Species currently listed under CESA for the Term and subject to and in accordance with the provisions of this Agreement.

### B. Issuance of Management Authorization for Unlisted Covered Species

As a result of the findings specified in this Section 10.2, concurrent with the Effective Date the CDFG has issued a Management

Authorization which authorizes the management take of the Covered Species not currently listed under CESA for the Term and subject to and in accordance with the provisions of this Agreement. In the event that one or more of the Covered Species that is not listed as threatened, endangered or as a candidate species under CESA as of the Effective Date is subsequently listed as threatened, endangered or as a candidate species (or there is a change in the listing status of a Covered Species that is currently listed as threatened, endangered or as a candidate species), the Management Authorization authorizes the management take under the CESA for the Term and subject to and in accordance with the provisions of this Agreement.

C. Additional Covered Species

The Management Authorization also authorizes the management take of the Additional Covered Species identified on attached Exhibit C, but for each Additional Covered Species, conditions the take on the issuance of Management Authorizations by CDFG in connection with approval of one or more MSCP subarea plans, provided that at the time of such approval, CDFG determines that the Additional Covered Species is adequately covered under the MSCP subarea plan(s). The Management Authorization shall become effective as to each Additional Covered Species on the latter of 1) the effective date of the Management Authorization(s) issued in connection with approval of the subarea plan(s) applicable to such Additional Covered Species or 2) the listing of such Additional Covered Species as threatened, endangered or as a candidate species under CESA (or there is a change in the listing status of a Covered Species that is currently listed as threatened, endangered or as a candidate species). CDFG shall provide written notice to the City of the approval of each MSCP subarea plan and those Additional Covered Species the incidental take of which is authorized under the City's Management Authorization.

10.3 Finding - Section 4(d) Special Rule

Upon acceptance of the MSCP by the USFWS and CDFG, respectively, as a viable subregional NCCP plan, the PSHCP shall also be considered an approved NCCP Plan under the NCCP Act and the Section 4(d) Special Rule for the gnatcatcher promulgated by the USFWS.. In accordance with the Section 4(d) Special Rule, incidental take of the coastal California gnatcatcher within the City in accordance with and consistent with the PSHCP/NCCP Plan and

this Agreement shall not be considered a violation of Section 9 of the ESA.

11.0 RELIANCE ON PSHCP IN FUTURE COVERED SPECIES LISTING DETERMINATIONS

11.1 USFWS

To the extent permitted by ESA, the USFWS shall consider the PSHCP, this Agreement, and all other existing conservation efforts (including, but not limited to, other plans approved under the NCCP Act, and any relevant Conservation Agreements) in any future determination concerning the listing as threatened or endangered of any Covered Species which is not so listed as of the Effective Date.

11.2 CDFG

To the extent permitted by CESA, the CDFG shall consider the PSHCP, this Agreement and all other existing conservation efforts (including, but not limited to, other plans approved under the NCCP Act, and any relevant Conservation Agreements) in any future determinations and recommendations by CDFG to the California Fish and Game Commission with regard to the listing as endangered, threatened, or as a candidate species, of any Covered Species which is not so listed as of the Effective Date.

12.0 NOTICES OF PROPOSED RULES AFFECTING ANY COVERED SPECIES, ADDITIONAL COVERED SPECIES, OR OTHER SPECIES IN PERMIT AREA

USFWS and CDFG each shall use its best efforts to send any future public notices to the City of any proposed rule which is published to list under the ESA or CESA, respectively, a Covered Species or an Additional Covered Species, or any other species that is known to occur within the Permit Area.

13.0 Listing of Other Species

In connection with the listing under the ESA or CESA of any species other than a Covered Species or an Additional Covered Species, and upon proper application and compliance with all substantive and procedural processes, USFWS or CDFG, as appropriate shall expeditiously consider the issuance of, and if, appropriate,



issue a Section 10(a) Permit or a Management Authorization, as applicable, to the City upon a finding that the PSHCP and this Agreement, as currently constituted or as amended, meet ESA or CESA, as applicable, standards for the issuance of a Section 10(a) Permit/Management Authorization for such species.

#### 14.0 COOPERATIVE EFFORTS TOWARD THIRD PARTIES

A. The USFWS and CDFG shall each apply their best efforts to contribute public lands and funds to the development of and acquisition of habitat lands within the Mitigation Area. Any habitat land acquired within the Mitigation Area through such means shall not be counted as mitigation for any public or private project. As appropriate, the USFWS and CDFG shall direct the acquisition of land acquired for offsite mitigation of federal and state projects to be located within the City, and lands banked for such projects, to lands within the Mitigation Area.

B. The USFWS and CDFG shall, as appropriate, encourage local special districts, public agencies, and regional public utility and facility providers (other than federal agencies) not subject to the regulatory control of the City, when carrying out development within the jurisdictional limits of the City, to seek take authorizations through the permitting authority of City through legally binding agreements approved by USFWS and CDFG, as described in this Agreement, rather than seeking separate take authorizations directly from the USFWS or the CDFG. Likewise, the City will make a concerted effort to coordinate the plans of such districts, agencies, and regional providers with its implementation of the HCP and this Agreement.

C. The Parties shall cooperate to encourage local special districts, public agencies, other local jurisdictions, and regional public utility and facility providers not subject to the regulatory control of the City, to plan and implement future development in a manner consistent with the PSHCP. Such entities include Poway Unified School District, Palomar/Pomerado Hospital District, City of San Diego Wastewater Management District/Clean Water Program, San Diego Gas and Electric Company, Pacific Bell Company, San Diego Metropolitan Water District, San Diego County Water Authority, Ramona Municipal Water District, County of San Diego, City of San Diego, City of Escondido, City of Santee, Metropolitan Transit Development Board, Caltrans, San Dieguito River Park Joint Powers

Authority (JPA) and other future established JPA's, and the Federal Bureau of Land Management.

#### 15.0 INCORPORATION OF PSHCP

The PSHCP and each of its terms are intended to be and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the PSHCP, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the PSHCP shall be interpreted to be supplementary to each other. In interpreting the PSHCP, consideration shall be given to the fact that the PSHCP was not drafted as a legal document.

#### 16.0 STATED TERM

As between the City of Poway and USFWS, this Agreement shall become effective on the date that USFWS issues the Section 10(a) Permit and shall remain in full force and effect for a period of 50 years or until termination of the Section 10(a) Permit, whichever occurs sooner. The Permit shall be renewable on request of the City in accordance with then existing regulatory requirements.

As between the City of Poway and CDFG, this Agreement shall become effective on the date the CDFG issues the Management Authorization and shall remain in full force and effect for a period of 50 years or until termination of the Management Authorization whichever occurs sooner. The Management Authorization shall be renewable on request of the City in accordance with then existing regulatory requirements.

Notwithstanding the stated term of this Agreement, the Parties agree and recognize that once the Covered Species have been taken and their habitats modified pursuant to the Section 10(a) Permit and Management Authorization, the take and habitat modification will be permanent. It is therefore the intention of the Parties that the provisions of the PSHCP and of this Agreement regarding the conservation of habitat within the Mitigation Area shall likewise, to the extent permitted by law, be perpetual, and extend beyond the stated term of this Agreement.

#### 17.0 REMEDIES AND ENFORCEMENT

### 17.1 Remedies in General

Except as set forth below, each Party shall have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement and the Section 10(a) Permit and Management Authorization, and to seek remedies and compensation for any breach thereof, consistent with and subject to the following:

A. None of the Parties shall be liable in damages to the other Parties or to any other person or entity for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement. Notwithstanding the foregoing, each Party shall retain whatever liability it would possess for its present and future acts or failure to act without existence of this Agreement. This provision shall not be interpreted to affect the authority and responsibility of the USFWS to invoke the penalties under the ESA or other federal law, for violations of the ESA or the Section 10(a) Permit.

B. The Parties acknowledge that each of the Covered Species and Additional Covered Species are unique and that the loss of any of such species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

### 17.2 The Section 10(a) Permit

#### A. Permit Suspension

In the event of any material violation or breach of the Section 10(a) Permit or this Agreement, in addition to invoking penalties provided under the ESA, USFWS may suspend the Section 10(a) Permit; provided, however, that except where USFWS determines that emergency action is necessary to protect the Covered Species, it will not suspend the Section 10(a) Permit without first (1) requesting the City to take appropriate remedial actions, and (2) providing the City written notice of the facts or conduct which may warrant the suspension and an opportunity for the City to demonstrate why suspension is not warranted.

### B. Permit Reinstatement

In the event USFWS suspends the Section 10(a) Permit, as soon as possible but no later than ten (10) days after such suspension, USFWS shall confer with the City concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, USFWS shall determine the specific actions necessary to effectively redress the violation or breach. In making this determination USFWS shall consider the requirements of the ESA, regulations issued thereunder, the conservation needs of the Covered Species, the terms of the Section 10(a) Permit and of this Agreement and any comments or recommendations received during the meet and confer process.

As soon as possible, but not later than thirty (30) days after the conference, USFWS shall send the City written notice of the actions necessary to effectively redress the violation or breach. Upon full performance of such necessary actions, Service shall immediately reinstate the Section 10(a) Permit. It is the intent of the Parties that in the event of any suspension of the Section 10(a) Permit all Parties shall act expeditiously to cooperatively reinstate the Section 10(a) Permit.

### C. Permit Revocation or Termination

1. USFWS agrees that it will revoke or terminate the Section 10(a) Permit for a violation or breach of the Section 10(a) Permit or this Agreement only if the USFWS determines that (a) such violation cannot be effectively redressed by other remedies or enforcement action, and (b) revocation or termination is required to fulfill a responsibility of USFWS under the ESA.

2. USFWS agrees that it will not revoke or terminate the Section 10(a) Permit without first (a) requesting the City to take appropriate remedial action, and (b) providing the City notice in writing of the facts or conduct which warrant the revocation or termination and a reasonable opportunity (but not less than sixty (60) days) to demonstrate or achieve compliance with the ESA, the Section 10(a) Permit and this Agreement.

## 17.3 MANAGEMENT AUTHORIZATION

### A. Suspension of Management Authorization

In the event of any material violation or breach of the Management Authorization or this Agreement, in addition to invoking penalties provided under CESA, CDFG may suspend the Management Authorization; provided, however, that except where CDFG determines that emergency action is necessary to protect the Covered Species, it will not suspend the Management Authorization without first (1) requesting the City to take appropriate remedial actions, and (2) providing the City written notice of the facts or conduct which may warrant the suspension and an opportunity for the City to demonstrate why suspension is not warranted.

B. Reinstatement of Management Authorization

In the event CDFG suspends the Management Authorization, as soon as possible but no later than ten (10) days after such suspension, CDFG shall confer with the City concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, CDFG shall determine the specific actions necessary to effectively redress the violation or breach. In making this determination CDFG shall consider the requirements of CESA, regulations issued thereunder, the conservation needs of the Covered Species, the terms of the Management Authorization and of this Agreement and any comments or recommendations received during the meet and confer process.

As soon as possible, but not later than thirty (30) days after the conference, CDFG shall send the City written notice of the actions necessary to effectively redress the violation or breach. Upon full performance of such necessary actions, CDFG shall immediately reinstate the Management Authorization. It is the intent of the Parties that in the event of any suspension of the Management Authorization all Parties shall act expeditiously to cooperatively reinstate the Management Authorization.

C. Revocation or Termination of Management Authorization

1. CDFG agrees that it will revoke or terminate the Management Authorization for a violation or breach of the Management Authorization or this Agreement only if CDFG determines that (a) such violation cannot be effectively redressed by other remedies or enforcement action, or (b) revocation or termination is required to fulfill a responsibility of CDFG under CESA.

2. CDFG agrees that it will not revoke or terminate the Management Authorization without first (a) requesting the City to take appropriate remedial action, and (b) providing the City notice in writing of the facts or conduct which warrant the revocation or termination and a reasonable opportunity (but not less than sixty (60) days) to demonstrate or achieve compliance with CESA, the Management Authorization and this Agreement.

#### 18.0 THIRD PARTY BENEFICIARIES

This Agreement is intended to benefit all persons or entities subject, by law or voluntarily, to the control of the City which obtain a building permit or other written land use approval (such as a use permit or grading plan approval) from the City for a planned development project which will result in the development of land which is not currently developed, and which implements or is consistent with the provisions of the PSHCP.

#### 19.0 ENVIRONMENTAL REVIEW

##### 19.1 NEPA COMPLIANCE

Issuance of a Section 10(a) Permit to the City by USFWS is an action subject to NEPA review. USFWS is a "co-lead" agency under NEPA. An Environmental Assessment and a Supplemental Environmental Assessment (EA) has been prepared pursuant to NEPA.

##### 19.2 CEQA COMPLIANCE

Implementation of the HCP is an action subject to CEQA review. The City, as a "co-lead" agency under CEQA, finds that the joint EA/Environmental Initial Study was prepared and completed pursuant to CEQA and the Supplemental Environmental Assessment.

#### 20.0 AMENDMENTS

Except as otherwise set forth herein, this Agreement may be amended only with the written consent of each of the Parties. Any material amendment of the PSHCP or this Agreement shall require an amendment to the Section 10(a) Permit and Management Authorization.

#### 21.0 MISCELLANEOUS PROVISIONS

### 21.1 TERMS USED

Terms defined and utilized in the PSHCP, the ESA and the CESA shall have the same meaning when utilized in this Agreement, except as specifically noted in Section 1.

### 21.2 No Partnership —

Except as otherwise expressly set forth in the PSHCP and this Agreement, neither the PSHCP or this Agreement shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

### 21.3 Successors and Assigns

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. However, as provided in 50 C.F.R. 13.25, the Section 10(a) permit may not be assigned or transferred.

### 21.4 Notice

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

United States Fish and Wildlife Service  
Assistant Regional Director  
911 Northeast 11th Avenue  
Portland, Oregon 97232-4181

United States Fish and Wildlife Service  
Field Supervisor  
2730 Loker Avenue West  
Carlsbad, California 92028

Director, California Department of Fish and Game  
1416 9th Street, 12th Floor  
Sacramento, California 95814

California Department of Fish and Game  
Regional Manager  
330 Golden Shore, Suite D  
Long Beach, California 90802

City of Poway  
City Manager  
13325 Civic Center Drive  
Poway, CA 92064

#### 21.5 Entire Agreement

This Agreement supersedes any and all other Agreements, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by the other Party or anyone acting on behalf of the other party that is not embodied herein.

#### 21.6 Attorneys' Fees

If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees and costs, provided that attorneys' fees and costs recoverable against the United States shall be governed by applicable Federal law.

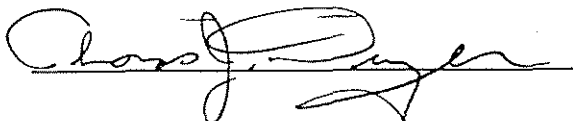
#### 21.7 Duplicate Originals

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties.



IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementation Agreement/Management Authorization to be in effect as of the date last signed below.

BY

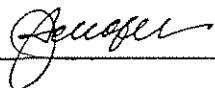


Date

7/19/96

Regional Director  
United States Fish and Wildlife Service  
Portland, Oregon

BY

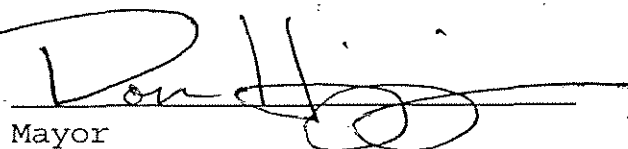


Date

7/18/96

Director  
California Department of Fish and Game  
Sacramento, California

BY



Date

6/21/96

Mayor  
City of Poway



**EXHIBIT A**



RESOLUTION NO. 95-096

A RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF POWAY, CALIFORNIA  
APPROVING GENERAL PLAN AMENDMENT, GPA 95-02  
AND RESCINDING RESOLUTION NO. 94-058 AND RESOLUTION P-90-89

WHEREAS, the City Council of the City of Poway recognizes that the need may arise to amend the City's General Plan; and

WHEREAS, Section 65350, et seq., of the California Government Code describes the procedures for amending General Plans; and

WHEREAS, the City of Poway/Poway Redevelopment Agency (hereinafter "City"), as the applicant, has prepared the proposed City of Poway Subarea Habitat Conservation Plan/Natural Community Conservation Plan (hereinafter "Poway Subarea HCP") and the companion Implementing Agreement (hereinafter "IA") documents; and

WHEREAS, the subject proposed documents have been completed to comply with the requirements of the State of California Natural Community Conservation Planning (NCCP) Act of 1991, the NCCP Process and Conservation Guidelines (NCCP Guidelines) as adopted in November 1993 by the California Department of Fish and Game (CDFG) in collaboration with the U.S. Fish and Wildlife Service (USFWS), and the Federal Endangered Species Act Section 4 (d) Special Rule for the "threatened" California gnatcatcher which is incorporated into the NCCP Guidelines; and

WHEREAS, the subject proposed documents have also been completed to satisfy the approved regional biological impact mitigation measure identified in the certified Final Environmental Impact Report (State Clearinghouse # 93091118) for the approved Scripps Poway Parkway Extension project, which requires the preparation and adoption of a City-wide subarea habitat conservation plan; and

WHEREAS, General Plan Amendment, GPA 95-02, will amend the relevant elements of the Poway General Plan to incorporate the requirements of the Poway Subarea HCP by reference as provided in this resolution; and

WHEREAS, upon approval of the subject documents by the City, USFWS and CDFG, the City will receive long-term permits from these agencies which allow for the incidental "take" of Federal- and State-listed plant species, wildlife species, and their habitats; and

WHEREAS, such long-term permits will apply to all public projects and to private development projects as the private owners choose, where such projects comply with the requirements of the subject documents, including the Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements; and

WHEREAS, on August 15, 1995 a duly advertised public hearing was conducted by the Poway City Council/Poway Redevelopment Agency in accordance with Section 65853, et seq., of the California Government Code and the California Environmental Quality Act (CEQA) to consider the Initial Study/Proposed Negative Declaration, the Poway Subarea HCP, the companion IA, and associated approval actions including GPA 95-02.

NOW, THEREFORE, BE IT RESOLVED, that the City Council of the City of Poway by adoption of this resolution, does hereby approve the following actions:

1. The City Council finds that the approval of General Plan Amendment, GPA 95-02 will not have significant adverse environmental impact and hereby issues a Negative Declaration pursuant to CEQA.
2. The City Council hereby approves General Plan Amendment, GPA 95-02, which amends the relevant elements of the Poway General Plan to incorporate by reference the requirements of the City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP) and companion Implementing Agreement (IA) as described below.
3. The Resource Conservation Area as defined in the Poway Subarea HCP and companion IA documents is hereby established.
4. The following resolutions of the City Council are hereby rescinded and replaced with the related requirements of the Poway Subarea HCP and companion IA documents.
  - Resolution No. 94-058, which established a policy concerning removal of coastal sage scrub pursuant to the interim strategy of the NCCP Guidelines.
  - Resolution No. P-90-89, which adopted an interim replacement standard as mitigation for coastal sage scrub impacts for the California gnatcatcher, and established a mitigation fund. Monies contained in the previously established mitigation fund shall be transferred to the Resource Conservation Area Acquisition Fund Account, as established with the adoption of the Poway Subarea HCP and companion IA documents.

5. In accordance with the adopted Implementing Agreement, the City hereby initiates the establishment of a permanent biological open space conservation easement over the lands acquired by the City as compensation mitigation for the approved Scripps Poway Parkway Extension (SPPE) Project, and also over the "cornerstone" lands that are owned by the City and designated Open Space-Resource Management (OS-RM), as described in the adopted Poway Subarea HCP. All habitat disturbance on the subject cornerstone lands shall be consistent with the compensation mitigation strategy, mitigation ratios, and special development requirements provided in the adopted Poway Subarea HCP.

The City shall execute the above described conservation easements in favor of the U.S. Fish and Wildlife Service and California Department of Fish and Game providing for the perpetual conservation of the subject SPPE compensation mitigation lands and City-owned OS-RM cornerstone lands for the protection of natural biological resources, including the Covered Species, pursuant to and consistent with the Poway Subarea HCP and companion IA. The conservation easement language for City-owned cornerstone lands shall allow for uses consistent with the current OS-RM land use and zoning designation, as defined in an Exhibit to the IA.

6. The Poway Subarea HCP and companion IA documents are hereby incorporated by reference into the Poway General Plan by text changes under existing Goals, Policies and Strategies, as indicated below. Where new language amends a General Plan strategy, such amendment language shall apply to the same strategies found throughout the General Plan to maintain General Plan internal consistency.

(A.) Land Use Element -

1. Goal I., Policy B - Subdivision Design. Strategy No. 18 shall be amended by the addition of the following language:

Subdivision design which is approved based upon the City's Incidental Take/Management Authorization Permit shall comply with the requirements of the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents, including the Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements.

2. Goal I., Policy C - Site Design. Strategy 23 shall be amended by the addition of the following language:

Site design which is approved based upon the City's Incidental Take/Management Authorization Permit shall incorporate the Special Development Requirements of the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents to the greatest extent practicable and feasible, to ensure the proper siting of

development and to protect and preserve important biological resources within the Resource Conservation Area, as defined in the subject Plan and companion Agreement.

3. Goal I., Policy D - Grading. Strategy 2 shall be amended by the addition of the following language:

Habitat removal associated with grading and clearing which is approved based upon the City's Incidental Take/Management Authorization Permit shall comply to the greatest extent practicable and feasible with the Special Development Requirements of the adopted Poway Subarea Habitat Conservation Plan, companion Implementing Agreement. All vegetation removal shall comply with the relevant requirements of the City's Grading Ordinance (Title 16, Land Use Regulations Code, of the Poway Municipal Code).

4. Goal I., Policy H - Walls and Fencing. Strategy 5 shall be added to read as follows:

6. The placement of fencing on public and private properties shall comply with the "Management Recommendations and Actions" for cornerstone and non-cornerstone lands as identified in the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents.

5. Goal I., Policy I - Lighting. Strategy 7 shall be added to read as follows:

7. The placement of lighting on public and private properties shall comply with the "Management Recommendations and Actions" for cornerstone and non-cornerstone lands as identified in the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents.

6. Goal II., Policy B - Distribution of Land Uses. Strategy 8 shall be amended by the addition of the following language:

Land uses within the rural residential designations and other land use designations in the Resource Conservation Area, as defined in the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents shall comply with the requirements of such documents, including the Land Use and Management, Compensation, Mitigation Strategy, Ratios, and Special Development Requirements thereof.



(B.) Public Facilities Element -

1. Goal IX., Policy A - City Water System. Strategy 6 shall be amended by the addition of the following language:

The extension of the City water system into the "rural residential" areas of the Resource Conservation Area, as defined in the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents, shall be cooperatively planned among the City, U.S. Fish and Wildlife Service, California Department of Fish and Game, and involved residents and property owners to achieve the conservation objectives and requirements of the subject Plan and companion Agreement.

(C.) Transportation Element -

1. Goal XII., Policy A - Planning. Strategy 9 shall be added to read as follows:

9. The development of public streets, ~~public and private residential roads and easements~~, scenic roadways, trails and pedestrian routes shall comply with the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement and the requirements thereof, including the Land Use and Management, Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements.

Compliance shall also be required for regional transportation improvements and other land use development undertaken by other public agencies and surrounding jurisdictions.

(D.) Natural Resources Element -

1. The Biological Resources section of the Natural Resources Element (current pages 16 through 25 up to OPEN SPACE, and pages 53-55), including text, tables, Policy C, and strategies shall be replaced augmented with the adopted Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents. These documents shall be fully incorporated by reference as a separately-bound appendix, including the Final Joint NEPA/CEQA document.

The following brief introduction shall be included after the existing heading of Biological Resources:

On August 15, 1995 the City of Poway/Poway Redevelopment Agency (City) adopted the Poway Subarea Habitat Conservation Plan/Natural Community Conservation Plan (Poway Subarea HCP) and the companion Implementing Agreement (IA) documents. The subject documents were adopted to comply

with the requirements of the State of California Natural Community Conservation Planning (NCCP) Act of 1991, the NCCP Process and Conservation Guidelines (NCCP Guidelines) as adopted in November 1993 by the California Department of Fish and Game (CDFG) in collaboration with the U.S. Fish and Wildlife Service (USFWS), and the USFWS Federal Endangered Species Act Section 4 (d) Special Rule for the "threatened" California gnatcatcher which is incorporated into the NCCP Guidelines.

The City has received long-term permits from USFWS and CDFG which allow for the incidental "take" of Federal- and State-listed plant species, wildlife species, and their habitats. Such long-term permits will apply to all public projects and to private development projects where the private owner requests participation and agrees to abide by the terms and requirements of the Poway Subarea HCP and companion Implementing Agreement (IA) anticipated by the Poway General Plan and Paguay Redevelopment Plan, where such projects comply with the requirements of the subject documents, including the Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements.

These documents, including the approved environmental review (NEPA/CEQA) documents are separately-bound as an appendix to the Natural Resources Element.

2. Goal XII., Policy A - Planning. Strategy 4 shall be amended by the addition of the following language:

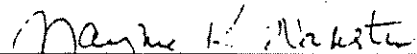
The City shall encourage the neighboring County of San Diego and City of San Diego jurisdictions to cooperatively develop and adopt subregional and subarea habitat conservation plans which are consistent with and foster the implementation of the adopted City of Poway Subarea Habitat Conservation Plan and companion Implementing Agreement documents.

All necessary clerical changes shall be made to the general plan to make its text consistent with the terms of this resolution.

APPROVED and ADOPTED by the City Council of the City of Poway, State of California, this 15th day of August, 1995.

  
\_\_\_\_\_  
Susan Callery, Deputy Mayor

ATTEST:

  
\_\_\_\_\_  
Marjorie K. Wahlsten, City Clerk

STATE OF CALIFORNIA       )  
                                  ) SS.  
COUNTY OF SAN DIEGO     )

I, Marjorie K. Wahlsten, City Clerk of the City of Poway, do hereby certify, under the penalty of perjury, that the foregoing Resolution, No. 95-096, was duly adopted by the City Council at a meeting of said City Council held on the 15th day of August, 1995, and that it was so adopted by the following vote:

AYES:       CAFAGNA, CALLERY, EMERY, REXFORD

NOES:       NONE

ABSTAIN:   NONE

ABSENT:     HIGGINSON

Marjorie K Wahlsten  
Marjorie K. Wahlsten, City Clerk  
City of Poway

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ORDINANCE NO. 449

AN ORDINANCE OF THE CITY OF POWAY, CALIFORNIA  
AMENDING TITLE 16 (LAND USE REGULATIONS CODE)  
OF THE POWAY MUNICIPAL CODE  
REGARDING REGULATIONS AND PERMIT REQUIREMENTS  
FOR GRADING, CLEARING, AND GRUBBING

WHEREAS, the City Council periodically finds it necessary to amend Title 16 (Land Use Regulations Code) of its Municipal Code in response to changing conditions within the City; and

WHEREAS, on August 15, 1995, the City Council adopted a resolution approving General Plan Amendment, GPA 95-02 and adopted an ordinance approving Zoning Ordinance Amendment, ZOA 95-01, which adopted the City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP) and the companion Implementing Agreement (IA) documents, and amended relevant elements and sections of the General Plan and Zoning Development Code to incorporate by reference the subject documents and the requirements thereof, including the Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements; and

WHEREAS, the City Council finds that the Land Use Regulations Code of the Poway Municipal Code should be amended to incorporate by reference the Poway Subarea HCP, the companion IA, and the requirements thereof to maintain consistency with the General Plan and Zoning Development Code; and as required by Section 65860 of the California Government Code; and

WHEREAS, a duly advertised public hearing was conducted in accordance with Section 65853, et seq., of the California Government Code and the California Environmental Quality Act (CEQA) to consider the proposed amendments and to provide interested parties the opportunity to address such.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Poway the following:

Section 1:

The City Council finds that the proposed amendments to the Land Use Regulations Code of the Poway Municipal Code will not have a significant adverse environmental impact and hereby issues a ~~Mitigated~~ Negative Declaration pursuant to CEQA.

Section 2:

As adopted by the City Council resolution approving General Plan Amendment, GPA 95-02, the City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP) and companion Implementing Agreement (IA) describe implementing requirements that apply to all public projects and to those private development projects within the City which rely upon the City's Incidental Take/Management Authorization Permit

Such requirements include, but are not limited to, a compensation mitigation strategy, mitigation ratios, and special development requirements. These requirements will apply to any covered land use activity that impacts sensitive plant species, wildlife species, and associated natural habitats both inside and outside the established Resource Conservation Area of the adopted Poway Subarea HCP. All permit applications reviewed by the City related to excavation, grading, clearing, brushing, grubbing, and stockpiling or development of land which impacts sensitive plant species, wildlife species, and associated natural habitats shall either comply with the adopted Poway Subarea HCP and companion IA or demonstrate authorization by the California Department of Fish and Game and the U.S. Fish and Wildlife Service prior to the issuance of such permits.

Section 3:

Amendments to the certain sections of Title 16 (Land Use Regulations Code) of the Poway Municipal Code as identified below are hereby established and shall read as follows:

1. CHAPTER 16.41. - DEFINITIONS

The definition of "Implementing Agreement" shall be added as new Section 16.41.445 to read as follows:

16.41.445 Implementing Agreement (IA). "Implementing Agreement (IA)" means the legally binding agreement that specifies the responsibilities and obligations of the City of Poway/Poway Redevelopment Agency (City) to implement the adopted City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP), as fully executed by the City, U.S. Fish and Wildlife Service, and California Department of Fish and Game.

The definition of "Poway Subarea HCP" shall be added as new Section 16.41.755 to read as follows:

16.41.755 Poway Subarea HCP. "Poway Subarea HCP" means the City of Poway Subarea Habitat Conservation Plan.

2. Section 16.43.010 Environmental Review

Paragraph A. of this section shall be amended to read as follows:

16.43.010 Environmental review. A. Prior to the issuance of any permit under this division, the City Engineer shall refer the permit application to the Planning Services Department for review and determination whether the proposed grading and/or clearing could have a significant effect upon the environment or verification that the City Council, a commission or City officer having final authority for project approval has adopted an environmental impact report or other environmental clearance which considered the proposed grading and/or clearing or has determined that the project, which included the proposed grading and/or clearing, would not have a significant effect upon the environment.

Prior to the issuance of any permit under this division for any proposed clearing or development that will impact sensitive plant species, wildlife species, and/or associated natural habitats both inside and outside the established Resource Conservation Area of the adopted Poway Subarea HCP, the property owner shall either demonstrate that the proposed clearing has been authorized by the California Department of Fish and Game and the U.S. Fish and Wildlife Service or request reliance upon the City's Incidental Take/Management Authorization Permit and comply with the provisions of the Poway Subarea HCP and companion IA documents prior to the issuance of such permits.

Section 4:

The City Council of the City of Poway hereby finds that these amendments are consistent with the General Plan, Zoning Development Code, and the intent and purpose of the Land Use Regulations Code.

EFFECTIVE DATE: This ordinance shall take effect and be in force thirty (30) days after the date of its passage; and the City Clerk of the City of Poway is hereby authorized to use summary publication procedures pursuant to Government Code Section 36933 utilizing the *Poway News-Chieftain*, a newspaper of general circulation published in the City of Poway.

Introduced and first read at a regular meeting of the City Council of the City of Poway held the 15th day of August, 1995, and thereafter PASSED AND ADOPTED at a regular meeting of said City Council held the 5th day of September, 1995, by the following roll call vote:

AYES: COUNCILMEMBERS: CAFAGNA, EMERY, REXFORD

NOES: COUNCILMEMBERS: NONE

ABSTAIN: COUNCILMEMBERS: HIGGINSON

ABSENT: COUNCILMEMBERS: CALLERY

  
Don Higginson, Mayor

ATTEST:

  
Marjorie K. Wahlsten, City Clerk

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ORDINANCE NO. 450

AN ORDINANCE OF THE CITY OF POWAY, CALIFORNIA  
AMENDING CERTAIN SECTIONS OF TITLE 17  
(ZONING DEVELOPMENT CODE)  
OF THE POWAY MUNICIPAL CODE,  
ZONING ORDINANCE AMENDMENT, ZOA 95-01

WHEREAS, the City Council periodically finds it necessary to amend Title 17 (Zoning Development Code) of its Municipal Code in response to changing conditions within the City; and

WHEREAS, on August 15, 1995, the City Council adopted a resolution approving General Plan Amendment, GPA 95-02 which adopted the City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP) and the companion Implementing Agreement (IA) documents, and amended relevant Elements of the General Plan to incorporate by reference the subject documents and the requirements thereof, including the Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements; and

WHEREAS, the City Council finds that the Zoning Development Code of the Poway Comprehensive Plan should also be amended to maintain consistency with the General Plan as required by Section 65860 of the California Government Code; and

WHEREAS, a duly advertised public hearing was conducted in accordance with Section 65853, et seq., of the California Government Code and the California Environmental Quality Act (CEQA) to consider the proposed amendments and to provide interested parties the opportunity to address such.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Poway the following:

Section 1:

The City Council finds that proposed Zoning Ordinance Amendment, ZOA 95-01 will not have a significant adverse environmental impact and hereby issues a Mitigated Negative Declaration pursuant to CEQA.

Section 2:

As adopted by the City Council resolution approving General Plan Amendment, GPA 95-02, the City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP) and companion Implementing Agreement (IA) describe implementing requirements that apply to all public projects and to those private development projects within the City which rely upon the City's Incidental Take/Management Authorization Permit.

Such requirements include, but are not limited to, a compensation mitigation strategy, mitigation ratios, and special development requirements. These requirements will apply to any covered development project that impacts sensitive plant species, wildlife species, and associated natural habitats both inside and outside the established Resource Conservation Area of the adopted Poway Subarea HCP. ~~All land use and zoning designations of the General Plan and Zoning Development Code are hereby subject to such requirements.~~

Section 3:

Amendments to the certain sections of Title 17 (Zoning Development Code) of the Poway Municipal Code as identified below are hereby established and shall read as follows:

All public projects and private development projects within the jurisdiction of the City that have the potential to adversely impact sensitive plant species, wildlife species, and associated natural habitats shall either demonstrate that any removal of habitat associated with the proposed development has been authorized by the California Department of Fish and Game and the U.S. Fish and Wildlife Service or comply with the adopted Poway Subarea Habitat Conservation Plan, the companion Implementing Agreement, and the requirements thereof including the Compensation Mitigation Strategy, Mitigation Ratios, and Special Development Requirements.

The following sections shall be amended to include this language:

Residential Zones: Section 17.08.180, Property development standards – Special requirements. Add amendment language as new requirement (U.).

Commercial zones: Section 17.10.140, Property development standards – Special requirements. Add amendment language as new requirement (K.).

MHP Mobile Home Park Zone: Section 17.16.050, Property development standards – Special requirements. Add amendment language as new requirement (O.).

PRD Planned Residential Development Zone: Section 17.18.040, Property development standards – Special requirements. Add amendment language as new requirement (L.).

PC Planned Community Zone: Section 17.20.040, Property development standards – Special requirements. Add amendment language as new requirement (C.).

HC Hospital Campus Zone: Section 17.21.050, Property development standards – General requirements. Add amendment language as new requirement (W.).

PF Public Facility Zone: Section 17.22.070, Property development standards – Special requirements. Add amendment language as new requirement (J.).

OS-R Open Space-Recreation Zone: Section 17.23.070, Property development standards – Special requirements. Add amendment language as new requirement (L.).

OS-RM Open Space-Resource Management Zone: Section 17.24.070, Property development standards – Special requirements. Add amendment language as new requirement (B.).

Section 4:

The City Council of the City of Poway hereby finds that these amendments are consistent with the General Plan and the intent and purpose of the Zoning Development Code.

EFFECTIVE DATE: This ordinance shall take effect and be in force thirty (30) days after the date of its passage; and the City Clerk of the City of Poway is hereby authorized to use summary publication procedures pursuant to Government Code Section 36933 utilizing the *Poway News-Chieftain*, a newspaper of general circulation published in the City of Poway.

Introduced and first read at a regular meeting of the City Council of the City of Poway held the 15th day of August, 1995, and thereafter PASSED AND ADOPTED at a regular meeting of said City Council held the 5th day of September, 1995, by the following roll call vote:

AYES: COUNCILMEMBERS: CAFAGNA, EMERY, REXFORD

NOES: COUNCILMEMBERS: NONE

ABSTAIN: COUNCILMEMBERS: HIGGINSON

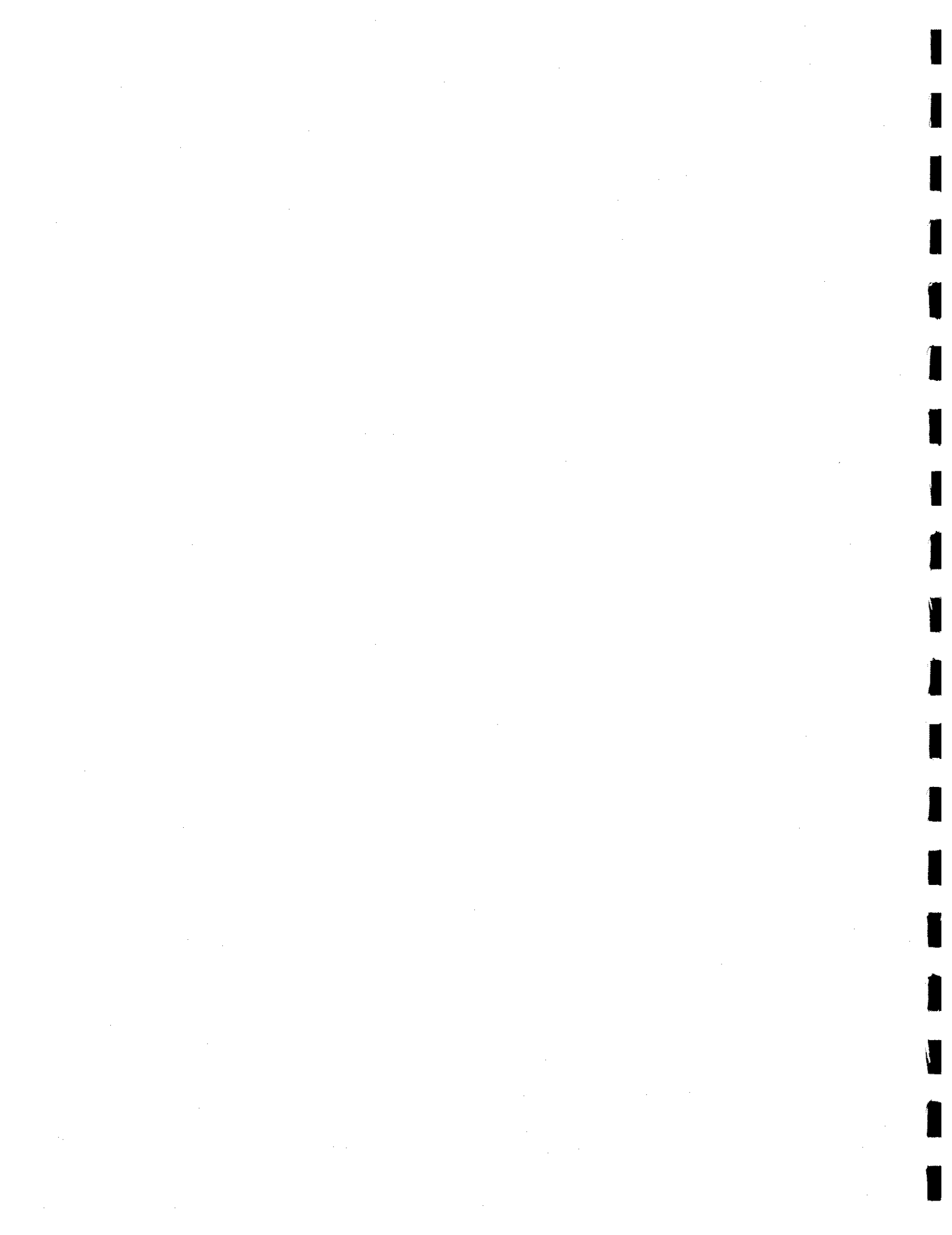
ABSENT: COUNCILMEMBERS: CALLERY

  
Don Higginson, Mayor

ATTEST:

  
Marjorie K. Wahlsten, City Clerk

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RESOLUTION NO. 95-097

A RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF POWAY, CALIFORNIA  
ADOPTING THE CITY OF POWAY SUBAREA HABITAT CONSERVATION PLAN  
AND AUTHORIZING THE MAYOR TO SIGN  
THE IMPLEMENTING AGREEMENT/  
CALIFORNIA ENDANGERED SPECIES ACT MEMORANDUM OF UNDERSTANDING

WHEREAS, the City of Poway/Poway Redevelopment Agency (City), as the applicant and co-lead agency with the U.S. Fish and Wildlife Service (USFWS), has prepared the proposed City of Poway Subarea Habitat Conservation Plan/Natural Community Conservation Plan (Poway Subarea HCP) and companion Implementing Agreement (IA)/California Endangered Species Act Memorandum of Understanding documents in consultation with the California Department of Fish and Game (CDFG); and

WHEREAS, the subject proposed documents have been completed to comply with the requirements of the State of California Natural Community Conservation Planning (NCCP) Act of 1991, the NCCP Process and Conservation Guidelines (NCCP Guidelines) as adopted in November 1993 by the California Department of Fish and Game (CDFG) in collaboration with the U.S. Fish and Wildlife Service (USFWS), the California Endangered Species Act (CESA), and the Federal Endangered Species Act (ESA) including the Special Rule for the California gnatcatcher which was issued under Section 4(d) of the ESA; and

WHEREAS, on August 15, 1995, the Poway City Council/Poway Redevelopment Agency held a duly advertised public hearing in accordance with the provisions of the California Government Code and the California Environmental Quality Act (CEQA) to consider the Joint Environmental Assessment and Initial Study/Proposed Negative Declaration documents, the proposed Poway Subarea HCP and companion IA documents, and associated approval actions including General Plan Amendment, GPA 95-02 and ordinances amending the City's grading and zoning ordinances; and

WHEREAS, at said public hearing the City Council issued the Negative Declaration in accordance with the CEQA Guidelines and adopted a resolution approving GPA 95-02, which adopted the proposed Poway Subarea HCP and companion IA documents, and amended the relevant Elements of the Poway General Plan to incorporate by reference such documents and the requirements thereof; and

WHEREAS, the City, USFWS and CDFG agree that adoption of the HCP and execution of the companion IA will provide a private property owner with the option to rely upon the City's Incidental Take/Management Authorization Permit; and

Page 5-21, paragraph 3, beginning on line 7

...The Poway Subarea HCP creates a resource conservation overlay that will further restrict land use and management activities on parcels within the RCA via implementation of district where conservation efforts will be focused and where special development requirements will apply to public projects and to private projects approved in reliance upon the City's Incidental Take/Management Authorization permit. These provisions will ensure....

Page 5-22, Section 5.3.1, Volume 2, Add new Section and Paragraphs as follows:

Appendices of this HCP includes two recent biological survey reports for the Liguori Ranch and the adjacent John Liguori property. These reports were submitted by the property owners just prior to the public review period of the EA/IS, Poway Subarea HCP and Companion IA documents. The site biologist, Vincent Scheidt, performed a detailed survey and Analysis of Habitat Values and Recommendations for both properties. The recommendations and complete text and graphics of said survey reports are fully incorporated into the Poway Subarea HCP and pocket maps, as approved by City Staff, CDFG and USFWS on August 7, 1995.

Recommendations

The following recommendations as contained in the survey reports have been included in the HCP and pocket maps:

1. Liguori Ranch Property -

As depicted on Figure 2 of the related survey report, the following areas shall be considered for future development purposes; Agricultural Area, Weedy and Ruderal or Barren and Eucalyptus Woodland. All other areas onsite continuing high habitat values and slopes of 45 percent and above are included within the Biological Linkage and Core Area (BCLA) and should be retained as high biological value open space at the time development applications are considered by the City.

2. John Liguori Property

As depicted on Figure 2 of the related survey report, the following areas shall be considered for development purposes; Non-native Grasslands and Successional Sage Scrub. All other areas of the property should be retained within the BCLA, as defined under number one above concerning the Liguori Ranch Property.

Page 7-3, paragraph 4, beginning on line 1

The special development requirements apply to public projects and to private development projects located within the boundary of the RCA which rely on the City's Incidental Take/Management Authorization permit or outside the RCA in areas supporting native vegetation....

Page 7-9, paragraph 1, beginning on line 1

The following specific requirements shall apply to parcels of land located within the boundary of the RCA which are either publicly owned or for which clearing or development approval has been sought in reliance upon the City's Incidental Take/Management Authorization permit....

Page 7-18, paragraph 4, beginning on line 1

2. ~~Impacts to all non-wetland habitats will require an in-lieu fee (currently set at \$12,000 per acre). This fee amount may be reduced by the City based on the professional opinion of a qualified biologist, where either disturbed or low quality habitats are impacted. In no case will the fee per acre of impact be less than \$8,500. An additional, one-time administrative fee of \$1,200 per acre of habitat impact will be necessary to cover costs related to management and maintenance activities conducted by the City. In-lieu mitigation fees shall be assessed in accordance with a fee schedule adopted by the City Council.~~

Map 3: Preserve Design

Various modifications to the Preserve Design map are also adopted as shown in the Preserve Design map dated August 15, 1995.

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**EXHIBIT B**

**PROPOSED CHANGES TO THE  
DRAFT IMPLEMENTING AGREEMENT/  
CESA MOU**

The following changes to the draft Implementing Agreement/CESA MOU are shown with reference to pages as numbered in the June 1995 draft included in Volume 2: Appendices of the Public Review Draft of the Poway Subarea Habitat Conservation Plan/Natural Community Conservation Plan.

Page 7, end of paragraph 4

...the Poway General Plan and Paguay Redevelopment Plan. The terms and requirements of the Plan shall be applicable to all public projects and to all private projects where the private property owner seeks to rely on the permits granted to the City in conjunction with the Plan and its associated documents.

Page 11, paragraph 4

A. Implementation of the PSHCP, and dedication of conservation easements on lands specified for mitigation, fulfills the regional biological resource impact mitigation identified for the approved Scripps Poway Parkway Extension Project, and that additional mitigation is not required for impacts to Covered Species.

Page 12, paragraph 2

A. CDFG agrees that implementation of the PSHCP, and dedication of conservation easements on lands specified for mitigation, fulfills the regional biological resource impact mitigation identified for the approved Scripps Poway Parkway Extension Project, and that additional mitigation is not required for impacts to Covered Species.

Page 12, paragraph 6

E. CDFG shall consider adherence to the terms of this Agreement, the Plan, and the Management Authorization to be compliance with the provisions of the CESA, the NCCP Act and CEQA ~~CESA~~.

Page 18, paragraph 2, beginning on line 10

...be submitted to CDFG ~~USFWS~~ under the Plan;...

A:\HCPIA.EXB



RESOLUTION NO. R-95-22

A RESOLUTION OF THE REDEVELOPMENT AGENCY  
OF THE CITY OF POWAY, CALIFORNIA  
ADOPTING THE CITY OF POWAY  
SUBAREA HABITAT CONSERVATION PLAN AND  
COMPANION IMPLEMENTING AGREEMENT

WHEREAS, the City of Poway/Poway Redevelopment Agency (City), as the applicant, has prepared the proposed City of Poway Subarea Habitat Conservation Plan (Poway Subarea HCP) and companion Implementing Agreement (IA) documents, and

WHEREAS, the subject proposed documents have been completed to comply with the requirements of the State of California Natural Community Conservation Planning (NCCP) Act of 1991, the NCCP Process and Conservation Guidelines (NCCP Guidelines), as adopted in November, 1993 by the California Department of Fish and Game (CDFG) in collaboration with the U.S. Fish and Wildlife Service (USFWS); and the USFWS Federal Endangered Species Act Section 4 (d) Special Rule for the "threatened" California gnatcatcher which is incorporated into the NCCP Guidelines; and

WHEREAS, the subject documents have also been completed to satisfy the approved regional biological impact mitigation measure identified in the certified Final Environmental Impact Report (State Clearinghouse # 93091118) for the approved Scripps Poway Parkway Extension project, which requires the preparation and adoption of a City-wide subarea habitat conservation plan; and

WHEREAS, on August 15, 1995, the Poway City Council/Poway Redevelopment Agency held a duly advertised public hearing in accordance with the provisions of the California Government Code and the California Environmental Quality Act (CEQA) to consider the Initial Study/Proposed Mitigated Negative Declaration, the proposed Poway Subarea HCP, the companion IA, and associated approval actions including General Plan Amendment, GPA 95-02; and

WHEREAS, at said public hearing the City Council issued the Mitigated Negative Declaration in accordance with the CEQA Guidelines and adopted a resolution approving GPA 95-02, which adopted the proposed Poway Subarea HCP and companion IA documents, and amended the relevant Elements of the Poway General Plan to incorporate by reference such documents and the requirements thereof; and

WHEREAS, the Poway Redevelopment Agency has determined that Agency approval of said documents and compliance with the requirements thereof by all Agency redevelopment projects is necessary and appropriate in order to be consistent with the Poway General Plan, as amended by City Council approval of GPA 95-02.

NOW, THEREFORE, BE IT RESOLVED, that the Redevelopment Agency of the City of Poway by adoption of this resolution, does hereby approve the following actions:

1. The Redevelopment Agency finds that the approval of the Poway Subarea HCP and the companion IA will not have a significant adverse environmental impact and hereby issues a Mitigated Negative Declaration pursuant to CEQA.
2. The proposed Poway Subarea HCP, the companion IA, and the requirements thereof, are hereby adopted as if in full force and effect.
3. The Redevelopment Agency hereby finds that all projects undertaken by the Agency shall comply with the requirements of the Poway Subarea HCP and the companion IA as approved herein, and as approved in accordance with the City Council resolution adopting General Plan Amendment, GPA 95-02.

APPROVED and ADOPTED by the Redevelopment Agency of the City Of Poway, State of California, this 15th day of August, 1995.

Susan Callery  
Susan Callery, Vice Chairman

ATTEST:

Marjorie K. Wahlsten  
Marjorie K. Wahlsten, Secretary

STATE OF CALIFORNIA           )  
  ) SS.  
COUNTY OF SAN DIEGO       )

I, Marjorie K. Wahlsten, Secretary of the Poway Redevelopment Agency, do hereby certify, under the penalty of perjury, that the foregoing Resolution, No. R-95-22, was duly adopted by the Redevelopment Agency at a meeting of said Agency held on the 15th day of August, 1995, and that it was so adopted by the following vote:

AYES:       CAFAGNA, CALLERY, EMERY, REXFORD

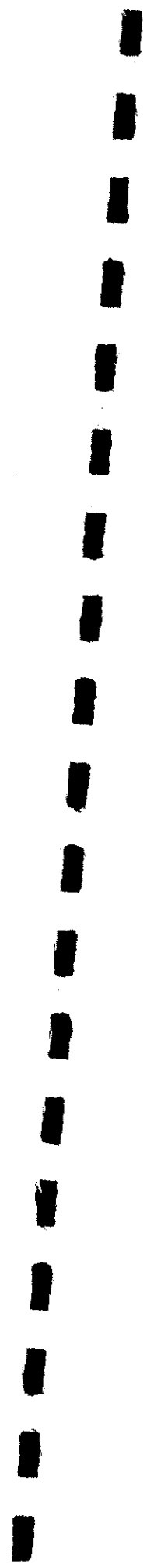
NOES:       NONE

ABSTAIN:   NONE

ABSENT:     HIGGINSON

Marjorie K. Wahlsten  
Marjorie K. Wahlsten, Secretary  
Poway Redevelopment Agency

**EXHIBIT B**



**SPECIES FOR WHICH SECTION 10(a) PERMITS AND 2081/2835  
MANAGEMENT AUTHORIZATIONS ARE REQUESTED\***

<b>Common Name</b>	<b>Scientific Name</b>	<b>**Status</b>
San Diego thorn-mint	<i>Acanthomintha ilicifolia</i>	C1/CE
Encinitas baccharis	<i>Baccharis vanessae</i>	PE/CE
Slender-pod jewelflower	<i>Caulanthus stenocarpus</i>	C3/CR
Lakeside ceanothus	<i>Ceanothus cyaneus</i>	C2/
Summer-holly	<i>Comarostaphylos diversifolia</i> spp. <i>diversifolia</i>	C2/
Palmer's ericameria	<i>Ericameria palmeri</i> spp. <i>palmeri</i>	C2/
San Diego barrel cactus	<i>Ferocactus viridescens</i>	C2/
Heart-leaved pitcher sage	<i>Lepechinia cardiophylla</i>	C2/
Willowy monardella	<i>Monardella linoides</i> spp. <i>viminea</i>	C2/CE
San Diego goldenstar	<i>Muilla clevelandii</i>	C2/
Narrow-leaved nightshade	<i>Solanum tenuilobatum</i>	C2/
Arroyo southwestern toad	<i>Bufo microscaphus californicus</i>	FE/SSC
California red-legged frog	<i>Rana aurora draytonii</i>	PE/SSC
Southwestern pond turtle	<i>Clemmys marmorata pallida</i>	/SSC
San Diego horned lizard	<i>Phrynosoma coronatum blainvillei</i>	C2/
Orange-throated whiptail	<i>Cnemidophorus hyperythrus beldingi</i>	C2/SSC
Granite spiny lizard	<i>Sceloporus orcutti</i>	LC
Coastal western whiptail	<i>Cnemidophorus tigris multiscutatus</i>	C2/
Silvery legless lizard	<i>Anniella pulchra pulchra</i>	C2/SSC
Coronado Island skink	<i>Eumeces skiltonianus interparietalis</i>	C2/SSC
San Diego banded gecko	<i>Coleonyx variegatus abbotti</i>	C2
Coastal rosy boa	<i>Lichanura trivirgata roseofusca</i>	C2/
Coast patch-nosed snake	<i>Salvadora hexalepis virgultea</i>	C2/SSC
San Diego ringneck snake	<i>Diadophis punctatus similis</i>	C2/
Two-striped garter snake	<i>Thamnophis hammondi</i>	C2/
Northern red diamond rattlesnake	<i>Crotalus ruber ruber</i>	C2/SSC
Bald eagle	<i>Haliaeetus leucocephalus</i>	FT/CE
Northern harrier	<i>Circus cyaneus</i>	/SSC
Swainson's hawk	<i>Buteo swainsoni</i>	/CT
Ferruginous hawk	<i>Buteo regalis</i>	C2/
American peregrine falcon	<i>Falco peregrinus</i>	FE/CE
Cooper's hawk	<i>Accipiter cooperii</i>	/SSC
Golden eagle	<i>Aquila chrysaetos canadensis</i>	BEPA/SSC

Table 1-1 (Continued)

**SPECIES FOR WHICH SECTION 10(a) PERMITS AND 2081/2835  
MANAGEMENT AUTHORIZATIONS ARE REQUESTED\***

<b>Common Name</b>	<b>Scientific Name</b>	<b>**Status</b>
Southwestern willow flycatcher	<i>Empidonax traillii</i>	FE/CE
California gnatcatcher	<i>Poliophtila californica californica</i>	FT/SSC
Least Bell's vireo	<i>Vireo bellii pusillus</i>	FE/CE
California rufous-crowned sparrow	<i>Aimophila ruficeps canescens</i>	C2/
Coastal cactus wren	<i>Campylorhynchus brunneicapillus couesi</i>	C3B/
Burrowing owl	<i>Athene cunicularia</i>	C2/SSC
Tri-colored blackbird	<i>Agelaius tricolor</i>	C2/SSC
Dulzura California pocket mouse	<i>Chaetodipus californicus femoralis</i>	C2/SSC
Northwestern San Diego pocket mouse	<i>Chaetodipus fallax fallax</i>	C2/SSC
American badger	<i>Taxides taxus</i>	/SSC

\*Permits Requested

- Permit for take of federally listed species under Section 10(a) and 4(d) of the Endangered Species Act.
- Management Authorization for take of state-listed species under Section 2081 of the California Fish and Game Code and the California Endangered Species Act.
- Includes prelisting permits and agreements for those species not listed as threatened or endangered by the State of California or the USFWS.

\*\*Status (Federal/State)

FE = Federally endangered.

PE = Proposed for federal listing as endangered.

FT = Federally threatened.

PT = Proposed for federal listing as threatened.

C1 = Category 1 candidate for federal listing.

C2 = Former Category 2 candidate for federal listing.

C3 = Category 3 candidate for federal listing.

CE = State endangered.

CR = State rare.

CT = State threatened.

SSC = State Species of Special Concern

Note: Additional species may be added to this list upon collection and analysis of new data for the region.

**EXHIBIT C**

**MSCP COVERED SPECIES LIST**

<b>SPECIES</b>	<b>STATUS</b>	<b>RATIONALE FOR FINDING</b>
Orcutt's birds-beak	C2	Adequately conserved if preserve design issues on Otay Ranch are resolved
Del Mar Mesa sand aster	PT	Adequately conserved if preserve design issues in neighborhood 8A are resolved
Tecate cypress	C2	Adequately conserved
Short-leaved dudleya	PE/CE	Adequately conserved if preserve design issues in neighborhood 8A are resolved
* Variegated dudleya	C2	Adequately conserved if preserve design issues on Otay Ranch are resolved
Sticky dudleya	C1	Adequately conserved
Palmer's ericameria	C2	Adequately conserved
San Diego button-celery	PE/CE	Adequately conserved if vernal pool issues in Spring Canyon area are resolved <sup>2</sup>
Coast wallflower	C2	Adequately conserved for MSCP <sup>1</sup>
San Diego barrel cactus	C2	Adequately conserved
* Otay tarplant	C2/CE	Adequately conserved if preserve design issues on Otay Ranch and San Miguel are resolved
Heart-leaved pitcher sage	C2	Adequately conserved
Gander's pitcher sage	C2	Adequately conserved
Nuttall's lotus	C2	Adequately conserved for MSCP <sup>1</sup>
Willow monardella	C2/CE	Adequately conserved for MSCP if protected in Marron Valley <sup>1</sup>
* San Diego goldenstar	C2	Adequately conserved
* Little mousetail	C2	Adequately conserved if vernal pool issues in Spring Canyon area are resolved <sup>2</sup>
* Prostrate navarretia	C2	Adequately conserved if vernal pool issues in Spring Canyon area are resolved <sup>2</sup>
Dehesa bear-grass	C1/CE	Adequately conserved

\* Species that were not requested to be covered under MSCP



MSCP COVERED SPECIES LIST

SPECIES	STATUS	RATIONALE FOR FINDING
Snake cholla	C2	Adequately conserved for MSCP; not covered for San Diego if permit is severed from MSCP
• California orcutt grass	PE/CE	Adequately conserved if vernal pool issues in Spring Canyon area are resolved <sup>2</sup>
Torrey pine	C2	Adequately conserved
San Diego mesa mint	PE/CE	Adequately conserved for MSCP <sup>1,2</sup>
• Otay mesa mint	PE/CE	Adequately conserved if preserve design issues on Otay Mesa are resolved <sup>2</sup>
Small-leaved rose	CE	Effects of MSCP on species considered insignificant
Gander's butterweed	C2/CR	Adequately conserved
• Narrow-leaved nightshade	C2	Adequately conserved if preserve design issues on Otay Ranch are resolved
• Parry's tetraococcus	C2	Adequately conserved
• Dense reed grass		Adequately conserved
• Felt-leaved monardella		Adequately conserved
• San Miguel savory		Adequately conserved
• Nevin's barberry		Adequately conserved
<b>ANIMALS</b>		
Salt marsh skipper	C2	Adequately conserved <sup>2</sup>
Thorne's hairstreak butterfly	PE	Adequately conserved
Riverside fairy shrimp	FE	Adequately conserved if vernal pool issues are resolved <sup>2</sup>
• San Diego fairy shrimp	PE	Adequately conserved if vernal pool issues are resolved <sup>2</sup>
• Arroyo southwestern toad	FE/SSC	Adequately conserved

• Species that were not requested to be covered under MSCP

**MSCP COVERED SPECIES LIST**

<b>SPECIES</b>	<b>STATUS</b>	<b>RATIONALE FOR FINDING</b>
• California red-legged frog	PE/SSC	Effects of MSCP on species considered discountable
• Southwestern pond turtle	SSC	Effects of MSCP on species considered insignificant
San Diego horned lizard	C2	Adequately conserved
Orange-throated whiptail	C2	Adequately conserved
California brown pelican	FE/CE	Adequately conserved <sup>2</sup>
Reddish egret	C2	Adequately conserved <sup>2</sup>
White-faced ibis	C2	Effects of MSCP on species considered insignificant <sup>2</sup>
Canada goose	none	Effects of MSCP on species considered insignificant
Bald eagle	FE/CE	Adequately conserved
• Northern harrier	SSC	Effects of MSCP on species considered insignificant
• Cooper's hawk	SSC	Adequately conserved
• Swainson's hawk	CT	Effects of MSCP on species considered insignificant
• Ferruginous hawk	C2	Effects of MSCP on species considered insignificant
• Golden eagle	BEPA/ SSC	Adequately conserved with conservation of additional grasslands
• American peregrine falcon	FE/CE	Effects of MSCP on species considered insignificant
Light-footed clapper rail	FE/CE	Adequately conserved <sup>2</sup>
Western snowy plover	FT/SSC	Adequately conserved for MSCP <sup>1</sup>
Mountain plover	C2	Effects of MSCP on species considered insignificant

• Species that were not requested to be covered under MSCP

*MSCP COVERED SPECIES LIST*

SPECIES	STATUS	RATIONALE FOR FINDING
• Long-billed curlew	C3/SSC	Effects of MSCP on species considered insignificant <sup>2</sup>
Elegant tern	C2	Adequately conserved
California least tern	FE/CE	Adequately conserved <sup>2</sup>
• Western burrowing owl	C2/SSC	Adequately conserved for MSCP with conservation of additional grasslands; covered for City of San Diego with conservation of grasslands and agricultural lands that are compatible with burrowing owls in San Pasqual Valley and Spring Canyon Area
Southwestern willow flycatcher	FE/CE	Adequately conserved with implementation of cowbird management <sup>2</sup>
• Coastal cactus wren	SSC	Adequately conserved if preserve design issues on Otay Ranch are resolved; habitat restoration would be a necessary component of management
California gnatcatcher	FT/SSC	Adequately conserved if preserve design issues on Otay Ranch are resolved
• Western bluebird	None	Effects of MSCP on species considered insignificant
Least Bell's vireo	FE/CE	Adequately conserved with implementation of cowbird management <sup>2</sup>
California rufous-crowned sparrow	C2	Adequately conserved
Belding's savannah sparrow	C2/CE	Adequately conserved <sup>2</sup>
Large-billed savannah sparrow	C2	Adequately conserved <sup>2</sup>
• Grasshopper sparrow	none	Adequately conserved if preserve design issues on Otay Ranch are resolved and with conservation of additional grasslands
Tri-colored blackbird	C2	Adequately conserved <sup>2</sup>

- Species that were not requested to be covered under MSCP

**MSCP COVERED SPECIES LIST**

<b>SPECIES</b>	<b>STATUS</b>	<b>RATIONALE FOR FINDING</b>
• American badger	SSC	Effects of MSCP on species considered insignificant
• Mountain lion		Effects of MSCP on species considered insignificant
Southern mule deer	game species	Adequately conserved

<sup>1</sup> Important habitat for this species occurs on property owned by the Department of Defense or other Federal agency. The Service will address this issue with the appropriately involved Federal agency to ensure adequate protection on Federal property.

<sup>2</sup> Habitat under the jurisdiction of the U.S. Army Corps of Engineers is presumed to be maintained (no net loss). Projects within suitable habitat will be subject to all existing State and Federal regulations, including section 7 of the Endangered Species Act, as appropriate.

**Definitions:**

**Adequately Conserved:** The overall benefits of the multiple-species planning effort to the natural ecosystem will provide for the species that inhabit that ecosystem.

**Insignificant effect:** An effect that cannot meaningfully be detected, measured, or evaluated relative to the species' status as a whole.

**Discountable effect:** An effect that would not reasonably be expected to occur.

• Species that were not requested to be covered under MSCP

**EXHIBIT D**



## NO SURPRISES

### ASSURING CERTAINTY FOR PRIVATE LANDOWNERS IN ENDANGERED SPECIES A HABITAT CONSERVATION PLANNING

#### U.S. FISH AND WILDLIFE SERVICE NATIONAL MARINE FISHERIES SERVICE

AUGUST 11, 1994

*"The Committee intends that the Secretary may utilize this provision [on HCPs] to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act.*

....

*"It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances."*

H. Rep. No. 835, 97th Cong., 2d Sess. 30-31 (1982)  
(1982 ESA Amendments Conference Report)

**PURPOSE:**

The purpose of this policy is to provide assurances to non-federal landowners participating in Habitat Conservation Planning (HCP) that no additional land restrictions or financial compensation will be required from an HCP permittee for species adequately covered by a properly functioning HCP in light of unforeseen or extraordinary circumstances.

**SUPPLEMENTARY INFORMATION:**

The HCP process under the Endangered Species Act (ESA) promotes endangered species conservation and habitat protection within the context of land use or development. Where appropriate, HCPs contribute to the long-term conservation of federally listed and unlisted species, while providing predictability and economic stability for non-federal landowners.

Species receive a variety of benefits under a properly functioning HCP. Private financial resources supplement limited federal funding, essential habitat areas are often preserved or managed differently, and comprehensive conservation programs are developed and promptly implemented. Although landowners must ultimately demonstrate that a species has been covered adequately under an HCP, the major benefit from the HCP process from the perspective of the development community or land manager is certainty. In exchange for adherence to long-term conservation commitments, an HCP permittee is provided assurance that development or land use may move forward despite the incidental taking of protected species.

Significant development projects often take many years to complete, therefore adequate assurances must be made to the financial and developmental communities that an HCP permit will remain valid for the life of the project. In authorizing the HCP process, Congress recognized that, within the constraints of the best available scientific information, permits of 30 years or more may be necessary to trigger long-term private sector funding and land use commitments for species conservation. Congress also recognized that circumstances may change over time, generating pressure to reconsider the mitigation commitments in an HCP agreement. Often referred to as "unforeseen" or extraordinary circumstances, Congress intended that additional mitigation requirements not be imposed upon an HCP permittee who has fully implemented his or her conservation commitments except as may be provided for under the terms of the HCP itself.

**POLICY:**

In negotiating "unforeseen circumstances" provisions for HCPs, the FWS shall not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, FWS shall not seek any other form of additional mitigation from an HCP permittee except under extraordinary circumstances.



#### A. General Assurances Provided to Landowners

- \* If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning HCP, the primary obligation for such measures shall not rest with the HCP permittee.
- \* If extraordinary circumstances warrant the requirement of additional mitigation from an HCP permittee who is in compliance with the HCP's obligations, such mitigation shall limit changes to the original terms of the HCP to the maximum extent possible and shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species. Additional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee. FWS retains the right, as authorized by section 5 of the ESA, to acquire endangered or threatened species habitat by purchase when additional conservation measures are necessary for a listed species included under an HCP.
- \* FWS shall not seek additional mitigation for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that particular species and contained measurable criteria for the biological success of the HCP which have been or are being met.

#### B. Determination of Extraordinary Circumstances.

- \* FWS shall have the burden of demonstrating that such extraordinary circumstances exist, using the best scientific and commercial data available. FWS findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.
- \* In deciding whether any extraordinary circumstances exist which might warrant requiring additional mitigation from an HCP permittee, the FWS shall consider, but not be limited to, the following factors:
  - the size of the current range of the affected species
  - the percentage of range adversely affected by the HCP
  - the percentage of range conserved by the HCP
  - the ecological significance of that portion of the range affected by an HCP
  - the level of knowledge about the affected species and the degree of specificity of the species' conservation program under the HCP
  - whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP
  - whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild

### C. ADDITIONAL CONSERVATION AUTHORITY

- Nothing in this policy shall be construed to limit or constrain FWS or any other governmental agency from taking any additional actions at its own cost with respect to the conservation or enhancement of a species which is included under an HCP.