

SAN DIEGO GAS & ELECTRIC COMPANY  
SUBREGIONAL NATURAL COMMUNITY CONSERVATION PLAN  
IMPLEMENTING AGREEMENT/CESA MEMORANDUM  
OF UNDERSTANDING

ENTERED INTO BY AND AMONG  
UNITED STATES FISH AND WILDLIFE SERVICE  
CALIFORNIA DEPARTMENT OF FISH AND GAME  
AND  
SAN DIEGO GAS & ELECTRIC COMPANY

This Agreement is made and entered into this 18 day of December, 1995, by and among the United States Fish and Wildlife Service, an agency of the United States Department of the Interior, herein called "USFWS", the California Department of Fish and Game, a Subdivision of the California Resources Agency, herein called "CDFG," and San Diego Gas & Electric Company, herein called "SDG&E", as follows:

In consideration of the following, representations, covenants and agreements, and for other valuable consideration, USFWS, CDFG and SDG&E agree as follows:

1. DEFINITIONS.

For purposes of this Agreement, the following terms shall have the following meanings:

1.1 Activities. The term Activities shall mean all current and future activities of SDG&E, arising out of or in any way connected with the siting, (including any site assessment, surveying, testing, or planning), design, installation, construction, use, maintenance, repair and removal of Facilities within the Subregional Plan Area, or any Activities associated with the acquisition of property rights in relation thereto, as more fully described in Sections 2, 4 and 6 of the Subregional Plan. A total of 400 acres of habitat modification as a result of temporary or permanent Activities is covered by the Subregional Plan which may result in the Incidental Take of Covered Species.

1.2 Agreement. The term Agreement shall mean this San Diego Gas & Electric Company Subregional Natural Community Conservation Plan Implementing Agreement/CESA Memorandum of Understanding, together with all documents and instruments which are attached hereto or incorporated herein by reference.

1.3 CESA. The term CESA shall mean the California Endangered Species Act Fish and Game Code Sections 2050 et seq.

1.4 Candidate Species. The term Candidate Species shall mean all Covered Species that (a) the CDFG Commission has formally noticed as being under review for addition to either the list of endangered species or the list of threatened species under CESA, or a species for which the CDFG Commission has published a notice of proposed regulation to add the species to either list, or (b) is being considered by the Secretary of the Interior for listing as an endangered or a threatened species under ESA, but not yet subject to a proposed rule, or for which a federal agency consultation would be required under ESA Section 7(a)(4).

1.5 Covered Species. The term Covered Species shall mean all species, subspecies, and populations identified in Section 3, Table 3.1, of the Subregional Plan. Uncovered Species may be added to the Covered Species identified in Table 3.1 in accordance with paragraphs 4 and 6 of this Agreement.

1.6 ESA. The term ESA shall mean the federal Endangered Species Act (16 United States Code Section 1531 et seq.).

1.7 Facilities. The term Facilities shall include each of the following facilities which are a part of SDG&E's operations as a public utility, whether owned or operated by SDG&E:

(a) Operation and maintenance of existing electric power generating plants, of whatever nature, including, but not limited to, steam electric and nuclear electric generating plants, and all related buildings, structures, fixtures, improvements, land and water uses, equipment, machinery, easements, licenses, franchises and other rights-of-way.

(b) Electric transmission systems and distribution systems, whether above or below ground, including, but not limited to, all related towers, poles, transformers, anchor lines, anchors, vaults, manholes, and access roads, together with any other related fixtures, equipment, machinery, improvements, and operational accouterments and appurtenances.

(c) Electrical substations, including all related buildings, structures, land uses, access roads, poles, towers, electric lines, anchor lines, anchors, pads, electric lines, transformers, switches, together with all other related improvements, fixtures, equipment, machinery, accouterments and appurtenances.

(d) Telecommunication systems, including all related buildings, structures, land uses, access roads, towers, poles, antennae, vaults, lines, switches, and all other related fixtures, equipment, machinery, improvements, and accouterments, and appurtenances.

(e) Natural gas compressor and regulator stations, transmission pipelines, and distribution systems, including, but not limited to, all related buildings, structures, pipes, valves, engines, compressors, vaults, manholes, odorant systems, and all other related equipment, machinery, fixtures, improvements, and operational accouterments, and appurtenances.

(f) Other facilities, including, but not limited to, communication or other service facilities, above and below ground such as, but not limited to, fiber optics links, fuel lines, water pipes, pipes or conduit of whatever nature, antennae, or lines of any kind, together with any related vaults, manholes, poles, towers, fixtures, structures, land uses, access roads, improvements, equipment, machinery, and operational accouterments and appurtenances, whether owned or operated by SDG&E, and which are compatible with and comprised of a similar nature to the Facilities enumerated in subparagraphs (a) through (e) above.

(g) Future Facilities owned or operated by SDG&E, including those described in subparagraphs (b) through (f) above, as a public utility, within the meaning of California Public Utilities Code, Section 216, as the same may be configured and constituted from time to time, and all property rights in land, now or hereafter vested in SDG&E, upon, under, in or over which such Facilities are located.

This Agreement and the Subregional Plan cover the Activities defined in Paragraph 1.1, portions of which are more fully described in Sections 2, 4 and 6 of the Subregional Plan. This Agreement and the Subregional Plan do not cover expansions of electric generating capacity or major expansions of electric or gas transmission systems beyond those described below. This Agreement and Subregional Plan do cover impacts to Covered Species or their Habitat within the boundaries of the Subregional Plan Area associated with new electrical transmission line facilities, electrical interconnections with other

utilities that do not project more than 30 miles outside of SDG&E's service territory boundary, new gas transmission line facilities not exceeding both 30" in diameter and 20 miles in length (but including the natural gas transmission line between Rainbow and Santee), new gas compressor stations with Habitat impacts under 10 acres, and new bulk power electric substations and gas regulator stations with Habitat impacts of less than 20 acres. If the impacts from any uncovered project or activity are determined by USFWS and CDFG, following compliance with applicable statutory and regulatory requirements, to be minimal and appropriate, then SDG&E, USFWS and CDFG may allow such project or activity to be covered by this Agreement, the Subregional Plan, and the Take Authorizations. Such uncovered projects or activities will be evaluated on a case by case basis by the standards set forth in this Agreement and the Subregional Plan.

A further description of certain specific types of SDG&E's Facilities is set forth in Sections 2, 4 and 6 of the Subregional Plan.

1.8 Federal Habitat Management Plan. The term Federal Habitat Management Plan shall mean any federal comprehensive multi-species and Habitat conservation plan meeting the requirements of ESA Section 7, pertaining solely to federal lands, and pertaining solely to federal agency action meeting the requirements of ESA Section 7.

1.9 Habitat. The term Habitat shall mean the area or niche occupied or suitable for occupation by any particular species, subspecies, or population of fish, wildlife or plant, and shall include all biological resources comprising any part of such niche which may among other things affect the food chain, shelter, nesting or foraging of any species, subspecies, or population. Habitats which may be affected by SDG&E Activities are described in Section 3 of the Subregional Plan.

1.10 Incidental Take. The term Incidental Take shall mean (a) for purposes of ESA the Take of Listed species or Candidate Species otherwise prohibited by ESA Section 9(a)(1)(B) where such Take is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity, and (b) the Take of Listed Species or Candidate Species otherwise prohibited by CESA (Fish and Game Code 2080) or under NPPA (Fish and Game Code 1900 et seq.) which occurs as an incidental consequence of SDG&E's Activities.

1.11 Listed Species. The term Listed Species shall mean any and all Covered Species which are listed as endangered species or threatened species under ESA or CESA, or both.

1.12 Management Authorization. The term Management Authorization means any authorization or permit issued to SDG&E by CDFG under Fish and Game Code

Sections 2081 and/or 2835, to permit the Incidental Take of or impact to Covered Species and to permit impacts to the Habitat of such Covered Species which is incidental to the lawful Activities of SDG&E. For purposes of this Agreement, the CDFG Management Authorization and USFWS ESA Section 10(a) Permit may sometimes be collectively referred to as "Take Authorizations."

1.13 Mitigation Credits. The term Mitigation Credits shall mean the reserve of unused mitigation value held by SDG&E in the Conservation Bank (as that term is used in Paragraph 5.5). Each Mitigation Credit represents one acre of high quality Habitat. Mitigation Credits may be expended by SDG&E, in accordance with the mitigation ratios set forth in Section 7.4 of the Subregional Plan to satisfy the need for mitigation arising out of Activities induced Habitat impacts.

1.14 NCCPA. The term NCCPA shall mean the Natural Community Conservation Planning Act (Fish and Game Code 2800 et seq.).

1.15 NPPA. The term NPPA shall mean the California Native Plant Protection Act (Fish and Game Code 1900 et seq.).

1.16 Preserve Areas. The term Preserve Area means the area encompassed by the Multiple Species Conservation Plan's Multi-Habitat Planning Area map, as currently defined or ultimately adopted, the equivalent maps for the Multiple Habitat Conservation Plan and Multiple Habitat Conservation and Open Space programs in San Diego County, the South Orange County NCCP Subregional Plan reserve area, and the Riverside County Conservation Agency Core reserve areas. Until preserve areas are formally delineated, within the areas covered by such plans, those areas which are designated moderate, high, and very high quality habitat on habitat evaluation maps prepared for the respective planning areas are considered the preserve. Preserve shall also include any Covered Species Habitat lands the ownership or use of which has been conveyed or dedicated to, or is otherwise managed by, any entity for the long term conservation of Covered Species, where such conveyance, dedication or management is accepted by and subject to enforcement by federal, state or local agencies.

1.17 Section 10(a) Permit. The term Section 10(a) Permit shall mean that permit to be issued by USFWS under ESA Section 10(a), in accordance with this Agreement, permitting the Incidental Take of Covered Species whether such Incidental Take occurs directly or as a result of impact to Habitat. For purposes of this Agreement, the Section 10(a) Permit and the CDFG Management Authorization, described above, will sometimes herein be collectively referred to as the "Take Authorizations."

1.18 Subregional Plan. The term Subregional Plan shall mean the San Diego Gas and Electric Company Natural Community Conservation Plan of even date herewith entered into by and among USFWS, CDFG, and SDG&E and all the documents and instruments specifically attached thereto or incorporated therein by reference.

1.19 Subregional Plan Area. The term Subregional Plan Area shall mean all existing land, whether owned or otherwise possessed or used by SDG&E, pursuant to any easement, license, permit or any other right or entitlement whatever, whether legal or equitable, upon which any SDG&E Facility is or will be located or any SDG&E Activity is or will be conducted during the term of this Agreement, and which lies within the area depicted on the map attached to the Subregional Plan as Figure 3.

1.20 Take. The term Take shall have the same meaning as provided in ESA with regard to any Activities subject to ESA and shall have the same meaning as provided under state law with regard to Activities subject to CESA. For purposes of ESA, Take under this agreement is limited to Incidental Take under the ESA.

1.21 Extraordinary Circumstances. The term Extraordinary Circumstances shall mean circumstances or events which occur after the effective date of this Agreement that were neither foreseen nor contemplated by the parties and which constitute a significant and material adverse impact to the proper functioning of the Subregional Plan or to a Covered Species within the Subregional Plan Area affecting the survivability of such Covered Species. Extraordinary Circumstances shall also mean the discovery of new or additional information by USFWS and/or CDFG which if known, on the effective date of this Agreement, would have materially and adversely affected USFWS's and/or CDFG's decision to enter this Agreement and issue the Take Authorizations described herein without requiring additional protective, conservation and/or mitigation measures, the absence of which will, on the basis of such new or additional information, likely result in the material and adverse impacts to any Covered Species. USFWS and CDFG shall have the burden of demonstrating that Extraordinary Circumstances exist, using the best scientific and commercial data available.

## 2. RECITALS.

2.0 The United States Fish and Wildlife Service (USFWS) is a federal agency charge with the responsibility to administer the federal Endangered Species Act (FESA) and provide for the conservation and recovery of threatened and endangered species and their habitats. That responsibility includes the authority to issue a permit under Section 10(a)(1)(B) of FESA for the incidental take of threatened and endangered species, provided that the applicant for such a permit submits a conservation plan for the affected species of which the USFWS approves.

2.01 The California Department of Fish and Game (CDFG) is a state agency, and is a subdivision of the California Resources Agency, charged with the responsibility of administering the California Endangered Species Act (CESA) the Natural Community Conservation Planning Act (NCCPA), and the Native Plant Protection Act (NPPA), and to provide for the recovery of threatened and endangered species and their habitats. That responsibility includes the authority to issue a management authorization for the take of threatened, endangered and candidate species, provided the applicant for such a management authorization meets the terms and conditions of CDFG to assure the conservation of the affected species as required by CESA, NCCPA, and NPPA.

2.1 SDG&E is a public utility providing natural gas, electric power, and other services to its customers within its service territory, which includes all of San Diego County and a portion of Orange County. Provision of these services requires the installation, operation, maintenance and repair of necessary Facilities. SDG&E's Facilities primarily consist of electric and natural gas systems located within San Diego County, and within portions of Riverside, and Orange Counties. The electric system is in part comprised of electric generating plants, transmission lines, electric substations and a distribution network. The natural gas system is in part comprised of natural gas compressor stations, transmission pipelines, regulator stations and a distribution network.

2.2 SDG&E is a "public utility" within the meaning of Article XII, Section 3, of the California Constitution and Section 216 of the California Public Utilities Code. SDG&E's operations as a public utility extend through the jurisdictional boundaries of numerous local governments and are matters of statewide concern. SDG&E's operations are regulated primarily by the California Public Utilities Commission (CPUC) and by other state agencies having concurrent jurisdiction. As a foundational mandate, Section 451 of the Public Utilities Code requires SDG&E to provide its customers with adequate, safe, and reliable electric and gas service. To the extent the CPUC has the authority or power to regulate public utilities, local governments are precluded by Article XII, Section 8, of the California Constitution from regulating the affairs of public utilities.

2.3 Various Covered Species are found in or may use Habitat within which SDG&E's Activities or Facilities may be conducted or are located. SDG&E's Activities may result in impact to Covered Species or their Habitat. Apart from the relatively small potential for impact arising out of the operation of existing electric generating plants, natural gas compressor stations, or the installation and operation of electric substations and natural gas compressor or regulator stations, the primary potential for impact to Covered Species and their Habitat from SDG&E Activities will arise out of or in connection with the installation, operation, maintenance and repair of lineal Facilities such as electric and natural gas transmission lines within the Subregional Plan Area.

2.4 Utilizing the comprehensive management and conservation of multiple wildlife species approach authorized by the NCCPA, and by ESA, SDG&E developed the San Diego Gas and Electric Company Subregional Natural Community Conservation Plan, herein called the "Subregional Plan," in cooperation with USFWS and CDFG. The Subregional Plan is a comprehensive long term conservation plan which addresses multiple species and their Habitat. The purpose of the Subregional Plan is to permit the continuation of SDG&E's Activities in a manner which provides long term certainty for planning and operational purposes, and in a manner which effectively provides for the long term conservation of Covered Species and their Habitat within the Subregional Plan Area. The Subregional Plan prescribes SDG&E's obligation to implement identified protective, mitigation, and conservation measures necessary to conduct the Activities and ensure the survivability and conservation of Covered Species and their Habitat, in accordance with the intent and purpose of ESA, CESA, NCCPA and NPPA, and any and all rules and regulations promulgated thereunder.

2.5 As more fully described in Subregional Plan, Section 1, various local governments and other entities propose to adopt, with USFWS and CDFG approval, subregional or subarea habitat and multi-species conservation plans, herein individually and collectively referred to as "Habitat Conservation Plans," affecting various portions of the Subregional Plan Area. For purposes of this Agreement and the Subregional Plan, the term Habitat Conservation Plans shall not include conservation plans pertaining to federal lands, herein referred to as "Federal Habitat Management Plans." To the extent known to SDG&E, such Habitat Conservation Plans are identified in Section 3.1 of the Subregional Plan. Though SDG&E will utilize its best efforts to coordinate its implementation of the Subregional Plan with the implementation of such Habitat Conservation Plans, as more fully described in Section 6 of the Subregional Plan, and though SDG&E relies upon and utilizes for the Subregional Plan information contained in biological studies prepared for such Habitat Conservation Plans, the Subregional Plan shall be implemented as an overlay of and independent of any Habitat Conservation Plan within the boundaries of which any SDG&E Activity takes place or any SDG&E Facility is located. Nothing in this Agreement, Subregional Plan, the Take Authorizations shall be construed to diminish or extend the powers or authority of any local government to regulate any SDG&E Activity or Facility. SDG&E's Activities, for purposes of the Subregional Plan, shall be governed solely by the terms and conditions of the Subregional Plan, this Agreement, and the Take Authorizations.



### 3. LEGAL AUTHORITY

This Agreement is made under the authority of the Endangered Species Act, herein called "ESA", 16 U.S.C. 1531 et seq.; the Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq.; the California Endangered Species Act, herein called "CESA", California Fish and Game Code 2050 et seq., the Natural Community Conservation Planning Act, herein called "NCCPA", California Fish and Game Code 2800 et seq., the California Native Plant Protection Act, herein called "NPPA", California Fish and Game Code 1900 et seq., Fish and Game Code 1802, and any rules and regulations promulgated thereunder.

### 4. AUTHORIZATION AND FINDINGS

4.1 (a) USFWS finds that the Subregional Plan contains all of the elements required by ESA Section 10(a)(2)(A) and Title 50 of the Code of Federal Regulations (CFR) Parts 17.22(b)(1) and 17.32(b)(2). Further, having reviewed the Subregional Plan and this Agreement, due opportunity for public comment regarding the same having been provided, and after due and independent consideration of such review and comments, USFWS specifically finds in accordance with ESA Section 10(a)(2)(B) and 50 CFR Parts 17.22(b)(2) and 17.32(b)(2) that:

- (i) The Taking authorized under the Section 10(a) permit will be incidental to the otherwise lawful Activities of SDG&E;
- (ii) By complying with its obligations under this Agreement, the Subregional Plan, and the Section 10(a) Permit, SDG&E will minimize and mitigate the impacts of such Incidental Take to the maximum extent possible.
- (iii) SDG&E has and will provide adequate funding for the implementation of the Subregional Plan;
- (iv) The Incidental Taking and impacts authorized under the Section 10(a) Permit will not appreciably reduce the likelihood of the survival or recovery of any Listed Species or Candidate Species in the wild;
- (v) All measures required by USFWS as requirements for or conditions of the Section 10(a) Permit have been provided for in the Subregional Plan as implemented by this Agreement.
- (vi) The Subregional Plan and this Agreement satisfy and fulfill all measures required by the USFWS as necessary or appropriate for the purposes of the Subregional Plan,

including any measures determined to be necessary by the Parties to deal with Extraordinary Circumstances.

(vii) Implementation of this Agreement and the Subregional Plan will provide for the conservation and protection of Covered Species and their Habitats within the Subregional Plan Area, as if each of the species, subspecies or populations were listed under ESA.

(b) Having reviewed the Subregional Plan and this Agreement, following opportunity for public comment regarding the same, and having thoroughly and independently considered such review and comments, CDFG finds that the Subregional Plan and this Agreement satisfy all legal requirements necessary for CDFG to issue a Management Authorization for Covered Species under Fish and Game Code Sections 2081 and 2835.

4.2 Upon execution of this Agreement, USFWS and CDFG shall take whatever actions are necessary and legally permissible under ESA and under CESA and NCCP, respectively, to authorize the Incidental Take of the Covered Species contemplated by and in accordance with the Subregional Plan as implemented by this Agreement.

(a) As a part of such actions, USFWS shall issue a Section 10(a) Permit to SDG&E permitting the Incidental Take of all Covered Species, subject to SDG&E's compliance with the terms and conditions of this Agreement, the Subregional Plan and the Section 10(a) Permit.

(b) Further, as a part of such actions, CDFG will issue a Management Authorization to SDG&E under Fish and Game Code sections 2081 and 2835, permitting the Incidental Take of all Covered Species, subject to SDG&E's compliance with the terms and conditions of this Agreement, the Subregional Plan, and the Management Authorization.

USFWS and CDFG agree to cooperate with SDG&E to effectively implement and comply with this Agreement, the Take Authorizations, and the Subregional Plan.

(c) For purposes of such Take Authorizations, the Incidental Take of narrow endemic species of plants and animals, as identified in Table 3.1 of the Subregional Plan, shall be further conditioned upon the following. SDG&E will avoid or minimize the Incidental Take of narrow endemic species in accordance with the Subregional Plan, the Section 10(a)(1)(B) permit and the Management Authorization. Where the Incidental Take of a narrow endemic species is unavoidable, SDG&E shall, whenever possible, provide USFWS and CDFG with notice of the anticipated Incidental Taking and provide the USFWS and CDFG with a reasonable opportunity to remove such species to a location which avoids the Incidental Take. In the event of an emergency, and where the Incidental Take of the narrow endemic species is unavoidable, SDG&E shall use its best efforts to

advise USFWS and CDFG of the expected Incidental Take to enable USFWS and CDFG to take whatever actions they may deem necessary consistent with the commencement and completion of any necessary emergency work.

4.3 Absent Extraordinary Circumstances, in the event that any Covered Species which is not a Listed Species or Candidate Species as of the effective date, shall later become a Listed Species or Candidate Species during the term of this Agreement, authorization to Incidentally Take such species under the Take Authorizations shall become effective concurrent with the listing of the species.

(a) USFWS agrees that absent Extraordinary Circumstances, SDG&E's compliance with the terms and conditions of this Agreement, the Subregional Plan and the Section 10(a) Permit, shall constitute compliance with ESA including the Section 4(d) rule for the gnatcatcher, with respect to any Covered Species.

(b) CDFG agrees that absent Extraordinary Circumstances, SDG&E's compliance with the terms and conditions of this Agreement, the Subregional Plan, and the Management Authorization, shall constitute compliance with CESA, NCCPA, and NPPA with respect to any Covered Species.

(c) Except as may be otherwise provided by federal or state law, the provisions of any Habitat Conservation Plan (including any implementing agreement thereof) the boundaries of which fall within any part of the Subregional Plan Area shall not be binding upon, govern or have any force or effect upon the performance of any Activities conducted by SDG&E and shall not in any way limit the scope of the Subregional Plan or any of the Take Authorizations issued or granted to SDG&E pursuant to Paragraphs 4.2 and 4.3 above.

4.4 To the extent ESA, CESA, NCCPA or NPPA, are amended following the effective date of this Agreement to provide for the protection and conservation of species, subspecies and populations of plants and animals existing within designated Habitats or Habitat types, whether or not such species, subspecies or populations are Listed Species or Candidate Species, SDG&E can make application to USFWS and CDFG to amend this Agreement, the Subregional Plan and the Take Authorizations, as appropriate, to include such species, subspecies, and populations within the Covered Species.

4.5 To the extent SDG&E's Activities within the Subregional Plan Area are conducted or occur on federal lands, USFWS, with the exception of wetland habitats addressed in Section 404 of the Clean Water Act, shall not impose or recommend any additional or different mitigation measures (beyond those described in the Subregional Plan) directed at the protection or conservation of the Covered Species or their habitats in

any Section 7 consultation or conference conducted in connection with Activities subject to other federal agency authorizations. USFWS and CDFG shall review the application under then-existing statutory and regulatory provisions and determine if the Agreement, Subregional Plan and Take Authorizations may be amended to include such species, subspecies and populations within the Covered Species.

## 5. CONSERVATION MEASURES

5.1 In consideration of the foregoing, SDG&E agrees to implement the conservation and mitigation measures set forth below and more fully described in the Subregional Plan, for Activities performed which result in an Incidental Take of or an impact to Covered Species or their Habitat.

5.2 SDG&E will conduct its Activities in accordance with operational protocols described in Section 7.1 of the Subregional Plan. In cooperation with USFWS and CDFG, SDG&E developed the operational protocols as an ecosystem-based approach to traditional utility construction, maintenance and repair Activities, recognizing that reasonable adjustments in design, planning and operational techniques can achieve major benefits to Covered Species and their Habitat. Such Operational Protocols were developed in an effort to avoid Incidental Take or impact to Covered Species or their Habitat in the first instance, or where such impacts are unavoidable to minimize the nature and extent of any affect such Incidental Take or impact may have.

5.3 SDG&E's transmission Facilities are located within SDG&E rights-of-way. Certain of the lands comprising such rights-of-way are owned in fee by SDG&E. SDG&E, USFWS and CDFG recognize that certain of SDG&E fee owned electric transmission rights-of-way may serve as an important foundation for the establishment by USFWS and CDFG of corridors for Covered Species between otherwise separated Habitat or Preserve Areas. To assist in the creation of these corridors, SDG&E agrees that it will not use certain of such fee owned rights-of-way for any purpose other than for SDG&E's Activities conducted in accordance with this Agreement, the Take Authorization and the Subregional Plan, during the terms thereof, and in accordance with the requirements of ESA, CESA and NPPA, thereafter. SDG&E may by license, permit, or lease allow other utilities to use such rights-of-way where such use and any required mitigation for impacts to unlisted/non-candidate species or their habitat is consistent with this Agreement and the Subregional Plan, and where any use causing Incidental Take or Take is conducted pursuant to Take Authorizations issued to such utility. SDG&E's agreement to limit its use of any particular right-of-way shall remain effective for so long as USFWS and CDFG elect to use such right-of-way to establish a corridor for Covered Species or to link separated Habitat areas. USFWS and CDFG may not without the prior written consent of SDG&E, elect to use SDG&E fee owned rights-of-way to establish a corridor for purposes of this paragraph in which an existing use by third parties, the purposes of which is inconsistent with habitat or Covered Species conservation, is present as a result of any lease, license, permit, or other approval of SDG&E. SDG&E's agreement to limit the use of such rights-of-way will be memorialized in an easement, in a form approved by SDG&E, USFWS and CDFG, in

favor of USFWS and CDFG, or their designee, and recorded in the County Recorder's Office for the county in which such rights-of-way are located within 30 days after SDG&E receives notice from USFWS and CDFG of their election to use an available fee owned right-of-way for the purposes specified in this section. Such easement shall be subject to SDG&E's broad form reservation of rights to continue to use any affected rights-of-way for public utility purposes and its Activities. SDG&E's reservation of rights to use such rights-of-way for its Activities and for public utility purposes shall not be limited to the term of this Agreement, the Subregional Plan or the Take Authorizations, but at the expiration of such term shall remain subject to the requirements of ESA, CESA and NPPA. However, in the event that any of such rights-of-way shall cease to be used, on election by USFWS and CDFG, as a corridor for Covered Species or to link separated Habitat areas, all easement rights conveyed by SDG&E affecting any such right-of-way shall terminate and revert back to SDG&E without limitation or reservation.

To the extent SDG&E rights-of-way extend over land in which it does not hold an undivided fee ownership interest, SDG&E agrees not to object to the conveyance, grant or dedication of such land by the fee owner to any relevant Habitat Conservation Planning Management entity for wildlife conservation purposes; provided, however, any such conveyance, grant or dedication shall remain subject to the authorizations and Take Authorizations granted by USFWS and CDFG to SDG&E herein and to the rights of SDG&E to use such property for public utility purposes and its Activities to the extent SDG&E held such rights, in law or in equity, at the time of such conveyance, grant or dedication.

5.4 Two of the principal mitigation measures in the Subregional Plan, the implementation of which are directly related to Habitat impacted by SDG&E Activities are (a) Habitat enhancement and (b) mitigation through the deduction of Mitigation Credits from the SDG&E Conservation Bank.

As a mitigation measure, Habitat enhancement employs two methods, vegetation restoration and habitat reclamation, more fully described in Section 7.2 of the Subregional Plan. Habitat enhancement measures which successfully mitigate the impacts to any particular area of Habitat, as determined in accordance with Section 7.2 of the Subregional Plan, will be deemed to fully satisfy SDG&E's mitigation obligation for such impacts and preclude the need to deduct Mitigation Credits from the SDG&E Conservation Bank, as described in Section 7 of the Subregional Plan.

5.5 To the extent USFWS and CDFG determine that habitat enhancement measures are unsuccessful for any particular impacted area, Mitigation Credits shall be deducted for such area in accordance with the criteria and ratios set forth in Section 7.4 of the Subregional Plan provided that, within Preserve Areas, the

determination whether habitat enhancement measures or Mitigation Credits shall be used to mitigate the impacts resulting from Activities under the Subregional Plan, shall be made, in the first instance, by USFWS and CDFG, following consultation with SDG&E.

5.6 To provide mitigation for unavoidable impacts to Covered Species or their Habitat, where Habitat enhancement measures cannot be employed or are unsuccessful, or within Preserve Areas where USFWS and CDFG determine that habitat enhancement measures are not appropriate mitigation, SDG&E will establish a Conservation Bank comprised of Mitigation Credits owned by SDG&E, in accordance with that certain Funding Agreement for Mitigation Credits of the San Diego Gas & Electric Company Subregional Natural Community Conservation Plan dated November 30, 1995 (Funding Agreement). On or before the effective date of this Agreement, SDG&E shall transfer funds, as required in the Funding Agreement, to USFWS and CDFG, contemplated by the parties to be sufficient to enable USFWS and CDFG to procure high quality Habitat lands within the Subregional Plan Area, having a total acreage substantially equal to the number of acres estimated by the parties to be necessary to mitigate for the impacts to be caused by Activities during the initial term of this Agreement. The transfer of such funds shall create a Conservation Bank in favor of SDG&E comprised of Mitigation Credits equal to the number of acres of high quality Habitat lands procurable utilizing such funds, as agreed upon by USFWS, CDFG and SDG&E in the Funding Agreement. Whenever 1) mitigation of impacted Habitat cannot be successfully achieved through Habitat enhancement; 2) habitat enhancement measures are not successful; or 3) within Preserve Areas, USFWS and CDFG determine that habitat enhancement measures are not appropriate mitigation, the impact shall be mitigated using SDG&E Mitigation Credits in accordance with the criteria and offsets ratios set forth in Table 7.4 of Section 7.4 of the Subregional Plan. SDG&E may acquire additional SDG&E Mitigation Credits, the location, nature, or value of which is subject to the approval of USFWS and CDFG, as may be needed to provide mitigation, for SDG&E Activities conducted during the term of this Agreement.

5.7 Whenever any portion of the Subregional Plan Area falls within the boundaries of a Preserve Area, SDG&E will coordinate with USFWS and CDFG in respect of SDG&E Activities within such Preserve Area in accordance with the provisions and procedures of Sections 6 and 7 of the Subregional Plan, and the management entity for any such Preserve Area to avoid impacts to Covered Species and biological resources and where impacts are unavoidable to minimize or mitigate such impacts, as more fully set forth in Sections 6 and 7 of the Subregional Plan.

5.8 USFWS, CDFG and SDG&E agree to commence and complete negotiations to develop, finalize, and agree upon terms and conditions in the form of a memorandum of agreement, establishing the manner and means by which SDG&E may apply any unused

Mitigation Credits procured by SDG&E under this Agreement or otherwise (provided that any Mitigation Credits procured outside of this Agreement shall represent high value habitat lands for Covered Species) toward mitigation for impacts to Covered Species or their Habitat resulting from projects or activities not covered by this Agreement, the Subregional Plan or the Take Authorizations. Such terms and conditions shall, among other things, entitle SDG&E to use Mitigation Credits, if any, in the Conservation Bank which are not needed for compliance under this Agreement (e.g., termination of Agreement, revocation/relinquishment of the Agreement) for mitigation of impacts to Covered Species or their habitat for activities not covered by this Agreement. The parties shall execute a memorandum of agreement embodying such terms and conditions within six (6) months of the effective date of this Agreement.

## 6. ASSURANCES.

6.1 The issuance of "Incidental Take" permits which allow the taking of Listed Species are expressly authorized under ESA Section 10(a)(1)(B). While the language of ESA Section 10(a)(1)(B) does not explicitly address unlisted species, including species proposed for listing and addressed in ESA Section 7(a)(4), the legislative history of the section clearly indicates that Congress contemplated that USFWS could approve habitat conservation plans that protect unlisted species as if they were listed under ESA and provide Section 10(a)(1)(B) assurances for those unlisted species. The following excerpt from the House Report on the amendment of ESA creating the Incidental Take permit authority evidences that intent.

The Secretary of the Interior . . . may approve 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 plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed that conservation of the species and its habitat as if the species were listed pursuant to the Act.

H.R. Rep. 97-835, 97th Cong., 2d Sess. 30-31 (1982).

Further, on August 11, 1994, the Secretary of the Interior and the Secretary of Commerce jointly issued an Assurances-No Surprises Policy, a complete copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference, evidence USFWS' commitment to follow Congress' intent regarding both listed and unlisted species as reflected in the foregoing quote. The Assurances-No Surprises Policy assures proponents of long-term conservation plans that once a plan is implemented in accordance with its

terms, no additional land or financial compensation will be sought from them to address impacts to species covered under the plan even in the event of Extraordinary circumstances. Moreover, in the event of Extraordinary Circumstances, if additional mitigation from an HCP permittee who is in compliance with the HCP's obligations is required, such mitigation shall limit changes to the terms of the original 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 under the original terms of the HCP without the consent of the HCP permittee .

California Fish and Game Code Sections 2081 empower CDFG to issue Take Authorizations for Listed Species and Candidate Species. In addition, California Fish and Game Code section 2835 authorizes CDFG to enter into natural community conservation plans for the comprehensive management and conservation of multiple species of wildlife, as that term is defined in California Fish and Game Code, Section 711.2, including Habitat upon which such wildlife depends; and to authorize the taking of such species whose conservation is provided for under any such plan.

6.2 (a) Subject to full compliance with the terms and conditions of this Agreement, the Subregional Plan and the Management Authorization, CDFG finds and determines as follows:

(1) This Agreement provides adequately for the Covered Species and their Habitat in the Subregional Plan Area.

(2) The mitigation, compensation and enhancement obligations contained in this Agreement and the Subregional Plan meet all applicable standards and requirements in CESA, NCCPA and NPPA with regard to Activities in the Subregional Plan Area.

(3) This Agreement provides adequately for the mitigation of potential "significant effects on the environment," as defined in Public Resources Code 66474, that may result from Activities in the Subregional Plan Area.

(4) Except as otherwise required by law, and barring a CDFG finding that Extraordinary Circumstances exist, CDFG shall require no further mitigation, compensation, or enhancement measures from the Parties pursuant to CESA, NCCPA, CEQA, or NPPA.

(b) In the absence of Extraordinary Circumstances, with the exception of impacts to wetland resources, no further protective or mitigation measures will be required by



USFWS pursuant to ESA with respect to any impact to or Incidental Take of Covered Species, including Take resulting from Habitat Modification, resulting from SDG&E's Activities conducted in compliance with this Agreement, the Section 10(a) Permit, and the Subregional Plan during the term of this Agreement. For purposes of SDG&E's Activities, SDG&E's compliance with the Agreement, the Section 10(a) Permit and the Subregional Plan shall be deemed to satisfy any wildlife, Habitat, or other biological resource, protective, preservation, mitigation or conservation measures which would otherwise be required or recommended by USFWS under ESA and various other federal laws, specifically directed at the protection or conservation of the Covered Species or their Habitat. Moreover, USFWS agrees that, in the absence of Extraordinary Circumstances, compliance by SDG&E with the terms and conditions of this Agreement, the Section 10(a) Permit and the Subregional Plan shall constitute the full extent of any protective, mitigation or conservation measures required for the Incidental Take of or the impact upon any Covered Species or their Habitat related to the performance of Activities.

In the absence of Extraordinary Circumstances, no further protective or mitigation measures will be required by CDFG pursuant to CESA, NCCPA or NPPA with respect to any impact to or Incidental Take or Take of Covered Species, including any Take resulting from habitat modification, resulting from SDG&E Activities conducted in compliance with this Agreement, the Subregional Plan and the Management Authorization. For purposes of SDG&E Activities, SDG&E's compliance with this Agreement, the Subregional Plan and the Management Authorization shall be deemed to satisfy the wildlife, Habitat, or other biological resource, protective, preservation, mitigation or conservation measures which would otherwise be required or recommended by CDFG under CESA, NCCPA, NPPA and various other state laws specifically directed at the protection or conservation of the Covered Species or their Habitat.

(c) Neither this Agreement, the Subregional Plan, nor the Take Authorizations cover or constitute compliance with the requirements of applicable laws and regulations pertaining to "wetlands" falling within the jurisdiction of the U.S. Army Corps of Engineers or to water crossings within the meaning of California Fish and Game Code Sections 1600 et seq. However, this Agreement, the Subregional Plan and the Take Authorizations shall otherwise apply to Covered Species and their Habitat within wetland areas.

6.3 In the event USFWS or CDFG shall determine, after the effective date of this Agreement, that Extraordinary Circumstances exist, and where SDG&E is in compliance with this Agreement, the Take Authorizations and the Subregional Plan, any additional mitigation required shall be limited to modifications of the habitat conservation measures identified in Chapters 6 and 7 of the Subregional Plan and Section 5 of this Agreement that do not involve an increase in the cost of compliance, the payment of additional

compensation, additional land or, without the consent of SDG&E, any additional restrictions on the Activities of SDG&E within the Subregional Plan Area. USFWS and CDFG also agree that they will not seek to impose additional protective, mitigation or conservation measures upon SDG&E, as a result of its Activities for the protection, preservation or conservation of any Covered Species or their Habitat through any other agency which may have permitting, approval or discretionary regulatory authority over any of SDG&E's Activities and which is not a party to this Agreement. As a responsible, trustee or cooperating agency under CEQA, NEPA, or any other wildlife protection law, USFWS and CDFG will notify the lead federal or state agency that they consider any protective, mitigation or conservation measures otherwise required for any impact to or Incidental Take of any Covered Species or their Habitat resulting from SDG&E Activities, satisfied by SDG&E's compliance with this Agreement, the Take Authorizations and the Subregional Plan.

6.4 To the extent any SDG&E Activity shall occur on federal lands within the Subregional Plan Area and require the consent of the federal agency having custody and control of such lands, and to the extent the granting of such consent shall trigger ESA Section 7 or NEPA for Activities on federal land and absent Extraordinary Circumstances, this Agreement, the Subregional Plan and the Take Authorizations shall define the nature and extent of the biological measures required or recommended by USFWS or CDFG to address the impacts to the Covered Species and their Habitats from SDG&E's Activities. Moreover, absent Extraordinary Circumstances, USFWS for federal lands will not condition any such consent on the implementation of mitigation measures in addition to that defined in this Agreement, the Subregional Plan and the Take Authorizations.

6.5 The Subregional Plan's protective and conservation measures are focused on the long-term preservation and conservation of Habitat. Habitat types are identified in Section 3 of the Subregional Plan. Impacts to Habitat types within the Subregional Plan Area as a result of SDG&E Activities are avoided whenever feasible, and where unavoidable are mitigated to the maximum extent practicable. The preservation of Habitat and other biological resources benefit and enhance the conservation of Covered Species. In the absence of Extraordinary Circumstances, in the event an uncovered species, subspecies, or population, whose range or Habitat falls within one or more of the identified Habitat-types becomes a Listed Species or Candidate Species, SDG&E may apply for an amendment to the Take Authorizations to allow Incidental Take of such species, subspecies, or population in connection with SDG&E's Activities. Upon receipt of an application for an amendment to the Take Authorizations, and following compliance with applicable public review procedures, USFWS and/or CDFG, upon a determination that all of the standards for issuance of Take Authorizations under ESA and CESA have been met, shall amend the Take Authorizations to allow Incidental Take of such species, subspecies or population.

6.6 (a) USFWS agrees to fully consider the protective, mitigation and conservation measures for species and their Habitat afforded by the Agreement, the Section 10(a) Permit, the Subregional Plan, and all other conservation efforts, such as all approved Conservation Agreements and Habitat Conservation Plans, in any future determinations or consultations USFWS may have concerning whether or not to list a species, subspecies or population as an endangered, threatened or as a candidate species pursuant to ESA, and whether or not to approve any application by SDG&E to amend the Take Authorizations to allow the Incidental Take of such species, subspecies or population as a Covered Species.

(b) To the fullest extent allowed by law, CDFG agrees to consider the protective, mitigation, and other conservation measures afforded to species and their Habitat under this Agreement, the Subregional Plan, the Management Authorization, any other relevant conservation efforts such as Habitat Conservation Plans or other conservation agreements, in any future CDFG determinations and recommendations regarding the listing of one or more uncovered species as endangered, threatened or candidate species under CESA, and whether or not to approve any application by SDG&E to amend the Take Authorizations to allow the Take of such species, subspecies or population as a Covered Species.

6.7 USFWS and CDFG shall exercise their best efforts to promptly provide SDG&E with notice of any proposed rule they publish pertaining to the listing of a species within the Subregional Plan Area.

(a) USFWS shall exercise its best efforts to provide SDG&E with prompt notice of any proposed rule published to list a Covered Species or an uncovered species as threatened or endangered species within the Subregional Plan Area. Where the proposed rule pertains to the listing under ESA of an uncovered species, and upon SDG&E's application therefore, USFWS shall exercise its best efforts to expeditiously, and contemporaneous with its determination of whether or not to list such species, consider the issuance of a Section 10(a) Permit amendment authorizing the Incidental Take of such species upon a finding that the Subregional Plan, this Agreement and the Section 10(a) Permit meet the protective, preservation and conservation requirements and standards of ESA to allow issuance of a Section 10(a) Permit. It is the intent of the Parties that any such amendment to the Section 10(a) Permit will occur simultaneously with any ultimate listing of such species.

(b) CDFG shall provide SDG&E with prompt notice of any proposed rule published to a list a species within the Subregional Plan Area. Where the proposed rule pertains to the listing under CESA of an uncovered species, and upon SDG&E's application therefore, CDFG shall expeditiously, and contemporaneous with its determination of whether or not to list such species, consider the issuance of a Management Authorization amendment

authorizing the Incidental Take of such species upon a finding that the Subregional Plan, this Agreement, the Management Authorization, together with all other conservation efforts (including but not limited to all approved Habitat Conservation Plans, meet the protective, preservation and conservation requirements and standards of CESA to maintain the survivability of such species. It is the intent of USFWS that any such amendment to the Section 10(a) Permit will occur simultaneously with any ultimate listing of such species.

6.8 In the event USFWS and/or CDFG propose to make a finding of Extraordinary Circumstances, such proposed finding, any additional protective, conservation or mitigation measures proposed by USFWS and/or CDFG for any Listed Species or Candidate Species and a statement of the facts underlying the proposed finding shall be submitted in writing to SDG&E at least sixty (60) days before such finding is to be made. Within 45 days after receipt thereof, SDG&E shall submit its response thereto identifying any rebuttal to the proposed finding and any alternative protective or mitigation measures or reasons why any protective or mitigation measures proposed by USFWS and/or CDFG are unnecessary. Promptly after USFWS' and CDFG's receipt of SDG&E's response to its notice of a proposed finding of Extraordinary Circumstances, USFWS and/or CDFG shall meet with SDG&E to discuss the same and approve or deny or approve in part and deny in part SDG&E's response thereto and/or its proposed alternative protective or mitigation measures.

6.9 Further, in the event of Extraordinary Circumstances, should USFWS and CDFG determine that adequate protective and conservation measures for any Covered Species do not exist, the imposition of any additional protective, mitigation or conservation measures deemed necessary for the preservation of any Listed or Candidate Species shall not include the requirement that SDG&E incur any additional cost of compliance, pay any additional compensation, or acquire any mitigation lands, apply to any land otherwise available for development by SDG&E, or modify the Conservation Bank or Mitigation Credit ratios as set forth in Paragraph 5.5 herein and in Section 7.4 of the Subregional Plan without SDG&E's written consent. USFWS and CDFG shall have the burden of establishing the occurrence of Extraordinary Circumstances and the need for any additional mitigation using the best scientific and commercial data available and reliable technical information regarding the status and Habitat requirements of the subject species, subspecies or population. In determining whether additional mitigation is necessary, the USFWS and CDFG will consider the existing protection, mitigation and conservation measures afforded the species, subspecies, or population through this Agreement, the Take Authorization, the Subregional Plan, and all other conservation plans, including any relevant Habitat Conservation Plans and Federal Habitat Management Plans.

6.11 In the event USFWS and/or CDFG may be required to or otherwise participate in any federal or state agency consultation or as a lead, responsible, trustee or coordinating agency in the evaluation of the potential environmental impacts of any proposed SDG&E Activity within the Subregional Plan Area, under NEPA, CEQA, or other law or regulations with the exception of consultations under Section 404 of the Clean Water Act with regard to impacts to wetland habitat and species, USFWS and CDFG will not require, recommend, or request the imposition of any additional or more stringent protective or mitigation measures directed at the protection or conservation of the Covered Species or their habitats than required in this Agreement, the Take Authorizations or the Subregional Plan, in the absence of Extraordinary Circumstances.

## 7. TERM.

7.1. The "Effective Date" of this Agreement shall be the later of 1) the date this Agreement is executed by all of the parties hereto and 2) the date(s) the Take Authorizations are issued. This Agreement shall be effective for an initial term of fifty-five (55) years; provided, however, that SDG&E may, at its election, terminate this Agreement after the twenty-fifth year and every ten years thereafter.

7.2 In contrast to other NCCP/HCPs, SDG&E will provide mitigation (other than Habitat Enhancement measures) to USFWS and CDFG upon the effective date of this Agreement, in return for which SDG&E will acquire Mitigation Credits as defined in Paragraph 5.5 hereof. In further contrast, to other NCCP/HCPs, SDG&E is a "public utility" whose activities are regulated by the CPUC. Local governments are precluded from regulating public utilities through their zoning laws, land use laws, ordinances and other police powers by the exclusive jurisdiction of the CPUC. The CPUC and other state agencies having concurrent jurisdiction with the CPUC, to the extent of their authority, (e.g. CDFG) regulate the operations of public utilities, which are a matter of statewide interest. Finally, the Subregional Plan, unlike many NCCP/HCPs does not depend on the creation of a multi-jurisdictional habitat preserve. Instead the Subregional Plan is premised upon the avoidance of impacts to Covered Species and their Habitat and provision of minimization and mitigation measures where such impacts are unavoidable. The implementation of the Subregional Plan is independent of other NCCP/HCPs and the Covered Species for which Incidental Take is authorized under the Take Authorizations is not dependent upon the implementation of such plans. In recognition of the distinctiveness of the SDG&E Subregional Plan, this Agreement may be terminated by SDG&E at any time, provided that any obligation to implement protective, mitigation, or conservation measures accrued prior to such termination for Activities conducted prior to such termination shall remain enforceable. In the event of SDG&E's termination of this Agreement, unused Mitigation Credits, if any, shall be useable by SDG&E, with the concurrence of USFWS and CDFG, to satisfy any appropriate mitigation requirement of

SDG&E resulting from impacts to Covered Species in accordance with the terms and conditions of the Conservation Bank agreement to be negotiated among the parties hereto pursuant to Paragraph 5.7 hereof.

7.3 USFWS and CDFG may suspend or revoke this Agreement in accordance with Paragraphs 10.3 and 10.4 of this Agreement.

7.4 A termination of this Agreement shall also terminate the Subregional Plan and the Take Authorizations.

## 8. FUNDING

8.1 Funding may be required for the performance of all impact avoidance, minimization and mitigation measures. Funding has been provided to ensure maintenance of the habitat values in the habitat lands underlying the creation of the Mitigation Credits in the Conservation Bank, pursuant to the Funding Agreement. However, only the performance of the Operational Protocols and Habitat enhancement, as described in Sections 7.1 and 7.2 of the Subregional Plan, will impose any significant funding requirements after the Effective Date. SDG&E's agreement to transfer funds to USFWS and CDFG as set forth in Paragraph 5.5 hereof and Section 7.4 of the Subregional Plan, pertaining to the creation of a Conservation Bank and Mitigation Credits, will be satisfied on the Effective Date. Similarly, SDG&E's agreement to provide easements for the protection of conservation values in respect of certain fee-owned rights of way as described in Paragraph 5.3 of this Agreement will be satisfied on the Effective Date. Consequently, no funding mechanism for prospective performance is required.

With respect to the Operational Protocols and Habitat enhancement, the nature and extent of their application is dependent upon the specific Activity being conducted. The Covered Species, Habitat and biological resources which may be impacted will vary from project to project. The costs of performing any appropriate avoidance, minimization or mitigation measure as prescribed in the Subregional Plan will properly be integrated within each project's design and budget. Application of the Operational Protocols and Habitat enhancement will necessarily involve an analysis of alternatives as discussed in Section 8 of the Subregional Plan when conducted in a Preserve Area. The costs of such measures over the term of this Subregional Plan cannot be ascertained with any degree of certainty. However, as each project arises and any appropriate measures are identified, such costs can be estimated. The inclusion of such costs as a part of capital or operation and maintenance projects budgets is a practice regularly approved by the CPUC.

SDG&E has served the San Diego area for over 114 years. The Company's evident stability is reflected in an A+ Standard & Poor's bond rating, and A1 bond rating by Moody's, and by the historical fact that SDG&E has not missed a dividend in 84 years. In 1994, SDG&E's operating revenues exceeded operating expenses by \$321,916,000. The fiscal health is such that SDG&E was able to declare a dividend of \$1.52 for each of its 116,484,000 shares of common stock for a 9.1% return on common equity. These figures, along with the Company's financial history provide adequate assurance that SDG&E has the fiscal soundness to fulfill its financial commitments with regard to the implementation of this Agreement and the Subregional Plan.

8.2 The USFWS shall include in its annual budget requests sufficient funds to fulfill its obligations under the Subregional Plan, this Agreement, and the Section 10(a) Permit.

8.3 The CDFG shall include in its annual budget requests sufficient funds to fulfill its obligations under the Subregional Plan, this Agreement, the Management Authorization.

## 9. MONITORING AND REPORTING

9.1 During the term of this Agreement, SDG&E will continuously monitor and maintain a written record of the amount and type of Habitat lands within the Subregional Plan Area impacted by its Activities, whether such impacts were within or outside Preserve Areas, and whether such impacts were "permanent" or "temporary."

9.2 SDG&E will prepare and submit to USFWS and CDFG by November 1 of each year, a single annual report describing (a) amount and type of impacted Habitat, (b) Activity causing the impact to Habitat, (c) amount of impacted Habitat within Preserve Areas, (d) and whether such Habitat impact was mitigated by Habitat enhancement techniques or Mitigation Credits.

9.3 Within thirty (30) days of receiving SDG&E's annual report USFWS and CDFG shall, in writing, approve the report as being in compliance with this Agreement, the Take Authorizations, and the Subregional Plan, or deny the same and identify the reasons therefore, and the required corrective action.

## 10. REMEDIES.

10.1 The parties to this Agreement shall have all remedies available to them at law or in equity to enforce, interpret, or declare their respective rights and obligations under the Agreement, the Subregional Plan and any Take Authorization issued to SDG&E by USFWS and/or CDFG under this Agreement. It is expressly understood by the parties

that monetary damages will not provide an adequate remedy for material breach of this Agreement. Therefore, the parties shall not be liable in monetary damages to any party or other person for any breach of this Agreement, in the performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement. Nothing in this Agreement shall be construed to permit or otherwise authorize any third party including, but not limited to, any management entity for any Habitat Conservation Plan, any owner of real property within the Subregional Plan Area or any Habitat Conservation Plan, or any other person to in any way enforce, interpret or seek, in law or in equity, the recovery of contract or to tort damages, declaratory relief, or injunctive relief or any other legal or equitable relief or remedy in respect of any Activity or otherwise concerning this Agreement, the Take Authorization, or the Subregional Plan.

10.2 Violations of ESA, CESA, NCCP, or NPPA occurring within the Subregional Plan Area caused by third parties which are not under the control of SDG&E and whose actions were not authorized by SDG&E shall not be deemed violations or Defaults by SDG&E of this Agreement, any of the Take Authorizations, or the Subregional Plan, and shall not be considered as a factor in any determination whether or not the Subregional Plan is properly functioning. USFWS and/or CDFG shall not require SDG&E to mitigate for any impacts to Covered Species or their Habitat caused by such third parties.

10.3 In the event of a material violation of this Agreement, the Subregional Plan, or of the Section 10(a) Permit for which SDG&E is responsible, and which USFWS believes is a valid ground for permit suspension, and except where, in the reasonable opinion of the USFWS and/or CDFG, the alleged violation involved imminent danger to a significant extent to uncovered species, USFWS shall provide SDG&E with written notice by certified or registered mail of its proposed suspension of the Section 10(a) Permit and of the nature and extent of the violation and of any required corrective measures to preserve the proper functioning of the Subregional Plan and maintain the Agreement and the Take Authorization in full force and effect, and of SDG&E's right to object to the proposed suspension. SDG&E shall have forty-five (45) days from the date of the notice of proposed suspension to file written objections, setting forth its response to such notice of suspension and/or to any of the required corrective measures. Such response shall set forth any factual or legal basis SDG&E may have for requesting that USFWS and/or CDFG, as appropriate, rescind all or any part of such notice of violation or to delete or modify any of the required corrective measures. If SDG&E timely responds and requests that USFWS and/or CDFG rescind all or any part of a notice of violation or its required corrective measures, within thirty (30) days of such response, USFWS and/or CDFG shall provide SDG&E with a written determination whether all or any part of such notice shall be rescinded or otherwise modified whether or not its required corrective measures will be modified or setting forth their basis for denying SDG&E's request.



If SDG&E fails to timely commence implementation of corrective measures or to diligently pursue the same within 15 days after USFWS issues its determination that such measures are required, USFWS may, in accordance with the procedures provided in 50 C.F.R. 13.27 and 13.28 take action to suspend or revoke the Section 10(a)(1)(B) Permit, subject to SDG&E's right to seek reconsideration and appeal of such determination pursuant to SO C.F.R. 13.29.

In the event USFWS suspends the Section 10(a) Permit USFWS shall, as soon as possible but no later than ten (10) days after such suspension, confer with SDG&E concerning how the violation 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. In making this determination USFWS shall consider the requirements of the ESA or regulations issued thereunder, the conservation needs of the Covered Species, the terms of the Section 10(a) Permit Agreement and any comments or recommendations received during the meet and confer process.

Upon full performance of such necessary actions, USFWS 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 or Management Authorization all Parties shall act expeditiously to cooperatively to reinstate the same.

USFWS agrees that it will not revoke or terminate the Section 10(a) Permit for violation of this Agreement, the Subregional Plan, or the Section 10(a) Permit unless USFWS has provided SDG&E with written notice of the violation, and of the required corrective action, and SDG&E has failed to take appropriate remedial action within the time periods provided in accordance with this section, or 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.

10.4 In the event a material violation of this Agreement, the Subregional Plan, or the Management Authorization occurs for which SDG&E is responsible, CDFG shall implement a procedure equivalent to that for USFWS detailed in Paragraph 10.3 hereof for providing notice of such violation and proposed suspension to SDG&E, SDG&E's right to respond thereto, CDFG's decision regarding the violation and suspension, SDG&E's right to seek reconsideration and appeal therefrom, permit suspension, and permit revocation, in respect of time and substance.

## 11. ENFORCEABILITY

11.1 USFWS, CDFG, and SDG&E agree that the Authorizations, Mitigation Measures,

and Assurances provisions set forth in Paragraphs 4, 5, and 6 and the other representations and agreements made elsewhere in this Agreement constitute valuable consideration to USFWS, CDFG and SDG&E and serve as mutual and material inducements for such parties to enter into this Agreement.

11.2 The Activities, for purposes of this Agreement, shall be governed by the terms and conditions of this Agreement, the Take Authorizations, and the Subregional Plan.

11.3 Except as may otherwise be required by law, while this Agreement is in effect, neither this Agreement, the Subregional Plan, the Take Authorizations, nor the Activities shall in any way be subject to any requirements, terms, conditions or restrictions of any Habitat Conservation Plan or other NCCP plan. Neither this Agreement, the Subregional Plan, nor the Take Authorizations shall be construed to expand or diminish the power of local government to regulate the affairs of SDG&E' Activities.

11.4 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, or otherwise carry out its obligations under the ESA or other federal law.

11.5 The Parties acknowledge that each of the 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.

11.6 Except as expressly provided herein, nothing herein shall be construed to waive any legal remedies available to USFWS and CDFG to enforce this Agreement, the Subregional Plan, and the Take Authorizations.

## 12. AMENDMENTS, MODIFICATIONS, EXCUSE OF PERFORMANCE, REVOCATION

12.1 Except as expressly set forth herein, the Parties may not amend or modify the terms and conditions of this Agreement except by (i) mutual agreement, or (ii) pursuant to Paragraph 6.8 hereof, in the event of Extraordinary Circumstances.

12.2 Except as provided in paragraph 7, this Agreement shall not be terminated except by mutual agreement of the Parties.

### 13. FORCE MAJEURE

13.1 Performance of the Parties under this Agreement may be excused as a result of Impossibility of Performance or Force Majeure such as Acts of God, acts of war, actions by third parties not under the direction or control of one or more of the Parties.

### 14. DISPUTE RESOLUTION

14.1 All disputes between USFWS, CDFG and SDG&E pertaining to the terms and conditions of this Agreement, any Take Authorizations issued hereunder, or the rights or duties of any party or parties hereunder, shall be resolved utilizing, in sequence, the successive methods described below, as necessary.

14.1.1 Except in cases involving Take Authorizations suspension or revocation, informal oral discussions and written correspondence between SDG&E and appropriate USFWS and CDFG staff members responsible for the implementation and enforcement of this Agreement.

14.1.2 Except in cases involving Take Authorizations suspension or revocation, formal meetings and written correspondence between SDG&E and USFWS and CDFG, together with a formal administrative resolution of the matter by USFWS or CDFG, with written notice to SDG&E of same.

14.1.3 For cases involving Section 10(a) Permit suspension or revocation or proposed suspension or revocation, the procedures set forth in 50 CFR Parts 13.27 and 13.28, respectively. Appeal of administrative action by a Party where necessary or appropriate pursuant to 50 CFR Part 13.29.

14.1.4 For cases involving CDFG suspension or revocation or proposed suspension or revocation of the Management Authorizations, administrative resolution of the matter with written notice to SDG&E.

14.1.5 Judicial review of administrative actions in question within the time frames permitted by controlling law.

### 15. APPLICABILITY OF SUPPORTING DOCUMENTATION

15.1 The NEPA/CEQA environmental documents prepared in conjunction with this

Agreement, along with this Agreement, the Subregional Plan, and the Take Authorizations will be included as part of the administrative record for both the USFWS and CDFG for purposes of resolving all disputes or litigation arising out of this Agreement or its implementation.

15.2 The USFWS and CDFG will rely on this Agreement together with all necessary supporting documentation, including but not limited to any NEPA/CEQA environmental documents or other environmental studies or documentation prepared or relied upon and approved for the implementation of this Agreement, to the maximum extent appropriate in all future federal and state agency consultations and permit applications made by SDG&E in respect of the Activities within the Subregional Plan Area.

#### 16. RESERVATION OF RIGHTS

SDG&E does not waive any rights it may have under ESA, CESA or NPPA to comment upon, object to, or petition for inclusion or removal of any species, subspecies or population as a Candidate Species or Listed Species under ESA, CESA or NPPA, or any Habitat designation in respect of the same.

#### 17. NOTICES

Any notices required or permitted under this Agreement shall be in writing and delivered personally or by certified/return receipt mail to the following parties, or as otherwise designated by any party in writing noticed to the remaining parties. Notices shall be deemed made to the addressee upon personal delivery or five (5) days after posting in the United States mail.

For USFWS:

Mr. Gail C. Kobetich  
Field Supervisor  
United States Fish & Wildlife Service  
2730 Loker Ave., West  
Carlsbad, CA 92008  
(619) 431-9440  
(619) 431-9618 (telecopier)

For CDFG:

Ron Rempel  
NCCP Program Manager  
California Department of Fish & Game  
1416 Ninth St.  
Sacramento, CA 95814  
(916) 653-9767  
(916) \_\_\_\_\_ (telecopier)

For SDG&E:

Mr. Don Rose  
Senior Land Planner  
Real Estate Operations  
San Diego Gas & Elec.  
101 Ash Street  
P.O. Box 1831  
San Diego, CA 92112-4150  
(619) 696-2409  
(619) 696-4795 (telecopier)

## 16. GOVERNING LAW

This Agreement shall be governed by the laws of the State of California and applicable federal law.

## 17. INTERPRETATION

This Agreement is to be the sole evidence and basis for interpretation of its terms and conditions except where the Agreement relies on the provisions of NCCP, ESA, or CESA.

## 18. INTEGRATION

This Agreement constitutes the full and complete agreement of the Parties and supersedes any and all prior or contemporaneous written or oral negotiations, correspondence, understandings and agreements between the Parties respecting the subject matter hereof. This Agreement includes and incorporates by reference the Subregional Plan, the Section 10(a)(1)(B) permit, the Management Authorization and the Funding Agreement between USFWS, CDFG and SDG&E. Except as expressly set forth herein, any supplement,

modification or amendment to this Agreement shall be executed in writing by all Parties. No waiver of any of the provisions of this Agreement shall constitute a waiver for any other provisions. No waiver shall be binding unless executed in writing by the party making the waiver.

#### 19. CONFLICT WITH SUBREGIONAL PLAN

The Subregional Plan and each of its terms are intended to be and by this reference are, incorporated herein. This Agreement is intended to specify, in contract language, the obligations of the parties under the Subregional Plan recognizing that the Subregional Plan is intended to set forth in a planning document the components of a conservation plan and was not drafted as a contract document. As a result, in the event of any direct contradiction, conflict or inconsistency between the terms of this Agreement and the Subregional Plan, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the Subregional Plan shall be interpreted to be supplementary to each other.

#### ATTORNEY 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 and/or California shall be governed by applicable federal or state law, as appropriate.

#### 19. COUNTERPARTS

This Agreement may be executed in multiple counterparts and each such executed counterpart shall be deemed an original, all of which together shall constitute a single executed Agreement.

#### 20. SEVERABILITY

The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render the remaining provisions unenforceable, invalid, or illegal.

#### 21. SUBREGIONAL PLAN IMPLEMENTATION

This Agreement, the Subregional Plan, and the Permits shall be fully effective upon the Effective Date, and shall not be conditioned upon any prior approval of any Habitat Conservation Plan or Federal Habitat Management Plan.

## 22. ASSIGNMENT

Subject to the written approval of USFWS and CDFG, SDG&E may assign its rights, interests and/or obligations under this Agreement, the Subregional Plan and any unused Mitigation Credits to any subsidiary, affiliated or successor entities created as a result of any corporate reorganization, merger, or acquisition or to any entity or person to which SDG&E may assign all or any part of its interest in any Facility or in performing any public utility Activities, as a part of any restructuring mandated or permitted by the California Public Utilities Commission and/or the Federal Energy Regulatory Commission, provided that the assignee assumes in writing those obligations of SDG&E under the Subregional Plan and this Agreement that pertain to the rights and interests assigned.

a) Assignment of any rights, interests and/or obligations under the Plan and Implementing Agreement shall not operate to release SDG&E from any obligations, responsibilities, liabilities, rights or duties under the Subregional Plan or this Agreement accruing prior to approval of the assignment by USFWS and CDFG.

b) Because under current FESA regulations, incidental take permits may not be assigned, assignment by SDG&E of all or a portion of its rights, interests and/or obligations under the Subregional Plan or this Agreement shall not operate to transfer any right to take incidentally any Covered Species in connection with Activities addressed by the Subregional Plan under the Section 10(a)(1)(B) permit. However, the assignee may obtain a new incidental take permit on the basis of the Subregional Plan and Implementing Agreement upon satisfaction of the following requirements:

- 1) approval by USFWS and CDFG of the assignment of all or a portion of SDG&E's rights, interests and /or obligations under the Subregional Plan and Implementing Agreement to the assignee;
- 2) the filing of an application for an incidental take permit by the assignee/applicant and compliance with then applicable regulatory review requirements by USFWS;
- 3) a determination by USFWS that the assignee/applicant is qualified under then existing regulations to hold a permit; and
- 4) a determination by USFWS that SDG&E is in full compliance with the permit issued to it.

When the assignee has satisfied each of the foregoing requirements, USFWS and CDFG shall use their best efforts to issue a new Section 10(a)(1)(B) permit and Management

Authorization, as appropriate, to the assignee/applicant within sixty (60) days of receipt of a complete application. Issuance of the new Section 10(a) Permit and Management Authorization to the assignee, in such an event, will be performed as a ministerial act. The USFWS and CDFG (assuming this applies to CDFG) shall not require any additional mitigation from the assignee/applicant as a condition of approving the permit.

### 23. THIRD PARTY BENEFICIARIES

None of the rights or benefits created by this Agreement shall incur or benefit any person other than the identified parties herein and their successors and assigns, nor shall it authorize any person who is not a party to this Agreement or a successor or assign of a party to seek enforcement of the terms of this Agreement. Notwithstanding the foregoing, this Agreement, the Subregional Plan and the Take Authorizations shall inure to the benefit of SDG&E's contractors, agents and representatives to the extent they are performing any of the Activities on behalf of, and under the control of, SDG&E.

### 24. CAPTIONS OR HEADINGS

The subject headings or captions of the sections of this Agreement are provided for convenience only and shall have no effect on the construction or interpretation of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement effective as of the last date set forth below.

Dated: DEC 18 1995, 1995.

UNITED STATES FISH AND  
WILDLIFE SERVICE, an  
agency of the United States  
Department of the Interior of the  
United States of  
America

By: 

Title: \_\_\_\_\_

JOHN H. DOE



Dated: \_\_\_\_\_, 1995

Approved As To Form

By: \_\_\_\_\_

Title: \_\_\_\_\_

Regional Solicitor for the United  
States Department of the Interior

Dated: 18 December, 1995

CALIFORNIA DEPARTMENT OF  
FISH AND GAME, a department of  
The Resources Agency of the State  
of California

By: [Signature]

Title: Deputy Director

Dated: 18 December, 1995

Approved As To Form

By: [Signature]

Title: General Counsel

Counsel for California Department  
of Fish and Game

Dated: \_\_\_\_\_, 1995

SAN DIEGO GAS & ELECTRIC

By: \_\_\_\_\_

Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 1995

Approved As To Form

By: \_\_\_\_\_

Title: \_\_\_\_\_

Regional Solicitor for the United  
States Department of the Interior

Dated: \_\_\_\_\_, 1995

CALIFORNIA DEPARTMENT OF  
FISH AND GAME, a department of  
The Resources Agency of the State  
of California

By: \_\_\_\_\_

Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 1995

Approved As To Form

By: \_\_\_\_\_

Title: \_\_\_\_\_

Counsel for California Department  
of Fish and Game

Dated: December 15, 1995

SAN DIEGO GAS & ELECTRIC

By:  \_\_\_\_\_

Title: Vice-President

Environmental and  
Regulatory Services

Dated: \_\_\_\_\_, 1995

Approved As To Form

By:  \_\_\_\_\_

Title: \_\_\_\_\_

Counsel for San Diego Gas &  
Electric Company

