

CITY OF LA MESA
MULTIPLE SPECIES CONSERVATION PROGRAM

IMPLEMENTING AGREEMENT

by and between

UNITED STATES FISH AND WILDLIFE SERVICE

CALIFORNIA DEPARTMENT OF FISH AND GAME

CITY OF LA MESA

September 10, 1999

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IMPLEMENTING AGREEMENT
by and between
UNITED STATES FISH AND WILDLIFE SERVICE
CALIFORNIA DEPARTMENT OF FISH AND GAME
CITY OF LA MESA

This Implementing Agreement ("Agreement") is entered into as of the _____ day of _____, 1999 by and among the UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), an Agency of the United States Department of the Interior, the CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG"), a Subdivision of the California Resources Agency, and the CITY OF LA MESA ("CITY"), hereinafter collectively called the "Parties."

AGREEMENT

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

1.0 RECITALS

1.1 The San Diego-area Multiple Species Conservation Program ("MSCP") describes a cooperative federal, state and local program of conservation for a number of "Covered Species" of plants and animals. The MSCP is a product of lengthy study and negotiation by the Parties and other interested persons and entities, and represents coordination of private development and conservation interests with federal, state and local governments.

1.2 The MSCP Plan Area is depicted on the map attached to this Agreement as Exhibit A. The MSCP Plan Area includes the territory of twelve general purpose agencies of government, listed in Exhibit B. These agencies are eligible to participate in the MSCP, and upon preparing a Subarea Plan and entering into an Implementing Agreement similar in form and content to this Agreement such agencies can become a "Participating Local Jurisdiction." Some regional public facility providers and special districts which operate within the MSCP Plan Area may also elect to participate in the MSCP. Upon entering into an Implementing Authorization agreement similar in form and content to this

Agreement, such entities will become a "Participating Special Entity."

1.3 A goal of the MSCP Plan is to conserve biodiversity in the MSCP Plan Area and to achieve certainty in the land development process for both private sector and public sector land development projects.

1.4 Pursuant to the federal Endangered Species Act ("ESA") and the California Endangered Species Act ("CESA"), the United States and the State of California, respectively, have identified certain plant and animal species which are or may be found in the MSCP Area and which, pursuant to ESA or CESA or other laws or programs, have been listed as threatened or endangered, have been proposed for listing as threatened or endangered, are candidates for listing as threatened or endangered, or which are otherwise of concern. Of such species, those which will be adequately conserved by the MSCP Plan when the MSCP Plan is fully implemented through Subarea Plans are referred to in the MSCP Plan and this Agreement as Covered Species. Those Covered Species which are adequately conserved by the Subarea Plan, and other Subarea Plans in effect within the MSCP Plan Area, are subject to the Take Authorization being granted pursuant to this Agreement and are referred to as Covered Species Subject to Incidental Take.

1.5 Future growth and land development within the MSCP Plan Area, consisting of both public and private projects, may result in a reduction of Covered Species habitat and/or the take of Covered Species incidental to the carrying out of otherwise lawful activities.

1.6 The City of La Mesa is participating in the development and implementation of the MSCP Plan to meet requirements under the ESA, the CESA, the Natural Community Conservation Planning Act of 1991 ("NCCP Act"), the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA") related to the potential obstacles to public and private development in the greater San Diego area posed by the project-by-project review under the ESA and CESA. Consistent with the NCCP Act, the MSCP is a broad-based planning effort intended to provide for protection and conservation of the region's wildlife and plant heritage while continuing to allow effective enforcement of public health and safety programs and appropriate development and growth. Such planning is an effective tool in protecting the region's biodiversity while reducing conflicts between protection of

wildlife and plants and the reasonable use of natural resources for economic development. The MSCP has been developed through a cooperative effort involving the USFWS, CDFG, local government agencies, property owners, development interests, environmental groups, and the public within the MSCP Area.

1.7 The MSCP Plan is a comprehensive, long-term habitat conservation plan for the Covered Species which addresses the needs of multiple species and the preservation of natural vegetation communities. The MSCP Plan addresses the potential impacts of urban growth, natural habitat loss and species endangerment and creates a plan to mitigate for the loss of Covered Species and their habitat due to the direct and indirect impacts of future development of both private and certain public lands within the MSCP Plan Area.

1.8 The MSCP Plan, as implemented through the CITY's Subarea Plan and this Agreement, establishes the conditions under which the CITY, for the benefit of itself and of public and private landowners and other land development project proponents within its jurisdictional boundaries, will receive from the USFWS and CDFG certain long-term Take Authorizations (and an acknowledgment that the MSCP Plan satisfies the conditions established in the Section 4(d) Special Rule for the coastal California gnatcatcher) which will allow the taking of certain Covered Species incidental to land development and other lawful land uses which are authorized by the CITY.

1.9 The Take Authorizations will authorize the Incidental Take of all Covered Species Subject to Incidental Take, including upon their listing, those Covered Species which are not presently listed as threatened, endangered or candidate species under the ESA or CESA. Conserving such unlisted Covered Species (the "taking" of which is not unlawful) the same as listed Covered Species (the taking of which is unlawful in the absence of a Take Authorization) equally in the MSCP, the Subarea Plan and this Agreement may prevent such species from ever being in danger of becoming extinct and will provide certainty regarding how the subsequent listing of such species under the ESA and CESA will affect permitting and mitigation requirements for future land development within the MSCP Plan Area.

1.10 Implementation of the MSCP Plan will allow the Participating Local Jurisdictions to maintain development flexibility by proactively planning a regional preserve system

which can meet future development project mitigation needs, while recognizing the independent land use planning and permitting authority of those entities.

1.11 Preservation of natural vegetation communities and wildlife will significantly enhance the quality of life in the San Diego region and lands set aside for the future use and enjoyment of the citizens within the MSCP Plan Area, the state, and the nation.

1.12 The MSCP Plan was submitted by the CITY to the USFWS and CDFG in support of, respectively, an application for a Section 10 (a) Permit and an NCCP Authorization. The CDFG has approved the MSCP, and the USFWS has issued written concurrence that the MSCP Plan meets the statutory criteria for issuance of a Section 10(a) Permit. The MSCP Plan will be implemented through individual Subarea Plans by having Participating Local Jurisdictions execute separate but coordinated agreements in a form substantially similar to this Agreement. Such agreements need not be executed at the same time. Instead, the USFWS and CDFG anticipate that implementation of the MSCP Plan will be phased in over time, through both the periodic addition of Participating Local Jurisdictions and Participating Special Entities, and the phased implementation of their respective MSCP-related obligations.

1.13 The purpose of this Agreement is to ensure the implementation of the MSCP and the City of La Mesa Subarea Plan by contractually binding each of the Parties to fulfill and faithfully perform the obligations, responsibilities, and tasks assigned to it pursuant to the terms of the MSCP, the Subarea Plan and this Agreement. This Agreement also provides remedies and recourse should any of the Parties fail to perform its obligations, responsibilities, and tasks as set forth in the MSCP, the Subarea Plan and this Agreement.

2.0 DEFINITIONS

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

2.1 "Additional Conservation Measures" means the conservation measures including those measures provided for under the Subarea Plan and this Agreement to respond to Changed Circumstances, which the USFWS and CDFG may seek from CITY under the circumstances described in Sections 9.4, 9.6 and 9.7 of this Agreement.

2.2 "Agreement" means this document.

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

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

2.5 "CESA" means the California Endangered Species Act (California Fish and Game Code § 2050 et. seq. including all regulations promulgated pursuant to that Act.

2.6 "NCCP Authorization" means any authorization issued in accordance with this agreement by CDFG under the NCCP Act to permit the Incidental Take of a species identified pursuant to section 2835.

2.7 "Covered Species" means those species within the MSCP Plan Area which will be sufficiently protected by the MSCP Plan when the MSCP Plan is implemented through the approved Subarea Plans. These species are listed in Exhibit C.

2.8 "Covered Species Subject to Incidental Take" means those Covered Species which are adequately conserved by the Subarea Plan and/or other approved Subarea Plans in the MSCP Plan Area, and which are therefore subject to Incidental Take under the Take Authorizations issued in conjunction with this Agreement. These species are listed in Exhibit D. As indicated in Section 23.2, additional covered species (from Exhibit C) may be added to the list of Covered Species Subject to Incidental Take (Exhibit D) after the Effective Date. Adequate conservation for certain Covered Species Subject to Incidental Take shall include the measures contained in the "findings" for those species in Table 3-5 of the MSCP Plan.

2.9 "Dependent upon" a particular vegetation community means that vegetation community provides the primary space for individuals of the species to feed, grow, reproduce, and/or undertake essential behavior patterns. A species is likely dependent upon a vegetation community if that vegetation community provides its primary source of food, nutrition, substrate, cover and/or shelter, including sites for breeding, reproduction, pollination, and rearing of offspring on a continual or seasonal basis. If a species is considered dependent upon a sufficiently or

significantly conserved vegetation community, as defined herein, then that vegetation community would provide the primary biological physical elements essential for the conservation of the species.

2.10 "Effective Date" means the date when all of the parties to this Agreement have signed this Agreement.

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

2.12 "Habitat Conservation Plan" and "HCP" mean the Multiple Species Conservation Program ("MSCP") and each Subarea Plan prepared pursuant to Section 10(a)(2)(A) of the ESA 1539(a)(2)(A)). The City of La Mesa Subarea Plan is dated February 1998.

2.13 "Incidental Take" means both the Take of a Covered Species incidental to and not the purpose of the carrying out of an otherwise lawful activity, as defined in the ESA, and its implementing regulations.

2.14 MBTA means the federal Migratory Bird Treaty Act (16 U.S.C. § 701 et seq.), including all regulations promulgated pursuant to that Act.

2.15 "Multi-Habitat Planning Area" or "MHPA" means the area within the MSCP Plan Area as described in Section 3.1.1 of the MSCP Plan within which preserve planning is focused and within which permanent conservation of habitat lands will be accomplished through implementation of the Subarea Plan.

2.16 "MSCP" means the Multiple Species Conservation Program Plan, a comprehensive habitat conservation planning program which addresses multiple species habitat needs and the preservation of native vegetation for an approximate 900-square mile area in southwestern San Diego County, California. The La Mesa Subarea Plan has been developed by the CITY to implement the MSCP within the CITY.

2.17 "MSCP Plan Area" consists of approximately 900 square miles in southwestern San Diego County, referred to in the MSCP Plan as the "MSCP Plan Study Area." The MSCP Plan Area is depicted on Exhibit A.

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

2.19 "Participating Local Jurisdiction" means any of the local governments identified in Exhibit B which implements a Subarea Plan and enters into an Implementing Agreement with the USFWS and CDFG. It is anticipated that such Implementing Agreement will be substantially similar in form to this Agreement.

2.20 "Participating Special Entity" means any regional public facility provider (such as a utility company) or special district which operates and/or owns land within the MSCP Plan Area and which enters into an Implementing Agreement with the USFWS and CDFG pursuant to and consistent with the MSCP Plan and which is substantially similar in form to this Agreement.

2.21 "Party" and "Parties" mean the signatories to this Agreement, namely the United States Fish and Wildlife Service, the California Department of Fish and Game, and the CITY.

2.22 "Permittee" means the CITY which has obtained a Section 10(a) Permit or a NCCP Authorization in conjunction with this Agreement.

2.23 "Section 4(d) Special Rule" means the regulation concerning the coastal California gnatcatcher, published by the USFWS on December 10, 1993 (58 Federal Register 65088) and codified at 50 C.F.R. §17.4 1 (b), which defines the conditions under which the Incidental Take of the coastal California gnatcatcher in the course of certain land use activities is lawful.

2.24 "Section 10(a) Permit" means the permit issued by the USFWS to the CITY under Section 10(a)(1)(B) of the ESA (16 U.S.C. §1539(a)(1)(B)) to allow the Incidental Take of Covered Species Subject to Incidental Take.

2.25 "Significantly Conserved Vegetation Communities" means those vegetation communities listed in Exhibit F and referred to in Section 4.2.4 of the MSCP Plan. For purposes of the MSCP and this agreement, the term "significantly conserved" is not meant to indicate the quantity or biological quality of the vegetation

community conserved but instead indicates that provision of additional measures needed to add a species to the list of Covered Species will be proportionately shared by the Parties as defined in the MSCP Plan Section 4.2.4 for those species dependent upon a vegetation community labeled "significantly conserved."

2.26 "Subarea" means the area encompassed by the Subarea Plan, as depicted in Exhibit E in which the Incidental Take of Covered Species Subject to Incidental Take is allowed by virtue of the Section 10(a) Permit and/or NCCP Authorization issued in accordance with this Agreement.

2.27 "Subarea Plan" means the plan as depicted in Exhibit E prepared by CITY and reviewed and approved by the USFWS and CDFG, to implement the MSCP within its jurisdictional boundaries pursuant to this Agreement.

2.28 "Sufficiently Conserved Vegetation Communities" means those vegetation communities listed in Exhibit F and described in Section 4.2.4 of the MSCP Plan. For purposes of the MSCP and this agreement, the term "sufficiently conserved" is not meant to indicate the quantity or biological quality of the vegetation community conserved but instead indicates that USFWS and CDFG will use all of their legal authorities to provide for those species dependent upon vegetation communities labeled "sufficiently conserved" as set forth in section 9.7 (C).

2.30 "Take" and "Taking" shall have the meanings provided by the ESA, and California Fish and Game Code Section 86.

2.31 "Take Authorization" means the Section 10(a) Permit and/or the NCCP Authorization.

2.32 "Third Party Beneficiary" means any landowner or other public or private entity that obtains and maintains Third Party Beneficiary status in compliance with Sections 10 and 17 of this Agreement.

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

3.0 HABITAT CONSERVATION PLAN/NCCP PLAN

3.1 As required by Section 10(a)(2)(A) of the ESA (1539(a)(2)(A)), a Habitat Conservation Plan known as the "Multiple

Species Conservation Program" or "MSCP" has been prepared. The MSCP in conjunction with the CITY's Subarea Plan also qualifies as an NCCP Plan under the NCCP Act. The MSCP proposes a program of conservation for the Covered Species and protection of their habitat in perpetuity through land use regulation, acquisition and management. The CITY has submitted the Subarea Plan to the USFWS and the CDFG and CITY has requested that the USFWS issue a Section 10(a) Permit and that the CDFG issue a NCCP Authorization, each of which actions will allow the Incidental Take within the Subarea of those Covered Species determined by USFWS and CDFG to be adequately conserved by the MSCP and the Subarea Plan in accordance with this Agreement. Such species are designated as Covered Species Subject to Incidental Take, and are listed in Exhibit D. CITY has also requested that the USFWS acknowledge that the MSCP and the Subarea Plan satisfy the conditions under the Section 4(d) Special Rule to allow the Incidental Take of the coastal California gnatcatcher within the Subarea.

3.2 The MSCP Plan, Subarea Plan, and the Biological Opinion on the Issuance of an Incidental Take Permit to the City of La Mesa under the Multiple Species Conservation Program for the La Mesa Subarea Plan (1-6-98-FW-10) and each of their provisions are intended to be and by this reference are incorporated herein. In the event of any direct contradiction, conflict or inconsistency between the terms of this Agreement and the MSCP Plan and the Subarea Plan, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the MSCP Plan and Subarea Plan shall be interpreted to be supplementary to each other.

4.0 PHASED IMPLEMENTATION

The MSCP Plan Area includes land within the jurisdictional boundaries of twelve local jurisdictions listed in Exhibit B. The USFWS and CDFG recognize and agree that the entire MSCP Plan will not be implemented simultaneously. Some local jurisdictions may be prepared to implement the MSCP Plan before others. Implementation of the MSCP Plan as a whole can and may be phased, with some local jurisdictions joining as Participating Local Jurisdictions (and some regional public facility providers and special districts joining as Participating Special Entities) earlier than others. Nevertheless, those local jurisdictions which become Participating Local Jurisdictions will receive Take Authorizations, and will obtain the benefits of and incur the obligations imposed by the Implementing Agreement which they sign, irrespective of whether

other local jurisdictions have also joined as and/or currently serve as a Participating Local Jurisdiction. The Take Authorization will cover only those Covered Species determined by USFWS and CDFG to be adequately covered by the Subarea Plan and other approved Subarea Plans, and such species will be referred to as Covered Species Subject to Incidental Take and will be specifically identified in each Implementing Agreement. The USFWS and CDFG also recognize and agree that the implementation of each Participating Local Jurisdiction's Subarea Plan will likewise be phased in over time in accordance with the schedule provided in each Implementing Agreement.

5.0 SEVERABILITY

The USFWS and CDFG recognize and agree that the Take Authorization received by Permittee pursuant to this Agreement is independent and severable from the other Take Authorizations which have been or will be issued to other Participating Local Jurisdictions or Participating Special Entities. Permittee's Take Authorization will remain effective so long as Permittee fulfills its obligations under this Agreement to implement the MSCP Plan through the Subarea Plan, including its obligation under Section 9.19 to enforce the terms of this Agreement as to itself and to all Third Party Beneficiaries, who will receive Incidental Take authorization through Permittee's Take Authorization. Permittee's Take Authorization may not be suspended, revoked or terminated against its will due solely to the actions or inactions of any other person or entity, including the other local jurisdictions identified in Exhibit B (whether or not they have become Participating Local Jurisdictions). However, if the inclusion of a species on the List of Covered Species Subject to Incidental Take either before or after the Effective Date (pursuant to Section 23.2 of this Agreement) is dependent, in whole or in part, upon the implementation of any other MSCP Subarea Plan(s), and the Participating Local Jurisdiction(s) associated with such Subarea Plan(s) terminates its participation in the MSCP or fails to implement its Subarea Plan, then the removal of such added species from the List of Covered Species Subject to Incidental Take may be required.

6.0 LEGAL AUTHORITY OF THE USFWS

The USFWS enters into this Agreement pursuant to the ESA, the Fish and Wildlife Coordination Act (16 U.S.C. §661 - 666), and the Fish and Wildlife Act of 1956 (16 U.S.C. §742(f) et seq.). Section

10(a)(1)(B) of the ESA, 16 U.S.C. §1539(a)(1)(B), expressly authorizes the USFWS to issue a Section 10(a) Permit to allow the Incidental Take of species listed as threatened or endangered under the ESA. The legislative history of Section 10(a)(1)(B) clearly indicates that Congress also contemplated that the USFWS would approve Habitat Conservation Plans that protect unlisted species as if they were listed under the ESA, and that in doing so the USFWS would provide Section 10(a)(1)(B) assurances for such unlisted species. The relevant excerpt from such legislative history states as follows:

The Committee intends that the Secretary [of the Interior] may utilize this provision [on habitat conservation plans] to approve conservation plans-which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that other mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no other mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act. It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances.

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

The USFWS's Habitat Conservation Plan Assurances ("No Surprises") rule implements the intent of Congress regarding both listed and unlisted species. Under the No Surprises rule, if Subregional and Subarea HCPs (such as the MSCP Plan and a Participating Jurisdiction's Subarea Plan), as implemented, protect identified unlisted species as if they were listed, the USFWS will not seek additional mitigation that requires the expenditure of

money or land set asides from the Permittee or Third Party Beneficiaries. The No Surprises rule is codified at 50 C.F.R. §§ 17.3, 17.22(b)(5) and 17.32(b)(5).

7.0 LEGAL AUTHORITY OF THE CDFG

The CDFG enters into this Agreement pursuant to its authority under the NCCP Act. The NCCP Act was enacted in 1991 to encourage collaborative, regional, multi-species habitat protection planning. The NCCP Act provides for the development of plans that identify and provide for the regional or area-wide protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development. NCCP Act plans may be undertaken by local, state, and federal agencies independently or in cooperation with other persons. CDFG is authorized to permit the taking of any identified species whose conservation and management is provided for in a CDFG approved NCCP Act plan.

8.0 SATISFACTION OF LEGAL REQUIREMENTS

In order to fulfill the legal requirements that will allow the USFWS to issue the Section 10(a) Permit, an HCP must provide measures that will ensure the following:

- A. Any Take occurring within the Subarea will be incidental;
- B. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- C. That adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided; and
- D. That the Incidental Take will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild.

The USFWS has found that the MSCP and the Subarea Plan as implemented pursuant to this Agreement do provide such measures, and has issued such findings in support of the granting of the Section 10(a) Permit authorizing the Incidental Take of Covered Species Subject to Incidental Take.

The CDFG has found that the Subarea Plan as implemented pursuant to this Agreement satisfies the legal requirements

necessary for the CDFG to issue a NCCP Authorization authorizing the Incidental Take of Covered Species Subject to Incidental Take, and to provide certainty in the form of specific assurances contained in this Agreement.

9.0 MUTUAL ASSURANCES

9.1 Purpose. The primary purpose of this Agreement is to set forth the agreements and understandings of the Parties as to their respective obligations in carrying out the MSCP and Subarea Plan. Based on and in consideration of this Agreement, the MSCP, and the Subarea Plan and subject to applicable law and regulations, the USFWS and CDFG hereby provide assurances to CITY and Third Party Beneficiaries with regard to the following provisions contained in this Section 9.0. In return, CITY hereby provides assurances to the USFWS and CDFG with regard to the following provisions contained in this Section 9.0.

9.2 Compliance with Applicable Laws. Compliance with the terms of this Agreement, the MSCP, the Subarea Plan, and the Take Authorizations and compliance with the land use regulation, mitigation, compensation and habitat management obligations contained in this Agreement and/or imposed by CITY on proponents of land development projects within the Subarea in accordance with the MSCP, the Subarea Plan, this Agreement the Take Authorizations, and governing federal and state regulations, including 50 C.F.R. Parts 13 and 17 and 14 C.C.R. sections 783.0-783.8 constitute compliance with the Incidental Take and related provisions of the ESA, the CESA, the NCCP Act, and the California Native Plant Protection Act (Cal. Fish & G. Code, § 1900 et seq.).

9.3 Conservation of Covered Species. Implementation of the MSCP through the Subarea Plan in accordance with this Agreement and the Take Authorizations should adequately provide for the conservation and protection of the Covered Species Subject to Incidental Take and their habitat in the Subarea in perpetuity. This conclusion is based on the biological analyses performed by the USFWS and the CDFG of the species evaluated by the MSCP Plan, and their resulting determination of which of those species are adequately protected so as to qualify as Covered Species and Covered Species Subject to Incidental Take.

9.4 No Additional Land or Money Required by USFWS. Provided the CITY has complied with its obligations under the Subarea Plan, MSCP, this Agreement and the Take Authorizations, USFWS may require

the CITY to provide mitigation for the Covered Species beyond that provided for in the MSCP, Subarea Plan, and this agreement including those measures provided for under the Subarea Plan to respond to Changed Circumstances, only under Unforeseen Circumstances and only in accordance with the No Surprises rule codified at 50 C.F.R. § 17.3, 17.22(b)(5) and 17.32(b)(5).

9.5 No Additional Land or Money Required by CDFG. CDFG has not adopted a regulation analogous to the federal No Surprises rule. However, the non-regulatory "Natural Community Conservation Planning General Process Guidelines," adopted by CDFG pursuant to Fish and Game Code Section 2825 on January 22, 1998, state as follows:

An NCCP may include, in both the plan and in a separate implementing agreement, assurances that provide for the long-term reconciliation of new land development in the planning area and the conservation and protection of species and natural communities identified in the plan. Departmental assurances will be determined for individual plans according to the level of conservation each plan affords. If warranted, the Department of Fish and Game will provide its assurance that the NCCP provides measures sufficient to conserve the species addressed in the plan and that no further land dedications, land use restrictions, water use commitments, or financial compensation will be required by the Department of plan participants, except in defined extraordinary circumstances.

In accordance with this provision, CDFG has determined, based on the MSCP, the Subarea Plan and this Agreement, that assurances to the City regarding additional mitigation are warranted. For so long as the City implements and adheres to the MSCP, the Subarea Plan, the NCCP Authorization and this Agreement, CDFG shall not impose or seek to impose on the City or Third Party Beneficiaries any additional mitigation or compensation for impacts to Covered Species beyond that provided for in the MSCP and Subarea Plan, including measures provided in the MSCP and Subarea Plan to address Changed Circumstances, unless CDFG determines that the continuation of activities authorized under the NCCP Authorization, the Subarea Plan or this Agreement would jeopardize the continued existence of a Covered Species. If CDFG makes such a determination, it shall require only such additional mitigation or compensation necessary to avoid jeopardy.

9.6 Unforeseen and Changed Circumstances.

A. Definition. The term "Unforeseen Circumstances" shall mean a change in circumstances affecting a Species or the geographic area covered by the MSCP and Subarea Plan that could not reasonably have been anticipated by the CITY and the USFWS at the time the MSCP and Subarea Plan were negotiated and developed and which results in a substantial and adverse change in the status of a Covered Species.

B. Relevant Factors. In deciding whether Unforeseen Circumstances exist which might warrant requiring Additional Conservation Measures, the USFWS shall consider, but not be limited to, the following factors:

1. The size of the current range of the affected Covered species;
2. The percentage of range adversely affected by the MSCP and Subarea Plan;
3. The percentage of range conserved by the MSCP and Subarea Plan;
4. The ecological significance of that portion of the range affected by the MSCP and Subarea Plan;
5. The level of knowledge about the affected Covered species and the degree of specificity of the species' conservation program under the MSCP and Subarea Plan; and
6. Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected Covered species in the wild.

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

of Extraordinary Circumstances must be made by the Director or Regional Director of the USFWS after consideration of all information submitted by the CITY in accordance with paragraph D below.

D. Advance Notice. Except where there is a substantial threat of imminent, significant adverse impact to a Covered Species, the USFWS shall provide the CITY at least sixty (60) days advance written notice of a proposed finding of Unforeseen Circumstances, the specific facts that may constitute Unforeseen Circumstances, and the evaluation of the factors described in Section 9.6.B of this Agreement; during which time the USFWS shall meet with the CITY to discuss the proposed finding and to provide the CITY with an opportunity to submit information to rebut the proposed finding. Only where the USFWS concludes, following consultation with the CITY, that existing measures available under the MSCP and Subarea Plan cannot adequately address the situation and that Additional Conservation Measures are necessary shall the USFWS proceed to finalize a finding of Unforeseen Circumstances. Where advance notice need not be given in accordance with this paragraph, the USFWS shall consider any additional information submitted by the CITY after a finding of Unforeseen Circumstances and shall issue a written response to the information within 120 days of its receipt.

E. Limits on Additional Conservation Measures. If the USFWS makes a finding of Unforeseen Circumstances in accordance with the procedures described above, and determines that Additional Conservation Measures are warranted, such Additional Conservation Measures shall maintain to the maximum extent possible the original terms of the MSCP and Subarea Plan. Additional Conservation Measures shall be limited to modifications of CITY'S preserve management program or habitat acquisition program as set forth in the Subarea Plan and this Agreement, and shall not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land or other natural resources otherwise available for development or use under the original terms of Subarea Plan, this Agreement and the USFWS Section 10 Permit without the CITY and any affected Third Party Beneficiary's consent.

F. Other Rights and Authorities Not Affected. Nothing in this Section shall be construed to limit the USFWS, any Federal, State, local or Tribal Government entity, or a private party from taking additional actions at its own expense to protect

or conserve any Covered Species or from taking other regulatory action authorized under the ESA or its implementing regulations, including 50 C.F.R. Parts 13 and 17, to avoid jeopardy to the Covered Species. The USFWS retains the right, as authorized under Section 5 of the ESA, 16 U.S.C. §1534 to purchase habitat within the MSCP Plan Area to conserve Covered Species or any other species of concern.

G. Interim Obligations Upon a Finding of Unforeseen Circumstances. If the USFWS makes a finding of Unforeseen Circumstances, during the period necessary to determine the nature and location of any appropriate Additional Conservation Measures, the CITY will avoid contributing to appreciably reducing the likelihood of survival and recovery of the affected species.

H. Changed Circumstances. The CITY and USFWS agree that the listing of a species under the ESA that is not a Covered Species is a Changed Circumstance. In the event that a non-covered species that may be affected by the Covered Activities becomes listed under the ESA, the CITY will implement the "no take/no jeopardy" measures identified by the USFWS until the Section 10(a) permit is amended to include such species, or until USFWS notifies the CITY that such measures are no longer needed to avoid the likelihood of jeopardy to, take of, or adverse modification of any designated critical habitat of, the non-covered species. The CITY, and USFWS agree that other Changed Circumstances, including fire, drought, insect infestation, flood, etc. and other natural catastrophes that are reasonably foreseeable in the MSCP area, will be addressed under the Subarea Plan through on going biological monitoring and adaptive management as described in the MSCP Plan, for areas required to be conserved under the MSCP and Subarea Plan. The CITY shall ensure that the designated land manager shall meet and confer with the USFWS and CDFG regarding any Changed Circumstances event (fire, flood, drought, and insect infestation) which occurs on any mitigation lands resulting from implementation of the Subarea Plan. The outcome of the conference, taking into consideration information obtained from the biological monitoring and adaptive management, shall be the development and implementation of appropriate measures to minimize, to the extent practicable, significant adverse impacts on Covered Species resulting from the Changed Circumstance event.

9.7 Future Listings.

A. Consideration of the MSCP and Similar Plans. To the extent required and permitted by the ESA, the CESA and the NCCP Act, the USFWS and CDFG shall take into account the species and habitat conservation provided under the MSCP, the Subarea Plan, this Agreement, and the species and habitat conservation provided through all other existing conservation efforts (including, but not limited to, other plans approved under the ESA, CESA, or NCCP Act, and any relevant Conservation Agreements), as well as all information and data developed in the course of these efforts which is made available to them, in any future determinations, and in any future recommendations from the CDFG to the California Fish and Game Commission, concerning the potential listing as threatened or endangered of any Covered Species or any other species which is not so listed as of the Effective Date.

B. Covered Species. If a Covered Species Subject to Incidental Take is not listed as threatened or endangered under the ESA as of the Effective Date, and becomes so listed during the term of this Agreement, then the Section 10(a) Permit shall become effective with respect to such species concurrent with its listing as threatened or endangered. If a Covered Species Subject to Incidental Take is not listed as threatened or endangered under the CESA as of the Effective Date, and becomes so listed during the term of this Agreement or becomes accepted by the California Fish and Game Commission as a candidate for such listing, then the NCCP Authorization shall become effective with respect to such species concurrent with its listing as threatened or endangered or its acceptance by the California Fish and Game Commission as a candidate for such listing.

C. Non-Covered Species. If a species which is not a Covered Species is subsequently proposed for listing as threatened or endangered under the ESA or CESA or is accepted by the California Fish and Game Commission as a candidate for listing after the Effective Date, and it is determined by the USFWS or CDFG based on reliable scientific evidence that such species occupies the Subarea Plan Area, the USFWS and CDFG (1) will work with the CITY to identify the conservation measures within six months, if any, which are necessary to adequately protect the species, and (2) determine whether such conservation measures are beyond those prescribed by the MSCP. Although such conservation measures may be identified after such species is proposed for listing, the CITY may choose not to approve and implement such measures until the species is actually listed. Upon application by the CITY which meets the requirements of the ESA, and the NCCP Act, and following compliance

with applicable procedures, Incidental Take of a non-covered, listed species shall be authorized when permit is amended.

1. Adequate Conservation Measures Already in MSCP.

If the USFWS and CDFG determine that the conservation measures already contained in the MSCP, as implemented through this Subarea Plan and other approved Subarea Plans, are adequate to fulfill the conservation measures identified pursuant to subsection C above, ~~then upon application by the CITY for Take Authorization for such~~ species and following satisfaction of applicable review procedures as required by the ESA, and the NCCP Act, the Parties will amend this Agreement to add such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take, and the USFWS and CDFG shall issue Take Authorizations for such species, effective for the remaining term of this Agreement.

2. Inadequate Conservation Measures in the MSCP.

a. Additional Conservation Measures Priorities. If the USFWS and CDFG determine that the conservation measures already contained in the MSCP, as implemented through this Subarea Plan, and this Agreement, and other approved Subarea Plans do not adequately fulfill the conservation measures identified pursuant to subsection C above, then the USFWS and CDFG will work with CITY and other Participating Local Jurisdictions to identify and jointly implement any Additional Conservation Measures identified as being necessary to add such species to the list of Covered Species and to the list of Covered Species Subject to Incidental Take. Such Additional Conservation Measures are not subject to or limited by the No Surprises Assurances provided in Section 9.6.E applicable to Covered Species. In developing a set of Additional Conservation Measures, the parties will look to the following, in order of preference:

(i) Habitat management practices and enhancement opportunities within the MHPA, using existing management resources, provided the redirection of such resources does not adversely affect any Covered Species.

(ii) Habitat acquisition through the reallocation of federal, state and/or regional funds identified for MSCP implementation, provided such reallocation does not adversely affect any Covered Species.

b. Developing Additional Conservation Measures. If the foregoing options are not adequate to fulfill the conservation measures identified pursuant to subsection C above, then the USFWS and CDFG will work with the CITY to identify, consistent with the ESA, and the NCCP Act, the Additional Conservation Measures necessary to add such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take, including measures beyond those required by the MSCP. Preference will be given by the USFWS and CDFG to Additional Conservation Measures that do not require additional mitigation or dedications of land. Although the Additional Conservation Measures necessary to add such species to the list of Covered Species may be identified at or after the species is proposed for listing, CITY will not be required to approve or implement these Additional Conservation Measures until such time as the permit is amended.

c. Significantly Conserved Vegetation Communities. If any species described in subsection C.2.a, above, is dependent upon a Significantly Conserved Vegetation Community, and if the subarea plans for the City of San Diego, County of San Diego, City of Poway, City of Chula Vista, City of Santee, City of Del Mar, City of El Cajon, and the City of La Mesa have been approved by USFWS & CDFG and are being implemented, then the USFWS and CDFG will, subject to the availability of appropriated funds, contribute in partnership to the same extent committed within the MSCP for Covered Species, with the CITY toward the land acquisition, management, and monitoring required to achieve the level of conservation necessary, within the Significantly Conserved Vegetation Communities, for such species to be added to the list of Covered Species and the list of Covered Species Subject to Incidental Take once such species becomes listed under the ESA and/or CESA. The commitment of the USFWS and CDFG to contribute their proportionate share(s) to the conservation of the species shall be contingent on the CITY's commitment of its proportionate share. In addition, if the USFWS or CDFG fail to provide their proportionate contributory share(s), neither the CITY nor Third Party Beneficiaries will be obligated to provide the USFWS and/or CDFG share(s), in which case the species would not be added to the list of Covered Species or the list of Covered Species Subject to Incidental Take.

d. Sufficiently Conserved Vegetation Communities. If any species described in subsection C.2.a, above, is dependent upon Sufficiently Conserved Vegetation Community, and if subarea plans for the City of San Diego, County of San Diego,

City of Poway, City of Chula Vista, City of Santee, City of Del Mar, City of El Cajon, and the City of La Mesa have been approved by USFWS and CDFG and are being implemented, then the USFWS and CDFG will use all of their legal authorities to provide for the conservation and management, maintenance and monitoring of the habitat of such species, within the Sufficiently Conserved Vegetation Communities, sufficient to enable the addition of such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take, and to enable the issuance of Take Authorizations for such species in the event they become listed under the ESA or CESA. For purposes of this paragraph, steps within the legal authority of USFWS include, but are not limited to, USFWS-funded habitat acquisition, USFWS-funded species relocation, and land exchanges to secure necessary habitat. For purposes of this paragraph, steps within the legal authority of CDFG include, but are not limited to, CDFG-funded acquisition, CDFG-funded species management and CDFG-funded species relocation. Consequently, the CITY shall not be required, without its consent, to provide any conservation or management, maintenance and monitoring for such species beyond that provided in the MSCP and the Subarea Plan or for the purpose of adding such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take.

e. Applicability of Significantly and Sufficiently Conserved Vegetation Communities Assurances. The assurances provided under subsections c and d, above are not applicable to the Pacific pocket mouse, Orcutt's spineflower, Mexican flannelbush, and Quino checkerspot butterfly as currently listed species, and shall not apply to evaluated species identified in Table 3-5 of the MSCP Plan which are not Covered Species and which are not dependent on Significantly or Sufficiently Conserved Vegetation Communities. Those species are:

Dean's milk vetch	<i>Astragalus deanei</i>
Mission Canyon bluecup	<i>Githopsis diffusa</i> ssp. <i>Filicaulis</i>
Tecate tarplant	<i>Hemizonia floribunda</i>
Little mousetail	<i>Myosurus minimus</i> ssp. <i>Apus</i>
Hermes copper butterfly	<i>Lycaena thornei</i>
Grasshopper sparrow	<i>Ammodramus savannarum</i>

3. Application for Take Authorization. The CITY makes no representation or commitment to pursue a Section 10(a)

Permit from the USFWS or a NCCP Authorization from the CDFG for any non-covered species, and in the absence of any such Take Authorization, the CITY shall comply with Section 9.6.H. The USFWS and CDFG shall process any applications which may be submitted for Take Authorization for a species in accordance with the requirements of the ESA, CESA and/or NCCP Act.

9.8 Other Regulatory Permitting

A. Other Permits. The Parties acknowledge that proponents of land development projects in the Subarea may be subject to permit requirements of agencies not parties to this Agreement, and to separate permit requirements which may be imposed by the USFWS and CDFG, such as under Fish and Game Code sections 1601 and 1603. Except as provided in Section 9.4 ("No Additional Land or Money Required"), Section 9.6 ("Unforeseen and Changed Circumstances"), Section 15.3 ("Failure to Provide State or Federal Contribution"), and this paragraph, compliance with the terms of this Agreement, the MSCP and the Subarea Plan, the federal policy of "no net loss" of wetland functions and values, and the United States Environmental Protection Agency's Section 404(b)(1) guidelines (40 C.F.R., Part 230) shall constitute the full extent of mitigation measures directed specifically at the Incidental Take of Covered Species Subject to Incidental Take required or recommended by the USFWS pursuant to the ESA and NEPA, and by the CDFG pursuant to CESA, the NCCP Act, and CEQA, in conjunction with other federal and state permits within the Subarea.

B. Migratory Bird Treaty Act. The Section 10(a) Permit issued pursuant to this Agreement also constitutes a Special Purpose Permit under 50 C.F.R. § 21.27 for the Take of those Covered Species Subject to Incidental Take which are listed as threatened or endangered under the ESA and which are also protected by the Migratory Bird Treaty Act, except for the Bald Eagle. The Take of such species in conjunction with any public or private land development project authorized and approved by CITY in accordance with this Agreement will not be in violation of the MBTA. Such Special Purpose Permit shall be valid for a period of three years from the Effective Date, provided the Section 10(a) Permit remains in effect for such period. Such Special Purpose Permit shall be renewed, provided that CITY continues to fulfill its obligations under this Agreement. Each such renewal shall be valid for the maximum period of time allowed by 50 Code of Federal Regulation section 21.27 or its successor at the time of renewal.

C. Future Environmental Documentation. In issuing any permits or other approvals pertaining to land development activities within the CITY for any Covered Species Subject to Incidental Take, and absent a finding of Unforeseen Circumstances under Section 9.6 of this Agreement, and subject to any requirements of NEPA or CEQA, the USFWS shall rely on and shall utilize the EIR/EIS prepared in conjunction with the MSCP and the Environmental Assessment for the Subarea Plan as the NEPA environmental document for such permits and approvals and for any other approval process subject to its jurisdiction or involvement with regard to potential impacts on Covered Species Subject to Incidental Take. CDFG shall rely on and shall utilize the EIR/EIS prepared in conjunction with the MSCP and the Negative Declaration for the Subarea Plan as appropriate CEQA documentation for any future approvals regarding potential impacts to Covered Species Subject to Incidental Take related to land development activities within the Subarea.

9.9 Federal and State Contributions. The USFWS and CDFG shall apply their reasonable efforts to contribute public lands and funds to the acquisition and management, maintenance and monitoring of habitat lands within the MHPA. Habitat land acquired within the MHPA through such means shall not be counted as mitigation for any public or private project. To the maximum extent appropriate after considering the location of the impacts, the USFWS and CDFG shall direct that the acquisition of land acquired for offsite mitigation of federal and state projects within the MSCP Plan Area, and lands banked for such projects, be located within the MHPA.

9.10 Public Facility Provider and Special Districts. The Parties shall cooperate to encourage regional public facility providers, and local special districts such as water districts and sewer districts, to become Participating Special Entities. However, the Parties acknowledge that regional public facility providers and special districts may apply for Take Authorizations from the USFWS and CDFG separate and apart from the MSCP.

9.11 Special Rules Under Section 4(d). In the event that the USFWS promulgates a new special rule for a Covered Species pursuant to Section 4(d) of the ESA (16 U.S.C. § 1533(d), as implemented by 50 C.F.R. § 17.31(c)), the USFWS shall consider the MSCP in developing the special rule, and shall ensure that the special rule will not affect the validity or alter the terms of any Take Authorization for Covered Species issued in accordance with an approved Subarea Plan.

9.12 Mitigation Guidelines. The CITY will establish and implement mitigation guidelines as directed in Section 6 of the Subarea Plan to be applied to all new land development within the Subarea, with the exception of development affecting wetlands which are separately regulated by Section 404 of the federal Clean Water Act, 33 U.S.C. § 1344. These mitigation guidelines (in draft form) titled "City of La Mesa Environmental Significance and Mitigation Guidelines" are attached as Exhibit I, and may be modified with the concurrence of USFWS and CDFG without the need to amend this Agreement. The CITY will insure a public process for implementing changes to the guidelines.

9.13 Contribution of Excess Mitigation. Lands contributed to the MHPA preserve system by public or private owners in excess of the mitigation requirements established by the CITY in accordance with Section 10 of the Agreement may count as "banked mitigation" which can later be used to provide mitigation for future developments projects within the MSCP Plan Area, provided USFWS and CDFG concur in writing that any such mitigation bank is consistent with applicable USFWS and CDFG mitigation banking policies.

9.14 Prior Dedications of Public Open Space. Except as specifically provided in Section 10.0 of this Agreement, public lands located within the MHPA as of the Effective Date will not qualify as "banked mitigation" for future land development.

9.15 Habitat Conservation Measures. Habitat conservation measures, provided for in the Subarea Plan, including habitat management within the MHPA, shall be consistent with the MSCP Plan and shall be implemented through the policies and local regulations established by the CITY pursuant to Section 10.0 of this Agreement. Such policies and local regulations may differ between the CITY and other Participating Local Jurisdictions, and between different MHPA habitat types within the Subarea.

9.16 Growth Inducing Impacts. Once the CITY or a Third Party Beneficiary has satisfied the mitigation requirements (established in accordance with Section 10.0 of this Agreement) applicable to a public infrastructure project which the CITY itself proposes to construct or to a private land development project, the CITY or a Third Party Beneficiary shall not be required to provide any additional mitigation for any growth inducing impacts such project may have on any Covered Species Subject to Incidental Take.

9.17 Previously Approved Projects. Prior to the Effective Date, the CITY has given discretionary approval to two land

development projects, Eastridge Specific Plan and Tentative Tract Map 90-02, as identified in Exhibit G. The Parties agree that these two projects are consistent with the MSCP Plan and Subarea Plan and shall be authorized to incidentally take and do not need further approvals from the Parties for purposes of incidental take of Covered Species Subject to Incidental Take upon issuance by the CITY of a Certificate of Participation which commits the project proponents to fulfill the mitigation obligations already imposed by the CITY as described in the Subarea Plan and in this Implementing Agreement. It is further agreed that the landowner project proponents identified in Exhibit G shall be treated as Third Party Beneficiaries pursuant to this Agreement for so long as such proponents continue to meet the criteria established in Section 17.B.. All public and private land development projects within the Subarea, except those specifically identified in Exhibit G, shall be evaluated and acted upon by the CITY pursuant to and in accordance with this Agreement, the Subarea Plan and the Take Authorizations issued pursuant to this Agreement.

9.18 Critical Habitat. The USFWS agrees that it will consider the MSCP and Subarea Plan in its preparation of any proposed designation of critical habitat concerning any Covered Species, and further agrees that consistent with 50 C.F.R. sec. 424.12, the MSCP as implemented through approved subarea plans incorporates special management considerations necessary to manage the Covered species in a manner that will provide for the conservation of the species within the MSCP Area. Except as otherwise provided in this Agreement or required by law, and consistent with the assurances provided under Section 9 of this Agreement, the USFWS agrees that if critical habitat is designated for any Covered Species Subject to Incidental Take and if the Subarea Plan (and any other subarea plans the approval of which enabled the Take Authorizations to apply to such species) is being properly implemented then the USFWS shall not require through the ESA Section 7 (16 U.S.C. § 1536) consultation process that the CITY or Third Party Beneficiaries commit additional land, additional land restrictions, or additional financial compensation beyond that provided pursuant to this Agreement.

9.19 Duty to Enforce. The CITY agrees to take all actions within its legal authority to enforce the terms of the Take Authorizations, the Subarea Plan, and this Agreement as to itself and to all persons or entities subject to the requirements established by this Agreement and covered by the Take Authorizations, specifically including the land development

permitting and approval requirements set forth in Section 10 of this Agreement.

10.0 IMPLEMENTATION RESPONSIBILITIES OF CITY

10.1 Introduction. The MSCP Plan establishes a plan to conserve the Covered Species by ultimately providing permanent protection for Covered Species habitat through implementation of individual subarea plans. The USFWS and CDFG agree to phased implementation of the MSCP Plan based on the agreement of the CITY to take the following specific actions to implement the MSCP Plan and Subarea Plan with respect to lands within its jurisdictional boundaries.

10.2 Compliance and Implementation.

A. In order to obtain and maintain its Take Authorizations, the CITY agrees to comply with and implement the MSCP Plan, the Subarea Plan and this Agreement. Specifically, the CITY will review all development proposals that could affect habitat lands in accordance with its land use regulations and environmental review process to ensure that such proposals are consistent with the MSCP Plan and the La Mesa Subarea Plan and the Mitigation Guidelines established pursuant to Section 9.12. The CITY will require project level biological surveys for all future development proposals that could result in the loss of native habitat or the "take" of a covered species. Development activities that would result in the loss of any native vegetation associations (e.g., coastal sage scrub, wetlands, grassland etc.) or impact Covered Species will be required by the CITY to fully mitigate impacts associated with the development in conformance with the Subarea Plan and this Implementing Agreement to insure that any loss of habitat or sensitive species is compensated for by preservation of habitat.

As provided in the Mitigation Guidelines attached hereto as Exhibit I, the CITY shall require that mitigation for all impacts to identified upland habitats, including coastal sage scrub, be mitigated off-site because the habitats in La Mesa are not included in the MSCP Plan Multi-Habitat Planning Area. Any southern maritime chaparral, mafic southern mixed chaparral, mafic chamise chaparral, native grassland, or oak woodlands that would be impacted by the covered activities will be mitigated in-kind off-site at a 2:1 ratio, although these habitat types have not been identified within the CITY. Impacts to any other upland habitat types will be mitigated off-site at a 1:1 ratio. Off-site

mitigation will be accomplished within the MSCP Plan Multi-Habitat Planning Area, either within the City of Poway's Subarea HCP or at other locations approved by the USFWS and the CDFG. On-site mitigation for any habitat type will be required only if it is considered appropriate for wetland impacts in the context of the Section 404 permitting processes or CDFG Code Section 1600, or if on-site preservation is deemed necessary by the wildlife agencies to benefit a narrow endemic species. Such on-site conservation to benefit narrow endemic species must be consistent with the MSCP Plan and requires the written concurrence of the USFWS and CDFG.

B. The CITY shall require by resolution approving the Mitigation Guidelines prior to or concurrent with the issuance of the Take Authorizations that all impacts to vegetation communities and wildlife habitats in the City of La Mesa are fully mitigated off-site as described in this Agreement and the Mitigation Guidelines, in accordance with Section VI of the Subarea Plan and the MSCP Plan. The 10(a)(1)(B) permit and NCCP Authorization shall not take effect until the Mitigation Guidelines are adopted through resolution. The Mitigation shall consist of the purchase and dedication of, or execution of a conservation easement over lands as biological open space. All such dedications or fee title acquisitions shall be accompanied by conservation easements, in a form approved by USFWS and CDFG, that identify CDFG and USFWS, or other entity acceptable to the wildlife agencies, as third-party co-beneficiaries with rights of enforcement, and provide for the conservation and management in perpetuity of the conserved lands consistent with the MSCP Plan. All such dedications or fee title acquisitions shall incorporate arrangements or funding for management sufficient to implement Preserve Management consistent with Section 6 of the MSCP Plan.

C. In conjunction with the consideration of planned public and private development on a "project-by-project basis", and approval of project-specific mitigation and related mitigation ratios, the CITY shall, based on substantial information in the record, make and adopt the following written findings:

1. The mitigation meets the implementing objectives of the Subarea Plan with regard to the project's impacts because it will offset the loss of upland habitat at a 1:1 or 2:1 ratio, as applicable. Upland impacts will be mitigated off-site within the MSCP Multi-Habitat Planning Area.

2. The mitigation habitat enhances the long-term viability and function of the MSCP Plan Multi-Habitat Planning Area;

3. The mitigation will be to the long-term benefit of the Covered Species and their habitats and will be consistent with the MSCP;

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

5. ~~Impacts to wetland habitats will be mitigated in compliance with the terms of the federal policy of no net loss of wetland functions and values and the Environmental Protection Agency's 404(b)(1) guidelines and section 10.4 of this Agreement.~~

D. Mitigation requirements shall include compensation with "in kind" vegetation communities, as described in Section VI of the Subarea Plan, except that impacts to wetlands regulated under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 1600 of the CDFG Code shall be mitigated according to those laws and as provided in sections 9.8A and 10.4 of this Agreement.

10.3 Resource Protection Measures. The City Manager of the CITY shall take all actions within his or her authority to ensure that all CITY departments comply with the policies, regulations and management obligations established as a result of the MSCP Plan and Subarea Plan on all CITY projects and day-to-day operations. The City of La Mesa shall utilize its existing development review and building and grading permit review process to ensure conservation of native vegetation habitats within the CITY's jurisdiction. These measures shall ensure that no habitat is lost in the CITY before minimization and mitigation of impacts to that habitat is assured. The CITY shall implement those conditions identified in the Conditions portion of Table 3-5 of the MSCP Plan that are applicable to any Covered Species.

10.4 Narrow Endemic Species. For certain species identified as "narrow endemic species", vernal pools in naturally occurring complexes, and wetlands, impacts will be avoided to the maximum extent practicable and disturbance or impacts to such species and habitats will require the concurrence of the USFWS and CDFG both within and outside the MHPA. Impacts that cannot be avoided shall be minimized and mitigated and the mitigation measures will require the approval of the USFWS and the CDFG.

10.5 Preserve Management. The CITY agrees to be responsible for managing or ensuring the management of the lands conserved through the Subarea Plan in perpetuity. The City of La Mesa shall

ensure that all mitigation lands resulting from implementation of the Subarea Plan both within and outside of the CITY's boundaries shall be managed consistent with Section 6 of the MSCP Plan. Within nine months of the Effective Date, the CITY shall submit to the USFWS and CDFG for review and approval a draft management plan for the on-site and off-site conservation lands resulting from the two projects referenced in Section 9.17 "Previously Approved Projects" of this Agreement. Within twelve months of the Effective Date the CITY shall submit a final management plan for USFWS and CDFG approval for the two projects. The management plan shall incorporate the species-specific management actions set forth in Table 3-5 of the MSCP Plan as applicable, as well as general preserve management actions in accordance with the MSCP Plan.

11.0 FUNDING RESPONSIBILITIES OF CITY

The CITY shall establish and implement a funding source adequate to cover its share of MSCP and Subarea Plan implementation costs. As a participating local jurisdiction in the MSCP Plan planning program, the CITY will participate in a subregional cooperative effort to secure funding sources for the acquisition of habitat within the MSCP Plan Multiple Habitat Planning Area (MHPA).

A. Regional Funding of Local Costs. As described in the MSCP, the CITY and other participating Local Jurisdictions will each be responsible for ensuring the acquisition of private lands within the MHPA, and for funding MHPA management, monitoring and administrative costs. The MSCP Plan intends that funds to cover these local costs will be raised on a regional, County-wide or MSCP Area-wide basis.

B. Short-term Regional Funding. In the short-term, prior to approval of a long-term regional financing mechanism as discussed in the MSCP Plan, the CITY will participate with the other Participating Local Jurisdictions to seek financing for the acquisition of private lands within the MHPA during the first three years following the Effective Date. Prior to the establishment of a regional financing mechanism, the CITY agrees to fund or ensure the costs for managing and monitoring those lands that are obtained as mitigation pursuant to the CITY Subarea Plan where those lands have been conveyed to the CITY in fee title or through conservation easement granted to the CITY, or a covenant of easement has been granted to the CITY which allows access for management purposes.

C. Long-term Regional Funding.

1. Voter Approval. The parties anticipate that any such long-term regional funding method will require voter approval.

2. Timetable. The MSCP Plan specifies a proposed timetable for securing long-term regional funding. Within eighteen (18) months of the Effective Date, the CITY, working cooperatively with the other Participating Local Jurisdictions, will initiate the process described in the MSCP Plan to procure long-term regional funding. Within an additional eighteen (18) months, the City of La Mesa intends to have a long-term regional funding source established. The USFWS and CDFG are willing to adjust this schedule if the CITY demonstrates that its good faith efforts to secure long-term regional funding require additional time. During this total period of time, the City of La Mesa, working cooperatively with other Participating Local Jurisdictions, will identify a new or existing structure through which regionally generated funds will be allocated to all Participating Local Jurisdictions.

3. Reassessment of Regional Funding. The Parties recognize that achieving the goal of long-term regional funding may be compromised if any of the jurisdictions identified in Exhibit B withdraw from the MSCP or fail to complete and obtain approval of a Subarea Plan. If such circumstances arise before long-term regional funding is secured, the parties agree to reassess, along with the other Participating Local Jurisdictions, the long-term funding approach. If at the conclusion of the time allowed under subsection C.2, above, a regional funding source has not been established, then, the CITY shall establish and implement a funding source adequate to meet its share of MSCP and Subarea Plan implementation costs, while it continues to pursue, with other Participating Local Jurisdictions, establishment of a regional funding source.

D. Effect of Inadequate Funding on Take Authorizations. In the event that adequate funding to implement the MSCP Plan and the Subarea Plan is not provided by the CITY, the USFWS and CDFG will assess the impact of the funding deficiency on the scope and validity of the Take Authorizations. The parties agree that they will then meet and confer to cooperatively develop a strategy to address the funding shortfall and to undertake all practicable efforts to maintain the level of conservation and Incidental Take authorization afforded by the Take Authorizations until the funding situation can be remedied.

12.0 ISSUANCE OF THE TAKE AUTHORIZATIONS

12.1 General. In order to provide predictability and certainty to public facility and private project developments, the Take Authorizations shall cover significant periods of time.

12.2 Findings - USFWS - Covered Species. The USFWS has found, following opportunity for public comment, that (a) the taking of Covered Species within the MSCP Area in accordance with the MSCP Plan as implemented by the subarea plans will be incidental to the carrying out of otherwise lawful activities; (b) the MSCP as implemented by the subarea plans will, to the maximum extent practicable, minimize and mitigate the impacts of such incidental taking; (c) the funding sources identified and provided for herein will ensure that adequate funding for the MSCP and the subarea plans will be provided; (d) the requested taking of Covered Species will not appreciably reduce the likelihood of survival and recovery of such species in the wild; and (e) the MSCP as implemented through the subarea plans will satisfy and fulfill all measures (including procedures determined by the USFWS to be necessary to address Unforeseen Circumstances).

12.3 Findings - USFWS - Covered Species Subject to Incidental Take. In addition to the findings in Section 12.2 above, the USFWS has found that the Covered Species Subject to Incidental Take will be adequately conserved in the Subarea as the result of implementation of the Subarea Plan and this Agreement. Accordingly, concurrent with the Effective Date the USFWS will issue the Section 10(a) Permit to the CITY authorizing the Incidental Take of the Covered Species Subject to Incidental Take. The Section 10(a) Permit will be effective for 50 years, and will be renewable utilizing the ESA procedures in effect at the time of renewal.

12.4 Section 10(a) Permit and Future Listings. As to any Covered species Subject to Incidental Take that is not listed as threatened or endangered under the ESA as of the Effective Date, the Section 10(a) Permit shall become effective with respect to such species concurrent with its listing as threatened or endangered under the ESA. As to any other Covered Species, the Section 10(a) Permit shall become effective with respect to that species (and it will be added to the list of Covered Species Subject to Incidental Take) when (1) the USFWS approves the subarea plans that the USFWS determines adequately conserve such species, (2) such species becomes listed as threatened or endangered under

the ESA, and (3) the USFWS notifies the CITY in writing that the Section 10(a) Permit is effective with respect to such species.

12.5 Findings - CDFG. The CDFG has found, following opportunity for public comment, that the MSCP, the Subarea Plan and this Agreement (1) adequately provide for the conservation and management of the Covered Species Subject to Incidental Take and their habitat within the MSCP Area and the Subarea, (2) satisfy all legal requirements under the NCCP Act necessary for the CDFG to issue a NCCP Authorization for the Covered Species Subject to Incidental Take, (3) are consistent with the NCCP Process and Conservation Guidelines, and (4) are consistent with the January 22, 1999 Natural Community Conservation Planning General Process Guidelines. The CDFG has found that the Subarea Plan, in combination with the MSCP Plan, meets the requirements of the NCCP Act for an NCCP Plan, and has approved the Subarea Plan as an NCCP Plan. The CDFG has found further that the MSCP, the Subarea Plan and this Agreement provide adequately for the mitigation of potential "significant effects on the environment" (as defined in Cal. Pub. Resources Code, § 21068) which may result to Covered Species Subject to Incidental Take and their habitat from the land development activities in the Subarea.

12.6 Issuance of NCCP Authorization. Concurrent with the Effective Date, the CDFG will issue its approval of the Subarea Plan and a NCCP Authorization which authorizes the Incidental Take of Covered Species Subject to Incidental Take in the Subarea, subject to the terms of the MSCP, the Subarea Plan, this Agreement, and the NCCP Authorization. As to any Covered Species Subject to Incidental Take that is not listed as threatened or endangered under the CESA as of the Effective Date, the NCCP Authorization shall automatically become effective with respect to such species concurrently with its listing as threatened or endangered under the CESA or its acceptance by the California Fish and Game Commission as a candidate for such listing. The NCCP Authorization will be effective for 50 years. The NCCP Authorization will be renewable utilizing the applicable procedures in effect at the time of renewal.

12.7 Findings - Section 4(d) Special Rule. The USFWS finds that the MSCP meets the standards set forth in 50 C.F.R. section 17.32(b)(2). Accordingly, the USFWS finds that the MSCP and the Subarea Plan are consistent with and satisfy the conditions under the Section 4(d) Special Rule, and therefore the Incidental Take of the coastal California gnatcatcher within that portion of

the MSCP Area covered by approved Subarea Plans (including the CITY's Subarea Plan), is lawful.

13.0 CONSULTATIONS WITH OTHER PUBLIC AGENCIES

13.1 Section 7 Consultations. To the maximum extent appropriate, in any consultation under Section 7 of the ESA (16 U.S.C. § 1536) involving the CITY and/or an existing or prospective Third Party Beneficiary with regard to Covered Species Subject to Incidental Take, the USFWS shall ensure that the biological opinion issued in connection with the proposed project which is the subject of the consultation is consistent with the biological opinion issued in connection with the MSCP and Subarea Plan, provided that the proposed project is consistent with the MSCP and Subarea Plan. Any biological measures included under the terms and conditions of the Section 7 biological opinion shall, to the maximum extent appropriate, be consistent with the mitigation required by the CITY for the particular project or activity under the MSCP and Subarea Plan as implemented by this Agreement, provided that the USFWS shall not impose measures in excess of those that have been or will be required by the CITY pursuant to the MSCP, the Subarea Plan and this Agreement. For Section 7 consultations conducted in connection with the issuance of permits under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, Section 9.8.A of this Agreement shall apply in lieu of this paragraph.

13.2 Consultations by CDFG. Except as otherwise required by law, and subject to Section 9.4, for projects and/or project impacts subject to the Subarea Plan, CDFG shall not recommend or otherwise seek to impose through consultation with other public agencies any mitigation, compensation or habitat enhancement requirements regarding the Take of Covered Species within the Subarea other than the requirements prescribed in and pursuant to the MSCP, the Subarea Plan and this Agreement.

14.0 MONITORING AND ANNUAL REPORTING

14.1 Implementation Monitoring. So long as the MSCP, the Subarea Plan, this Agreement, and the Take Authorizations remain in effect the CITY will continuously monitor the amount and location of habitat lands (by habitat type) which it has preserved within the MHPA, and the amount and location of habitat lands (by habitat type) within the geographic limits of its jurisdiction which have been disturbed by land development both within and outside of the MHPA.

14.2 Annual Reporting. In accordance with Section 6.4.1 of the MSCP Plan, the CITY shall prepare and submit to the USFWS and the CDFG by February 15 of each year a public report containing an annual accounting, by project and cumulatively, of habitat acreage lost and conserved within the Subarea during the previous calendar year. This accounting shall specify acres conserved within the MHPA by habitat type and location, as well as acres committed to land development outside of the MHPA. This report shall also describe how habitat preservation is proceeding in rough step with development. The report will be used by the USFWS and CDFG to evaluate whether adequate progress toward implementation of the MSCP and the Subarea Plan is being achieved.

14.3 Biological Monitoring. The Parties agree that biological monitoring, which involves the collection and analysis of data on specific species and habitats, is necessary to determine whether Covered Species and their habitats are being maintained by the MSCP as expected. Biological monitoring will be jointly funded by the federal and state governments and the Participating Local Jurisdictions and Participating Special Entities through the federal, state and regional funding programs. As required by this Agreement, the CITY will continuously monitor and maintain a written record (by location and habitat type) of the amount of habitat lands within its jurisdictional boundaries, and acquired for project mitigation. The CITY will be responsible for ensuring that biological monitoring consistent with the MSCP shall be funded and implemented on all mitigation lands conserved pursuant to the Subarea Plan. The Federal and State agencies will monitor their present identified lands and those acquired for the MSCP with federal and state funds, as described in the MSCP Plan. Proper management of the MHPA will require ongoing and detailed analysis of the data collected through biological monitoring activities. To ensure uniformity in data gathering and analysis, the USFWS and CDFG will assume primary responsibility for coordinating the monitoring program, analyzing data, and providing information and technical assistance to the Participating Local Jurisdictions and Participating Special Entities. Biological monitoring will focus on selected Covered Species and representative habitats. The USFWS and CDFG will prioritize specific monitoring activities based on available budget and specific needs of individual species and habitats, and will produce a summary report on monitoring activities every three years at the same time as the report described in this section.

14.4 Annual Implementation Meeting. Once each year, CITY shall meet or confer with the USFWS and the CDFG to review and

coordinate implementation of the Subarea Plan. The parties will review the Annual Report described in Section 14.2 above, for the purposes of evaluating the implementation of the MSCP during the preceding year and the adequacy of the overall progress being made towards reaching the conservation goals of the MSCP and the Subarea Plan. Items to be considered in the evaluation include, but are not limited to, all contributions towards the preservation of habitat lands, such as public lands, private mitigation lands, land donations, land acquisitions, and management activities undertaken or proposed on habitat lands. Habitat management issues will also be discussed. No Participating Local Jurisdiction or Participating Special Entity will be subject to any annual, quantitative habitat preservation requirement, given the uncertainties created by natural economic and land development fluctuations. If the USFWS and the CDFG determine that adequate progress towards implementation of the Subarea Plan is not being achieved, the USFWS, the CDFG, and the CITY will take the actions specified in this Agreement to remedy that situation. If the USFWS and CDFG determine that adequate progress towards implementation of the Subarea Plan is being achieved, but is nevertheless not providing sufficient protection to Covered Species, then the Parties shall work cooperatively and take appropriate actions consistent with the MSCP and Subarea Plan (such as altering management activities or redirecting mitigation and acquisition) in order to address the situation. Such actions may include additional management activities, or redirection of land acquisition funds, so long as they are consistent with the Subarea Plan and this Agreement.

14.5 Public Reporting/Hearing. Every three years the CITY, in conjunction with the other Participating Local Jurisdictions, shall prepare a public report on the status of the MSCP, and shall participate in a public hearing in conjunction with the issuance of the report. The report shall incorporate information on the amount of land preserved within the MHPA and otherwise to date, the amount of land added to the MHPA or otherwise preserved within the previous three years, and the total expenditures made toward habitat acquisition to date and over the preceding three years. This report shall also include a subarea by subarea accounting of all funds received and expended during the previous three years to implement the Subarea Plans, including the amounts received and expended on habitat acquisition, management, and monitoring.

14.6 Audit. Once every three or more years as needed, the USFWS and CDFG may conduct an audit of (1) all development approvals and mitigation imposed through land use regulations or otherwise within approved Subareas; (2) all lands acquired by each

Participating Local Jurisdiction toward meeting its habitat acquisition obligation under the MSCP; and (3) all monies received, invested and expended on acquisition, management and monitoring activities within approved Subareas during the previous three years or other applicable time period. The CITY shall cooperate fully with USFWS and CDFG to insure a complete and accurate audit.

14.7 Coordination of Preserve Management.

A. The CITY will ensure that habitat lands used as mitigation for project impacts will be managed consistent with the MSCP and the Subarea Plan, and the designated land manager will participate with the Regional Habitat Management Technical Committee. The USFWS and CDFG will work with this committee to furnish information and advice on habitat management. The committee will have the responsibilities identified in Section 2.8.3 of the MSCP Plan.

15.0 USFWS AND CDFG OBLIGATIONS

15.1 USFWS. The USFWS shall include in its annual budget requests sufficient funds to fulfill its obligations under the MSCP, this Agreement, and all Section 10(a) Permits it issues pursuant to the MSCP.

15.2 CDFG. The CDFG shall include in its annual budget requests sufficient funds to fulfill its obligations under the MSCP, this Agreement, and all NCCP Authorizations it issues pursuant to the MSCP.

15.3 Failure to Provide State or Federal Contribution. The USFWS and CDFG acknowledge that the MSCP is long-term in nature, and that the MHPA will be established over a fifty year period. Contributions of the USFWS and CDFG will be made at varying levels throughout the life of the program, with contributions to habitat acquisition to occur within the first 30 years of the program. State and federal contributions may include, but are not limited to, state and federally funded habitat acquisitions, land exchanges, personnel, and habitat restoration and enhancement. If, following the exercise of all available authority and utilization of all available resources the state and/or federal contribution committed to MSCP cannot be provided, the MSCP will be reevaluated, with possible adjustments to permit coverage and assurances, in light of the extent of the state and federal contribution. Prior to such reevaluation of the MSCP, the USFWS and CDFG shall first attempt to address the shortfall in the state and/or federal

contribution through (1) habitat management practices and enhancement opportunities within the MHPA using existing management resources, provided the redirection of such resources does not adversely affect any Covered Species and (2) habitat acquisition through the reallocation of existing state, federal and/or regional funds identified for MSCP implementation, provided such reallocation does not adversely affect any Covered Species.

16.0 REMEDIES AND ENFORCEMENT

16.1 Remedies in General. Except as set forth below, each Party shall have all remedies available in equity (including specific performance and injunctive relief) to enforce the terms of this Agreement and Section 10(a) and NCCP Authorization, and to seek remedies and compensation for any breach or violation thereof.

A. None of the Parties shall be liable in damages to the other Parties or to any other person or entity for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement. Notwithstanding the foregoing, each Party shall retain whatever liability it would possess for its present and future acts or failure to act without existence of this Agreement.

B. The Parties acknowledge that the Covered Species are unique and that their loss as species would be irreparable and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

16.2 The Section 10(a) Permit.

A. Permit Suspension. The Service may suspend the permit, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension. (See 50 C.F.R. §§ 1327-29, 17.22(b) and 17.32(b)). However, except where the USFWS determines that emergency action is necessary to avoid irreparable harm to a Covered Species, it will not suspend the Section 10(a) Permit without first (1) requesting the Permittee take appropriate remedial actions, and (2) providing the Permittee with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for the Permittee to demonstrate why suspension is not warranted.

B. Reinstatement of Suspended Permit. In the event the USFWS suspends the Section 10(a) Permit, in whole or in part, as

soon as possible but no later than ten (10) days after such suspension, the USFWS shall confer with the Permittee concerning how the suspension can be lifted. At the conclusion of any such conference, the USFWS shall identify reasonable specific actions necessary to effectively redress the suspension. In making this determination the USFWS shall consider the requirements of the ESA, regulations issued thereunder, the conservation needs of the Covered Species, the terms of the Section 10(a) Permit and of this Agreement and any comments or recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, the USFWS shall send the Permittee written notice of the reasonable actions necessary to effectively redress the suspension. Upon performance of such necessary actions, the Service shall immediately reinstate the Section 10(a) Permit. It is the intent of the Parties that in the event of any total or partial suspension of the Section 10(a) Permit all Parties shall act expeditiously and cooperatively to reinstate the Section 10(a) Permit.

C. Permit Revocation or Termination

1. Consistent with 50 C.F.R. section 13.28-13.29 and 50 C.F.R. 17.22(b)(8) and 17.32(b)(8), the USFWS agrees that it will revoke or terminate the Section 10(a) Permit, in whole or in part only (a) for a material violation of the Section 10(a) Permit or material breach of this Agreement by the CITY where (1) the CITY fails to cure the violation or breach after receiving actual notice of it from the USFWS and a reasonable opportunity to cure it, or (2) the USFWS determines in writing that such violation or breach cannot be effectively redressed by other remedies or enforcement action; or (b) where revocation of the permit is necessary to avoid the likelihood of jeopardy to a Covered Species.

2. The USFWS agrees that it will not revoke or terminate the Section 10(a) Permit, in whole or in part, for a material violation of the Section 10(a) Permit or a material breach of this Agreement without first (a) requesting the CITY take appropriate remedial action, and (b) providing the CITY with notice in writing of the facts or conduct which warrant the partial or total revocation or termination and a reasonable opportunity (but not less than sixty (60) days) to demonstrate or achieve compliance with the ESA, the Section 10(a) Permit and this Agreement. The USFWS agrees that it will not revoke or terminate the Section 10(a) Permit, in whole or in part, to avoid the likelihood of jeopardy to a Covered Species, without first notifying the CITY of those measures, if any, that the CITY may undertake to prevent jeopardy

to the Covered Species and maintain the Section 10(a) Permit and a reasonable opportunity, consistent with section 16.4 of this Agreement, to implement such measures.

3. Notwithstanding partial or total suspension or revocation of the CITY's Section 10(a) Permit under this Section, the CITY and all Third Party Beneficiaries shall remain obligated to fulfill its mitigation, enforcement, monitoring and management obligations in accordance with this Agreement for all Covered Activities undertaken or approved prior to the circumstances which lead to the suspension or revocation.

16.3 The NCCP Authorization.

A. Authorization Suspension. CDFG may suspend the NCCP Authorization, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension. However, except where CDFG determines that emergency action is necessary to avoid irreparable harm to a Covered Species, it will not suspend the NCCP Authorization without first (1) requesting the CITY take appropriate remedial actions, and (2) providing the CITY with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for the CITY to demonstrate why suspension is not warranted.

B. Reinstatement of Suspended Authorization. In the event the CDFG suspends the NCCP Authorization in whole or in part, as soon as possible but no later than ten (10) days after such suspension, the CDFG shall confer with the CITY concerning how the suspension can be lifted. At the conclusion of any such conference, the CDFG shall identify reasonable specific actions necessary to lift the suspension. In making this determination the CDFG shall consider the requirements of the NCCP Act and regulations issued and guidelines adopted thereunder, the conservation needs of the Covered Species, the terms of the NCCP Authorization and of this Agreement and any comments or recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, the CDFG shall send the CITY written notice of the reasonable actions necessary to lift the suspension. Upon full or substantial performance of such necessary actions, the CDFG shall immediately reinstate the NCCP Authorization. It is the intent of the Parties that in the event of any total or partial suspension of the NCCP Authorization all Parties shall act expeditiously and cooperatively to reinstate the NCCP Authorization.

C. Authorization Revocation or Termination.

1. The CDFG agrees that it will revoke or terminate the NCCP Authorization, in whole or in part, for a material violation of the NCCP Authorization or material breach of this Agreement by the CITY, only if (a) the CITY fails to cure the violation or breach after receiving actual notice of it from CDFG and a reasonable opportunity to cure it, or (b) CDFG determines in writing that such violation or breach cannot be effectively redressed by other remedies or enforcement action.

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

3. Notwithstanding partial or total suspension or revocation of the CITY's NCCP Authorization under this Section, the CITY and all Third Party Beneficiaries shall remain obligated to fulfill its mitigation, enforcement, monitoring and management obligations in accordance with this Agreement for all Covered Activities undertaken or approved prior to the circumstances which lead to the suspension or revocation.

D. Effect on Third Party Beneficiaries. The effect on Third Party Beneficiaries of Take Authorization revocation or suspension is specified in Section 17.2.

16.4 Circumstances Likely to Constitute Jeopardy to Species. In the event of circumstances which are likely to jeopardize the continued existence of a Covered Species, the USFWS and/or CDFG may suspend or revoke the Take Authorizations without resorting to the procedures specified above.

16.5 CITY Obligations In The Event of Suspension or Revocation. In the event that the USFWS and/or CDFG suspend or revoke the Take Authorizations issued to CITY under this Agreement, CITY will remain obligated to fulfill its mitigation, enforcement and management obligations and its other MSCP and Subarea Plan obligations, in accordance with Section 22.A.2,B and C of this Agreement.

17.0 THIRD PARTY BENEFICIARIES

17.1 Authorization. Upon execution of this Agreement by the Parties and the issuance of Take Authorizations by USFWS and CDFG, the CITY may allow within the Subarea the Incidental Take of Covered Species Subject to Incidental Take by Third Party Beneficiaries under the direct control of the CITY, specifically including landowners and public and private entities undertaking land development activities in conformance with an approval granted by the CITY in compliance with this Section and Sections 9 and 10 of this Agreement.

A. Creation of Third Party Beneficiary Status. Except for certain phased projects, as provided below, the creation of Third Party Beneficiary status shall occur during the CITY's permitting process at the point in time when:

1. Review of the project's impacts on biological resources and a determination of necessary mitigation has occurred in compliance with Section 10 of this Agreement;

2. The determined mitigation includes an immediately effective requirement to maintain the biological values of the land committed for mitigation; and

3. The mitigation has been imposed through a condition of development (such as a mitigation agreement) that is recorded and runs with the land and is enforceable against and binding upon the Third Party Beneficiary and any successor in interest to the Third Party Beneficiary.

Third Party Beneficiary status may be attained for a project as a whole, or for a discrete phase(s) of a project so long as the mitigation for the discrete phase(s) is not functionally dependent in the context of the MSCP and Subarea Plan upon the mitigation proposed for subsequent phases.

B. Maintenance of Third Party Beneficiary Status. Third Party Beneficiary status will remain in effect unless, prior to the issuance of take authorization in accordance with Section 17.1.D., below, the Third Party Beneficiary alters the project in a manner that increases or substantially alters impacts to biological resources evaluated pursuant to Section 17.1.A., above, or fails to maintain the biological values of the land committed for mitigation pursuant to Section 17.1.A., above. In such circumstance, the Third Party Beneficiary status is automatically extinguished, and

the subsequent creation of Third Party Beneficiary status will require biological review and imposition of mitigation for the increased or altered impacts, pursuant to Section 17.1.A. above. However, Third Party Beneficiary status shall not be extinguished as a result of impacts to biological values resulting from natural or other causes beyond the Third Party Beneficiary's control, as determined by the USFWS and CDFG, including fire, flood, storm, and earth movement, or from any prudent action taken by the Third Party Beneficiary to prevent, abate, or mitigate significant injury to the land evaluated pursuant to Section 17.1.A., above, resulting from such causes provided the CITY complies with the measures provided for under Section 9.6.H of this Agreement to respond to such causes.

C. Assurances to Third Party Beneficiaries. For a project or portion thereof where Third Party Beneficiary status has been attained and is effective, the Parties shall not alter existing mitigation obligations imposed by the CITY on the Third Party Beneficiary, except as otherwise specifically allowed under Sections 9.4, 9.6 and 9.7 of this Agreement, provided that the Third Party Beneficiary satisfies all mitigation obligations imposed by the CITY in conformance with this Section and Section 10 of this Agreement.

D. Authorization for Take Conferred by Local Jurisdictions to Third Party Beneficiary. The authorization for incidental take conferred by the CITY on the Third Party Beneficiary shall be for the length of time and run concurrent with the specific land development approval granted by the CITY. However no grading or grubbing activities may be commenced by the Third Party Beneficiary pursuant to the CITY's development approval until the mitigation established pursuant to Section 17.1.A. above has been fully satisfied (via conservation easement, transfer of fee title, etc.) or is guaranteed (via irrevocable offer of dedication, mitigation bond, letter of credit, pledged savings account or other equivalent mechanism) to occur within a time frame approved by the CITY, which time frame shall not under any circumstance exceed one year from the date the permit for grading or grubbing is issued.

17.2 Effect of Take Authorization Revocation, Termination or Suspension. In the event that the USFWS and/or CDFG revoke, terminate or suspend the Take Authorizations issued to the CITY pursuant to this Agreement, the assurances provided to Third Party Beneficiaries under this Agreement and the right to Take Covered Species Subject to Incidental Take authorized under the CITY's

development approvals pursuant to the Take Authorizations, will remain in effect as to every individual Third Party Beneficiary which fulfills the mitigation obligations imposed upon it by the CITY in compliance with this Section and Section 10 of this Agreement unless FWS determines that continuing to authorize take by Third Party Beneficiaries would likely result in jeopardy to a Covered Species.

~~17.3 Enforcement.~~ The Parties reserve the right to enforce all applicable federal, state or local laws against persons or entities which engage in unlawful land development activity without obtaining proper permits and approvals from the Parties. Also, the Parties reserve the right to enforce all applicable federal, state or local laws against Third Party Beneficiaries which conduct land development activities in the Subarea which are not in compliance with land development approvals granted by the CITY in conformance with Section 10 of this Agreement.

17.4 No Right to Sue Under this Agreement. Notwithstanding the use of the term "Third Party Beneficiary" or any other provision of this Agreement, this Agreement shall confer no right upon Third Party Beneficiaries or any other person to sue the USFWS or the CDFG.

18.0 ENVIRONMENTAL REVIEW

18.1 Federal Law - NEPA. Issuance of a Section 10(a) Permit to the CITY by USFWS is an action subject to NEPA review. USFWS is a lead agency under NEPA. Pursuant to NEPA, an Environmental Impact Statement has been prepared by USFWS on the MSCP and an Environmental Assessment has been prepared by USFWS on the CITY's Subarea Plan.

18.2 State LAW - CEQA. Implementation of the Subarea Plan is an action subject to CEQA review. As the CEQA lead agency for the MSCP Plan, the City of San Diego, in consultation with CDFG and other responsible agencies, prepared the Recirculated Draft Joint EIR/EIS for Issuance of Take Authorizations for Threatened and Endangered Species Due to Urban Growth within the Multiple Species Conservation Program (MSCP) Planning Area, dated August, 1996 and the Final EIR/EIS for Issuance of Take Authorizations for Threatened and Endangered Species Due to Urban Growth within the Multiple Species Conservation Program ("MSCP") Planning Area, dated January, 1997 (LDR. No. 93-0287, SCH No. 93121073) (collectively,

the "Joint EIR/EIS"). Based on the Joint EIR/EIS, the CITY has completed a Negative Declaration addressing the Subarea Plan pursuant to CEQA.

19.0 COOPERATIVE EFFORT

In order that each of the legal requirements summarized in Section 8.0 of this Agreement are fulfilled, each of the Parties to this Agreement must perform certain specific tasks. The MSCP Plan thus describes a cooperative program by federal, state and local agencies to conserve the Covered Species.

20.0 TERMS USED

Terms defined and utilized in the MSCP, the ESA, the CESA, and the NCCP Act shall have the same meaning when used in this Agreement, except as specifically noted.

21.0 TERM

21.1 50-year Agreement. This Agreement takes effect on the Effective Date, and shall remain in full force and effect for a period of 50 years, or until termination of the Section 10(a) Permit and NCCP Authorization pursuant to Section 16 or Section 22 of this Agreement, whichever occurs sooner.

21.2 50-year Take Authorizations. The Section 10(a) Permit and the NCCP Authorization issued to CITY shall be effective for a period of 50 years from the Effective Date.

21.3 Permanent Preservation. Notwithstanding the stated term as herein set forth, the Parties agree and recognize that once Take of a Covered Species has occurred and/or their habitat modified within the Subarea, such Take and habitat modification will be permanent. The Parties, therefore, agree that the preservation and maintenance of the habitat provided for under this Agreement shall likewise be permanent and extend beyond the term of this Agreement.

22.0 TERMINATION

A. Upon 90 days written notice to USFWS and CDFG and all other Participating Local Jurisdictions, the CITY may unilaterally withdraw from this Agreement provided:

1. The CITY and all Third Party Beneficiaries have complied with all mitigation obligations incurred under the Take

Authorizations, the MSCP, Subarea Plan and this Agreement up to the date of withdrawal, and the CITY provides written evidence of such compliance to USFWS and CDFG; and

2. The CITY and Third Party Beneficiaries shall remain obligated to carry out all of their long term management and monitoring obligations assumed under the MSCP, Subarea Plan, this Agreement and the Take Authorizations with respect to habitat conservation lands included in, or required to be included in, the MHPA under the CITY's Subarea Plan prior to withdrawal from the Agreement.

B. The CITY's withdrawal from this Agreement shall not affect the obligations of the CITY with respect to mitigation lands or other lands owned or controlled by the CITY and included in the MHPA.

C. Any Incidental Take associated with land development projects approved by the CITY for which mitigation has been assured as provided in Section 17 shall continue to be authorized under the terms of the Take Authorizations provided the CITY continues to carry out its obligations under this Agreement with respect to such Take as provided in Sections 9.19 10, 14 and 17 of this Agreement unless FWS determines that continuing to authorize take by Third Party Beneficiaries would likely result in jeopardy to a Covered Species.

D. Withdrawal of the CITY from this Agreement shall be deemed to constitute a surrender of the CITY's Take Authorizations issued pursuant to this Agreement.

23.0 AMENDMENTS

23.1 Amendments to Agreement. Except as otherwise set forth herein, this Agreement may be amended only with the written consent of each of the Parties.

23.2 Amendments to List of Covered species Subject to Incidental Take. The Parties anticipate and intend that the list of Covered Species Subject to Incidental Take (attached as Exhibit D) will be augmented to include additional Covered Species as additional Participating Local Jurisdictions and Participating Special Entities enter into separate but coordinated agreements in a form substantially similar to this Agreement, and/or if additional information becomes available concerning the population and distribution of such additional Covered Species and the

protection afforded such species by the MSCP Plan and/or this Agreement. The Parties agree to work cooperatively to expeditiously amend the list of Covered Species Subject to Incidental Take under such circumstance.

24.0 FORCE MAJEURE

In the event that the CITY is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the CITY ("force majeure"), including but not limited to acts of God, labor disputes, sudden actions of the elements, or actions of federal or state agencies or other local jurisdictions, the CITY shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that nothing in this Section shall be deemed to authorize any Party to violate ESA or CESA, and provided further that:

A. The suspension of performance is of no greater scope and no longer duration than is required by the force majeure;

B. Within two weeks after the occurrence of the force majeure the CITY gives the USFWS and CDFG written notice describing the particulars of the occurrence;

C. The CITY uses its best efforts to remedy its inability to perform (however, this paragraph shall not require the settlement of any strike, walk-out, lock-out or other labor dispute on terms which in the sole judgment of the CITY are contrary to its interest); and

D. When the CITY is able to resume performance of its obligations, the CITY shall give USFWS and CDFG written notice to that effect.

24.1 Changed Circumstances Not Subject to Force Majeure. Events or causes identified as Changed Circumstances in the Subarea Plan and this Agreement are not considered unforeseeable events or Acts of God within the meaning of this Section 24 and the CITY shall be responsible for implementing the responses to Changed Circumstances provided for in Section 9.6.H of this Agreement.

25.0 MISCELLANEOUS PROVISIONS

25.1 Agency Response Times. Except as otherwise set forth in this Agreement or as statutorily required under CEQA, CESA, or the ESA, or other laws or regulations, the Wildlife Agencies and the CITY shall use their reasonable efforts to respond to written requests with a 45-day time frame.

25.2 No Partnership. Except as otherwise expressly set forth herein, neither this Agreement nor the MSCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

25.3 Successors and Assigns. This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. The CITY may only assign its rights and obligations under this Agreement with the approval of the USFWS and CDFG, which approval shall not be unreasonably withheld. Assignment or other transfer of the Section 10(a) Permit shall be governed by then-current USFWS and CDFG regulations.

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

United States Fish and Wildlife Service
Operations Manager
California/Nevada Operations Office
2800 Cottage Way, Room W-2606
Sacramento, California 95825

United States Fish and Wildlife Service
Field Supervisor, Carlsbad Field Office
2730 Loker Avenue West
Carlsbad, California 92008

October 7, 1999

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

Regional Manager
South Coast Region
California Department of Fish and Game
4949 Viewridge Ave.
San Diego, California 92123

City of La Mesa
City Manager
8130 Allison Avenue
P.O. Box 937
La Mesa, CA 91944-0937

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

25.6 Defense.

A. The USFWS will, upon request of the CITY and subject to the responsibilities of the United States Department of Justice in the conduct of litigation, provide appropriate support to the CITY in defending, consistent with the terms of the MSCP, lawsuits arising out of the CITY's adoption of the MSCP and Subarea Plan.

B. Upon request, CDFG will, to the extent authorized by California law, provide appropriate support to the CITY in defending, consistent with the terms of the MSCP, lawsuits arising out of the CITY's adoption of the MSCP and Subarea Plan.

25.7 Attorneys' Fees. If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees and costs.

25.8 Duplicate Originals. This Agreement may be executed in any number of duplicate originals. A complete original of this

Agreement shall be maintained in the official records of each of the Parties.

25.9 Federal and State Appropriations. The duty of the USFWS and CDFG to carry out their respective obligations and assurances under the MSCP, the Subarea Plan and this Agreement shall be subject to the availability of appropriated funds.

25.10 Elected Officials. No member of Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

25.11 Governing Law. This Agreement shall be governed by and construed in a manner consistent with the statutory and regulatory authority of the USFWS under the ESA, its implementing regulations and other applicable federal laws, and of the CDFG under the CESA, the NCCP Act and other applicable state laws and regulations. Nothing in this Agreement is intended to nor shall be construed to limit or compromise the authority of the USFWS or the CDFG under such laws and regulations.

25.12 Relationship to ESA, CESA and Other Authorities Nothing in this Agreement is intended or shall be construed to limit or diminish the legal responsibility of USFWS as an agency of the federal government or CDFG as an agency of the State of California. In that regard, nothing in this Agreement is intended to limit the authority of USFWS to fulfil its responsibilities under ESA or CDFG under CESA, including but not limited to seeking penalties against the CITY.

25.13 References to Regulations Any reference in this Agreement, the MSCP, the Subarea Plan or the Take Authorizations to any regulation or rule of USFWS or CDFG, shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

25.14 Applicable laws. Notwithstanding any other provisions of this Agreement, all activities covered under the MSCP, Subarea Plan, this Agreement and the Take Authorizations must be in compliance with all applicable state or federal laws and regulations including CESA (including § 2080) and the ESA (including the provisions of §§ 7 and 10).

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

La Mesa Subarea Plan Implementing Agreement

October 7, 1999

By: Elizabeth H. Stevens Date: OCT 13 1999
~~Acting~~ Operations Manager
United States Fish and Wildlife Service
Sacramento, California

By: Ronald D. Rempel Date: 11/16/99
~~Director~~ Deputy Director
California Department of Fish and Game
Sacramento, California
Approved on 11/5/99

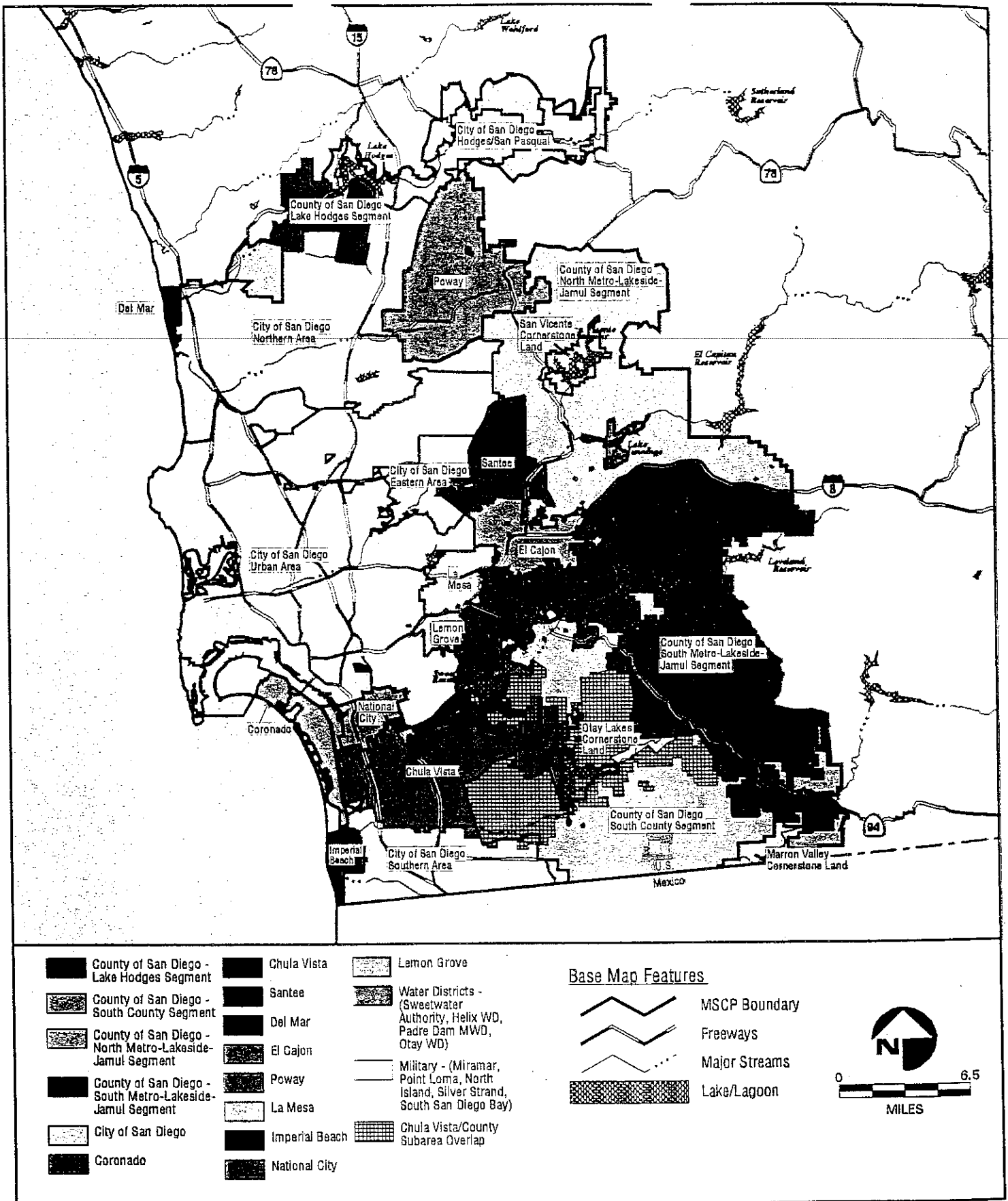
By: Art Madrid Date: 12-16-99
Mayor
City of La Mesa
La Mesa, California

La Mesa Subarea Plan Implementing Agreement

October 7, 1999

EXHIBIT A

MSCP PLAN AREA MAP



OGDEN

MSCP Subareas

FIGURE

3-1

La Mesa Subarea Plan Implementing Agreement

October 7, 1999

EXHIBIT B

MSCP PLAN PARTICIPATING AGENCIES

MSCP PLAN PARTICIPATING AGENCIES

CITY OF CHULA VISTA
CITY OF CORONADO
CITY OF DEL MAR
CITY OF EL CAJON
CITY OF IMPERIAL BEACH
CITY OF LA MESA
CITY OF LEMON GROVE
CITY OF NATIONAL CITY
CITY OF POWAY
CITY OF SAN DIEGO
CITY OF SANTEE

COUNTY OF SAN DIEGO

OTAY WATER DISTRICT

EXHIBIT C

LIST OF COVERED SPECIES

Table 3-4

MSCP COVERED SPECIES LIST¹**Plants**

San Diego thorn-mint
 Shaw's agave
 San Diego ambrosia
 Aphanisma
 Del Mar manzanita
 Otay manzanita
 Coastal dunes milk vetch
 Encinitas baccharis
 Nevin's barberry
 Thread-leaved brodiaea
 Orcutt's brodiaea
 Dense reed grass
 Dunn's mariposa lily
 Slender-pod jewelflower
 Lakeside ceanothus
 Wart-stemmed ceanothus
 Salt marsh bird's-beak
 Orcutt's bird's-beak
 Del Mar Mesa sand aster
 Tecate cypress
 Short-leaved dudleya
 Variegated dudleya
 Sticky dudleya
 Palmer's ericameria
 San Diego button-celery
 Coast wallflower
 San Diego barrel cactus
 Otay tarplant
 Heart-leaved pitcher sage
 Gander's pitcher sage
 Nuttall's lotus
 Felt-leaved monardella

Willow monardella
 San Diego goldenstar
 Prostrate navarretia
 Dehesa bear-grass
 Snake cholla
 California Orcutt grass
 Torrey pine
 San Diego mesa mint
 Otay Mesa mint
 Small-leaved rose
 San Miguel savory
 Gander's butterweed
 Narrow-leaved nightshade
 Parry's tetraococcus

Animals

Salt marsh skipper butterfly
 Thorne's hairstreak
 butterfly
 Riverside fairy shrimp
 San Diego fairy shrimp
 Arroyo southwestern toad
 California red-legged frog
 Southwestern pond turtle
 San Diego horned lizard
 Orange-throated whiptail
 California brown pelican
 Reddish egret
 White-faced ibis
 Canada goose
 Bald eagle

Northern harrier
 Cooper's hawk
 Swainson's hawk
 Ferruginous hawk
 Golden eagle
 American peregrine falcon
 Light-footed clapper rail
 Western snowy plover
 Mountain plover
 Long-billed curlew
 California least tern
 Elegant tern
 Burrowing owl
 Southwestern willow
 flycatcher
 Coastal cactus wren
 California gnatcatcher
 Western bluebird
 Least Bell's vireo
 California rufous-crowned
 sparrow
 Belding's savannah
 sparrow
 Large-billed savannah
 sparrow
 Tricolored blackbird
 American badger
 Mountain lion
 Southern mule deer

¹See Table 3-5 for specific conditions required for take authorizations.

EXHIBIT D

COVERED SPECIES SUBJECT TO INCIDENTAL TAKE

COVERED SPECIES SUBJECT TO INCIDENTAL TAKE

<i>Polioptila californica</i>	Coastal California gnatcatcher
<i>Aimophila ruficeps canescens</i>	California rufous-crowned sparrow
<i>Circus cyaneus</i>	Northern harrier
<i>Phrynosoma cornatum</i> <i>blainvillei</i>	San Diego horned lizard
<i>Cnemidophorus hyperythrus</i> <i>beldingi</i>	Orange-throated whiptail
<i>Dudleya variegata</i>	Variegated dudleya
<i>Ferocactus viridescens</i>	San Diego barrel cactus
<i>Accipiter cooperii</i>	Cooper's hawk

La Mesa Subarea Plan Implementing Agreement

October 7, 1999

EXHIBIT E

CITY OF LA MESA SUBAREA PLAN

CITY OF LA MESA

**SUBAREA HABITAT CONSERVATION PLAN /
NATURAL COMMUNITY CONSERVATION PLAN**

**ADOPTED BY THE
LA MESA CITY COUNCIL
FEBRUARY, 1998**

CITY OF LA MESA SUBAREA HABITAT CONSERVATION PLAN

I. Subarea Description

The City of La Mesa is almost entirely developed with urban uses, and is surrounded by urbanization (i.e., the cities of San Diego, El Cajon, and Lemon Grove, and the unincorporated communities of Spring Valley and Valle De Oro (within the jurisdiction of the County of San Diego). State Routes 94 and 125 form the southern and general eastern boundaries of the City, respectively, and Interstate 8 bisects the City east to west (Figure 1).

La Mesa encompasses a total of 6200 acres of land, and has a population of 56,000 people. The topography of La Mesa is essentially a mesa ranging from 500 to 600 feet above mean sea level (MSL). The mesa is bisected east to west by Alvarado Canyon which contains Interstate 8 and Fletcher Parkway, both major west-east transportation corridors. Along the southern boundary is a northeast-southwest trending ridge that rises in elevation to 750 feet MSL.

The Multiple Species Conservation Program (MSCP) vegetation mapping identifies coastal sage scrub habitat as the only significant natural habitat within the City limits. The MSCP maps indicate that approximately 208 acres of coastal sage scrub habitat exists within the City (Figure 2). These 208 acres constitute 0.2% of the total coastal sage scrub mapped in the MSCP area. The MSCP Habitat Elevation Model ranks the habitat as "High" and "Moderate."

The MSCP vegetation map shows that the coastal sage scrub habitat located in La Mesa is divided into three distinct blocks. The western block contains 11 acres, the central block contains 159 acres, and the eastern block contains 38 acres. In 1992 the construction of a Navy housing complex removed 36 of the 38 acres of coastal sage scrub in the eastern block. Two acres of coastal sage scrub were dedicated as open space for preservation of the California Gnatcatcher.

The remaining 179 acres of coastal sage scrub in the City of La Mesa are surrounded by urban development as shown on Figure 2. As part of the approval of the Eastridge Specific Plan and Tentative Tract Map 90-02, which covers approximately 87% of the habitat area, 50 acres of coastal sage scrub habitat will be preserved as permanent open space and habitat area through the granting of an open space easement to the City. While none of the coastal sage scrub habitat in La Mesa is not included in the MSCP "Multi-Habitat Planning Area" or the "Core Biological Resource Areas and Linkages" (Figures 3 and 4), these 55 acres, or 31% of the City's remaining coastal sage scrub habitat will be preserved.

The remainder of the coastal sage scrub habitat will be removed in association with residential development over a period of time. The Environmental Assessment prepared for this Plan examined alternatives for this taking (Section II) and found that the alternatives were not feasible due to conflicts with the City's General Plan goals and the fact that these habitat areas are not included in the MSCP's Multi-Habitat Planning Area or Core Biological Resource Areas and Linkages, and are not biologically significant to the long-term preservation of coastal sage scrub habitat in the region due to its size and isolated location. However, the taking of this habitat will result in the acquisition of habitat lands located within the Core Resource areas through the mitigation requirements listed in Section VI and will therefore contribute to achieving the regional goals of the MSCP.

II. Covered Species List

The species covered by the La Mesa Subarea Preserve Plan are the same species included in the MSCP. As noted in the MSCP Plan, the Multi-Habitat Planning Area provides adequate conservation for 85 of the 93 target species, including 29 priority species and 28 other target species. The MSCP Covered Species List is contained in Table 3-4 of the proposed MSCP Plan (3/1/95). MSCP covered species known to exist in the City of La Mesa are: *Ferocactus viridescens* (San Diego barrel cactus); *Polioptila californica* (Coastal California gnatcatcher); and *Aimophila ruficeps canescens* (California rufous-crowned sparrow). Other covered species that may be present in La Mesa include: *Phrynosoma cornutum blainvillei* (San Diego horned lizard); *Acanthomintha ilicifolia* (San Diego thornmint); and *Cnemidophorus hyperythrus beldingi* (Orange-throated whiptail). Additional target species that are known to be present in La Mesa include: *Dudleya variegata* (Variegated dudleya); and *Accipiter cooperii* (Cooper's hawk).

III. Preserve Management

The approximately 55 acres of coastal sage scrub habitat to be preserved within the City of La Mesa will be maintained by the private property owner. While this area will be preserved under the Eastridge Specific Plan adopted by the City in 1989, the remainder of the coastal sage scrub habitat within the City will eventually be removed due to development. The loss of this habitat will be mitigated under Section VII of this Plan within the MSCP Multi-Habitat Preserve Area.

Property owners within the City of La Mesa may mitigate the loss of habitat by acquiring, and dedicating in perpetuity, property within the City of Poway's preserve areas in conformance with Section 6, Land Use and Management, of the Poway Subarea Habitat Conservation Plan. As an alternative to the actual acquisition of land, property owners may also participate in the City of Poway's in-lieu fee program. This program requires a fee of \$12,000 per acre. Funding of the management and maintenance of these preserve areas is established in Section 7.6, Acquisition/Mitigation, of the Poway Subarea Plan as a one-time fee of \$1,200 per acre to be paid by La Mesa property owners.

Property owners within the City of La Mesa may also mitigate the loss of habitat elsewhere within the boundaries of the MSCP in conformance with this Plan and/or any applicable approved subarea plan. In these cases, property owners will be required to submit a project mitigation plan outlining the required mitigation, including the management of all mitigation preserve areas and their required funding. Such project plans will be subject to review and approval by the Fish and Wildlife Service.

All impacts to habitat areas within the City of La Mesa will comply with the Reporting, Biological Monitoring, and Preserve Management provisions listed in Section 14 of the Implementing Agreement.

IV. Interim/Long-term Protection of the Multi-Habitat Planning Area and Funding

The MSCP Multi-Habitat Planning Area (MHPA) identifies sixteen core biological resource areas and associated habitat linkages. The MHPA does not include any of the habitat located in the City of La Mesa. Thus, the habitat in La Mesa is not part of the identified core biological resource areas or associated habitat linkages. However, the City of La Mesa existing development review and building and grading permit review processes provide protection to native vegetation habitats within the City's jurisdiction. These measures will ensure that no habitat is lost in the City before mitigation for that habitat is assured. Project level biological surveys will be required for all future development proposals that could result in the loss of native habitat or the "take" of a covered species.

V. Interim Protection Measures

La Mesa development policies prohibit grading prior to the issuance of approved grading and building permits. City policies also prohibit the clearing and grubbing of habitat within the City prior to the completion of environmental review as required by the California Environmental Quality Act (CEQA). Wetland impacts would be mitigated through the adherence to Section 404 of the Clean Water Act.

VI. Mitigation Goals and Criteria

The City of La Mesa will review development proposals that could affect habitat lands in accordance with its land use regulations and environmental review process. Project level biological surveys will be conducted which will include directed searches for habitats and species covered under this HCP and the MSCP. The U.S. Fish and Wildlife Service (USFWS) and the State of California Department of Fish and Game (CDFG) will be afforded an opportunity to review individual projects within the City of La Mesa whenever such projects might result in the loss of a covered species or its habitat. The purpose of this review by USFWS and CDFG is to insure consistency with the MSCP and the La Mesa Subarea HCP. Written comments would be provided to the City of La Mesa if inconsistencies were found.

Development activities that would result in the loss of any native vegetation associations (e.g., coastal sage scrub, wetlands, etc.), or impact covered species are required to fully mitigate impacts associated with the development. The goal is to insure that any loss of habitat or sensitive species is compensated for by either on-site or off-site preservation of habitat. Mitigation for all impacts to identified natural upland habitats, including coastal sage scrub, will be mitigated off-site because the habitats in La Mesa are not included in the MSCP Multi-Habitat Preserve Area. Any southern maritime chaparral, mafic southern mixed chaparral, mafic chamise chaparral, native grassland, or oak woodlands that would be impacted will be mitigated in-kind at a 2:1 ratio, although these habitat types have not been identified within the City. Impacts to any other upland habitat types will be mitigated off-site at a 1:1 ratio. Off-site mitigation will be accomplished within the MSCP Multi-Habitat Preserve Area, either within the City of Poway's Subarea HCP or at other locations approved by the USFWS and the CDFG. Mitigation for wetlands will be at a location and ratio as required by the approval of a Section 404 permit from the Army Corps of Engineers. On-site mitigation for any habitat type would occur only if it is considered appropriate for wetland impacts in the context of the Section 404 permitting process or on-site preservation is deemed necessary by the wildlife agencies for the survival of a rare species.

VII. Funding for MHPA Acquisition

As a participating agency in the Natural Community Conservation Plan (NCCP) the City of La Mesa is committed to cooperating with the development and implementation of regional funding mechanisms for the acquisition and maintenance of habitat within the MSCP Multi-Habitat Preserve Area.

VIII. Consistency with Biological Preserve Design Criteria

The City of La Mesa will utilize the Biological Preserve Design Checklist contained in section 3.2.5 of the MSCP Plan to insure that public and private developments in this jurisdiction are consistent with the MSCP Plan. Qualified biologists will assist in the preparation of plans, formulation of mitigation measure, implementation activities, preserve maintenance, and monitoring of preserves.

IX. Consistency With Proposed MSCP Multi-Habitat Planning Area

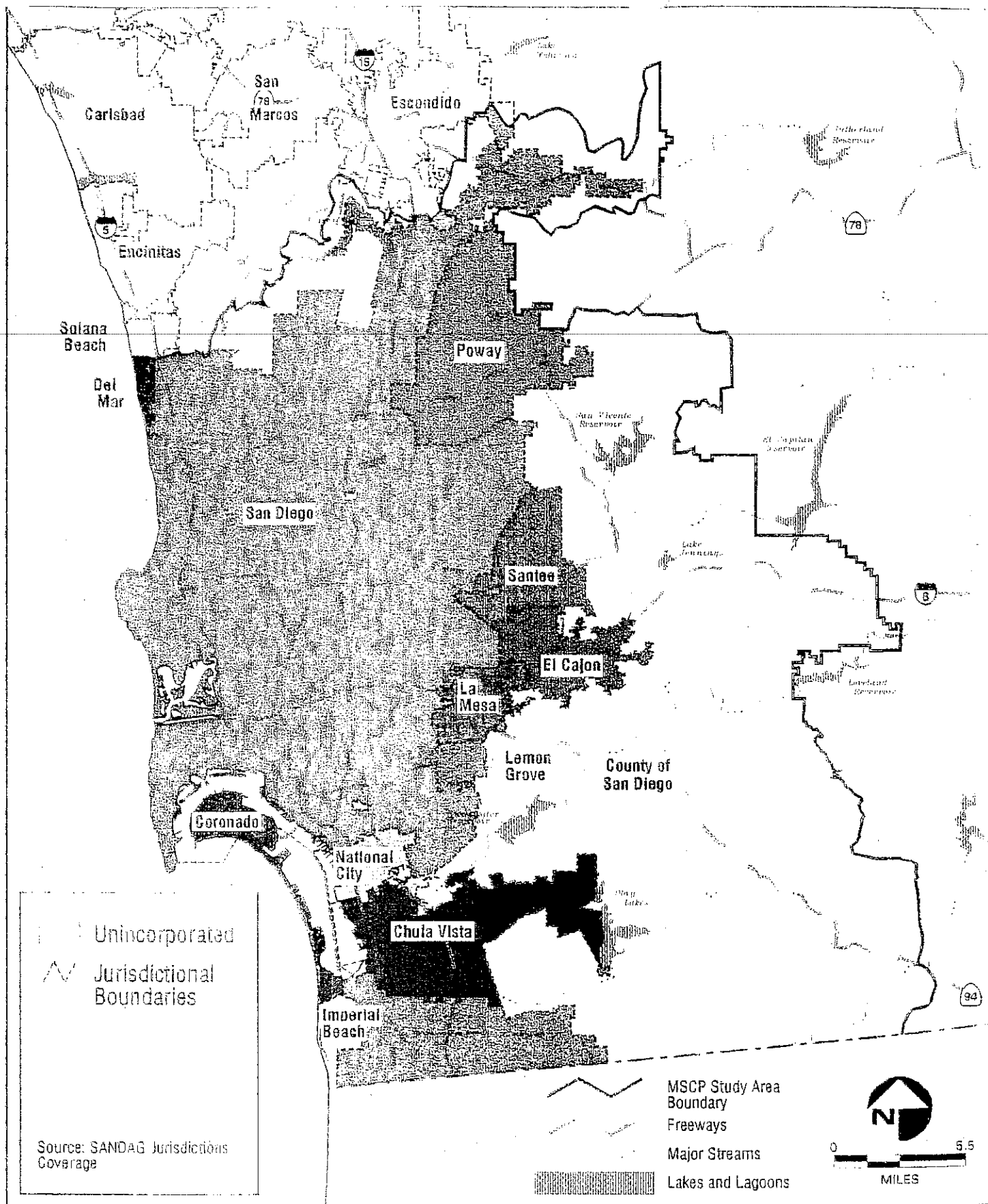
The La Mesa Subarea Preserve Plan is consistent with the MSCP Multi-Habitat Planning Area because off-site mitigation for impacts within the City of La Mesa would be accomplished within the Poway Subarea HCP, or at other locations consistent with the MSCP Subregional Plan and approved by the USFWS and CDFG. Impacts to habitat within La Mesa would not adversely affect the MSCP Multi-Habitat Planning Area.

X. Amendment Process

Subarea Preserve Plan amendments will be considered by the City of La Mesa should new scientific data on habitats and species within the city become available, or to add or delete species from the Covered species List. Amendments to the subarea plan would be processed in a manner consistent with Section 3.4.7 in the proposed MSCP Plan. Amendments of the subarea preserve plan would require concurrence by the USFWS, CDFG, and potentially by the City of Poway if the amendment would affect the Poway HCP.

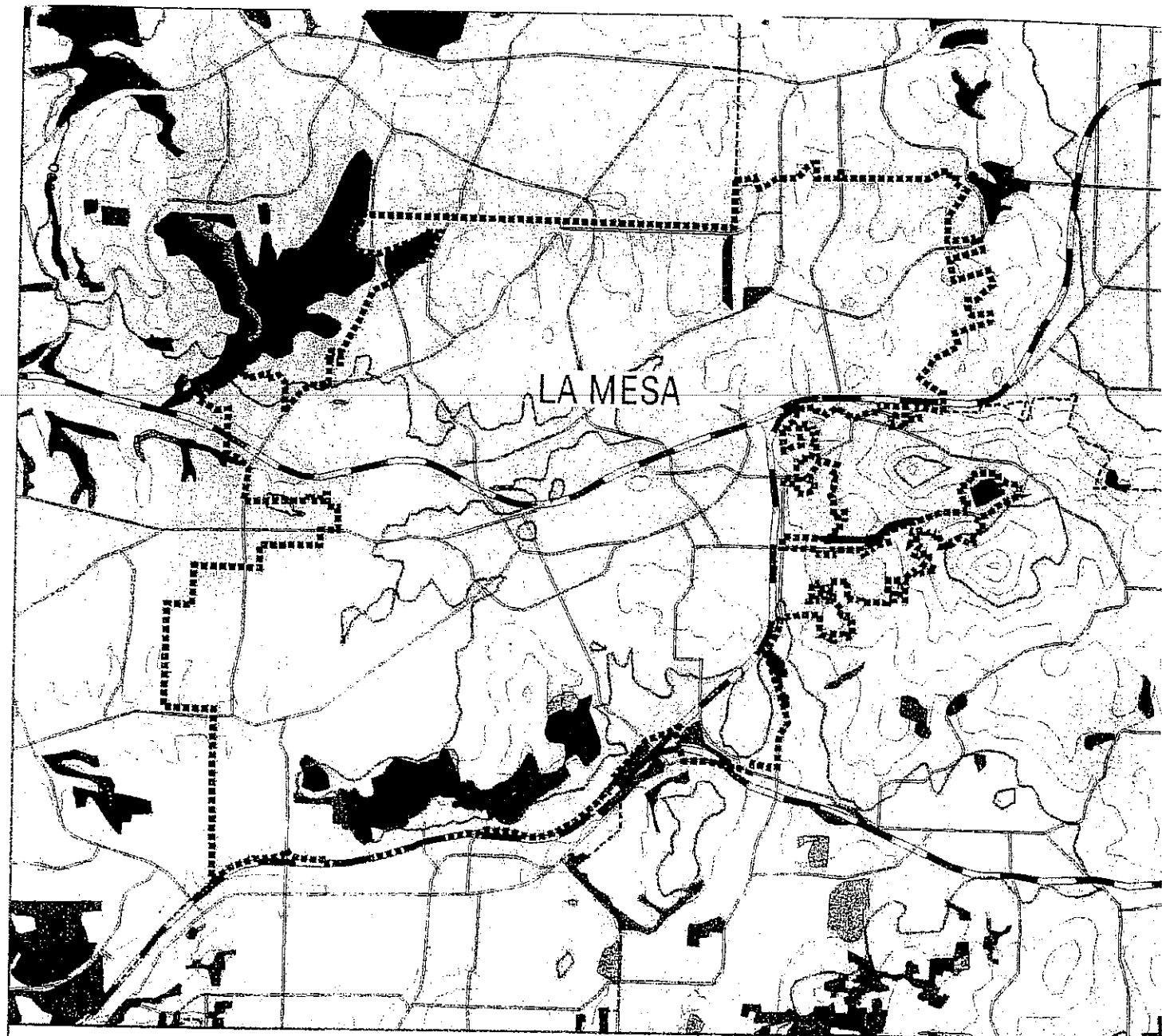
XI. Extraordinary Circumstances

The Implementing Agreement includes provisions in Section 9.6 for Extraordinary Circumstances which may affect the implementation of this Subarea HCP as outlined herein.




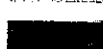



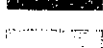
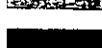
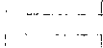





FIGURE





1

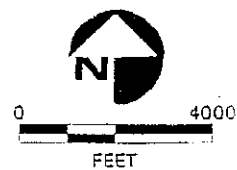


Vegetation Communities

	Coastal Sage Scrub		Beach/Foredunes
	Chaparral		Eucalyptus Woodland
	Coastal Sage Scrub/Chaparral		Disturbed Habitat
	Grassland		Shallow Bay
	Riparian/Wetlands		Developed
	Oak Woodland		Agriculture
	Coniferous Forest		

Base Map Features

	City Boundary
	Freeways
	Major Streams
	Lakes and Lagoons



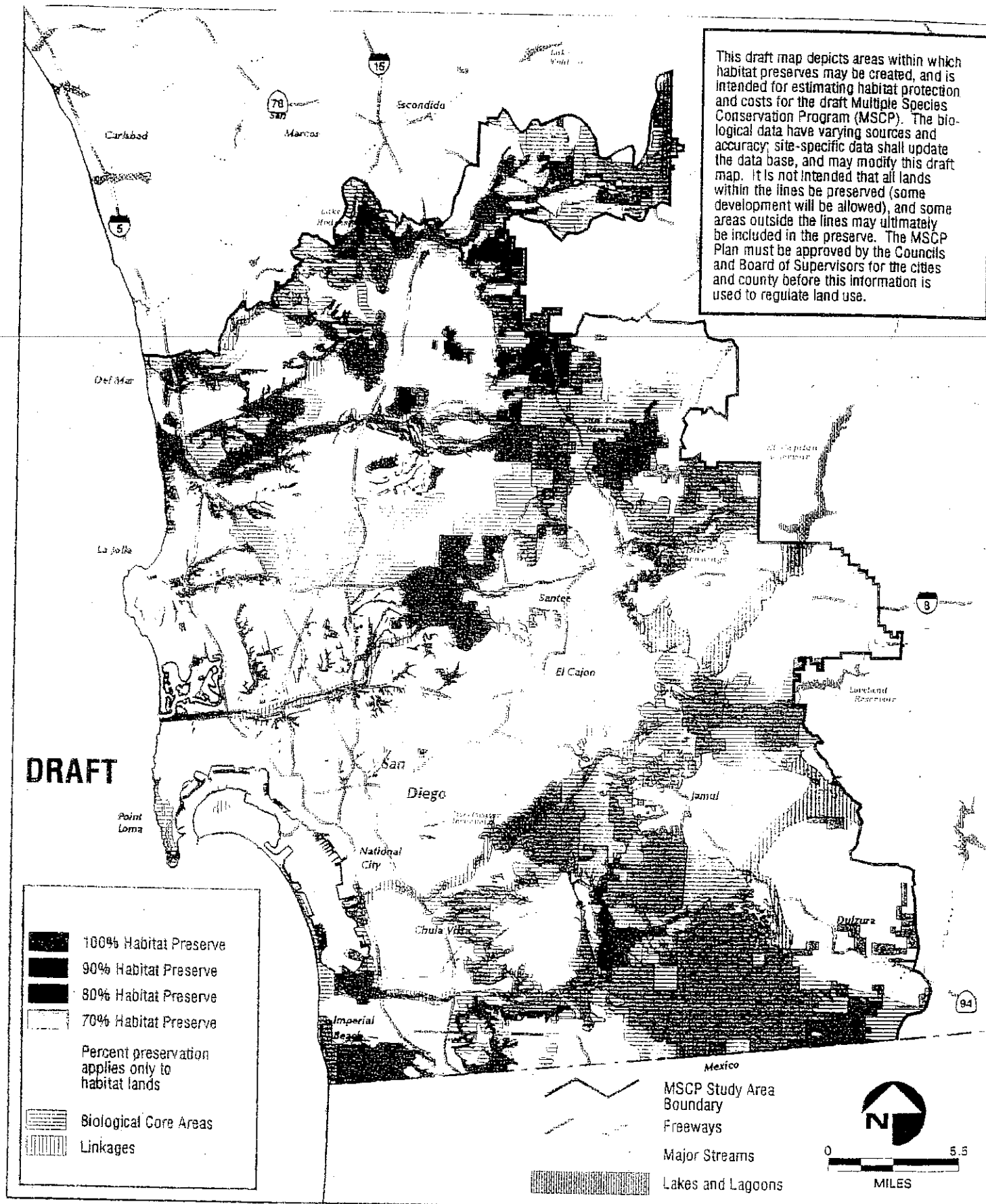
OGDEN

Vegetation Communities for MSCP Study Area

FIGURE

2

This draft map depicts areas within which habitat preserves may be created, and is intended for estimating habitat protection and costs for the draft Multiple Species Conservation Program (MSCP). The biological data have varying sources and accuracy; site-specific data shall update the data base, and may modify this draft map. It is not intended that all lands within the lines be preserved (some development will be allowed), and some areas outside the lines may ultimately be included in the preserve. The MSCP Plan must be approved by the Councils and Board of Supervisors for the cities and county before this information is used to regulate land use.



OGDEN

Multi-Habitat Planning Area

FIGURE

3

HEARINGS

9. APPEAL FROM MARIAN MILLSAPS AND LINDA FREY OF THE PLANNING COMMISSION'S APPROVAL OF SPECIAL PERMIT SP-02-97 (CARMELITE SISTERS), PERMITTING AN INCREASE IN THE HEIGHT LIMIT FROM SIX TO SEVEN FEET FOR A FENCE LOCATED AT 8585 LA MESA BOULEVARD

This item was previously continued to February 24, 1998.

10. CONSIDERATION OF THE LA MESA HABITAT CONSERVATION PLAN, A PROPOSAL TO ADOPT A PLAN UNDER THE UNITED STATES ENDANGERED SPECIES ACT AND STATE OF CALIFORNIA NATURAL COMMUNITIES CONSERVATION PROGRAM ACT, THE NEGATIVE DECLARATION PREPARED FOR THE PLAN, AND AN IMPLEMENTING AGREEMENT PREPARED FOR THE SECTION 10(a) PERMIT FROM THE UNITED STATES FISH AND WILDLIFE SERVICE

Notice of the hearing was given in accordance with legal requirements, and the hearing was held on the date and at the time specified in the notice.

Senior Planner Richter explained that under the federal and state Endangered Species Acts (ESA), property owners are prohibited from "taking" an endangered species through the development of habitat on their property. This "taking" is only permitted after the issuance of permits from the federal and state wildlife agencies. Under the federal ESA, these permits are issued only after the preparation of a habitat conservation plan. Individual property owners may prepare plans and apply for permits, although the federal and state agencies strongly prefer to process regional and sub-area habitat plans in order to provide a more comprehensive approach to habitat preservation. In lieu of each property owner being required to prepare such a plan, the City has prepared a comprehensive Habitat Conservation Plan (HCP), which has been in process for more than two years and which provides for the management of the City's remaining natural habitat resources.

Mr. Richter further explained that Staff has determined that there are potentially 179 acres of coastal sage scrub habitat on the vacant hillsides generally bounded by Massachusetts Avenue to the west, State Route 94 to the south, Spring Street to the east, and the Eastridge residential neighborhood to the north. The habitat is broken into numerous ownerships, ranging from properties of less than one acre to the largest parcel of approximately 142 acres, which is owned by Wardley Development Company. Wardley Development hired a planning consultant to assist City Staff in the preparation of the HCP in order for the City to obtain the necessary permits which will allow the company to proceed with development. He then explained the key provisions of the HCP.

Mr. Richter stated that after preparation of La Mesa's HCP, the City prepared a joint Initial Environmental Study/Environmental Assessment in accordance with the California Environmental Quality Act and the National Environmental Protection Act. The environmental studies

HEARINGS (Continued)

concluded that implementation of the HCP would not have a significant adverse impact on the environment, due to the requirements for off-site mitigation for any removal of habitat within the City. The documents were circulated for the 30-day review period, and no written comments were received. Therefore, Staff prepared a Negative Declaration for adoption by the Council, and the U.S. Fish and Wildlife Service is preparing a Finding of No Significant Impact.

Mr. Richter concluded by stating that both Staff and the Planning Commission recommend that the Council (1) adopt the Negative Declaration; (2) adopt the La Mesa Habitat Conservation Plan; and (3) authorize the Mayor to execute the final Implementing Agreement with the United States Fish and Wildlife Service and the State Department of Fish and Game.

Mayor Madrid then opened the public hearing.

Mr. Philip Hinshaw, representing the Wardley Development Company, spoke in support of the recommendations and asked the Council to adopt the Plan and Negative Declaration in order to allow the Eastridge development to proceed.

Mr. George Felix, owner of the second largest habitat parcel in the Eastridge area, also spoke in support of the adoption of the Plan.

ACTION: There being no one else from the audience wishing to speak, Councilmember La Suer moved to close the hearing. Vice Mayor Alm seconded the motion, and it carried 4-0.

ACTION: Following Council comments, Councilmember La Suer moved to (1) adopt the Negative Declaration; (2) adopt the La Mesa Habitat Conservation Plan; and (3) authorize the Mayor to execute the final Implementing Agreement with the United States Fish and Wildlife Service and the State Department of Fish and Game. Councilmember Sterling seconded the motion, and it carried 4-0.

ORDINANCES: FIRST READING

11. ORDINANCE SUPPORTING OIL DIVORCEMENT AS A MEANS TO COMBAT EXCESSIVELY HIGH GASOLINE PRICES IN SAN DIEGO COUNTY

City Attorney Sabine read the title of the proposed Ordinance.

Ms. Jan Speelman, Executive Director of the Automotive Trade Organizations of California, urged Council support of the Ordinance.

ACTION: Councilmember La Suer moved to introduce the Ordinance, an Ordinance establishing regulatory provisions pertaining to the use and operation of gasoline service stations and to instruct the City Attorney to schedule the Ordinance for second reading at the appropriate time. Vice Mayor Alm seconded the motion, and it carried 4-0.

La Mesa Subarea Plan Implementing Agreement

October 7, 1999

EXHIBIT F

SUFFICIENTLY AND SIGNIFICANTLY CONSERVED VEGETATION COMMUNITIES

SUFFICIENTLY AND SIGNIFICANTLY CONSERVED VEGETATION COMMUNITIES

NO SUFFICIENTLY CONSERVED HABITAT

SIGNIFICANTLY CONSERVED HABITAT
Coastal Sage Scrub

EXHIBIT G

PREVIOUSLY APPROVED PROJECTS

**CITY OF LA MESA
PREVIOUSLY APPROVED PROJECTS**

Eastridge Specific Plan
(Approved February 28, 1989)

Tentative Tract Map 90-02
(Approved February 26, 1991)

EXHIBIT H

HABITAT CONSERVATION PLAN ASSURANCES
ISSUED BY THE
SECRETARIES OF THE INTERIOR AND COMMERCE
FEBRUARY 23, 1998

product adhesive operations at Solar Corporation's Libertyville, Illinois facility from 3.5 pounds VOM per gallon to 5.75 pounds VOM per gallon.

(i) *Incorporation by reference.* July 20, 1995, Opinion and Order of the Illinois Pollution Control Board, AS 94-2, effective July 20, 1995.

3. Section 52.720 is amended by adding paragraph (c)(136) to read as follows:

§ 52.720 Identification of plan.

* * *

(c) * * *
(136) On January 9, 1997, Illinois submitted a site-specific revision to the State Implementation Plan which grants a temporary variance from certain automotive plastic parts coating volatile organic material requirements at Solar Corporation's Libertyville, Illinois facility.

(i) *Incorporation by reference.* September 5, 1996, Opinion and Order of the Illinois Pollution Control Board, PCB 96-239, effective September 13, 1996. Certificate of Acceptance signed September 13, 1996.

[FR Doc. 98-4378 Filed 2-20-98; 8:45 am]

BILLING CODE 5560-50-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Marine Fisheries Service

50 CFR Part 222

[Docket No. 980212035-8035-01]

RIN 1018-AE24

Habitat Conservation Plan Assurances ("No Surprises") Rule

AGENCY: Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

ACTION: Final rule.

DATES: This rule is effective March 25, 1998.

SUMMARY: This final rule codifies the Habitat Conservation Plan assurances provided through section 10(a)(1)(B) permits issued under the Endangered Species Act (ESA) of 1973, as amended. Such assurances were first provided through the "No Surprises" policy issued in 1994 by the Fish and Wildlife Service (FWS) and the National Marine

Fisheries Service (NMFS), (jointly referred to as the "Services.") and included in the joint FWS and NMFS Endangered Species Habitat Conservation Planning Handbook issued on December 2, 1996 (61 FR 63854). The No Surprises policy announced in 1994 provides regulatory assurances to the holder of a Habitat Conservation Plan (HCP) incidental take permit issued under section 10(a) of the ESA that no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit. The Services issued a proposed rule on May 29, 1997 (62 FR 29091) and the comments received on that proposal have been evaluated and considered in the development of this final rule. This final rule contains revisions to parts 17 (FWS) and 222 (NMFS) of Title 50 of the Code of Federal Regulations necessary to implement the Habitat Conservation Plan assurances.

ADDRESSES: To obtain copies of the final rule or for further information, contact Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C., 20240; or Chief, Endangered Species Division, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD, 20910.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, (Telephone 703/358-2171, or Facsimile 703/358-1735), or Nancy Chu, Chief, Endangered Species Division, National Marine Fisheries Service (Telephone (301/713-1401, or 301/713-0376).

SUPPLEMENTARY INFORMATION: These final regulations and the background information regarding the final rule apply to both Services. The proposed rule has been revised based on the comments received. The final rule is presented in two parts because the Services have separate regulations for implementing the section 10 permit process. The first part is for the final changes in the FWS's regulations found at 50 CFR 17.22 and 17.32, and the second part is for the final changes in NMFS's regulations found at 50 CFR 222.22.

Background

Section 9 of the ESA generally prohibits the "take" of species listed under the ESA as endangered. Pursuant to the broad grant of regulatory

authority over threatened species in section 4(d) of the ESA, the Services' regulations generally prohibit take of species listed as threatened. See, e.g., 50 CFR 17.31 and 17.21 (FWS). Section 3(18) of the ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." FWS regulations (50 CFR 17.3) define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

Section 10 of the ESA, as originally enacted in 1973, contained provisions allowing the issuance of permits authorizing the taking of listed species under very limited circumstances for non-Federal entities. In the following years, both the Federal government and non-Federal landowners became concerned that these permitting provisions were not sufficiently flexible to address situations in which a property owner's otherwise lawful activities might result in limited incidental take of a listed species, even if the landowner were willing to plan activities carefully to be consistent with the conservation of the species. As a result, Congress included in the ESA Amendments of 1982 provisions under section 10(a) to allow the Services to issue permits authorizing the incidental take of listed species in the course of otherwise lawful activities, provided that those activities were conducted according to an approved conservation plan (habitat conservation plan or HCP) and the issuance of the HCP permit would not jeopardize the continued existence of the species. In doing so, Congress indicated it was acting to " * * * address the concerns of private landowners who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking * * * " H.R. Rep. No. 835, 97th Cong., 2d Sess. 29 (1982) (hereafter "Conf. Report").

Congress modeled the 1982 section 10 amendments after the conservation plan developed by private landowners and local governments to protect the habitat of two listed butterflies on San Bruno Mountain in San Mateo County, California while allowing development activities to proceed. Congress recognized in enacting the section 10 HCP amendments that:

" * * * significant development projects often take many years to complete and permit applicants may need long-term permits. In this situation, and in order to provide sufficient incentives for the private sector to

participate in the development of such long-term conservation plans, plans which may involve the expenditure of hundreds of thousands if not millions of dollars, adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project. Thus, the Secretary should have the discretion to issue section 10(a) permits that run for periods significantly longer than are commonly provided [for other types of permits]." (Conf. Report at 31).

Congress also recognized that long-term HCP permits would present unique issues that would have to be addressed if the permits were to function to protect the interests of both the species involved and the non-Federal community. For instance, Congress realized that " * * * circumstances and information may change over time and that the original [habitat conservation] plan might need to be revised. To address this situation, the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances." (Conf. Report at 31). Congress also recognized that non-Federal property owners seeking HCP permits would need to have economic and regulatory certainty regarding the overall cost of species mitigation over the life of the permit. As stated in the Conference Report on the 1982 ESA amendments:

"The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in the approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." (Conf. Report at 30 and 50 FR 39681-39691, Sept. 30, 1985).

Congress thus envisioned and allowed the Federal government to provide regulatory assurances to non-Federal property owners through the section 10 incidental take permit process. Congress recognized that conservation plans could provide early protection for many unlisted species and, ideally, prevent subsequent declines and, in some cases, the need to list covered species.

The Services decided that a clearer policy regarding the assurances provided to landowners entering into an HCP was needed. This need prompted the development of the No Surprises policy, which was based on the 1982

Congressional Report language and a decade of working with private landowners during the development and implementation of HCPs. The Services believed that non-Federal property owners should be provided economic and regulatory certainty regarding the overall cost of species conservation and mitigation, provided that the affected species were adequately covered by a properly functioning HCP, and the permittee was properly implementing the HCP and complying with the terms and conditions of the HCP permit in good faith. A driving concern during the development of the policy was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities.

The Services issued the ESA No Surprises policy in August of 1994. This policy was then included in the joint Endangered Species Habitat Conservation Planning Handbook, which was published in draft form for public review and comment on December 21, 1994 (59 FR 65782), and, after consideration of the comments, was issued as final in December 1996 (61 FR 63854). In addition to that opportunity for public comment on the No Surprises policy in general, the application of the policy and its assurances have been and continue to be subject to an opportunity for public comment on each proposed HCP permit under section 10(c) of the ESA on a case-by-case basis. The Services were subsequently sued in *Spirit of the Sage Council v. Babbitt*, No. 1:96CV02503 (SS) (D. D.C.), which challenged the procedures under which the No Surprises policy was adopted and under which subsequent HCP permits were issued. In settling this lawsuit, the Services agreed to submit the No Surprises Policy to further public comment and to consider public comment in deciding whether to adopt the No Surprises policy as a final regulation. The Services agreed to this approach because they recognized the benefits of permanently codifying the No Surprises policy as a rule in 50 CFR, as well as the value of soliciting additional comments on the policy itself.

Summary of the Proposed Rule

The proposed rule stated that the Services, when negotiating unforeseen circumstances provisions for HCPs, would not require the commitment of additional land, property interests, or financial compensation beyond the level of mitigation that was otherwise

adequately provided for a species under the terms of a properly functioning conservation plan. Moreover, the Services would not seek any other form of additional mitigation from a permittee except under unforeseen circumstances. However, if additional mitigation measures were subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning conservation plan, the obligation for such measures would not rest with the permittee.

Under the proposed rule, if unforeseen circumstances warrant additional mitigation from a permittee who is in compliance with the conservation plan's obligations, such mitigation would, to the maximum extent possible, be consistent with the original terms of the conservation plan. Further, any such changes will be limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species. Additional mitigation requirements would not involve the payment of additional compensation or apply to parcels of land or the natural resources available for development under the original terms of the conservation plan without the consent of the permittee.

Criteria were also developed by the Services that must be used for determining whether and when unforeseen circumstances arise.

Under the proposed rule, the Services also would not seek any form of additional mitigation for a species from a permittee where the terms of a properly functioning conservation plan were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the conservation plans which have been or are being met. Nothing in the proposed rule would limit or constrain the Services, or any other governmental agency, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

The Services also proposed a permit-shield provision in the proposed rule that stated that compliance with the terms of an incidental take permit constitutes compliance with the requirements of sections 9 and 10 of the ESA with respect to the species covered by the permit regardless of changes in circumstances, policy, and regulation, unless a change in statute or court order specifically requires that assurances given in the original permit be modified or withdrawn.

The Services also clarified in the proposed rule that the regulatory and economic assurances provided to HCP permittees are limited to section 10(a)(1)(B) permits. In addition, the assurances are not provided to Federal agencies.

Summary of Comments Received

The Services received more than 800 comments on the proposed rule from a large variety of entities, including Federal, State, County, and Tribal agencies, industry, conservation groups, religious groups, coalitions, and private individuals. The Services considered all of the information and recommendations received from all interested parties on the proposed regulation during the public comment period and appreciated the comments received on the proposed rule. In addition to comments that specifically addressed the proposed No Surprises policy in the proposed rule, the Services received numerous additional comments on the HCP process itself, comments which were beyond the narrow scope of this particular rulemaking on the No Surprises policy. The Services will utilize these more generic comments on HCPs, as appropriate, as we continue to improve the implementation of our HCP programs. However, at this time, the Services will only address comments received that are specific to the proposed No Surprises rule.

The Services have made changes in the proposed rule where appropriate. In addition, the Services intend to revise the HCP Handbook, both to reflect the final No Surprises rule and to further enhance the effectiveness of the HCP process in general through expanded use of adaptive management, monitoring provisions, and the establishment of overall biological goals for HCPs.

The following is a summary of the comments on the proposed regulations, and the Services' response.

Issue 1: Many commenters believed that to provide regulatory No Surprises assurances, the Secretary was directed to " * * * consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem * * * " (Conf. Report at 31.) and that the Services have no legislative authority to provide regulatory assurances for HCPs that do not meet this standard.

Response 1: A proposed HCP must satisfy the specific issuance criteria enumerated in section 10(a)(2)(B) of the ESA. In deciding whether these criteria have been satisfied and whether the

permit should be issued for a given species, the Services consider, among other things, the extent to which the habitat of the affected species or its long-term survivability may be improved or enhanced. While it may be appropriate to consider an "enhancement factor" for an HCP, it is not a mandatory section 10(a)(2)(B) issuance criterion for all species.

Each HCP is analyzed on a case-by-case basis, using the best scientific information available. Habitat conditions are part of the data the Services evaluate to determine whether a proposed HCP meets the section 10 issuance criteria. The legislative history of the 1982 amendments to section 10 of the ESA indicates that Congress viewed habitat improvement and species conservation as appropriate considerations in determining whether to issue long-term incidental take permits. Certain types of HCPs, such as forest HCPs that include aquatic species, often allow for significant timber harvest and consequent species impacts during the initial years, while it may take decades before the riparian measures under the plan produce stream conditions that provide essential habitat functions for the listed species. The Services agree that, in appropriate situations, the legislative history supports including measures to provide for improved habitat over the life of the plan in section 10 permits. Severely depleted species and species for which the HCP covers all or a significant portion of the range are examples of circumstances in which essential habitat functions must be addressed to ensure that the conservation measures in the HCP provide a high probability that the habitat functions essential to the species' long-term survival will be achieved and maintained during the term of the permit.

Issue 2: Many commenters felt that this proposed regulation was driven solely by the needs of private landowners, and is not in the best interests of the species or other public concerns. Many commenters noted that the proposed regulation did not have commensurate certainties for protection of biological resources.

Response 2: The section 10(a) HCP provisions of the ESA were designed to help alleviate section 9 "take" liability for species on non-Federal lands. The ESA, as originally enacted, allowed the taking of listed species only under very limited circumstances, and did not, for example, allow the incidental take of listed species in the course of otherwise lawful activities. The 1982 ESA amendments to section 10(a) authorize the Services to issue HCP permits

allowing the incidental take of listed species in the course of otherwise lawful activities, provided the activities are conducted according to an approved habitat conservation plan that minimize and mitigate take and avoids jeopardy to the continued existence of the affected species.

The Services disagree that the No Surprises policy has a narrow focus that excludes the consideration of listed species conservation. To the contrary, a driving concern in the development of the policy was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities. The Services knew that much of the habitat of listed species is in non-Federal lands and believed that HCPs should play a major role in protecting this habitat. Yet, while thousands of acres of species habitat were disappearing each year, only a handful of HCPs had been sought and approved since 1982. The No Surprises policy was designed to rechannel this uncontrolled ongoing habitat loss through the regulatory structure of section 10(a)(1)(B) by offering regulatory certainty to non-Federal landowners in exchange for a long-term commitment to species conservation. Given the significant increase in landowner interest in HCPs since the development of the No Surprises policy, the Services believe that the policy has accomplished one of its primary objectives—to act as a catalyst for integrating endangered species conservation into day-to-day management operations on non-Federal lands. The Services also believe that the HCP process, which is a mechanism that reconciles economic development and the conservation of listed species, is good for rare and declining species, and encourages the development of more of these plans. If species are to survive and recover, such plans are necessary because more than half of the species listed have 80 percent of their habitat on non-Federal lands.

Issue 3: Many commenters stressed that the proposed regulation would unlawfully allow the Services to avoid their mandatory duties under section 7 of the ESA. They argued that the proposed regulation precludes the Services from meeting the regulatory and statutory requirements under 50 CFR 402.16 and section 7(d) because it makes reinitiation of consultation useless and precludes any meaningful reexamination of mitigation measures if the measures in the HCP are later found to be inadequate to avoid jeopardy as required under section 7(a)(2). If jeopardy did arise, commenters do not

feel that the Services would be able to implement the necessary mitigation to avoid the jeopardy because of lack of funding. Other concerns were also raised by commenters regarding the respective balance of responsibilities among the participants to an HCP containing a No Surprises assurance. Also, some commenters suggested the Services would not be fulfilling their mandatory conservation obligations under section 7(a)(1).

Response 3: The Services are committed to meeting their responsibilities under section 7(a)(2) of the ESA. As required by law, the Services conduct a formal intra-Service section 7 consultation regarding the issuance of each permit issued under section 10(a)(1)(B). The purpose of any consultation is to insure that any action authorized, funded, or carried out by the Federal government, including the issuance of an HCP permit, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of such species. In addition, the Services encourage all applicants to maximize benefits to species covered by their HCPs because of the Services' responsibilities under 7(a)(1). Moreover, as discussed in Response #1, in appropriate situations, such as when an HCP covers most or the entire range of a species or covers severely depleted species, the Services will seek measures necessary for the long-term survival of the species and its habitat.

The Services do not believe they are disregarding the requirements of section 7(d) in providing assurances to landowners through the section 10 process. During the formal section 7(a)(2) consultation process, and prior to the issuance of a final biological opinion, the Services (like any other Federal action agency) must not make any irreversible or irretrievable commitments of resources (in the case of proposing to issue an HCP permit, the Services cannot authorize incidental take) that would preclude the development of reasonable and prudent alternatives in the event that the action, as proposed, violates section 7(a)(2) of the ESA. In the context of HCP permit procedures, the only manner in which the Services could violate section 7(d) is if they authorized incidental take prior to making a final decision on a permit application, which is never the case.

In addition, the No Surprises assurances do not make reinitiation of consultation useless or preclude any meaningful reexamination of the HCP's operating conservation program. The Services will not require the landowner to provide additional mitigation

measures in the form of additional land, water, or money. However, additional mitigation measures can be provided by another entity. Similarly, the No Surprises rule does not preclude the Services from shifting emphasis within an HCP's operating conservation program from one strategy to another in an effort to enhance an HCP's overall effectiveness, provided that such a shift does not increase the HCP permittee's costs. For example, if an HCP's operating conservation program originally included a mixture of predator depredation control and captive breeding, but subsequent research or information demonstrated that one of these was considerably more effective than the other, the Services would be able to request an adjustment in the proportionate use of these tools, provided that such an adjustment did not increase the overall costs to the HCP permittee.

Moreover, if the Services reinitiate consultation on the permitting action, and if additional measures are needed, the Services will work together with other Federal, State, and local agencies, Tribal governments, conservation groups, and private entities to ensure additional measures are implemented to conserve the species.

Regarding the concerns on the respective balance of responsibilities among the participants to an HCP containing a No Surprises assurance, the Services believe the No Surprises rule places the preponderance of the responsibility for protection beyond the terms of a specific HCP upon the Services. The only impediments to the Services' assumption of this additional responsibility will arise from limits on authority or funding to provide this additional protection.

The Services have significant resources and authorities that can be utilized to provide additional protection for threatened or endangered species that are the subject of a given HCP including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques. For example, lands managed by the Department of the Interior could be used to ensure listed species protection. Moreover, subsequent section 7 consultations and approval of subsequent section 10 permits will have to take into account the HCP and the status of the species at that time. The section 9 prohibition against unauthorized take by other landowners provides additional protection.

In addition, section 5 of the ESA authorizes the Services to acquire lands to conserve endangered and threatened fish, wildlife, and plants, and section 6

of the ESA authorizes the Services to cooperate with the States in conserving listed species. While many of these programs and authorities are subject to the availability of appropriations, others, such as the authority under the Federal Land Policy and Management Act to exchange land for conservation purposes, do not require appropriations. These authorities provide additional flexibility through which the Services could meet their section 7 responsibilities. While by no means exhaustive, the above discussion demonstrates the depth of authorities and resources available to the Services to meet their No Surprises commitments.

Utilizing these authorities and resources, the Services should be able to provide additional species protection that may be required in the unexpected event that an HCP falls short of providing sufficient protection.

Issue 4: Many commenters stated that the proposed regulation violates section 4(b)(8) of the ESA, which requires " * * * the publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this ESA shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation * * *".

Response 4: The Services believe section 4(b)(8) is intended to apply only to listing and critical habitat decisions under section 4. However, even if section 4(b)(8) did apply to this rule, the Services have complied with its requirements. The proposed rule contained a thorough discussion of the basis for the proposed rule (62 FR 29091, May 29, 1997). In addition, the Services had previously explained the background of the No Surprises Policy in the draft HCP Handbook, which was published for public comment in the Federal Register (59 FR 65782, December 21, 1994).

Issue 5: Many commenters believe that the Secretary of the Interior does not have the authority to issue assurances for species covered by the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA).

Response 5: The FWS believes that the ESA is more restrictive and protective of species than the MBTA and the BGEPA, and that species covered under an HCP that are also covered by the MBTA and the BGEPA will adequately be protected as long as the HCP is properly implemented. The FWS has concluded that under certain

conditions, a section 10 permit allowing incidental take of listed migratory birds is sufficient to relieve the permittee from liability under the MBTA and BGEPA for taking those species. For the MBTA, this is accomplished by having the HCP permit double as a Special Purpose Permit authorized under 50 CFR 21.27. For the BGEPA, the FWS would exercise its prosecutorial discretion not to prosecute an incidental take permittee under the BGEPA if such take is in compliance with a section 10 permit under the ESA.

However, there are conditions that must be satisfied before either of these protections apply, which are explained on pages 3-40 to 3-41 in the joint Endangered Species Habitat Conservation Planning Handbook (61 FR 63854, December 2, 1996). The FWS believes this approach is warranted because the permittee already would have agreed to an operating conservation program designed to conserve the species and minimize and mitigate the impacts of take of the listed species of migratory birds to the maximum extent practicable. Through the permitting provisions of the MBTA and the FWS's discretion in the enforcement of the BGEPA and the ESA, the FWS has the authority to provide a permittee with assurance that they will not be prosecuted under the MBTA or BGEPA for take expressly allowed under the ESA.

Issue 6: Many commenters stated that HCPs with No Surprises assurances are in conflict with the issuance criteria in the ESA because, in the event of unforeseen circumstances, the project impacts may not be fully mitigated and the plan may reduce the survival and recovery of a covered species.

Response 6: The assurances provided through this regulation are consistent with the issuance criteria of the ESA. Before issuing a permit, the Services ensure that the applicant minimizes and mitigates the project impacts, to the maximum extent practicable, and that the permitted activities avoid jeopardy to the continued existence of the affected species.

In addition, in cases where significant data gaps exist, adaptive management provisions are included in the HCP. The primary reason for using adaptive management in HCPs is to allow for up-front, mutually agreed upon changes in the operating conservation program that may be necessary in light of subsequently developed biological information. In the event of unforeseen circumstances, these strategies may be redirected as long as the redirection is consistent with the scope of the

mutually agreed-upon adaptive management provisions of the HCP.

Issue 7: Many commenters stated that the applicant is legally required to address all unforeseen circumstances in the HCP pursuant to section 10. They noted that fire, disease, drought, flood, global climate change, and non-point source pollution may be unforeseen, but are not uncommon. Also the proposed regulation does not direct the applicant to provide for all unforeseen circumstances that might occur during the length of the permit because it is the Services' responsibility to determine that there was an unforeseen circumstance that was not addressed and is not the fault of the permittee implementing the HCP. In addition, commenters noted that the nature of many of the HCPs that the Services are approving increases the likelihood for unforeseen events to happen (i.e., the permits are issued for many years and cover large areas and many species).

Response 7: The Services disagree that HCPs must address *all* hypothetical future events, no matter how remote the probability that they may occur. Rather, the Services believe that only reasonably foreseeable changes in circumstances need to be addressed in an HCP. Moreover, these circumstances are likely to vary from HCP to HCP given the ever changing mix of species and affected habitats covered by a given plan. Nevertheless, the Services agree that the proposed rule's treatment of unforeseen circumstances could be strengthened, and a definition of unforeseen circumstances has been codified in this rule. In particular, the Services would like to clarify that unforeseen circumstances will only include events that could not reasonably have been anticipated. *All reasonably foreseeable circumstances, including natural catastrophes that normally occur in the area, should be addressed in the HCP.* The final rule specifies how unforeseen circumstances will be addressed if they occur during the life of the permit.

Issue 8: Commenters believe that the proposed regulation would not allow for social changes that could occur over the lifetime of the permit. For example, they claim that the development and implementation of the Emergency Salvage Timber rider has affected the success of the conservation measures of several HCPs.

Response 8: There may be situations that do arise related to social changes that could occur during the lifetime of the permit. In these situations, the Services will use all of their legal authorities to adequately address the changes. The Timber Salvage rider to

the Appropriations bill is actually a good example of how the Administration responded to a change in social policy. On July 27, 1995, the President signed the Rescission Act (Public Law 104-19) that provided funds for disaster relief and other programs. This bill contained provisions for an emergency salvage timber sale, and directed the preparation, offer, and award of timber salvage sales nationwide. Although the bill passed, the President did not support the provision that waived compliance with environmental laws during timber salvage and directed the Secretaries of Agriculture, the Interior and Commerce, and the heads of other agencies, to move forward to implement the timber-related provisions of the bill in an expeditious and environmentally-sound manner. The Services worked with other Federal agencies to develop a process that, as a matter of Administration policy, addressed compliance with all environmental laws while also meeting the requirements of Pub. L. 104-19. An interagency team of Federal agencies then drafted a process that addressed compliance with the ESA through a streamlined section 7 consultation procedure to ensure that these sales did not jeopardize listed species. In this case, the Services and other Federal agencies cooperatively used their administrative discretion and legal authorities to ameliorate adverse impacts upon listed species conservation.

Issue 9: Several commenters believe that the proposed No Surprises rule negates adaptive management provisions incorporated into HCPs, and may not allow future jeopardy situations to be addressed, because adaptive management must allow for adaptations to changes as they occur rather than trying to plan for everything up front. In addition, many commenters believe that in order to get No Surprises assurances, an HCP must have an adaptive management program that addresses all foreseeable biological and environmental changes and that is designed so that new applicable scientific information and information developed through a monitoring program is incorporated into the plan.

Response 9: The Services do not believe that the proposed rule negates adaptive management provisions incorporated into HCPs for the species with biological data gaps. The No Surprises assurances only apply to an approved HCP that has otherwise satisfied the issuance criteria under section 10(a)(2)(B) of the ESA. When considering permits where there are significant biological data gaps, the

Services have two choices: either deny an HCP permit application due to the inadequacy of the overall proposed plan, or build in adaptive management and monitoring provisions where warranted because of biological data gaps and issue the permit. If there is significant uncertainty associated with the operating conservation program, adaptive management becomes an integral component of the HCP. Incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-term interest of affected species when HCPs cover species with significant biological data gaps. Through adaptive management, the biological objectives of an operating conservation program are defined using techniques such as models of the ecological system that includes its components, interactions, and natural fluctuations. If existing data makes it difficult to predict exactly what conservation and mitigation measures are needed to achieve a biological objective, then an adaptive management approach should be used in the HCP. Under adaptive management, the HCP's operating conservation program can be monitored and analyzed to determine if it is producing the desired results (e.g., properly functioning riparian habitats). If the desired results are not being achieved, then adjustments in the program can be considered through an adaptive management clause of the HCP. Thus, adaptive management can be an integral part of the operating conservation program for an HCP and can be implemented to adjust strategies accordingly. The Services support continuing to strengthen the effectiveness of adaptive management provisions in HCPs and intend to do so in further revisions to the HCP Handbook.

Issue 10: Numerous commenters stated that the proposed regulation should identify secured sources of funding that do not rely on appropriations for the implementation of conservation measures that may be needed to address unforeseen circumstances.

Response 10: Funding mechanisms of this type would have to be established through Congressional action. Absent Congressional action on this matter, the Services must operate with the fiscal resources otherwise made available to them through the appropriations process. Moreover, in approving an HCP in the first instance, the Services must conclude that the permittee has provided for adequate funding to implement the terms of the HCP.

Issue 11: Many commenters stated that the Federal government is not capable of shouldering the financial burden of funding the implementation of conservation measures that may be needed to address unforeseen circumstances. The hardship of paying for any changes needed in the HCP on the government may have severe and far reaching effects on funding for other Federal activities. In addition, some commenters noted that the proposed regulation unlawfully shifts the burden of funding to the Services when section 10 clearly states that the applicant will provide the funding. Numerous commenters stated that the government does not have guaranteed funding for covering unforeseen circumstances and cannot make such guarantees in violation of the Anti-Deficiency Act.

Response 11: The ESA requires the Service to find that an incidental take permittee has provided adequate funding to implement an HCP in the first instance. In addition, the Services must ensure that HCPs are designed to adequately mitigate the incidental take authorized by the permit, include measures to deal with unforeseen circumstances that may arise, and comply with such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan. Once the Services have concluded that a permittee has initially satisfied the issuance criteria in section 10(a), there is nothing in the ESA that precludes the Services from assuming additional responsibility for species covered under the terms of an HCP, especially when such responsibilities are limited to highly unlikely unforeseen circumstances. In fact, the Services have responsibility for listed species conservation regardless of whether an HCP is involved or not, and carrying out that responsibility (for example, through the initiation of litigation to enforce section 9 of the ESA) is also dependent upon the availability of appropriated funds. Therefore, at a conceptual level, the lack of guaranteed funding to handle a breakdown of an HCP due to unforeseen circumstances is no different from a lack of guaranteed funding to enforce the ESA generally.

The Anti-Deficiency Act applies to the Services' activities under the ESA as it does to their activities under all other environmental laws. In the face of an unexpected species decline, where additional conservation efforts are warranted, the Services have significant resources at their disposal to address the comparative needs of the species. As noted earlier in Response #3, the Services can also work with Congress,

other Federal, State, and local agencies, tribes, environmental groups, and private entities to help ensure the continued conservation of the species in the wild. The Services have a variety of tools available to ensure that the needs of the species affected by unforeseen circumstances are adequately addressed, including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques. Thus, the Services believe they have a wide array of options and resources available to respond to any unforeseen circumstances.

Issue 12: Many commenters noted that many HCPs do not have adequate funding, and the Services must not issue an incidental take permit unless an applicant has secured adequate funding to address all foreseeable changes that might be needed in the conservation measures during the lifetime of the permit. County or State Bonds that are not guaranteed should not be considered "adequate funding."

Response 12: Section 10(a)(2)(B)(iii) requires incidental take permit applicants to "ensure that adequate funding for the plan will be provided." This issuance criterion requires that the applicant detail the funding that will be available to implement the proposed operating conservation program. Therefore, all conservation plans specify funding requirements necessary to implement the plan. The Services issue a permit only when they have concluded that the operating conservation program will be adequately funded. No Surprises only applies to an HCP that is being properly implemented, and if a major component of an HCP, like its funding strategy, is never initiated or implemented, then No Surprises no longer applies and the assurances lapse.

The FWS has incorporated provisions into HCPs that allow for a reevaluation of species coverage in case a County or State Bond that is supposed to meet the adequate funding issuance criterion ultimately is not passed. Under these provisions, the list of species authorized for incidental take may be diminished if funding is not in place within a specified time frame, and any incidental take that would occur before the bond measure is acted upon would have to be adequately mitigated up-front. This reevaluation mechanism was used in the Multiple Species Conservation Program for southwestern San Diego County, California. This type of reevaluation process will be incorporated into other HCPs that rely on proposed bonds to provide required funding.

Issue 13: Many commenters stated that funding and accountability mechanisms are more complicated for permits that involve third party beneficiaries (e.g., certificates of inclusion), and that these types of permits should not include assurances.

Response 13: The Services believe that the assurances provided by the final rule should be available to individuals who participate in HCPs through a larger regional planning process. These large-scale, regional HCPs can significantly reduce the burden of the ESA on small landowners by providing efficient mechanisms for compliance, distributing the economic and logistical impacts of endangered species conservation among the community, and bringing a broad range of landowner activities under the HCPs' legal protection. In addition, these large-scale HCPs allow for ecosystem planning, which can provide benefits to more species than small-scale HCPs. Large-scale HCPs also provide the Services with a better opportunity for analyzing the cumulative effects of the projects, which is more efficient than the piecemeal approach that could result if each landowner developed his/her own HCP. The Services do believe, however, that the party that holds the "overarching" permit, and issues subpermits (e.g., Certificates of Inclusion or Participation Certificates) must have the legal authority to enforce the terms and conditions of the permit and the underlying funding mechanisms for the HCP.

Issue 14: Many commenters requested the Services to remove the permit-shield provision from the proposed regulation because it improperly restricts the authority of the Secretary and citizens to enforce the requirements of the ESA. These commenters assert that the Services do not have the authority to prevent citizens from suing those who are in violation of the ESA. One commenter stated that the permit-shield provision lacks important limitations found in other permit-shield provisions, such as the Clean Water Act and Resource Conservation and Recovery Act. Commenters also stated that the proposed permit-shield provision conflicts with the citizen suit provision in section 11(g) of the ESA. Other commenters supported the proposed permit-shield provision and urged the Service to incorporate it into the final rule. These commenters believe failure to include a permit-shield provision would undercut the No Surprises assurances by exposing permit holders to potential enforcement actions even if they are complying fully with the terms and conditions of valid permits.

Response 14: After further review of the permit-shield concept, including a review of legal authorities, the Services have decided not to include a legally binding permit-shield provision in the final rule. The purpose of the permit-shield provision was to provide certainty to permittees regarding their legal obligations. The current statutory and regulatory framework appears to already provide permittees with that certainty. Although commenters stated that a permit holder might still be vulnerable to government-initiated enforcement actions notwithstanding the No Surprises assurances, the Services cannot identify situations in which a permittee would be in violation of Sections 9 or 11 of the ESA, if in fact they were acting within the permit's authorization and were complying with the terms and conditions of the permit.

In addition, as part of the review of legal authorities, the Services reviewed the court decision in *Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741, 761-765 (D.C. Cir. 1991), which addressed the legality of the Environmental Protection Agency's permit-shield rule for permits issued under the Resource Conservation and Recovery Act (RCRA). Although that decision upheld the RCRA permit-shield rule promulgated by the EPA, 40 CFR 270.4(a), the Services are concerned that the incidental take permit program is sufficiently different from the RCRA permit program that the *Shell Oil* decision may not support a permit-shield rule for incidental take permits. For instance, the court noted that the maximum term of RCRA permits is 10 years, which is considerably shorter than the terms of most incidental take permits. In addition, the EPA retains explicit authority to modify or terminate RCRA permits in response to information arising after a permit is issued that would have justified different permit terms had it existed when the permit was issued. In contrast, the No Surprises rule commits the Service to issue permits that do not require additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources if unforeseen circumstances arise.

Although the Services have decided not to include a legally binding permit-shield provision in the final rule, they nonetheless strongly support a policy that permittees should feel free of potential prosecution if they are acting under the authorizations of their permit and are complying with the terms and conditions of the permit. The Services therefore will continue their policy of not enforcing the prohibitions of Section

9 of the ESA against any incidental take permittee who complies fully with the terms and conditions of the permit.

Many commenters requested that the Services remove the permit-shield provision from the proposed regulation because it improperly restricts the authority of citizens to enforce the requirements of the ESA. The purpose of the proposed permit-shield provision was to provide that the Services would not utilize Section 11(e) of the ESA to enforce Section 9 prohibitions against a permittee who is in full compliance with the terms and conditions of a permit. The permit-shield provision would not, therefore, have restricted citizen suits.

Issue 15: Commenters believe that the regulatory assurances provided to the permittee deprive citizens of the right to have general oversight of HCPs, including challenging government's management decisions, guaranteeing that landowners are in compliance with the agreements, and ensuring that the plans are actually working to conserve listed species.

Response 15: The No Surprises assurances do not deprive citizens of HCP oversight or of their ability to challenge an improperly issued HCP permit. In addition, all Service decision documents (such as approval of HCP management plans) are part of the Administrative Record for any individual HCP and are available to any member of the public upon request. Nothing in this rule prevents citizens from challenging the adequacy of those decisions or bringing HCP permit terms and conditions compliance issues to the Services' attention. The Services welcome citizen input on HCP implementation. Public comments must be considered in all permit decisions. Providing No Surprises assurances to an HCP permittee does not eliminate this public comment period. In addition, the Services or any party designated as responsible by the Services (e.g., State wildlife agency, local government) in the HCP will be expected to monitor the project for compliance with the terms of the incidental take permit and HCP. The Services also require periodic reporting from the permittee in order to maintain oversight to ensure the implementation of the HCP's terms and conditions. The final rule does nothing to affect these reporting requirements.

Issue 16: Numerous commenters stated that the proposed regulation should provide for permits to contain a reopener clause. Any entity (e.g., landowners, government agencies, ecologists, environmentalists) would then be able to reopen the permit for any of the following reasons: 1) Any

party fails to implement the terms and conditions of the permit; (2) new listings of any species not covered; and (3) monitoring indicates that conservation goals are not being met and that the operating conservation program is ineffective.

Response 16: The HCP process already provides various mechanisms for reopening an HCP. First, the Services may suspend, or in certain circumstances, revoke all or part of the privileges authorized by a permit if the permittee does not comply with the terms and conditions of the permit or with applicable laws and regulations governing the permitted activity. If an HCP permit is suspended or revoked, incidental take must cease. The provisions of most HCPs expressly address permit suspension or revocation procedures. Second, if a species was not initially listed on an HCP permit, it may not be automatically covered by an HCP when subsequently listed. For example, if a species was not originally listed on a permit, the HCP must be formally amended. Amendment of a section 10(a)(1)(B) permit is also required when the permittee wishes to significantly modify the project, activity, or conservation program as described in the original HCP. Such modifications might include significant boundary revisions, alterations in funding or schedule, or an addition of a species to the permit that was not addressed in the original HCP. The Services encourage the public to provide them with applicable information concerning any approved HCP that would be useful in evaluating the effectiveness of the HCP or other concerns they may have.

Issue 17: Numerous commenters stated that the assurances provided through these proposed regulations should not be automatic and should be commensurate with risk, and that the Services should provide assurances to a permittee only if the HCP includes specific objectives or measurable biological goals that must be met and that would ensure the conservation of the species, if they are attained.

Response 17: The Services believe that the commitments of an HCP must be specifically identified and scientifically based, reflecting the particular needs of the species that are covered. Thus, the concept of comparative risk to various species is factored in by the Services as they assess the adequacy of the operating conservation program for a given HCP. The Services will not approve an HCP permit request found to be inadequate, but will provide No Surprises assurances to all HCPs that are found to be adequate.

For many recent HCPs, the Services are defining specific biological goals. Furthermore, comprehensive monitoring programs provide added value for measuring progress toward meeting the goals and commitments and ensuring that the permittee is in compliance with the permit. The Services often incorporate monitoring measures to assess whether goals are being met, especially in cases where additional information may be desirable or there is significant scientific uncertainty. If existing data makes it difficult to predict exactly what measures are needed to achieve a biological objective, then an adaptive management strategy is usually required. Adaptive management, which then becomes an integral component of the operating conservation program, is not negated by the No Surprises assurances because it was a part of the HCP's operating conservation program as approved by the Services.

Issue 18: Most commenters stated that to get assurances, a multispecies HCP must adequately cover each individual species rather than collectively cover a group of species defined by some type of commonality (e.g., guild or habitat).

Response 18: The Services believe that each species in a multispecies HCP must be adequately addressed by satisfying the permit issuance criteria under section 10(a)(2)(B) of the ESA. The Services believe, nevertheless, that in some cases, using a "girdling" or habitat-based approach to craft preserve designs or management measures may be appropriate.

However, even when such tools are used, the Services will ensure that for each species that receives assurances, the species must be specifically named in the HCP, and adequate conservation measures are included in the plan.

Issue 19: Commenters believe that to get assurances, an HCP must have an adequate and comprehensive biological monitoring program that addresses all foreseeable changes in circumstances that may occur over the lifetime of the permit.

Response 19: Monitoring is already an element of HCPs under the Services' Federal regulations (50 CFR 17.22(b)(1), 17.32(b)(1), and 222.22). Monitoring is also an important tool for HCPs, and their associated permit and Implementing Agreements, and should be properly designed and implemented. The scope of the monitoring program should be sufficient to address reasonably foreseeable changes in circumstances that occur during the life of the permit. Monitoring is needed to obtain the information necessary to properly assess the impacts from the

HCP and to ensure that HCPs are properly implemented. Monitoring will also allow the use of the scientific data obtained on the effects of the plan's operating conservation program to modify specific strategies through adaptive management, and to enhance future strategies for the conservation of species and their habitat.

While the Services appreciate the numerous benefits of a well-developed monitoring program, some low-effect HCPs have minimal monitoring requirements because the impacts from the plan are minor or negligible, and the attempt by the commenters to make an extensive monitoring program a requirement for No Surprises assurances is misplaced. A well-developed monitoring program will add to the credibility of an HCP proposal and will facilitate the eventual approval of the HCP. Thus, the Services believe that the real test for receiving the No Surprises assurances should be whether the issuance criteria under section 10(a) have been satisfied, and not whether a particular conservation tool, such as monitoring, has been extensively employed under an HCP whether it is needed or not.

Issue 20: Numerous commenters stated that to get assurances for unlisted species, a plan must be in place that describes what is necessary for their long-term conservation. Commenters encouraged a standard for unlisted species equal to that used in the proposed policy and regulations for the Candidate Conservation Agreements (CCAs).

Response 20: While the Services agree that these two types of agreements are similar, the purposes of the proposed CCA policy and the No Surprises rule are somewhat different. As stated in the proposed CCA policy, the ultimate goal of these agreements is to encourage landowners and State and local land managing agencies to manage their lands in a manner that, if adopted on a broad enough scale by similarly situated landowners, would remove threats to species and thereby obviate the need to list them under the ESA. The purposes of including unlisted species in HCPs and of making them subject to No Surprises assurances, are to enlist landowners in efforts to conserve these species and to provide certainty to landowners who are willing to make long-term commitments to the conservation of listed and unlisted species that they will not be subjected to additional conservation and mitigation measures if one of the species is listed, except as provided in their HCPs. The standards for including an unlisted species under an HCP are the

issuance criteria under section 10(a)(2)(B) of the ESA. For HCPs, the Services will continue to use the conservation standard identified in the Habitat Conservation Planning Handbook for unlisted species. The Handbook clearly states that an unlisted species is "adequately covered" in an HCP only if it is treated as if it were listed pursuant to section 4 of the ESA, and if the HCP meets the permit issuance criteria in section 10(a)(2)(B) of the ESA with respect to the species. The No Surprises assurances apply only to species (listed and unlisted) that are adequately covered in the HCP. Species, whether listed or nonlisted, will not be included in the HCP permit if data gaps or insufficient information make it impossible to craft conservation and mitigation measures for them, unless these data gaps can be overcome through the inclusion of adaptive management clauses in the HCP.

Issue 21: Many commenters requested an addition to the rule that would address the early termination of an HCP. Commenters want the Services to discuss the possibility of terminating an HCP, including how the assurances and applicable mitigation apply to the termination.

Response 21: The Services believe that such a requested change is unnecessary. The No Surprises assurances apply during the life of the permit, provided that the HCP is properly implemented and the terms and conditions of the HCP incidental take permit are being followed. Should a permit be terminated early, the No Surprises assurances also terminate as of the same date. The question of how outstanding mitigation responsibilities should be handled upon early termination is a more generic HCP policy issue that is unrelated to the No Surprises assurances and is, therefore, beyond the scope of this particular rulemaking.

Issue 22: Several commenters stated that the proposed rule was confusing regarding the different level of assurances established in the proposed rule (for regular HCPs and for HCPs that provide a "net benefit" to the covered species) and that the distinction between the two levels should be clarified further or only one level of assurances should be provided to HCP permittees.

Response 22: The Services agree that these distinctions were unnecessarily confusing and have revised the final rule accordingly. The final rule requires the Services to provide only one level of assurances to any permittee that has an approved HCP permit. The Services eliminated the level of assurances for

HCPs that were developed to provide a net benefit for the covered species since the distinction between the two types of HCPs were very difficult to delineate in practice.

Issue 23: Commenters noted that there were differences between the regulations, such as FWS use of the term "unforeseen" circumstances throughout the proposed rule, whereas NMFS used the terms "unforeseen" and "extraordinary" circumstances in their proposed rule.

Response 23: The Services agree that there was some confusion and have made the regulations consistent between the two agencies, where possible. Moreover, there was never an intention in the August 1994 No Surprises announcement to create a substantive difference between "unforeseen" and "extraordinary" circumstances. NMFS will use the term "unforeseen" in its regulations in place of "extraordinary."

Revisions to the Proposed Rule

The following represents a summary of the revisions to the proposed rule as a result of the consideration of the public comments received during this rulemaking process. The Services have rewritten the "Assurances" section of the preamble and regulatory language to improve clarity and readability. Many commenters were confused by the language in the proposed rule, and asked the Services to provide a clearer explanation of this section. Accordingly, the Services have edited and reorganized the Assurances provision, but have not made any substantive changes.

(1) Some of the definitions used in this rulemaking process will now be codified as definitions in 50 CFR 17.3 for FWS and 50 CFR 222.3 for NMFS. These definitions were concepts identified in the "Background" section of the proposed rule.

(2) The rule was revised so the Services will only provide assurances for species listed on a permit that are adequately covered in the conservation plan and specifically identified on the permit.

(3) The Services have clarified that the duration of the assurances is the same as the length of the permit.

(4) The Services revised the rule so that there is only one level of assurances provided to permittees, instead of one level of assurances for standard HCPs and another level for HCPs that were developed to provide a "net benefit" for the covered species.

(5) The Services have clarified the rule so that it is apparent that No Surprises assurances do not apply to Federal agencies who have a continuing

obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA.

(6) The Services believe that HCPs are, and will continue to be, carefully crafted so that unforeseen circumstances will be rare, if at all, and that the Services will be able to successfully handle any unforeseen circumstance so that species are not jeopardized. To help ensure that unforeseen circumstances are a rare occurrence, the Service revised the rule in appropriate areas.

(7) The Services replaced the term "properly functioning," which was used in the proposed rule to "properly implemented." This change accurately reflects the intent of the Services when discussing the implementation of HCPs.

(8) The Services eliminated the permit-shield provisions from the final rule.

(9) The Services revised the final rule by replacing the term "property interests" with the term "natural resources," which more accurately describes the intent of the Services.

Description/Overview of the Final Habitat Conservation Plan Assurances ("No Surprises" Policy) Rule

The information presented below briefly describes the "No Surprises" assurances adopted in this final rule. These assurances provide economic and regulatory certainty for non-Federal property owners that participate in the ESA's section 10(a)(1)(B) permitting process through the following:

1. **General assurances.** The No Surprises assurances apply only to incidental take permits issued in accordance with the requirements of the Services' regulations where the conservation plan is being properly implemented, and apply only to species adequately covered by the conservation plan.

Discussion: Once an HCP permit has been issued and its terms and conditions are being fully complied with, the permittee may remain secure regarding the agreed upon cost of conservation and mitigation. If the status of a species addressed under an HCP unexpectedly worsens because of unforeseen circumstances, the primary obligation for implementing additional conservation measures would be the responsibility of the Federal government, other government agencies, or other non-Federal landowners who have not yet developed an HCP.

"Adequately covered" under an HCP for listed species refers to any species addressed in an HCP that has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA. For

unlisted species, the term refers to any species that is addressed in an HCP as if it were listed pursuant to section 4 of the ESA and is adequately covered by HCP conditions that would satisfy permit issuance criteria under section 10(a)(2)(B) of the ESA if the species were actually listed. For a species to be covered under a HCP it must be listed on the section 10(a)(1)(B) permit. These assurances apply *only* to species that are "adequately covered" in the HCP.

"Properly implemented conservation plan" means any HCP, Implementing Agreement, and permit whose commitments and provisions have been and are being fully implemented by the permittee and in which the permittee is in full compliance with the terms and conditions of the permit, so the HCP is consistent with the agreed-upon operating conservation program for the project.

2. Changed circumstances provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changes in circumstances that were provided for in the plan's operating conservation program, the permittee will be expected to implement the measures specified in the plan.

3. Changed circumstances not provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances that were not provided for in the plan's operating conservation program, the Services will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

Discussion: It is important to distinguish between "changed" and "unforeseen" circumstances. Many changes in circumstances during the course of an HCP can reasonably be anticipated and planned for in the conservation plan (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events), and the plans should describe the modifications in the project or activity that will be implemented if these circumstances arise. "Unforeseen circumstances" are changes in circumstances affecting a species or geographic area covered by an HCP that could not reasonably have been anticipated by plan developers or the Services at the time of the HCP's negotiation and development, and that result in a substantial and adverse change in the status of a covered species (e.g., the eruption of Mount St. Helens was not reasonably foreseeable).

4. Unforeseen circumstances. In negotiating unforeseen circumstances,

the Services will not require without the consent of the permittee, the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, including quantity and timing of delivery, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan.

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Services may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or restrictions on the use of land, water (including quantity and timing of delivery), or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

In determining unforeseen circumstances, the Services will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Services will consider, but not be limited to, the following factors: size of the current range of the affected species; percentage of range adversely affected by the conservation plan; percentage of range conserved by the conservation plan; ecological significance of that portion of the range affected by the conservation plan; level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

Discussion: The first criterion is self-explanatory. The second identifies factors to be considered by the Services in determining whether the unforeseen circumstances are biologically significant. Generally, the inquiry would focus on the level of biological threats to the affected species covered by the HCP and the degree to which the

welfare of those species is tied to a particular HCP. For example, if a species is declining rapidly, and the HCP encompasses an ecologically insignificant portion of the species' range, then unforeseen circumstances warranting reconsideration of an HCP's conservation program typically would not exist because the overall effect of the HCP upon the species would be negligible or insignificant. Conversely, if a species is declining rapidly and the HCP in question encompasses a majority of the species' range, then unforeseen circumstances warranting a review of an HCP's conservation program probably would exist. If unforeseen circumstances are found to exist, the Services will consider changes in the operating conservation program or additional mitigation measures. However, measures required of the permittee must be as close as possible to the terms of the original HCP and must be limited to modifications within any conserved habitat area or to adjustments within lands or waters that are already set aside in the HCP's operating conservation program. "Conserved habitat areas" are areas explicitly designated for habitat restoration, acquisition, protection, or other conservation uses under an HCP. An "operating conservation program" consists of the conservation management activities, which are expressly agreed upon and described in an HCP or its Implementing Agreement and that are undertaken for the affected species when implementing an approved HCP. Any adjustments or modifications will not include requirements for additional land, water, or financial compensation, or additional restrictions on the use of land, water (including quantity and timing of delivery), or other natural resources otherwise available for development or use under the HCP, unless the permittee consents to such additional measures.

Modifications within conserved habitat areas or to the HCP's operating conservation program means changes to the plan areas explicitly designated for habitat protection or other conservation uses under the HCP, or changes that increase the effectiveness of the HCP's operating conservation program, provided that any such changes do not impose new restrictions or require additional financial compensation on the permittee's activities. Thus, if an HCP's operating conservation program originally included a mixture of predator depredation control and captive breeding, but subsequent

research or information demonstrated that one of these was considerably more effective than the other, the Services would be able to request an adjustment in the proportionate use of these tools, provided that such an adjustment did not increase the overall costs to the HCP permittee. Additionally, the No Surprises assurance does not preclude any Federal agency from exercising its Federal reserved water rights.

The "Unforeseen circumstances" section of the HCP should discuss the process for addressing those future changes in circumstances surrounding the HCP that could not reasonably be anticipated by HCP planners. While HCP permittees will not be responsible for bearing any additional economic burden for more mitigation measures, other methods remain available to respond to the needs of the affected species and to assure that the goals of the ESA are satisfied. These include increasing the effectiveness of the HCP's operating conservation program by adjusting the program in a way that does not result in a net increase in costs to the permittee, and actions taken by the government or voluntary conservation measures taken by the permittee.

When negotiating the unforeseen provisions in an HCP, the permittee cannot be required to commit additional land, funds, or additional restrictions on lands, water (including quantity and timing of delivery) or other natural resources released under an HCP for development or use from any permittee who is implementing the HCP and is abiding by all of the permit terms and conditions in good faith or has fully implemented their commitments under an approved HCP. Moreover, this rule does not preempt or affect any Federal reserved water rights.

In the event of unforeseen circumstances, the Services will work with the permittee to increase the effectiveness of the HCP's operating conservation program to address the unforeseen circumstances without requiring the permittee to provide an additional commitment of resources as stated above. The specific nature of the requested changes to the operating conservation program will vary among HCPs depending upon individual habitat and species needs.

5. Nothing in this rule will be construed to limit or constrain the Services, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

Discussion: This means the Services or other entities can intervene on behalf

of a species at their own expense at any time and be consistent with the assurances provided to the permittee under this final rule. However, it is unlikely that the Services would have to resort to protective or conservation action requiring new appropriations of funds by Congress in order to meet their commitment under this final rule (consistent with their obligations under the ESA). If this unlikely event occurred, these actions would be subject to the requirements of the Anti-Deficiency Act and the availability of funds appropriated by Congress.

Also, nothing in this final rule prevents the Services from asking a permittee to voluntarily undertake additional mitigation on behalf of affected species. While an HCP permittee who has been implementing the HCP and permit terms and conditions in good faith would not be obligated to provide additional mitigation, the Services believe that many landowners would be willing to consider additional conservation assistance on a voluntary basis if a compelling argument for assistance could be made.

The Services believe that it will be rare for unforeseen circumstances to result in a jeopardy situation. However, in such cases, the Services will use all of their authorities, will work with other Federal agencies to rectify the situation, and work with the permittee to redirect conservation and mitigation measures so as to offset the likelihood of jeopardy. The Services have a wide array of authorities and resources that can be used to provide additional protection for threatened or endangered species covered by an HCP.

Required Determinations

A major purpose of this final rule is to provide section 10(a)(1)(B) permittees regulatory assurances related to the issuance of an HCP permit. From the Federal government's perspective, implementation of this rule would not result in additional expenditures to the permittee that are above and beyond that already required through the section 10(a)(1)(B) permitting process. There are, however, benefits derived from HCPs for both the non-Federal permittees and the species covered by the HCPs. HCPs are mechanisms that allow non-Federal entities to continue with economic use or development activities, while factoring species' conservation needs into natural resource management decisions. Benefits to the covered species may include the conservation of lands and waters upon which the species depends, decreased habitat fragmentation, the removal of

threats to candidate, proposed, or other unlisted species, and in various instances, advancement of the recovery of listed species. Non-Federal entities are then provided regulatory assurances pursuant to an approved incidental take permit under section 10(a)(1)(B) of the ESA for those species that are adequately covered by the permit, conditioned, of course, on the proper implementation of the HCP. Since the Habitat Conservation Plan Assurances ("No Surprises" policy) impose no additional economic costs or burdens upon an HCP permittee, the Services have determined that the final rule would not result in significant costs of implementation to non-Federal entities.

Information Collection/Paperwork Reduction Act

No significant effects are expected on non-Federal entities exercising their option to enter into the HCP planning program because there is no additional information required during the HCP development or processing phase due solely to these regulatory assurances.

The Services have examined this final rule under the Paperwork Reduction Act of 1995 and found it to contain no requests for additional information or increase in the collection requirements associated with incidental take permits other than those already approved for incidental take permits with OMB approval #1018-0094, which has an expiration date of February 28, 2001.

Economic Analysis

This final rule was subject to Office of Management and Budget review under Executive Order 12866. However, the Services have determined that there will be no additional costs placed on the non-Federal entity associated with this final regulation. The No Surprises policy, which was drafted in 1994, went through a public comment period as part of the draft 1994 *Habitat Conservation Planning Handbook* (59 FR 65782, December 21, 1994), was included in the final 1996 *Habitat Conservation Planning Handbook* (61 FR 63854, December 2, 1996), and currently is being implemented in individual HCP permits as they are issued after an opportunity for public comment. The No Surprises assurances provided to permittees through these final rules apply to the HCP permitting process only, and the Services have determined that there will be no additional information required of non-Federal entities through the HCP permitting process to provide assurances to the permittee.

The Department of the Interior has certified that this rulemaking will not

have a significant economic impact on a substantial number of small entities, which includes businesses, organizations, or governmental jurisdictions. This final rule will provide non-Federal entities regulatory certainty pursuant to an approved incidental take permit under section 10(a)(1)(B) of the Act. No significant effects are expected on non-Federal entities exercising their option to enter into the HCP planning program because there will be no additional information required through the HCP process due to the application of assurances or "No Surprises." Therefore, this rule would have a minimal effect on such entities. NMFS has also reviewed this rule under the Regulatory Flexibility Act of 1980 and concurs with the above certification.

The implementation of the final Habitat Conservation Plan Assurances rule does not require any additional data not already required by the HCP process. Regulatory assurances are provided to the permittee if the HCP is properly implemented, and if all the terms and conditions of the HCP, permit, or Implementing Agreement are all being met. The underlying economic basis of comparing the final rule with and without the assurances was used to determine if there existed any potential economic effects from implementing this policy. Since the rule is being implemented with existing data, there are no incremental costs being imposed on non-Federal landowners. The benefits generated by this rule are being shared by the Services (*i.e.*, less habitat fragmentation, habitat management, and protection for covered species) and by non-Federal landowners (*i.e.*, assurances that approved HCPs will allow for future economic uses of non-Federal land without further conservation and mitigation measures).

There are no specific data to assess the effects on businesses from this rule. To the extent businesses are affected, however, such effects would be positive, not negative. Until specific HCPs are approved, it is not possible to determine effects on commodity prices, competition or jobs. Moreover, any economic effects would likely be tied to the cost of the development and implementation of the HCP itself and not to these assurances. There is a positive effect expected on the environment because these assurances act as an incentive for non-Federal entities to seek HCPs and to factor species conservation needs into national resources management decisions. No effect on public health and safety is expected from this rule. Therefore, this rule most likely would not have a

significant effect on a substantial number of small entities.

The Services have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. No additional information will be required from a non-Federal entity solely as a result of these assurances.

Civil Justice Reform

The Departments have determined that these final regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

National Environmental Policy Act

The Department has determined that the issuance of the final rule is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1.10. NMFS concurs with the Department of Interior's determination that the issuance of the final rule qualifies for a categorical exclusion and falls within the categorical exclusion criteria in NOAA 216-3 Administrative Order, Environmental Review Procedure.

List of Subjects

50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

50 CFR Part 222

Administrative practices and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

For the reasons set out in the preamble, the Services amend Title 50, Chapter I, subchapter B; and Title 50, Chapter II, subchapter C of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

Subpart C—Endangered Wildlife

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. The FWS amends § 17.3 by adding the following definitions alphabetically to read as follows:

* * * * *

Adequately covered means, with respect to species listed pursuant to

section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan, and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

* * * * *

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (*e.g.*, the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

* * * * *

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

* * * * *

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

* * * * *

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the Service at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse

change in the status of the covered species.

3. The FWS amends § 17.22 by adding paragraphs (b) (5) and (6) to read as follows:

§ 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.

(b) * * *

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such

measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

(1) Size of the current range of the affected species;

(2) Percentage of range adversely affected by the conservation plan;

(3) Percentage of range conserved by the conservation plan;

(4) Ecological significance of that portion of the range affected by the conservation plan;

(5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

Subpart D—Threatened Wildlife

4. The FWS amends § 17.32 by adding paragraphs (b)(5) and (6) to read as follows:

§ 17.32 Permits—general.

* * *

(b) * * *

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with

paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to [insert 30 days after the date of publication in the Federal Register]. The assurances provided in incidental take permits issued prior to [insert 30 days after the date of publication in the Federal Register] remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original

terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

- (1) Size of the current range of the affected species;
 - (2) Percentage of range adversely affected by the conservation plan;
 - (3) Percentage of range conserved by the conservation plan;
 - (4) Ecological significance of that portion of the range affected by the conservation plan;
 - (5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and
 - (6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.
- (6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

PART 222—ENDANGERED FISH OR WILDLIFE

5. The authority citation for part 222 is revised to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

Subpart C—Endangered Fish or Wildlife Permits

6. In part 222, a new section is added to read as follows:

222.2 Definitions.

These definitions apply only to § 222.22:

Adequately covered means, with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species

covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and NMFS and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and NMFS at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

§ 222.22 [Amended]

7. In § 222.22, paragraphs (g) and (h) are added.

(g) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (g) apply only to incidental take permits issued in accordance with paragraph (c) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25,

1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(1) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(2) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, NMFS will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(3) *Unforeseen circumstances.* (i) In negotiating unforeseen circumstances, NMFS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(ii) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, NMFS may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(iii) NMFS will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. NMFS will

but not be limited to, the following factors:
(G) Size of the current range of the species;
(H) Percentage of range adversely affected by the conservation plan;
(I) Percentage of range conserved by the conservation plan;
(J) Ecological significance of that portion of the range affected by the conservation plan;
(K) Level of knowledge about the affected species and the degree of efficacy of the species' conservation

program under the conservation plan; and

(F) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(h) Nothing in this rule will be construed to limit or constrain the Assistant Administrator, any Federal, State, local, or tribal government agency, or a private entity, from taking additional actions at its own expense to

protect or conserve a species included in a conservation plan.

Dated: February 13, 1998.

Rolland A. Schmitten,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

Dated: February 11, 1998.

Donald J. Barry,

*Acting Assistant Secretary, Fish, Wildlife, and
Parks, Department of Interior.*

[FR Doc. 98-4367 Filed 2-20-98; 8:45 am]

BILLING CODE 4310-55-P

EXHIBIT I

CITY OF LA MESA
ENVIRONMENTAL SIGNIFICANCE
and
MITIGATION GUIDELINES

APRIL 28, 1999

CITY OF LA MESA
ENVIRONMENTAL SIGNIFICANCE
and
MITIGATION GUIDELINES

April 28, 1999

PART I BACKGROUND

Under the California Environmental Quality Act (CEQA), the City must determine whether any aspect of a discretionary project may have a significant effect on the environment. The *Environmental Significance and Mitigation Guidelines* have been adopted to assist the City of La Mesa in making such determinations.

The State CEQA Guidelines define a significant effect on the environment "as a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance" (CEQA Guidelines §15382). In evaluating the significance of the environmental effect of a project, "the lead agency (i.e., City of La Mesa) shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project" (CEQA Guidelines §15064(d)).

The City Council adopted the *City of La Mesa Subarea Habitat Conservation Plan/Natural Community Conservation Plan* (HCP) on February 24, 1998. The City also signed an Implementing Agreement with the U.S. Fish & Wildlife Service (USFWS) and the California Department of Fish & Game (CDFG) to implement the HCP. Section VI of the HCP requires that the City "review development proposals that could affect habitat lands in accordance with its land use regulation and environmental review process."

Part II Intent

The intent of these guidelines is to achieve consistency in the application of CEQA requirements and the mitigation goals and criteria of the HCP. These guidelines are incorporated into the City of La Mesa CEQA Initial Study process. An Initial Study is prepared for all discretionary projects as required by the State CEQA Guidelines (§ 15063). These guidelines:

- Serve as an informational document for the public, applicants, city staff, and environmental consultants in the preparation of environmental documentation and analysis of potential environmental impacts;
- Provide for the consistent application of CEQA requirements in all discretionary projects; and
- Integrate the HCP mitigation goals and criteria into the City's established CEQA review process.

Part III GENERAL ENVIRONMENTAL REVIEW PROCESS

The Community Development Department is responsible for reviewing all discretionary project applications to determine what, if any, environmental effects could result from implementation of the project. The department also determines the appropriate environmental documentation (e.g., Negative Declaration or Environmental Impact Report) to be prepared.

A. Application for Environmental Initial Study Form

The project proponent submits a completed Application for Environmental Initial Study (AEIS) form to the Community Development Department. This form provides basic information about the proposed project and the existing site conditions.

B. Staff Review

The Community Development Department staff reviews the AEIS and City data files to determine what environmentally sensitive resources may exist on, or adjacent to, the project site. A field visit is conducted to verify information in the AEIS and City data files.

Numerous policies, ordinances, and various types of legislation exist that address the protection of environmental resources. They must be considered during the AEIS review to ensure that the proposed project is in compliance with the policies, ordinances and legislation. These include, but are not limited to:

- California Environmental Quality Act and Guidelines;
- City of La Mesa General Plan;
- City of La Mesa Habitat Conservation Plan;
- Federal Endangered Species Act;
- California Endangered Species Act;
- California Fish & Game Code; and
- Clean Water Act (Section 404).

C. Initial Study

The Community Development Department staff completes an Initial Study checklist in accordance with State CEQA Guidelines. If necessary, the project proponent will be requested to submit additional environmental information. For example, additional information is required if cultural resources sites, sensitive biological habitat, land use conflicts, or potential noise issues are associated with the project. The project proponent is responsible for the preparation and submission of the required technical studies.

D. Environmental Determination

A determination is made as to the type of environmental documentation to be prepared as a result of completing the Initial Study form. The three types of environmental documentation are:

- A Negative Declaration is prepared when the proposed project could not have a significant effect on the environment.
- A Mitigated Negative Declaration is prepared when the proposed project could have a significant effect on the environment, but revisions in the project have been made by or agreed to by the project proponent that avoids the significant effect.
- An Environmental Impact Report is prepared when the proposed project may have a significant effect on the environment.

PART IV BIOLOGICAL RESOURCES

A. Introduction

The Environmental Checklist identifies factors that could result in potentially significant impacts to biological resources. Such impacts could occur if the project would:

- Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service.
- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service.
- Have a substantial adverse effect on federally protected wetlands, as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means.
- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites.
- Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance.
- Conflict with the provision of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional or state habitat conservation plan.

B. Known Biological Resources in the City of La Mesa

Upland Resources

The Multiple Species Conservation Program (MSCP) vegetation mapping identified coastal sage scrub (CSS) habitat as the only significant natural habitat within the City limits. The MSCP maps indicate that approximately 208 acres of CSS exist within the City (see Attachment A). The MSCP Habitat Evaluation Model ranks the habitat as "High" and "Moderate."

There are three distinct blocks of CSS habitat in La Mesa. The western block contains 11 acres, the central block contains 159 acres, and the eastern block contains 38 acres. The construction of the Navy housing complex in 1992 removed 36 of the 38 acres of CSS in the eastern block. Two acres of CSS were dedicated as open space for the preservation of the California gnatcatcher (CAGN).

As part of the approval of the Eastridge Specific Plan and Tentative Tract Map 90-02, which covers approximately 87% of the CSS habitat area, 55 acres of CSS will be preserved as permanent open space. While none of the CSS in La Mesa is included in the MSCP "Multi-Habitat Planning Area" or the "Core Biological Resource Areas and Linkages," these 55 acres of CSS will be preserved. The remainder of the CSS will be removed as a result of the development over time.

The Environmental Assessment (EA) prepared for the HCP examined alternatives for the loss of habitat and "taking" of covered species. The EA found that the,

"[A]lternatives were not feasible due to conflicts with the City's General Plan goals and the fact that these habitat areas are not included in the MSCP's Multiple-Habitat Planning Area (MHPA) or Core Biological Resource Areas and Linkages, and are not biologically significant to the long-term preservation of coastal sage scrub habitat in the region due to its size and isolated location. However, the taking of this habitat will result in the acquisition of habitat lands located with the Core Resource areas through the mitigation requirements listed in Section VI [of the HCP] and will therefore contribute to achieving the regional goals of the MSCP." (Emphasis added).

The species covered by the La Mesa HCP are the species included in Table 3-4a of MSCP Plan (dated August 1998)(see Attachment B). MSCP covered species known to exist in the City of La Mesa are:

- San Diego barrel cactus (*Ferocactus viridescens*);
- California gnatcatcher (*Polioptila californica californica*); and
- California rufous-crowned sparrow (*Aimophila ruficeps canescens*).

Other covered species that may be present in La Mesa include:

- San Diego horned lizard (*Phrynosoma cornatum blainvillei*);
- San Diego thorn-mint (*Acanthomintha ilicifolia*);
- Orange-throated whiptail (*Cnemidophorus hyperythrus beldingi*);
- Cooper's hawk (*Accipiter cooperii*); and
- Variegated dudleya (*Dudleya variegata*).

Wetland and Riparian Resources

The Multiple Species Conservation Program (MSCP) vegetation mapping identified five acres of riparian scrub within the City of La Mesa (Final MSCP Plan, August 1998, Table 3-1). The only U.S. Geological Service mapped "blue line" stream in La Mesa is Alvarado Canyon Creek that parallels Interstate 8 and Fletcher Parkway.

Wetland communities (vernal pools, freshwater marsh, riparian forest, oak riparian forest, riparian woodland, riparian scrub, open water, disturbed wetlands, and natural flood channel) within the MSCP study area include areas subject to California Fish and Game Code §17600 et seq., and Section 404 of the federal Clean Water Act. Such areas continue to be regulated by these state and federal statutes.

C. Mitigation Goals and Criteria

Development activities that would result in the loss of any native vegetation (e.g., coastal sage scrub) or impact covered species are required to fully mitigate impacts associated with the development. The goal is to insure that any loss of habitat or sensitive species is compensated for by either on-site or off-site preservation of habitat.

Impacts to natural upland habitats, including coastal sage scrub, will be mitigated off-site because the habitats in La Mesa are not included in the MSCP Multi-Habitat Preserve Area. Except as noted below, impacts will be mitigated off-site at a 1:1 ratio. Thus, each acre of impact requires an acre of mitigation. On-site mitigation would occur only if it were considered appropriate by the USFWS and CDFG for the survival of a rare species.

Off-site mitigation will be accomplished within the MSCP Multi-Habitat Preserve Area, either within the City of Poway's Subarea HCP, or at other locations approved by the USFWS and CDFG.

Certain habitats are required to be mitigated at a 2:1 ratio. These habitats are:

- Southern maritime chaparral;
- Mafic southern mixed chaparral;
- Mafic chamise chaparral;
- Native grasslands; or
- Oak woodlands.

None of the habitat types have been identified in the City of La Mesa, but it is possible they could be detected during a biological survey.

Impacts to wetland vegetation communities will be mitigated in compliance with the terms of the federal policy of no net loss of wetland functions and values, and the Environmental Protection Agency's (EPA) 404(b)(1) guidelines. Such compliance will constitute the full extent of mitigation measures for the take of covered species required or recommended by the USFWS pursuant to the federal ESA and National Environmental Policy Act (NEPA) and the CDFG pursuant to the CESA, NCCP Act, and CEQA.

Avoidance of wetland impacts is the preferred approach whenever wetlands are present within the boundaries of a development project. If complete avoidance is not possible, then impacts are to be minimized to the extent possible. The policy of no net loss of wetland functions requires that impacts be fully mitigated. This may require a mitigation acreage ratio that exceeds 1:1. The exact mitigation requirements for a given project will be determined by the ACOE during the Section 404 permit process.

D. Project Specific Environmental Review Process

The City of La Mesa Community Development Department staff will utilize its environmental review process to determine if sensitive habitats or covered species would be affected by development proposals. The environmental review will be conducted for both public and private proposals.

The following steps will be conducted during the environmental review process:

1. Examine the description of the site in the Application for Environmental Initial Study (AEIS) completed by the project proponent for identification of native vegetation, rock outcrops, oak trees, etc.

2. Examine photographs of the site to determine if the site contains native vegetation or whether the site is devoid of native vegetation.
3. A field visit shall be made if sensitive habitats and/or species are expected to occur on the project site. Specific items to be observed include:
 - a) Presence of native vegetation;
 - b) Evidence of wildlife usage;
 - c) Presence of streams (perennial or intermittent) and drainage swales;
 - d) Potential for nesting by sensitive species;
 - e) Impact of the proposed project on off-site biological resources;
 - f) Potential impacts to biological resources from noise, traffic, human activity, etc.
 - g) Fuel clearing requirements and associated habitat impacts;
 - h) Impact of grading, soil compaction, erosion, etc.; and
 - i) Relationship of project site to surrounding lands.
4. If the review conducted in steps 1-3 above indicate that sensitive habitat and/or species may be present, a biological survey of the site shall be prepared. The biological survey shall be conducted by a qualified biologist acceptable to the City of La Mesa. The survey report shall contain an identification of all habitat on-site, as well as a map depicting the extent of the habitats. Sensitive species noted during the survey shall be identified and mapped.

The biological survey report shall be prepared in accordance with the *City of San Diego Guidelines for Conducting Biology Surveys* included in Attachment C. The significance of impacts shall be determined in accordance with the *City of San Diego Significance Determination Guidelines Under the California Environmental Quality Act* included in Attachment D.

The biological survey report shall qualitatively and quantitatively identify impacts to sensitive habitats and species. The exact acreage of habitat impact shall be identified in the report.

5. Whenever a project would result in the loss of a covered species or its habitat, the biological survey report will be forwarded to the USFWS and the CDFG for review prior to the commencement of the environmental document public review process. The purpose of the USFWS and CDFG review is to insure consistency with the MSCP and the La Mesa Subarea HCP. The USFWS and CDFG are expected to provide written comments to the City of La Mesa within 30 days of their receipt of the report.
6. Biological impacts and proposed mitigation measures shall be identified in the environmental documentation (Environmental Impact Report or Mitigated Negative Declaration) prepared for the project.

7. Mitigation, either on-site or off-site, for impacts to upland habitats shall consist of the acquisition and recordation of a conservation easement for the habitat area to be preserved. Sample easements are contained in Attachment E.

E. Mitigation Measure Implementation

Mitigation measures may be required to achieve the mitigation goals and objectives listed in Part IV.C above (page 5). To insure that recommended mitigation measures are implemented the City of La Mesa will complete the actions listed below.

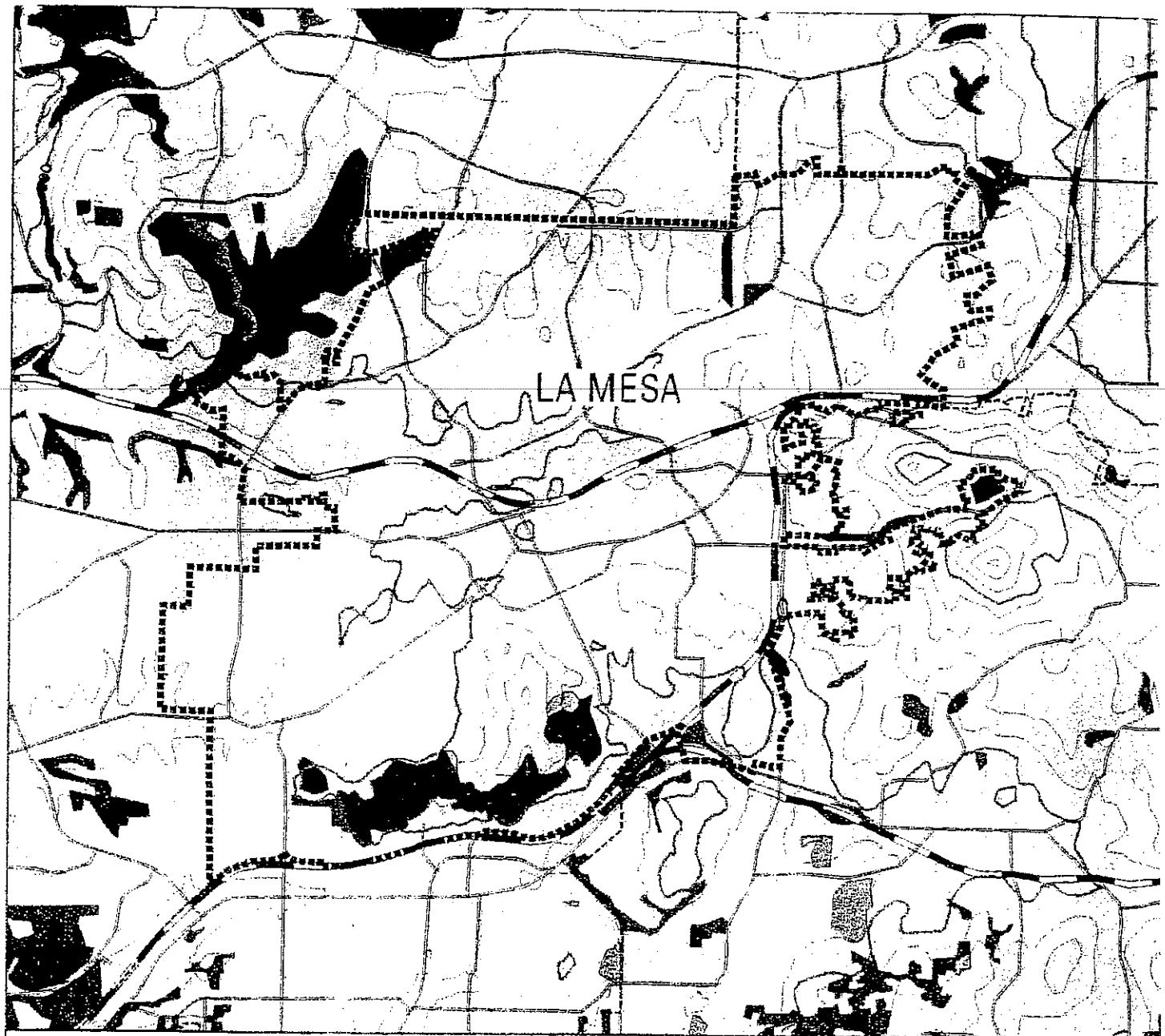
1. Include recommended mitigation measures as conditions in the project approval document (e.g., tentative map resolution of approval, site plan, or design review certification of action).
2. For each project-specific mitigation measure the City of La Mesa will make and adopt written findings that:
 - a) The mitigation meets the implementing objectives of the Subarea Plan with regard to the project's impacts;
 - b) The mitigation habitat enhances the long-term viability and function of the MSCP Plan Multi-Habitat Planning Area;
 - c) The mitigation will be to the long-term benefit of the Covered Species and their habitats;
 - d) The mitigation will foster the incremental implementation of the HCP in an effective and efficient manner; and,
 - e) The mitigation will not result in a negative fiscal impact with regard to the successful implementation of the Subarea Plan.
3. Mitigation measures adopted by the decision making body will be included in the Mitigation Monitoring and Reporting Program (MMRP) adopted by the decision-making body. The MMRP will identify the timing of implementation and the person or agency responsible for verifying the completion of the mitigation measure.
4. Mitigation for impacts that would result in the loss of native habitat and/or sensitive species must be completed prior to the issuance of a clearing or grading permit for the project. The specific steps to be followed to insure the implementation of mitigation measures are:
 - a) The project proponent shall purchase mitigation property in fee title, or an open space easement over mitigation property, within the MSCP Multiple Habitat Planning Area (e.g., the City of Poway Multiple Habitat Planning Area). The amount of mitigation property required shall be established in the project approval mitigation measures;

- b) The project proponent shall submit documentation to the City of La Mesa that the selected mitigation property is acceptable to the U.S. Fish & Wildlife Service (USFWS), the California Department of Fish and Game (CDFG), and the local jurisdiction where the mitigation property is located;
- c) The project proponent shall record a conservation easement over the mitigation property. The conservation easement shall:
 - (1) Identify CDFG and USFWS, or other entity acceptable to these agencies, as third-party co-beneficiaries with rights of enforcement;
 - (2) Provide for the conservation and management in perpetuity of the conserved lands consistent with the MSCP Plan; and
 - (3) Incorporate arrangements or funding for management activities;
- d) The project proponent shall submit the recorded conservation easement to the City of La Mesa.

Attachment A

Vegetation Communities for MSCP Study Area

(La Mesa Habitat Conservation Plan, Figure 2)

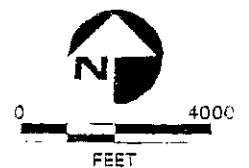


Vegetation Communities

	Coastal Sage Scrub		Beach/Foradunes
	Chaparral		Eucalyptus Woodland
	Coastal Sage Scrub/Chaparral		Disturbed Habitat
	Grassland		Shallow Bay
	Riparian/Wetlands		Developed
	Oak Woodland		Agriculture
	Coniferous Forest		

Base Map Features

	City Boundary
	Freeways
	Major Streams
	Lakes and Lagoons



OGDEN

Vegetation Communities for MSCP Study Area

FIGURE

2

Table 3-4a

MSCP COVERED SPECIES¹**Plants**

San Diego thorn-mint
 Shaw's agave
 San Diego ambrosia
 Aphanisma
 Del Mar manzanita
 Otay manzanita
 Coastal dunes milk vetch
 Encinitas baccharis
 Nevin's barberry
 Thread-leaved brodiaea
 Orcutt's brodiaea
 Dense reed grass
 Dunn's mariposa lily
 Slender-pod jewelflower
 Lakeside ceanothus
 Wart-stemmed ceanothus
 Salt marsh bird's-beak
 Orcutt's bird's-beak
 Del Mar Mesa sand aster
 Tecate cypress
 Short-leaved dudleya
 Variegated dudleya
 Sticky dudleya
 Palmer's ericameria
 San Diego button-celery
 Coast wallflower
 San Diego barrel cactus
 Otay tarplant
 Heart-leaved pitcher sage
 Gander's pitcher sage
 Nuttall's lotus
 Felt-leaved monardella

Willow monardella
 San Diego goldenstar
 Prostrate navarretia
 Dehesa bear-grass
 Snake cholla
 California Orcutt grass
 Torrey pine
 San Diego mesa mint
 Otay Mesa mint
 Small-leaved rose
 San Miguel savory
 Gander's butterweed
 Narrow-leaved nightshade
 Parry's tetradococcus

Animals

Salt marsh skipper butterfly
 Thorne's hairstreak butterfly
 Riverside fairy shrimp
 San Diego fairy shrimp
 Arroyo southwestern toad
 California red-legged frog
 Southwestern pond turtle
 San Diego horned lizard
 Orange-throated whiptail
 California brown pelican
 Reddish egret
 White-faced ibis
 Canada goose
 Bald eagle

Northern harrier
 Cooper's hawk
 Swainson's hawk
 Ferruginous hawk
 Golden eagle
 American peregrine falcon
 Light-footed clapper rail
 Western snowy plover
 Mountain plover
 Long-billed curlew
 California least tern
 Elegant tern
 Burrowing owl
 Southwestern willow
 flycatcher
 Coastal cactus wren
 California gnatcatcher
 Western bluebird
 Least Bell's vireo
 California rufous-
 crowned sparrow
 Belding's Savannah
 sparrow
 Large-billed Savannah
 sparrow
 Tricolored blackbird
 American badger
 Mountain lion
 Southern mule deer

¹ See Table 3-5 (at the end of this section) for specific conditions required for take authorizations.

Attachment C

Guidelines for Conducting Biology Surveys

(City of San Diego)



City of San Diego

BIOLOGICAL REVIEW REFERENCES

1. City of San Diego, Guidelines for Conducting Biological Surveys, October, 1998;
2. City of San Diego, Significance Determination Guidelines Under the California Environmental Quality Act, October 1998
3. City of San Diego, Biology Guidelines for the Environmentally Sensitive Lands Regulations (ESL), The Open Space Residential (R-I-2) Zone, and the California Environmental Quality Act (CEQA), November 18, 1997); and
4. Amended Resource Protection Ordinance, January 12, 1998.

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I. GOALS OF THE BIOLOGY SURVEY GUIDELINES

These guidelines are intended to prescribe the content of biology survey reports and will be used in the analysis and preparation of environmental documents. The Biological Survey Guidelines shall be used as part of the environmental review process to meet the requirements of the California Environmental Quality Act (CEQA), the Multiple Species Conservation Program (MSCP), and the City's Environmentally Sensitive Lands (ESL) (and/or the Resource Protection Ordinance, as amended) Regulations.

The intent of the biology survey is to identify biological resources on the project site, determine impacts, and recommend suitable mitigation measures. Mitigation and monitoring requirements pursuant to the MSCP and CEQA shall ensure preservation of the native species and sensitive biological resources of San Diego.

II. TYPES OF SURVEY REPORTS

No two project sites are identical in terms of the biological resources present, the degree of disturbance, the proximity to developed areas, and the type of project proposed. For these reasons, three types of biological surveys are suggested. These types are the "General", the "Letter" and the "Focused" survey. All conditions of the City's Biology Guidelines, dated November, 1997, (herein after called the Biology Guidelines) must be met. For example, Table 1 of the Biology Guidelines (Attachment 1) will aid in determining the need for focused surveys. In most cases the General Survey Report will be required or a previous basic report but may need to be updated. Letter Survey Reports may (with complete flora and fauna lists) be acceptable for a small disturbed site or where previous reports are applicable. If sensitive species (e.g., listed, narrow endemics, candidate species, etc.) are on the site or are likely to be present, Focused Survey Reports may be required. Focused Survey Reports may require the use of any required state or federal agency protocols. Biologists conducting surveys are responsible for contacting federal and state and local agencies, and acquiring protocol survey guidelines.

NOTES:

1. Protocol surveys may be performed by a biologist who possesses current survey permit(s) for certain species, as required by state or federal regulatory agencies, or by the City of San Diego.
2. Biology Survey Reports for emergency public works projects shall include relevant information as appropriate. In other words, "before-impact" surveys

may not be possible, but conditions can be reconstructed.

A. GENERAL SURVEY REPORT

Projects involving or permitting modification of land in a natural or near natural state, and all areas containing sensitive habitats or sensitive species (Attachment I) shall be investigated as follows:

1. Time in the field shall be proportional to the size of the project site and biological heterogeneity and the significance of sensitive habitats present.
2. Completeness of the biological inventory will be based on a "diminishing returns" criterion. In other words, the level of effort should be based on significance of resources present.
3. Data collected should be quantified where appropriate to indicate the extent of resources on the project site.
4. It is highly recommended that field surveys be performed when the majority of critical resources can be best evaluated. Some survey times are mandated per protocol established by state and federal agencies for certain species (e.g. Quino checkerspot butterfly).
5. The most recent generally accepted nomenclature shall be used to indicate plant and animal names to avoid confusion (see Attachment IV. or more recent literature).
6. Surveys shall include information on the presence or absence of Narrow Endemic Species (Page 3 of the Biology Guidelines) likely to be present. If not present, a statement explaining the theoretical physical/biological basis for the lack of expected species shall be included.
7. Conditions of MSCP coverage shall be addressed for covered species (listed in Appendix A "Species Evaluated for Coverage Under the MSCP" of the MSCP Subarea Plan) found on the site.
8. Vernal Pools: If this habitat is suspected, a focused survey is necessary to determine presence/absence of vernal pools. Historical photos and research may be necessary on a case-by-case basis. The entire vernal pool watershed shall be surveyed and mapped. (See Attachment II, B-3). Fairy shrimp surveys may be

required per U.S. Fish & Wildlife Service Vernal Pool Guidelines.

9. Other procedures, as listed below in C., Focused Survey Report and in the Biology Guidelines.

B. LETTER SURVEY REPORT

A Letter Survey Report may be acceptable (at the discretion of the City Manager or his/her designee) for projects with:

1. Recent adequate General Survey Report.
2. Projects involving minimal habitat alteration.
3. Highly disturbed areas, including but not limited to, agricultural areas presently or recently under cultivation (regulated by the ESL). The biology survey conducted as part of the MSCP may be used when the applicant and the City agree that the MSCP data adequately reflect the habitats and species found on site. Additional information may be required based upon the results of the Letter Survey Report.
4. Very small sites, especially when they are isolated by development or when there are temporary impacts.

C. FOCUSED SURVEY REPORT

1. Focused surveys shall be performed in conformance with Table 1 of the Biology Guidelines (Attachment I), including Narrow Endemics. Surveys should be done at the appropriate time of year to determine presence/absence of sensitive species. If surveys are not done at the appropriate time of year, and the potential for occurrence is moderate to high (based on historical knowledge, site records, determination by the biologist, etc.), then it will be concluded that their presence exists on the property. The emphasis of the survey shall be directed at a search for rare, endangered, threatened, or otherwise sensitive resources. See Section H, page 10, for vernal pool survey requirements.
2. When appropriate, the methodology for the focused survey(s) and report(s) shall be obtained from the appropriate regulating agencies (i.e. protocols for state listed species would be obtained from the California Department of Fish and Game and federal species would be obtained from U.S. Fish and Wildlife Service). Depending on the

species, one or more focused surveys may be required. In some instances, protocol survey guidelines may not be available. It is the responsibility of the consulting biologist to assure all required protocols are followed.

3. A statement explaining the theoretical physical/biological basis for any lack of expected species shall be included.

III. SUBMISSION REQUIREMENTS AND REPORTING FORM AND CONTENT

The survey reports shall contain the elements listed below and be presented in the following format. For the Letter Survey Reports, the format can be presented in correspondence form, but pertinent items such as brief methodology, species list, vegetation map, impact analysis, and mitigation measures shall be addressed.

A total of four draft and final reports/letters shall be submitted to Planning and Development Review for distribution (four each of the draft and one final).

A. TITLE PAGE

1. Report title (type of study, project name, city, state)
2. LDR (Land Development Review Division) Project number(s).
3. Party preparing report (example: lead agency under CEQA)
4. Party for whom report prepared (e.g., contracting or responsible party such as agency, developer or lead agency under CEQA)
5. Biologist or consulting firm preparing report (name, address, telephone number)
6. Investigators (include titles)
7. Date (month, year)
8. Signature block of the principal investigators.

B. TABLE OF CONTENTS

1. Major report sections, subheadings, and appendices with page numbers.
2. Figures/graphics/maps with page numbers.
3. Tables with page numbers.

C. MANAGEMENT SUMMARY/ABSTRACT

Briefly state the purpose, results of the survey, sensitive species present, and the impacts anticipated with any feasible measures to reduce or eliminate likely impacts. State whether or not the project site is entirely within, partially within, adjacent to, or outside the Multiple Habitat Planning Area (MHPA) of the City's MSCP.

D. INTRODUCTION

1. Purpose of study (relevant federal, state, and local laws). If applicable, reference any previous studies.
2. Location map of the project shown on 800-foot scale City Engineering base map with survey boundaries.
3. Project description, all areas of impacts, and construction staging areas.
4. Project schedule, including phasing and duration.

E. METHODS AND SURVEY LIMITATIONS

Discuss survey methodology including rationale for the use of the given survey method. Include dates, times, personnel (with qualifications), weather conditions during the survey; limitations for the survey (e.g. portions of the property indirectly surveyed or seasonal variability); and a map showing the location of transects, sample points and the areas actually visited, as appropriate. If surveys for listed, sensitive or MSCP-covered species are completed more than 24 months before the application is submitted, then the surveys should be updated, as appropriate, to accurately reflect resources on site. Surveys should be done at the appropriate time of year to detect presence/absence of sensitive species. If surveys are not done at the appropriate time of year, and the potential for occurrence is moderate to high (based on historical knowledge, site records, determination by the biologist, etc.), then it will be concluded that their presence exists on the property.

NOTE: Protocol Survey requirements/protocol guidelines are subject to change by the regulatory agencies and methods must be valid at the time of the survey.

IV. SURVEY RESULTS

A. Physical Characteristics

Briefly describe the physical characteristics of the property from a biological perspective; include existing land use, slope/aspect (exposure), topographic characteristics, water resources, soil and rock types, rock outcrops, and adjacent land uses.

Include a brief discussion of habitats present. Discuss any wetlands, water bodies, watersheds or stream beds on the project site which would be modified and subject to the California Fish and Game (CDFG) Code, section 1600-1603, the U.S. Army Corps of Engineers (ACOE) Section 404 of the Clean Water Act, the City's Resource Protection Ordinance (RPO, as

amended) permit process, or subsequent ordinance such as the Environmentally Sensitive Lands Ordinance. Describe existing conditions, sensitive lands per MSCP, and any critical habitats of endangered species as determined by the wildlife agencies. A discussion of wetland jurisdiction/definition for the ACOE, CDFG, and the City of San Diego shall be required for each project.

B. Biological Resources

1. Botanical Resources-Flora

Describe the existing vegetation communities as well as disturbed areas, and list the dominant (indicator) species of each vegetation community type. Identify, if possible, the nature of any disturbance, e.g., grading, fire, etc. Each vegetation community should be categorized into either wetland(s) and/or type of upland(s) as shown on Tables 2 & 3, pages 14 and 16 of the Biology Guidelines). Include a vegetation map (at least one copy submitted must be on a project plan map) overlain by the development proposal. The amount of each vegetation community or habitat type present on the property should be indicated in acres, hectares, or square feet, as appropriate. Quantify transect data when appropriate. Indicate locations of sensitive plants as points or polygons as appropriate. Include a complete listing (in an appendix) of all plant species observed, including scientific and common names. Indicate in which community or habitat each species was found and which species are not native to the area.

2. Zoological Resources - Fauna

Provide a list of all vertebrate species observed or detected in an appendix. Both common and scientific names should be used. "Regional Lists" are not acceptable. Listing of particular expected species may be appropriate but should be justified (migratory, estivating, nocturnal species, etc.).

Include the method used to identify the species (e.g., direct sighting, scat, or calls) in the text or lists. Indicate the number and location of individuals detected or estimated. Note indications of breeding activity (i.e., nests, dens) on the property. Occurrence of the species should be related to the vegetative community or wildlife habitat types on the property when possible. Relative amounts of each wildlife habitat type should be indicated (may be same as plant communities).

Discuss invertebrates in special situations (i.e., rare, threatened or endangered butterfly species, unusual species concentrations, or

pest species).

If a species is reported which is considered rare or unusual in occurrence in the region, verify its identification with a photographed or a written species diagnostic description in the appendix or use the form provided as Attachment III.

Indicate locations of (on at least one copy of a project map) and discuss areas exhibiting concentrations or a higher diversity of wildlife or wildlife signs, and discuss possible reasons for these activities (e.g. amphibian breeding areas, deer feeding, raptor hunting areas, etc.). Such areas may reflect physical attributes of the property such as dunes, rock out-crops, streams, ponds, stands of trees, etc. which should be mapped.

C. Rare, Threatened, Endangered, Endemic and/or Sensitive Species or MSCP Covered Species

The report shall contain a separate discussion of any sensitive species occurring on or using areas directly or indirectly affected by the project that are recognized by a governmental agency, conservation or scientific group, or the investigator(s) as being depleted, potentially depleted, declining, rare, critical, endemic, endangered, or threatened, and/or any species nominated or on a state or federal rare, endangered or threatened species list.

The survey report shall contain a theoretical discussion and/or list of rare, endangered, and threatened species and habitats likely to occur on site or nearby. Species discussed shall be based on sources listed in the paragraph above or more recent data. Discuss the suitability of the habitat on the property for each such species and the probability of the property being utilized by them, particularly if the survey was done when the species would not be identifiable. Discuss the known growth requirements of said species, including required soil types, exposure, elevation, availability of water, etc., as well as when the species is identifiable. Confirm the identification of rare, endemic, endangered, or threatened species, by a species-diagnostic photograph or by a written description. A California Natural Diversity Data Base, "California Native Species Field Survey Form" Form, (Attachment III) should be completed where a species has not been reported before, or as deemed appropriate.

D. Maps

All maps submitted with the biology survey report must be of sufficient scale to show the location of the identified resources and their relationship to the

project. (see Attachment II). Elevations/topography, north direction, and scale must be indicated on all maps. The map should identify biological resources (plants and animals) present on site, including any portions of the site identified as part of or adjacent to the MSCP's MHPA and any other species not listed by federal and/or state agencies and/or not covered by the MSCP and to which any impacts may be considered significant under CEQA. In addition, at least one copy of a full scale project map (Tentative Map, Tentative Parcel map, Site Plan, etc.) must be submitted, showing the resources identified and project characteristics including lot lines, roads, grading, open space easements, off-site improvements etc. To summarize, the following maps are required:

1. A copy of the project map or site plan, etc. with sensitive species/habitats plotted thereon (see interactive mapping feature on the following web site: www.sangis.org; page 12, MSCP.)
2. A copy of the project map or site plan with the MHPA boundaries shown thereon; and
3. A copy of the project map or site plan showing project impacts in relationship to biological resources.

NOTE: All information can be put on one map if it can be clearly depicted. If information is depicted on separate maps, all maps must be presented at the same scale.

V. PROJECT IMPACT ANALYSIS

Identify all potential impacts of the project (both on-site and off-site impacts such as roads, staging areas, water, and sewer lines) to sensitive biological resources and to other significant biological resources as determined by the CEQA process (i.e. sensitive, non-covered species). The report should evaluate the significance, and quantify/qualify impacts. Impact assessments need to include analysis of direct impacts (e.g. grading, Zone I brush management), indirect (e.g. lighting, noise, edge effects, sediment loading, etc.) and cumulative impacts, if appropriate. The City of San Diego's Significance Determination Guidelines (Biological Resources, January, 1994 or as amended) under the California Environmental Quality Act (City of San Diego, 1994), should be used as a reference. The proposed area of impact to each resource by the project must be presented in both a graphic and tabular form. In addition, this section shall contain a discussion of the following:

- A. An evaluation of the physical or biological features used by flora and fauna on the property and their relative importance.
- B. An evaluation of the physical and biological relationship of the property to

surrounding or contiguous habitats and relationships to the MHPA. Discuss, if the proposed project will disrupt the integrity or continuity of an important habitat, (i.e., disruption of a wildlife corridor and/or an extensive riparian woodland, etc.).

- C. Indicate the percentage (or acreage) of plant communities and habitats to be removed or modified in tabular form by the proposed development or reasonably anticipated to be removed. Discuss likely subsequent impacts for phased and staged development, even if they are not a part of the project.
- D. A determination of significance must be done per the City of San Diego Significance Determination Guidelines (January, 1994, or as amended);
- E. Quantify the anticipated loss of sensitive plant and animal habitat, populations, or individuals. Define where possible, the local and regional significance of this loss.
- F. Discuss and evaluate indirect impacts anticipated on and off site from project implementation.
- G. Discuss the following consistency issues with the MSCP (Discuss how the project will provide for the long-term viability of wildlife and sensitive habitats):
 - 1. Whether or not the project lies within or adjacent to the MHPA (see interactive mapping feature on the following web site: www.sangis.org; Page 12, MSCP).
 - 2. Describe any relevant MHPA Guidelines (map notes).
 - 3. Assess compliance with the planning policies and guidelines (is the project an allowed use within the MHPA ?).
 - 4. Address, if applicable, the land use adjacency guidelines (as shown on Page 48, the MSCP Subarea Plan).
 - 5. Identify any appropriate management issues per Section 1.5, MSCP Subarea Plan.
 - 6. Assess whether any special conditions of coverage apply to the species affected by the project (per Covered Species list, Appendix A, MSCP Subarea Plan).
 - 7. Discuss any boundary adjustments to the MHPA. If proposed, evaluate for functional equivalency per Sections 1.1.1 and 5.4.2 of the MSCP Subarea Plan.

8. Discuss whether or not the project is located on the least sensitive portion of the site (see Page 5, Biology Guidelines).

H. Vernal Pools (see Attachment II)

A focused survey evaluating the quantity and quality of vernal pool(s) and watershed must be provided. Substantial evidence must be presented that demonstrates: 1) presence/absence of the pools; 2) what measures are being taken to avoid the pools and 3) if unavoidable, provide substantiation as to why the impacts can not be avoided and what measures are being used to minimize impacts (see Page 4 of the Biology Guidelines).

I. Cumulative Impacts

Projects that conform to the MSCP would not result in significant cumulative impacts. However, a rare circumstance could occur where impacts to a particular species not covered by the MSCP (e.g. little mousetails, salt marsh daisy) may still result in a cumulative/significant impact. In this case, the report would identify those species and describe why a cumulative impact still exists regardless of the habitat level protection provided by the MSCP.

VI. MITIGATION AND MONITORING REQUIREMENTS

This program will consist of three elements: 1) Mitigation Element, 2) Protection and Notice Element, and 3) Management Element. Refer to page 12 of the Biology Guidelines, November, 1997.

NOTE: Creation of vernal pools in historically non-vernal pool areas is not acceptable.

VII. PREPARER'S QUALIFICATIONS AND CERTIFICATIONS

Persons preparing or responsible for biological technical reports should have the following qualifications: formal educational background in appropriate areas of study to understand local floral and faunal relationships; sufficient local field experience in identification of flora or fauna, particularly rare, endangered, and threatened species with knowledge of their local and range-wide population status and trends, and experience in habitat evaluation and predicting, and in quantifying environmental impacts. With regards to focused surveys, the Principal or other member of the survey team must meet regulatory agency protocol qualifications and possess or obtain appropriate permits, prior to conducting the survey, where necessary.

VIII. ACKNOWLEDGMENTS AND SURVEY GUIDELINE REFERENCES

A. Acknowledgments

The following persons assisted in the preparation of these survey guidelines:

Holly Boessow, Associate Planner
Cathy Cibit, Senior Planner
Keith Greer, Biologist III
Matt Kreplin, Intern
Holly Smit, Associate Planner
Chris Teng, Assistant Planner

B. Biology Survey Guideline References

The following documents were used in the preparation of these Survey Guidelines:

1. "Biology Guidelines" refers to the City of San Diego, "San Diego . Municipal Code - Land Development Manual/Land Development Code Update - Biology Guidelines"; otherwise known as "City of Zone, and the California Environmental Quality Act (CEQA)", San Diego, Biology Guidelines for the Environmentally Sensitive Lands Regulations (ESL), The Open Space Residential (R-1-2) November 18, 1997.
2. "MSCP Subarea Plan" refers to the "City of San Diego, Multiple Species Conservation Program (MSCP) Subarea Plan", March 1997.
3. Mitigation Monitoring and Reporting Program (MMRP) Guidelines, City of San Diego, as amended.
4. Significance Determination Guidelines, City of San Diego, 1998.

IX. DEFINITIONS - Alphabetical Order

ACOE- Army Corps Of Engineers

CDFG- California Department of Fish and Game

CEQA- California Environmental Quality Act

EIR- Environmental Impact Report

ESL- Environmentally Sensitive Lands Regulations, Land Development Code

GIS - Geographic Information System

LDR- Land Development Review

MMRP- Mitigation Monitoring Reporting Program

MHPA - Multiple Habitat Planning Area (90% Preserve Area of the MSCP)

MSCP- Multiple Species Conservation Program

NAD- North American Datum

Regulating Agencies: Those governmental agencies with discretionary power to issue permits. i.e., U.S. Army Corps of Engineers; California Department of Fish and Game; City of San Diego, Planning and Development Review).

RPO- Resource Protection Ordinance

RUIS- Regional Urban Information System - now known as SANGIS - San Diego GIS

SANDAG- San Diego Association of Governments

SANGIS- San Diego Geographic Information System

USFW- United States Fish & Wildlife Service

www.sangis.org - City of San Diego's web site which includes the MHPA mapping.

ATTACHMENT I
Table 1: (Page 11 of Biology Guidelines)
Summary of Biological Survey Requirements

RESOURCE	SURVEY REQUIREMENTS	
	Inside MHPA	Outside MHPA
Vegetation		
• Uplands	Confirm/Revise MSCP mapping.	Confirm/Revise MSCP mapping.
• Wetlands	Delineate wetlands per City definition.	Delineate wetlands per City definition.
Covered spp ¹		
• Listed spp (e.g. Ca. gnatcatcher)	Focused survey per protocol.	Per MSCP conditions of coverage ² .
• Narrow endemic (e.g. S.D. Thornmint)	Focused survey per protocol.	Focused survey per protocol.
• Other (e.g. S.D. horned lizard)	Survey as necessary to comply with sitting requirements as outlined in Section II.A.2 of these Guidelines.	Per MSCP conditions of coverage ² .
Non-Covered spp ¹		
• Listed spp (e.g. pacific pocket mouse)	Focused survey per protocol.	Focused survey per protocol.
• "Other Sensitive Species ³ " (e.g. little mouse tails)	Case-by-case determination depending on the spp.	Case-by-case determination depending on the spp.

¹ Based upon the MSCP mapping, site specific surveys, the NDDDB records, previous EIRs and biological surveys, and/or discussion with the wildlife agencies, the potential for listed species, narrow endemics and CEQA sensitive species will be determined. Where there is a reasonable likelihood that one of these species exists, surveys will follow the above requirements.

² Survey as necessary to conform with Appendix A of the City of San Diego MSCP Subarea Plan (March 1997).

³ "Other Sensitive Species" Those other species that are not listed by federal and/or state agencies and/or not covered by the MSCP and to which any impacts may be considered significant under CEQA.

ATTACHMENT II

MAP SUBMISSIONS & METHODOLOGY

I. Vegetation Community Subassociations

The mapping of vegetation should be based on the R.F. Holland system of natural communities as described in Preliminary Descriptions of the Terrestrial Natural Communities of California, California Department of Fish and Game, Non-Game Heritage Program, Sacramento, 1986 [and as modified for San Diego County (SANDAG 1992).] This system will provide the names and descriptions of the basic plant community associations. These documents are available in the office of the Environmental Analysis Section, Land Development Review Division, Planning and Development Review, City of San Diego. If additional mapping categories are used, a cross-reference table should be provided to clearly show how these "new" categories fit into the Holland system. In most cases, an aerial photograph at 1"=200" scale should be used to aid in the delineation of vegetation boundaries.

Where applicable to enhance the clarity of field data, subassociations should be mapped. For example, where a coastal sage scrub community is dominated by *Adolphia californica* rather than the more typical coastal sagebrush, the community should be identified as *Adolphia californica*-dominated coastal sage scrub. The study report should describe the subassociations in terms of the dominant elements and distinguishing characteristics.

All vegetation should be considered potential habitat whether it is disturbed or not, and/or if it supports a cover of approximately 30 % of non-ruderal vegetation. This is applicable to fallow agricultural fields too. (No time frame is necessary as long as at least 30% cover is demonstrated). However, other factors may be present to preclude viable habitat..see below.

The use of the modifier "disturbed" should be limited to human-induced disturbance such as agriculture, prior grading activities, or off-road vehicle use. The probable cause of the disturbance should be noted. The modifier is not applicable to burned areas. Canopy cover varies by vegetation type. Therefore the percent canopy cover which represents a disturbed condition will vary according to vegetation type. The use of the term "disturbed" is within the discretion of the principal investigator, biologist, and/or City staff, and should be applied to provide a true and accurate representation of field conditions.

A. Problem Mapping Areas:

The following descriptions are given as guidelines for distinguishing difficult habitats in the field. If a habitat fits one of the descriptions below, but there is scientific information to classify the habitat otherwise, please submit that information in the biology report.

1. Non-native grassland vs. Ruderal (disturbed):

Non-native grasslands typically contain annual grasses including, but not limited to: brome (*Bromus sp.*), wild oat (*Avena sp.*), and ryegrass (*Lolium sp.*). There should be at least 30% cover attributable to annual non-native grasses, although other plant species native or non-native species may be intermixed.

Ruderal or disturbed areas typically have some sort of disturbance associated with it, such as prior development or past agricultural use of the property. The habitat consists of bare ground or non-native ruderal plant species including, but not limited to, horseweed (*Conyza spp.*), garland chrysanthemum (*Chrysanthemum coronarium*), pineapple-weed (*Chamomilla suaveolens*), sow-thistle (*Sonchus spp.*), Russian thistle (*Salsola tragus*), and other non-native plant species other than grasses. More than 70% of the ruderal or disturbed area should be bare ground or non-native ruderal plant species.

2. Southern Maritime Chaparral vs. Southern Mixed Chaparral:

Distinguishing between Southern Maritime and Southern Mixed Chaparral can be difficult, especially in areas where the habitat may be transitional between the two. Please keep in mind when identifying these habitats, especially on smaller parcels, that it may be necessary to assess the adjacent, associated habitats, not just what occurs on site. If access to adjacent areas cannot be obtained, any data available such as historic records or aerial photos, should be used in making your determination.

Southern Maritime Chaparral is a rare vegetation community associated with the fog belt along the coastal areas and could extend inland to areas such as, but not limited to, Carlsbad, El Camino Real, and Palomar Road. The following characteristics and plant species are considered indicators of Southern Maritime Chaparral within the City of San Diego: occurrence on sandstone soils; occurrence within the coastal fog belt; Del Mar manzanita (*Arctostaphylos glandulosa* ssp. *crassifolia*), wart-stemmed ceanothus (*Ceanothus verrucosus*), Orcutt's spineflower (*Chorizanthe orcuttiana*), sea-dahlia (*Coreopsis maritima*), California aster (*Lessingia filaginifolia* var. *filaginifolia*), summer holly (*Comarostaphylis diversifolia*), short-leaved dudleya (*Dudleya blochmaniae* ssp. *brevifolia*), Torrey pine (*Pinus torreyana*), Nuttall's scrub oak (*Quercus dumosa*), and Encinitas baccharis (*Baccharis vanessae*). The above plant species do not need to be dominant, only present, to be considered as an indicator of Southern Maritime Chaparral.

Southern Mixed Chaparral is a more common inland vegetation community, typically associated with drier, more drought-tolerant plant species. Typical plant species include chamise (*Adenostoma fasciculatum*), ceanothus (*Ceanothus spp.*), manzanita species excluding Del Mar manzanita (*Arctostaphylos spp.* or *Xylococcus bicolor*), and scrub oak (*Quercus berberifolia* or *Quercus dumosa*). If any single species dominates more than 50% of the cover, then the habitat is not a mixed habitat and should be designated according to that dominant species present (i.e.

chamise chaparral).

3. Vernal Pools vs. Road Ruts:

Vernal Pools are seasonally flooded depressions that support a distinctive living community which is adapted to extreme variability in hydrologic conditions (seasonally very dry and very wet conditions). In the City of San Diego, vernal pools extend from Otay Mesa along the border, and in the Penasquitos and Rancho Bernardo areas. Other areas in the County of San Diego include Ramona, Proctor Valley, and Marron Valley. Vernal pools are usually associated with mima-mounds, occurring on mesas, especially where the hardpan or bedrock is underlain by clay soils (Zedler, 1987). Due to these soil conditions, vernal pools hold water after rain storms.

Under U.S. Army Corps regulations, for a seasonally flooded depression to be considered a vernal pool, it must have at least one vernal pool indicator species. The City of San Diego will consider similar factors. Depressions which are man-made, such as tire tracks or road ruts, may still be considered vernal pools if they contain at least one indicator plant species. A list of these indicator species has been compiled by the U.S. Army Corps of Engineers, (Special Public Notice, Regional General Conditions to the Nationwide Permits, Nov. 25, 1997), and this list should be used as a guideline to distinguish vernal pools from other seasonal depressions. Many of these species are endemic to vernal pools and are covered by the MSCP and/or are listed by federal and/or state agencies.

Road ruts and other seasonal depressions which are not vernal pools may contain wildlife associated with vernal pools, such as fairy shrimp, but will not contain vernal pool plant indicator species. Seasonal depressions not containing indicator plant species are usually not considered vernal pools by the City of San Diego. Careful consideration should be given to road ruts or other seasonal depressions adjacent to vernal pool complexes. These depressions are likely to contain vernal pool plant indicator species and should be examined thoroughly (i.e. multiple surveys) before they are dismissed as not being vernal pools.

II. Biological Resource Map Submittal Requirements

Biological resource maps must have the following format features, consistent with the following:

- A. For projects with accompanying tentative subdivision maps or small projects (single-family dwellings, on lots less than 1.0 acre in size) :
 1. A 1" = 200' scale (minimum) of the overall project on a site plan.
 2. Topographic maps accurate at a 1"=200' scale (minimum), and/or use ortho-topographic photos as the base.
 3. One map on a non-distorting medium such as mylar should be used (but is not required) and submitted rolled, not folded.

4. Four blue-line copies should be submitted folded to 8 1/2" X 11" size. A reduced version of c. to fit to 8 1/2" X 11" or 11 1/2" X 17 size " and incorporated into the Biology Report is required. (The final four copies shall be submitted to Planning and Development Review for distribution.)

B. For projects without accompanying tentative subdivision maps:

1. A 1" = 400' scale (minimum) map may be used with prior approval by Planning and Development Review.
2. Same as c - d. above.

The minimum mapping unit should be based on the project scale and type of vegetation being mapped. However, splits of vegetation community subassociations, as described above, should be made if they are accurately labeled and described. The maps should contain all the necessary biological information on the same sheet, as long as it is clearly readable. If there is too much information to make a single legible map, mylar or acetate overlays may be used. Maps should be dated and at the original scale (not photo-reproduced).

III. Vernal Pool Requirements:

Show all vernal pools on the full scale biological resource map. In addition, provide another map of appropriate scale (such as a minimum of 1"=40 feet), that depicts the limits and/or boundaries of the basins and watersheds. This map must be delineated using standard survey techniques or GPS. Identification of the presence/absence of vernal pool plant and animal species, shall be done, where appropriate, utilizing the U. S. Fish and Wildlife Service's Vernal Pool Guidelines. Techniques include, but are not limited to, cyst sampling in dry pools; presence/absence of mima-mound topography, and /or historical indicators.

IV. Optional Maps (SANGIS/digitally-compatible submittals):

If the digital information is available for the project, a 3 1/2 " disk with the information in ARC/info-compatible format should be provided. Until SANGIS standards have been agreed upon for digital submittal of information, the hard copy mapping is requested in addition to the computerized data. When topography becomes available on the SANGIS system, standard base maps will be available, and required, for use in mapping areas within the City. The coordinate system used by the City is the California State Plane Coordinate System NAD 83; all information submitted must be consistent with this coordinate system. At least four registration points should be identified on each sheet or layer of information, compatible with NAD 83. Digital files provided should be clean, error-free and final versions.

Natural Diversity Data Base
California Dept. of Fish and Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814

Source Code _____ Quad Code _____
Elm Code _____ Occ # _____
Copy to _____ Map Index # _____

Date of field work: mo - day - year

Scientific Name (no codes):

species Found? [] [] If not, why?
yes no

total # Individuals: Subsequent visit? [] yes [] no

compared to your last visit: [] more [] same [] fewer

is this an existing NDDb occurrence? [] [] []
Yes, Occ. # no unk.

Collection? If yes:
number Museum/Herbarium

Reporter: _____
Address: _____
Phone: () _____
Other knowledgeable individuals (name/address/phone): _____

Plant Information:

phenology: % vegetative % flowering % fruiting

Animal Information:

Age Structure: # adults # juveniles # unknown

Site Function: [] [] [] [] [] []

 breeding foraging wintering roosting burrow site other

Location: (Please also attach or draw map on back.)

County: _____ Landowner/Mgr: _____
 Quad Name: _____ Elevation: _____ UTM: _____
 T _____ R _____ 1/4 of _____ 1/4 Sec _____ T _____ R _____ 1/4 of _____ 1/4 Sec _____

Habitat Description: (Plant communities, dominants, associates, substrate/soils, aspect/slope)

Other rare spp.?

Site Information: Current/surrounding land use:

Visible disturbances, possible threats:

Overall site quality: ☐ Excellent ☐ Good ☐ Fair ☐ Poor Comments:

Termination: (Check one or more, fill in the blanks)

Keyed in a site reference: _____
 Compared with specimen housed at: _____
 Compared with photo/drawing in: _____
 By another person (name): _____
 Other: _____

Photographs: (Check one or more)	Slide	Print
Plant/animal	_____	_____
Habitat	_____	_____
Diagnostic Feature	_____	_____
Other	_____	_____
May we obtain duplicates at our expense? <input type="checkbox"/> Yes <input type="checkbox"/> No		

ATTACHMENT IV

SUGGESTED REFERENCES AND NAMING AUTHORITIES

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Attachment D

Significance Determination Guidelines Under the California Environmental Quality Act

(City of San Diego)

Attachment D

Significance Determination Guidelines Under the California Environmental Quality Act

(City of San Diego)

SIGNIFICANCE DETERMINATION GUIDELINES
UNDER THE
CALIFORNIA ENVIRONMENTAL QUALITY ACT

BIOLOGY

PLANNING AND DEVELOPMENT REVIEW,
LAND DEVELOPMENT REVIEW DIVISION,
ENVIRONMENTAL ANALYSIS SECTION

CITY OF SAN DIEGO

October, 1998

BIOLOGICAL RESOURCES

I. INTRODUCTION

The California Environmental Quality Act (CEQA) Guidelines define "significant effect on the environment" as a "substantial, or potentially substantial adverse change in the environment". The CEQA Guidelines (Appendix G) further indicate that there may be a significant effect on biological resources if the project will:

- A. Substantially affect an endangered, rare, or threatened species of animal or plant or the habitat of the species;
- B. Interfere substantially with the movement of any resident or migratory fish or wildlife species; or
- C. Substantially diminish habitat for fish, wildlife, or plants.

Impacts to biological resources are assessed by City staff through the CEQA review process, the Resource Protection Ordinance, the Environmentally Sensitive Lands Ordinance¹ and through the review of the projects consistency with the City's Multiple Species Conservation Program (MSCP) Subarea Plan. Before a determination of the significance of an impact can be made, the presence and nature of the biological resources must be established. If biological resources may be present, a survey should be conducted pursuant to the City of San Diego's Biology Survey Guidelines (revised 1998). The following two steps summarize the procedure for collecting the necessary information.

1. Determine the extent of biological resources and values present on the site. The analyst needs to visit the site and review existing biological information (e.g. MSCP vegetation maps). If there is any evidence that the site supports biological resources, or that it supported significant biological resources in the recent past, a survey or letter report is necessary.

A key factor in making this determination is whether or not the site has been graded or grubbed. In some cases it is appropriate to consider the biological values on the site before a disturbance such as grading or fire. In general, if the site has been legally graded or grubbed and/or is characterized by ruderal species, and is not included in the City's Multiple Habitat Planning Area (MHPA), is not a habitat defined in Table 1 of the Biology Guidelines, it probably does not support significant biological resources.

1. The ESL ordinance will supercede RPO upon the adoption of the Land Development Code.

Note: The presence of trash and debris on a site does not indicate a lack of biological habitat. In addition, lack of vegetation due to fire, clearing of vegetation for brush management (Zone 2 is impact neutral), unauthorized off-road vehicle use or other uses also does not preclude the presence of potential habitat.

An affirmative answer to any of the following questions indicates that significant biological resources MAY be present.

- a. The site has been identified as part of the MHPA by the City's MSCP's Subarea Plan (March, 1997).
 - b. The site supports or could support vegetation communities (such as grassland, chaparral, coastal sage scrub, etc.). The CEQA determination of significant impacts may be based on what was on the site, if appropriate.
 - c. The site contains, or comes within 100 feet of a natural or man-made drainage. The site occurs within the 100-year flood plain established by the Federal Emergency Management Agency (FEMA), and the Flood Plain Fringe (FPF)/ Flood Way (FW) zones.
 - d. The site does not support a "covered" (per MSCP) vegetation community; however, important wildlife species may use the site for a corridor, etc. (e.g. California least terns on dredge spoil).
2. Determine the nature and extent of any biological resources present on the site. If biological resources may be present, then a survey to determine the nature and extent of the biological resources on the site is warranted (See Guidelines for Conducting Biology Survey Guidelines, 1998). The survey should identify which biological resources are present on the site and the number and extent of each type. Biological resources include, but are not limited to:
- a. Lands included within the MHPA;
 - b. Wildlife corridors and large areas of natural habitat and grassland;
 - c. Uplands and wetlands supporting State or Federally listed rare or endangered species;
 - d. Wetlands, as defined by the U. S. Army Corps of Engineers and the City of San Diego;

- e. Waters of the U. S., as defined by the U.S. Army Corps of Engineers;
- f. All habitats classified as Tier I, II, IIIa or IIIb under the City of San Diego, Biology Guidelines (See Table 3 of Biology Guidelines).
- g. Land supporting narrow endemic or other sensitive species.

The significance and/or sensitivity of the resource can be determined at this stage, however, a resource may be more vulnerable to some kinds of development than to others. Sensitivity and/or significance of a resource is, therefore, more appropriately considered in the context of the proposed project, as discussed below.

II. SIGNIFICANCE DETERMINATION

A. Direct Impacts

The direct, indirect and cumulative impacts of the project must be analyzed for significance. The first step in making the determination is to identify the nature of the impact, and the extent, and degree of direct impacts to biological resources.

In order to determine the extent of impacts, the acreage of each habitat type to be lost should be quantified. If an upland, categorize into one of the four Tier categories (I-IV), which are listed on Table 3 of the Biology Guidelines. If a wetland, please categorize as indicated on Table 2 of the Biology Guidelines. In addition, the boundaries of the MHPA should be determined and any proposed encroachment should be quantified. Where possible, the extent or number of individuals of sensitive, threatened, rare, or endangered species to be taken or harassed should also be quantified. In order to determine the degree of the impact, fragmentation of habitat, loss of foraging area for sensitive species, and other factors should be considered.

The City's permit to 'take' covered species under the MSCP is based on the concept that 90% of lands within the MHPA will be preserved. As such any encroachment into the MHPA is considered a significant impact. In addition, lands containing Tier I, II, IIIa and IIIb (see Table 3 of City's Biology Guidelines) and all wetlands (see Table 2 of City's Biology

Guidelines) are considered to have habitat value for species covered by the MSCP. As such, impacts to these resources may be considered significant. Lands designated as Tier IV are not considered to have significant habitat value and impacts would not be considered significant.

Impacts to individual sensitive species, outside of any impacts to habitat, may also be considered significant based upon the rarity and extent of impacts. Impacts to state or federally listed species and all narrow endemics (see the City's Biology Guidelines) should be considered significant. Certain species covered by the MSCP (see page 26 of the Biology Guidelines) and other species not covered by the MSCP, may be considered significant on a case-by-case basis taking into consideration all pertinent information regarding distribution, rarity, and the level of habitat conservation afforded by the MSCP.

NOTES:

1. Upland impacts less than 0.1 acre are not considered significant and do not require mitigation.
2. Wetland impacts less than 0.01 acre are not considered significant and do not require mitigation. THIS DOES NOT APPLY TO VERNAL POOLS.
3. Brush management Zone 2 is "impact neutral" and any impacts within this zone are not considered significant.

B. Indirect Effects

Depending on the circumstances, indirect effects of a project may be as significant as the direct effects of the project. In general, however, indirect effects are easier to mitigate than direct ones. Some impacts may be considered indirect effects in some circumstances and direct effects under other circumstances. For example, the introduction of meso-predators (dogs and cats), as described below, would be considered a direct effect if prey species, such as the light-footed clapper rail, were known to nest near by. Indirect effects include but are not limited to, the following impacts:

- a. The introduction of urban meso-predators into a biological system;

- b. The introduction of urban run-off into a biological system;
- c. The introduction of invasive exotic plant species into a biological system;
- d. Noise and lighting impacts;
- e. Loss of a biological buffer, such as a wetland buffer;
- f. Alteration of a dynamic portion of a system, such as stream flow characteristics or fire cycles; and
- g. Introduction of urban uses near a wetland, resulting in the need for environmentally damaging mosquito abatement.

C. Cumulative Effects

The MSCP was designed to compensate for the regional loss of biological resources throughout the region. Projects that conform with the MSCP as specified by the City MSCP Subarea Plan, implementing ordinances, (e.g., RPO/ESL) and Biology Guidelines, would not result in a significant cumulative impact for those biological resources adequately covered by the MSCP.

All vegetation communities identified as Tier I through IV (see City's Biology Guidelines), and all wetlands have been considered sufficiently or significantly covered by the MSCP except for grasslands and vernal pools. Cumulatively significant impacts to grasslands (both native and non-native grasslands) and vernal pools may result from project-level impacts.

Impacts to species covered by the MSCP (see Appendix A of MSCP Subarea Plan) would not be considered cumulatively significant, provided that all mitigation and conditions of coverage are implemented. Impacts to state or federally listed species not covered by the MSCP would still be considered cumulatively significant.

It is expected that the majority of other sensitive species not analyzed for coverage under the MSCP will be adequately conserved through the habitat based mitigation as described in Section B.1. a. And B.1.b. of the City of San Diego, Biology Guidelines. A rare circumstance may arise, however, where impacts to a particular species may still result in a cumulatively significant impact. The project-level biological survey report would identify those species and describe why a cumulative impact still

exists in light of the habitat level of protection provided by the MSCP. Depending on the size of the impact, the salt marsh daisy (*Lasthenia glabrata* ssp. *coulteri*) found in salt pannes) and the little mouse tail (*Myosurus minimus* found in vernal pools) would be examples of non-covered species that might be considered rare enough to conclude cumulatively significant impacts.

Attachment E

SAMPLE OPEN SPACE EASEMENT

TENTATIVE MAP # _____

A. On the Final Map, or prior to issuance of any grading permit (not plan approval), whichever occurs first, the subdivider shall:

- (1) Grant an open space easement to the (*California Department of Fish & Game/City of La Mesa/City of Poway/County of San Diego*) over portions of (*Lots X through XX as shown on Tentative Map #_____/Exhibit A*). This easement is for the preservation and protection of significant biological resources, including inland sage scrub, Engelmann oak woodland, sycamore woodland, and the sensitive species that inhabit these areas, including the prostrate spineflower (*Chorizanthe procumbens*), rufous-crowned sparrow (*Aimophila ruficeps*), white-tailed kite (*Elanus leucurus*), Cooper's hawk (*Accipiter cooperii*), American peregrine falcon (*Falco peregrinus anatum*), and San Diego desert woodrat (*Neotoma lepida intermedia*). This easement prohibits all of the following on any portion of the land subject to said easement: grading; excavation; placement of soil, sand, rock, gravel, or other material; clearing of vegetation; construction, erection, or placement of any building or structure; vehicular activities; trash dumping; or use for any purpose other than as open space.

The sole exceptions to this prohibition are:

- (a) Construction and grading of trails as shown on (*Exhibit A*) and approved by the USFWS and CDFG.
- (2) Grant a fire clearing easement to the City of La Mesa over portions of Lots X through XX as shown on TM# _____. This easement shall be a minimum of 100 feet in width and is intended to provide a buffer to prevent fire clearing from occurring in the biological open space easement. This easement prohibits construction, erection, or placement of any habitable buildings or structures that would require fire clearing in the biological open space easement. Grading, landscaping and uses that will not require fire clearing within the biological open space easement as determined by the applicable fire protection district are allowed, including, but not limited to:
- (a) Swimming pools, tennis courts, paddocks, corrals;
(b) Roads; and
(c) Trails.

Attachment E

SAMPLE OPEN SPACE EASEMENT

TENTATIVE MAP # _____

A. On the Final Map, or prior to issuance of any grading permit (not plan approval), whichever occurs first, the subdivider shall:

- (1) Grant an open space easement to the (*California Department of Fish & Game/City of La Mesa/City of Poway/County of San Diego*) over portions of (*Lots X through XX as shown on Tentative Map #_____/Exhibit A*). This easement is for the preservation and protection of significant biological resources, including inland sage scrub, Engelmann oak woodland, sycamore woodland, and the sensitive species that inhabit these areas, including the prostrate spineflower (*Chorizanthe procumbens*), rufous-crowned sparrow (*Aimophila ruficeps*), white-tailed kite (*Elanus leucurus*), Cooper's hawk (*Accipiter cooperii*), American peregrine falcon (*Falco peregrinus anatum*), and San Diego desert woodrat (*Neotoma lepida intermedia*). This easement prohibits all of the following on any portion of the land subject to said easement: grading; excavation; placement of soil, sand, rock, gravel, or other material; clearing of vegetation; construction, erection, or placement of any building or structure; vehicular activities; trash dumping; or use for any purpose other than as open space.

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 - (a) Swimming pools, tennis courts, paddocks, corrals;
 - (b) Roads; and
 - (c) Trails.

The requirements to protect biological resources are included in the CEQA, the Federal Endangered Species Act (ESA), and the California Endangered Species Act (CESA). The ESA states that the United States has pledged to conserve various species of fish or wildlife or plants facing extinction. Furthermore, the purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved..." Within Section 2051 of the CESA, the State legislature has declared that:

- a) "Certain species of fish, wildlife, and plants have been rendered extinct as a consequence of man's activities, untempered by adequate concern and conservation."
- b) "Other species of fish, wildlife and plants are in dangor of, or threatened with, extinction, because their habitats are threatened with destruction, adverse modification, or severe curtailment, or because of overexploitation, disease, predation, or other factors."
- c) "These species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this State, and the conservation, protection, and enhancement of these species and their habitat is of Statewide concern."

The California Environmental Quality Act (Public Resources Code) Section 2100(g) states that, "It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian."