

MEMORANDUM OF UNDERSTANDING
DESIGNATING CALIFORNIA DEPARTMENT OF FISH AND GAME
AS PRIMARY CONTACT FOR FISH AND WILDLIFE ISSUES
IN THE EVENT OF OIL OR TOXIC SUBSTANCE SPILLS
WITHIN THE STATE OF CALIFORNIA

Background:

Oil or toxic substance spills require rapid, efficient response and coordinated clean up to minimize their effects on both human and wildlife and fisheries resources. The United States Coast Guard has been given the primary responsibility to respond to major oil or toxic material spills within the marine environment. The Environmental Protection Agency has been designated the lead agency to respond to major spills in inland areas. A Regional Response Team plans for and facilitates the rapid response to major spills or to spills which have no designated "responsible party." Interagency cooperation and response is coordinated by an On-Scene-Coordinator from the United States Coast Guard or the Environmental Protection Agency who must communicate rapidly and efficiently with various local, State and Federal agencies to minimize damage and facilitate clean up efforts. On occasion, the On-Scene-Coordinator may be a designate of the "responsible party" who may also need to communicate with agencies with natural resource trust responsibilities.

Trust responsibilities for certain wildlife resources and their habitats, in the event of an oil or toxic spill are clearly given to the U.S. Fish and Wildlife Service (Service) through several legislative acts and regulations associated with the acts (Comprehensive Environmental Response Compensation and Liability Act, Clean Water Act, National Oil and Hazardous Substances Contingency Plan). The California Department of Fish and Game also has trust responsibilities for wildlife and fisheries resources within the State boundaries under various State statutes. Because of overlapping areas of responsibility for certain endangered species, migratory birds and migratory fishes which may be impacted by a spill event, both agencies are responsible for responding. To facilitate the most efficient and effective coordination of response to an ongoing operation being conducted by the On-Scene-Coordinator, a lead agency represented by a single individual coordinator should be designated as the primary contact for advice concerning fish and wildlife resources during a natural resources emergency situation. Additionally, issues of resource commitment and legal permits to handle wildlife need to be addressed as well as cooperative roles in damage assessment to natural resources.

(A) Purpose:

The purpose of this Memorandum of Understanding between the Service and California Department of Fish and Game is to designate for the On-Scene-Coordinator a primary contact person who can respond within certain designated limits of authority concerning fish and wildlife resources in the event of an oil or toxic material spill within the State of California and its coastal habitats.

(B) The specific provisions of this Memorandum of Understanding are:

- (1) California Department of Fish and Game will designate a primary contact person for the On-Scene-Coordinator. The primary contact person will advise on and coordinate activities related to fish and wildlife problems resulting from a spill and:
 - (a) Give advice and direction to minimize or prevent damage to wildlife resources during clean up operations.
 - (b) Locate, select and coordinate efforts of qualified private groups to collect and care for injured birds or mammals and oversee the adherence to permit conditions for both Federal and State wildlife permits.
 - (c) Immediately contact appropriate Service area response coordinators and the Environmental Contaminants Coordinator, Regional Office and inform them of the spill event if migratory birds, endangered or threatened species or Service-administered lands are threatened or impacted.
 - (d) Continue to update the above personnel of significant happenings related to the event.
 - (e) Maintain close communications with the designated Service field response advisor and communicate action requests by the Service to the On-Scene-Coordinator or from the On-Scene-Coordinator to the Service representative.
 - (f) Subject to permit, reporting, and other requirements of Federal law, provide for the collection of samples or data on impacted wildlife during salvage or emergency operations so that an accurate damage assessment may be generated.

- (2) The Service will designate a secondary contact person for the On-Scene-Coordinator, who will advise and coordinate with the California Department of Fish and Game primary contact person on activities related to wildlife and fisheries resource problems resulting from a spill and specifically:
 - (a) Will act as the primary contact only if the California Department of Fish and Game designate is unavailable to carry out assigned activities.
 - (b) Will coordinate arrangements for entry to and use of resources of National Wildlife Refuges and/or other Service administered facilities.
 - (c) Will provide coordination with specialized Service groups such as the Sea Otter Recovery Group and the National Wildlife Health Center, which have unique technical knowledge, training, equipment or facilities that may be valuable in the emergency or for assessing damages to natural resources by the spiller.
- (3) Additionally, the Service will expeditiously review and act upon applications for necessary Federal permits to recover and provide temporary assistance to migratory birds affected by the spill. Such permits shall be applied for by the California Department of Fish and Game primary contract person. Bird rescue organizations under the direct control of the California Department of Fish and Game or employed by or under contract to the California Department of Fish and Game, may carry out the activities authorized by the permit. The Service will expeditiously review and act upon applications from qualified treatment centers for permits to authorize care and treatment of endangered or threatened species.
- (4) California Department of Fish and Game and the Service will work cooperatively to assess damages to natural resources including but not limited to the Department of the Interior Type A and Type B damage assessment regulations developed under the Comprehensive Environmental Response Compensation and Liability Act. Data will be developed and cooperatively shared to document clean up and natural resource damage liability costs and recover these costs from the spiller.

Memorandum of Understanding

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(C) Limitations:

- (1) Nothing in this Memorandum of Understanding shall be interpreted to conflict with or to be inconsistent with any statute, regulation, or other provision of law applicable to the California Department of Fish and Game or the Service. The Service will carry out the duties of primary contact person in those instances wherein the protected species receives Federal but not State protection or as requested by either the California Department of Fish and Game or Department of the Interior.
 - (2) Implementation of this Agreement by the Service shall be subject to the limits of appropriated funds.
 - (3) No commitment of Service funds to the California Department of Fish and Game shall be made with regard to any spill or planning operation without express written agreement to that effect. Likewise, no commitment of California Department of Fish and Game funds shall be made with regard to spill or planning operation without express written agreement to that effect.
- (D) This agreement may be canceled by either party by providing 30 days prior written notice to the other party or by mutual agreement.

In witness whereof, the parties have executed this Memorandum of Understanding (Agreement) as of the day and year last below written.

Pete Butadell 1-20-88
Director, California Department of Fish and Game Date

Wally Stenche 3-15-88
Acting Regional Director, U.S. Fish and Wildlife Service, Reg 1, Date

**COOPERATIVE AGREEMENT BETWEEN
THE CALIFORNIA DEPARTMENT OF FISH AND GAME
AND
THE U.S. FISH AND WILDLIFE SERVICE
Endangered and Threatened Fish, Wildlife and Plants**

This Cooperative Agreement is entered into pursuant to Section 6(c) of the Endangered Species Act of 1973, as amended 16 U.S.C. § 1531-et seq (hereinafter referred to as 'the Act'), and the California Endangered Species Act of 1984 (CESA), Species Preservation Act of 1970, and California Native Plant Protection Act of 1977, between the U.S. Fish and Wildlife Service, U.S. Department of the Interior, and the California Department of Fish and Game. Hereinafter, the parties shall be referred to as "USFWS", and "CDFG" respectively.

WHEREAS, the Congress of the United States has found that there are resident species of fish, wildlife and plants which are in danger of extinction and that these species of fish, wildlife and plants are of aesthetic, ecological, educational, scientific, economic, and other value to the Nation and its people;

WHEREAS, the purposes of the Act are to provide a means whereby the ecosystems upon which endangered and threatened fish, wildlife and plants depend may be conserved, to provide a program for the conservation of such species, and to take such steps as may be appropriate to achieve the purposes of the various treaties and conventions related to the conservation of fish, wildlife and plants;

WHEREAS, the Congress of the United States has declared that encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards as expressed in the said Endangered Species Act is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in its fish, wildlife and plants;

WHEREAS, the Secretary of the Interior has delegated his responsibilities under the Act to the Director, USFWS;

WHEREAS, the Director, USFWS, desires to enter into this Cooperative Agreement for the purpose of assisting in the implementation of the endangered and threatened fish, wildlife, and plant conservation program of the State of California for those species under his jurisdiction;

WHEREAS, the State of California acting through the CDFG, wishes to administer its program for the conservation of endangered, threatened and rare fish, wildlife and plants in harmony with the terms and spirit of the Act;

WHEREAS, the parties agree that programs of the State of California are designed to assist in the conservation and recovery of resident endangered and threatened and rare fish, wildlife and plants, and that it is the mutual desire of the CDFG and the USFWS to work in harmony for the common purposes of planning, developing and conducting programs to protect and enhance populations of all resident endangered and threatened and rare fish, wildlife and plants within the State of California;

Whereas, the Director, USFWS, has the statutory and administrative responsibility to establish programs for the conservation of endangered and threatened fish, wildlife and plants which are under his jurisdiction to provide periodic review of the State program at no greater than annual intervals; to provide funding to that program as such funding is available and in accordance with the terms of the Act, to provide coordination among the programs of the various States; and to exchange with the CDFG such biological data or other information which may result in the enhancement and recovery of endangered, threatened and rare fish, wildlife and plants;

WHEREAS, the CDFG has a statutory responsibility to conserve endangered, threatened and rare fish, wildlife and plants which are resident in the State of California. Resident wildlife species is defined for purposes of this Act in 50 CFR Part 81 (40 FR 47509, Oct. 9, 1975) and plant species as included in the term "species" under amended definitions; and

WHEREAS, the CDFG (a) has the authority to conserve resident fish or wildlife and plants determined by the State agency or the Secretary to be endangered, threatened or rare; (b) has established an acceptable conservation program, consistent with the purposes and policies of the Act, for all resident fish, wildlife and plants in the State which are deemed by the Secretary to be endangered and threatened and has furnished a copy of such a program together with all pertinent details, information, and data requested by the Secretary; (c) has the authority to conduct investigations to determine the status and requirements for survival of resident fish, wildlife and plants; (d) has the authority to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered, threatened or rare fish, wildlife and plants; and (e) has provided for public participation in designating resident fish, wildlife and plants as endangered, threatened or rare;

Now therefore the parties agree as follows:

1. Cooperative Program

- (a) The CDFG will carry out the activities identified in its program for the benefit of the endangered, threatened and rare fish, wildlife and plants which are resident in the State of California.
- (b) The Director, USFWS, may agree with the State to provide financial assistance for the implementation of an acceptable project for the conservation of endangered and threatened fish, wildlife and plants. Such financial assistance will require the submission of an Application for Federal Assistance and the successful negotiation of a Project Agreement. These will comply with the Secretary's Rules and Regulations 50 CFR Part 81, (40 FR 47509, Oct. 9, 1975), and the USFWS Federal Aid Manual.
- (c) As a part of this cooperative program, the law enforcement authorities of USFWS and the CDFG shall cooperate in the detection, apprehension, and prosecution of violators of the Act or State law intended to conserve endangered, threatened and rare fish, wildlife and plants.
- (d) As additional species of resident fish or wildlife and plants in the State of California are listed as endangered or threatened by the USFWS or endangered, threatened or rare by the State, the parties agree to cooperate in the development of programs and projects for the benefit of such species.
- (e) It is understood that any Federal funding pursuant to Section 6(d) of the Act is contingent on the continued implementation of an adequate and active program for the conservation of federally listed endangered and threatened fish, wildlife and plants that are resident in the State of California as defined in 50 CFR Part 81 (40 FR 47509, Oct. 9, 1975). If the program for the conservation of such fish, wildlife or plants is determined by the Director,

USFWS, to be inadequate or inactive, this Agreement and funding shall be terminated in accordance with Sections 5 and 7 of this Agreement.

- (f) As part of the listing process pursuant to Section 4 of the Act for the determination of endangered and threatened fish, wildlife and plants, and of critical habitat for Federally listed endangered or threatened species, the parties agree to exchange biological and other data as necessary to facilitate such determination by the Director, USFWS.
- (g) As part of the interagency cooperation and consultation process, provided for by Section 7 of the Act and Section 2095 of the CESA, the parties agree to exchange information, as appropriate, during their respective consultation processes.

2. Permits

(a) General Rule

The CDFG agrees not to engage in, or issue a permit authorizing the taking of resident federally listed endangered or threatened fish, wildlife or plants as defined in 50 CFR Part 81, (40 FR 47509, Oct. 9, 1975) without prior issuance of a permit to the applicant by the Director, USFWS, except as authorized in subsection 2(b), (c), or (d) of this Agreement, pursuant to a special rule in 50 CFR § 17.21.

- (b) Any qualified employee or agent (contractor to the CDFG for implementation of specific recovery actions) of the CDFG who is designated by that Agency for such purposes, may, when acting in the course of his official duties, take any resident federally listed endangered or threatened fish, wildlife or plant for conservation purposes that are consistent with the Cooperative Agreement and any approved Application for Federal Assistance attached thereto, or any recovery recommendations in draft or recovery plans, provide that such taking is not reasonably anticipated to result in:

- (1) the death or permanent disabling of the specimen;
- (2) the removal of the specimen from the State of California;
- (3) the introduction of the specimen or any of its progeny into an area beyond the historical range of the specimen; or
- (4) the holding of the specimen in captivity for a period of more than 45 consecutive days in the case of animals; and
- (5) that the authority conveyed to the CDFG by this subsection may, at any time, be temporarily suspended for a particular project or that part of the conservation program by written notification by the Regional Director, USFWS, upon his receipt and determination that there is substantial evidence demonstrating the CDFG is using this authority for purposes inconsistent with the purposes of the Act. Such suspension will not be imposed until after consultation between the Regional Director, USFWS, and CDFG. Upon notification of the temporary suspension and the reasons therefore, the CDFG may request from the Director, USFWS, an opportunity to demonstrate compliance with the purposes of the Act. The Director shall promptly consider the evidence so submitted by the CDFG and either reaffirm the conclusion of the Regional Director, USFWS, and revoke the authority temporarily suspended pursuant to this subsection, or reverse the conclusion of the Regional Director, USFWS, and reinstate the authority temporarily suspended.

(c) Emergency Provisions

Any employee or agent of the CDFG who is designated by that Agency for such purposes may, when acting in the course of his official duties, take federally listed

endangered and threatened fish, wildlife or plants without a permit if such action is necessary to:

- (1) aid a sick, injured, or orphaned specimen; or
- (2) dispose of a dead specimen; or
- (3) salvage a plant or dead animal specimen which may be useful for scientific study; or
- (4) remove specimens which constitute a demonstrable, but non-immediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring animals only if it has not been reasonably possible to eliminate such threat by live capturing and releasing the specimen unharmed in remote area; or
- (5) defend his own life or the lives of others.

Any taking pursuant to this subsection 2 (c) must be reported in writing within 5 days to the Regional Director, USFWS, for transmission to the Division of Law Enforcement, USFWS, in Washington, D.C. The specimen may only be retained, disposed of, or salvaged in accordance with directions from the USFWS.

3. Records

The CDFG agrees to maintain records of:

- 1) the federally funded projects for the conservation of endangered threatened and rare fish, wildlife or plants in accordance with Chapters 4 and 5 of the USFWS Federal Aid Manual; and
- (2) the number of specimens of each species of federally listed endangered and threatened fish, wildlife or plants taken by State employees or agents pursuant to 50 CFR § 17.21(c)(5) and § 17.31(b) as amended, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking.

4. Notification

The CDFG agrees to inform the USFWS of any change in circumstances that could cause the state program to be in nonconformance with the requirements of Section 6(c) of the Act. Included without limitation are changes in the CDFG's relevant constitutional, statutory, or regulatory authority. The CDFG shall promptly furnish the USFWS with an assessment of the effect of such a change on the State's ability to remain in compliance with the requirements of Section 6(c) of the Act. The Director, USFWS, agrees to notify the State of all regulations and rulemakings made pursuant to the provisions of the Act, that might affect the State's program.

5. Effective Date and Renewal

- (a) This Agreement shall become effective when signed by the Regional Director, USFWS, and the Director, CDFG, and may be renewed in the following manner: Not later than June 30th of each year the CDFG shall submit to the USFWS, the following items: (1) additions and/or deletions to the Federal and State lists of endangered, threatened, and rare fish, wildlife or plants which are resident in the State; (2) a memorandum of law analyzing any changes in the CDFG's statutory authority for endangered, threatened and rare fish, wildlife or plants which were made since the date of the previous program submission. This memorandum shall also analyze the application of State law to any resident fish, wildlife or plant species that have been added to the Federal endangered and threatened species list since the date of the previous program submission; (3) a list of any substantial changes in the State's endangered, threatened and rare fish, wildlife or plant conservation programs since the date of the previous program submission; (4) a detailed description of the number of specimens of each species of federally listed

Endangered and Threatened species taken by State employees or agents pursuant to 50 CFR § 17.21(c)(5) and 17.31(b) as amended, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries to them resulting from the taking; and (5) copies of such reports the CDFG has prepared since the previous program accomplishments for resident, federally listed endangered and threatened species.

- (b) USFWS will, on or before October 1st of each year, notify the CDFG in writing either that the Cooperative Agreement is renewed effective October 21st of that year, or that the CDFG endangered and threatened fish, wildlife and plant conservation program or authorities are not in compliance with the criteria of Section 6(c) of the Act, and unless appropriate changes are made by June 30th of the following year, this Agreement shall be terminated.
- (c) For the purposes of this section, the phrase "previous program submission" means either the program submission of (1) the original Cooperative Agreement and amendments or (2) the most recent renewal application for the Cooperative Agreement, whichever is later in time.

6. Amendment

This Agreement may be amended at any time with the concurrence of the signatory parties.

7. Termination

This Agreement may be terminated: (a) by mutual agreement; (b) by the CDFG upon 60 day written notice to the USFWS; or (c) notwithstanding the renewal provisions in Section 5(b) of this Cooperative Agreement, by the USFWS upon 60 days written notice to the signatory party for the State of California from the Regional Director, USFWS, stating that the State's endangered and threatened fish, wildlife or plant conservation program is no longer in compliance with the criteria of Section 6(c) of the Act or that the State has violated a provision of this Agreement. The CDFG may submit a written request for review to the Director, USFWS, within 30 days of receipt of the termination notice. The Director, USFWS, will consider all evidence submitted by the CDFG in its request for review and either reaffirm the conclusion of the Regional Director and terminate this Agreement at the end of the 60-day notification period, or reverse the conclusion of the Regional Director and revoke the notice of termination. All Federal funds which have been obligated to but not expended by the CDFG as of the date of the termination notice shall be retained by the USFWS for reallocation pursuant to Section 6(d) of the Act, unless: (1) those funds are specifically approved by the Regional Director for expenditure before the date of actual termination; or (2) the notice of termination is revoked by the Director, USFWS.

AUG 28 1991

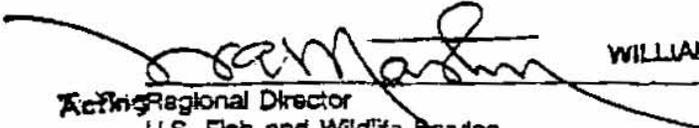
Date

Original Signed By
Howard A. Sarasohn for

Director
California Department of Fish and Game

JUN 6 1991

Date


Acting Regional Director
U.S. Fish and Wildlife Service

WILLIAM E. MARTIN

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NHD-TR



United States Department of the Interior
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

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In Reply Refer To:
FWS/AFF/FA

February 9, 1994

Boyd Gibbons, Director
California Department of Fish and Game
1416 Ninth Street
Sacramento, California 94244-2090

Dear Mr. Gibbons:

We appreciate your January 25, 1994 letter that provides information for renewal of the Cooperative Agreement between the California Department of Fish and Game and the U.S. Fish and Wildlife Service (Service) as required for the continuation of the Section 6 Grant Program of the Endangered Species Act. The necessary information has been supplied pursuant to Section 5(a) of the Cooperative Agreement. By fulfilling the requirements of this Section of the Agreement and also Section 6(c) of the Act, the Cooperative Agreement can be renewed for another year.

Enclosed is a copy of approved Grant Proposal Amendment 9 (Form 424). This Amendment requests the continuation of Project E-2, Statewide Endangered, Threatened and Rare Species Program and provides a list of proposed projects.

Please understand the approval of the Form 424 along with the renewal of the Cooperative Agreement only completes the eligibility requirements to participate in the Section 6 Grant Program of the Endangered Species Act. Funding and recovery actions funded are contingent on appropriations from Congress and the recovery needs and priorities as determined by the Service, State and other responsible agencies. When final selections have been made from the proposed projects submitted by your and other state agencies, you will be notified of the projects funded for California with Fiscal Year 1994 Section 6 funds.

If you have any questions, please contact Tom Williams at (503)231-6273.

Sincerely,

Donald V. Friberg
Deputy Assistant Regional Director
Division of Federal Aid

Enclosure