

CALFED
BAY-DELTA
PROGRAM

Attachment 5 Conservation Agreement Regarding Multi-Species Conservation Strategy

August 28, 2000

Conservation Agreement

by and among

**the United States Fish and Wildlife Service,
the National Marine Fisheries Service,
the United States Bureau of Reclamation,
the United States Bureau of Land Management,
the United States Environmental Protection Agency,
the United States Army Corps of Engineers,
the Natural Resources Conservation Service,
the California Resources Agency,
the California Department of Fish and Game, and
the California Department of Water Resources**

regarding the

**CALFED Bay-Delta Program
Multi-Species Conservation Strategy**

August 28, 2000

CALFED Bay-Delta Program Multi-Species Conservation Strategy Conservation Agreement

This agreement regarding the **CALFED Bay-Delta Program Multi-Species Conservation Strategy** (“Agreement”) is entered into as of the Effective Date by and among the **United States Fish and Wildlife Service** (“USFWS”), the **United States Bureau of Reclamation** (“USBR”), the **United States Bureau of Land Management** (“BLM”), the **National Marine Fisheries Service** (“NMFS”), the **United States Environmental Protection Agency** (“EPA”), the **United States Army Corps of Engineers** (“USACE”), the **Natural Resource Conservation Service** (“NRCS”), the **California Resources Agency** (“Resources Agency”), the **California Department of Fish and Game** (“DFG”) and the **California Department of Water Resources** (“DWR”). These entities may be referred to collectively as “Parties” and each individually as a “Party.” USFWS, NMFS and DFG are referred to herein collectively as “the Fishery Agencies.” USBR and DWR are referred to herein collectively as “the Water Agencies.”

Recitals

A. In 1994, the Governor’s Water Policy Council of the State of California and the Federal Ecosystem Directorate entered into a Framework Agreement to establish a comprehensive program for coordination and communication with respect to environmental protection and water supply dependability in the San Francisco Bay/San Joaquin River Bay-Delta Estuary. This Framework Agreement served as the basis for the **CALFED Bay-Delta Program** (“Program”).

B. The Program is a cooperative effort of eighteen State and federal agencies with regulatory and management responsibilities in the Bay-Delta to develop a long-term plan to restore ecosystem health and improve water management for beneficial uses of the Bay-Delta system. The Program’s objective is to identify comprehensive solutions to the problems of ecosystem quality, water supply reliability, water quality, and Delta levee and channel integrity.

C. The Program’s mission is to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system. The Program is also guided by solution principles adopted by CALFED agencies. According to these principles, a successful Program solution must reduce conflicts in the system, be equitable, be affordable, be durable, be implementable, and have no significant redirected impacts.

D. On or near the Effective Date, the Resources Agency, USBR, USFWS, NMFS, EPA, NRCS, and the USACE will issue a **Record of Decision** (“ROD”) and will certify the **Final Programmatic Environmental Impact Statement/Environmental Impact Report** (“EIS/EIR”) prepared for the Program pursuant to the **National Environmental Policy Act** (“NEPA”) and the **California Environmental Quality Act** (“CEQA”). Following issuance of the ROD, specific Program actions will be developed and implemented in accordance with applicable environmental laws.

E. Certain Program actions may result in adverse effects upon species of fish, wildlife and plants and their habitat. Among these species are species that are protected under the **California Endangered Species Act** (“CESA”), the **federal Endangered Species Act** (“FESA”), or both CESA and FESA.

F. The **CALFED Bay-Delta Program Multi-Species Conservation Strategy** dated July 2000 (“MSCS”) was developed for the Program in accordance with FESA, CESA and California’s **Natural Community Conservation Planning Act** (“NCCPA”). The MSCS is a comprehensive programmatic strategy for the conservation of numerous species of fish, wildlife and plants and their habitat based on key Program elements, such as the Program’s Ecosystem Restoration Program and the Environmental Water Account. Implementation of the MSCS is intended to ensure that entities implementing Program actions will satisfy the requirements of FESA, CESA and the NCCPA. A primary purpose of this agreement is to allow the MSCS to serve as adequate compliance under NCCPA.

G. The USFWS’ “Programmatic Biological Opinion on the CALFED Bay-Delta Program,” dated August 28, 2000, NMFS’ “CALFED Bay-Delta Program Programmatic Biological Opinion,” dated August 28, 2000, and DFG’s “Natural Community Conservation Planning Act Approval of the CALFED Bay-Delta Program Multiple Species Conservation Strategy,” dated August 28, 2000, are each based, in part, on the MSCS.

H. To ensure that the MSCS is effective, and to ensure compliance with FESA, CESA and the NCCPA, the Program must be implemented substantially as described in the EIS/EIR, and the MSCS and Biological Opinions must be implemented and adhered to. FESA compliance shall be conducted in a manner consistent with applicable law and regulation.

I. The Parties anticipate that the State Water Resources Control Board (“SWRCB”) will be executing this Agreement in the near future. The Parties recognize that the SWRCB has adjudicative responsibilities with respect to contested regulatory matters that are brought before it. The SWRCB’s responsibilities include the requirement that the SWRCB and its members avoid bias, prejudice, or interest in the adjudicative matters before it; e.g., it cannot decide, before completion of any required hearing or equivalent proceeding, the outcome of a matter. This Agreement does not in any way require or commit the SWRCB to participate in proposing a project that will come before it for approval; nor does this Agreement require or imply that the SWRCB will approve a project that requires an adjudicative proceeding. Under this Agreement, the role of the SWRCB in connection with matters that may require an adjudicative decision is limited to promptly and diligently processing any applications, petitions, or other requests for approval. Nothing in this Agreement commits the SWRCB to an approval or disapproval of any project subject to the SWRCB’s authority, nor to a term or condition in any approval of a project by the SWRCB.

AGREEMENT

To ensure that the MSCS is implemented in a manner consistent with the statutory authority of each Party and the Program objectives, the Parties agree as follows:

I. Definitions

The following definitions shall be used to interpret this Agreement. Terms not defined below, but defined in the MSCS, shall have the definition ascribed in the MSCS.

- A. Action-Specific Implementation Plans are plans developed for specific Program actions that provide information and analyses necessary for compliance with FESA, CESA and the NCCPA, as further described in Chapter 6.1 of the MSCS.
- B. Biological Opinions are the USFWS' "Programmatic Biological Opinion on the CALFED Bay-Delta Program," dated August 28, 2000, NMFS' "CALFED Bay-Delta Program Programmatic Biological Opinion," dated August 28, 2000, and DFG's "Natural Community Conservation Planning Act Approval of the CALFED Bay-Delta Program Multiple Species Conservation Strategy," dated August 28, 2000, or their successor documents.
- C. Covered Species are species for which the MSCS provides program-level compliance for the Program under FESA, the NCCPA, or both. Each Fishery Agency shall maintain a list of Covered Species in accordance with its statutory authority.
- D. Evaluated Species are all of the species of fish, wildlife and plants evaluated and addressed in the MSCS, many of which are Covered Species.
- E. EWA Agreement is the Environmental Water Account Operating Principles Agreement dated August 28, 2000.
- F. MSCS is the "CALFED Bay-Delta Program Multi-Species Conservation Strategy," dated July 2000, a Technical Appendix to the EIS/EIR. The MSCS is hereby incorporated by reference in this Agreement.
- G. MSCS Focus Area means the legal Delta as defined in California Water Code Section 12220, Suisun Bay and Marsh, the Sacramento and San Joaquin Rivers and their tributaries downstream of major dams, and the potential locations of conveyance and water storage facilities.
- H. Phase III refers to the period of time following the ROD and Certification encompassing the thirty-year planning horizon used in developing the CALFED plan, during which the Program actions will be implemented. Phase III will include site-specific environmental review and permitting.
- I. Program actions are actions that are within the scope of the Final PEIS/EIR and carried out or funded by CALFED Agencies as part of the Program.

- J. Program Agencies means the Resources Agency, DFG, DWR, the Delta Protection Commission, the Reclamation Board, the California Department of Food and Agriculture, the California Environmental Protection Agency, SWRCB, the Interior Department, USBR, the USFWS, the United States Geological Survey, BLM, EPA, USACE, United States Department of Commerce, NMFS, the United States Department of Agriculture, NRCS, the United States Forest Service, and the Western Area Power Administration. Program Agencies are agencies that are eligible to enter this Agreement.
- K. Regulatory Baseline is the regulatory baseline described in Section 2.2.7 of the ROD.

II. Purpose

The purpose of this Agreement is to define and memorialize the Parties' commitments with respect to the MSCS and the process by which the Parties will comply with FESA, CESA and the NCCPA in the implementation of the Program.

III. Cooperation

The Parties agree to cooperate in the implementation of the MSCS.

IV. Implementation of Program Actions

Each Party that approves, funds or implements a Program action agrees to ensure that the action follows and adheres to the MSCS, is consistent with the Biological Opinions, and is consistent with all applicable legal requirements.

A. MSCS Action-Specific Implementation Plans

The MSCS provides a program-level evaluation of the Program under FESA and the NCCPA, just as the EIS/EIR provides a program-level evaluation of the Program under NEPA and CEQA. The MSCS also requires the preparation of Action-Specific Implementation Plans ("ASIPs") for individual Program actions that may affect a Covered Species. ASIPs are intended to complement the project-level environmental review of individual Program actions under NEPA and CEQA that is anticipated in the EIS/EIR. Each ASIP is intended to fulfill the informational and substantive requirements of FESA, CESA and the NCCPA for each Program action. The use of ASIPs is integral to the MSCS and fundamental to compliance with the Biological Opinions. Each Party that approves, funds or implements a Program action that may affect a Covered Species therefore agrees to ensure that an ASIP is prepared for the action in accordance with Section 6.1 of the MSCS. An ASIP shall not be required for a Program action if the Party that approves, funds or implements the action determines, with the written concurrence of the applicable Fishery Agency(ies), that the action is not likely to adversely modify critical habitat designated pursuant to FESA or adversely affect a Covered Species.

B. Incidental Take

The MSCS does not grant take authority to any Party for any Program action. However, the MSCS creates a simplified FESA and NCCPA compliance process based on the use of ASIPs. Under the MSCS, each Party will use a single ASIP to provide the information and analyses required to comply both with FESA and the NCCPA. An ASIP can then serve both as a biological assessment under Section 7 of FESA and as a **Natural Community Conservation Plan** (“NCCP”) under the NCCPA. Under FESA, ASIPs will streamline consultations with the USFWS and NMFS regarding Program actions. The streamlined consultations are intended to result in the issuance of FESA incidental take coverage for Covered Species in accordance with Section 7 of FESA, where take may occur. Under the NCCPA, ASIPs will be components of the MSCS, which is a programmatic NCCP. As components of the MSCS, each ASIP will fulfill the requirements for an NCCP and may be used to obtain incidental take authorizations for Covered Species for Program actions under CESA. The Fishery Agencies agree to coordinate their review of ASIPs for Program actions and to follow the simplified FESA and NCCPA compliance process described in Section 6.1 and Section 6.2 of the MSCS.

V. Cooperating Landowner Commitments

Many Program actions are expected to enhance or restore the habitat of endangered species and threatened species and to increase populations of such species. Many landowners may be concerned that FESA or CESA may restrict the use of land or water in the area where such Program actions are implemented. To address this concern, and to preserve compatible land uses, the MSCS provides a framework for making commitments to landowners who cooperate in the implementation of Program actions.

VI. The Environmental Water Account

The **Environmental Water Account** (“EWA”) is integral to the Program’s Water Management Strategy and is critical to the success of the Program. The terms and conditions under which the EWA will be established are set forth in the “Environmental Water Account Operating Principles Agreement” dated August 28, 2000, and attached hereto as Exhibit 1 (the “EWA Agreement”). The Water Agencies and the Fishery Agencies agree to implement the EWA in accordance with the EWA Agreement. The other Parties agree to cooperate in the implementation of the EWA.

VII. The Ecosystem Restoration Program

The Program’s objectives for ecosystem restoration are to improve and increase aquatic and terrestrial habitats and improve ecological functions in the Bay-Delta Estuary and its watershed to support sustainable populations of diverse plant and animal species. The **Ecosystem Restoration Program** (“ERP”) is the principal Program element designed to meet these objectives. Implementation of the ERP will be coordinated with by the **Science Program**, which will conduct pertinent research, and monitor and evaluate the implementation of ERP actions. The ERP and the Science Program are directly relevant and important for FESA, CESA and NCCPA compliance and are integral to the MSCS. To ensure that the ERP is implemented in a manner and

to an extent sufficient to sustain programmatic FESA, CESA and NCCPA compliance for all Program elements, the Fishery Agencies have collaborated to develop a single, joint list of MSCS-ERP Milestones (“Milestones”) for Stage 1 of Program implementation. Each Fishery Agency included the Milestones in its Biological Opinions. The Milestones include ecosystem related water quality actions and may include specific Science Program actions. The Fishery Agencies agree that the identified Milestones, if achieved as specified in the Agencies’ Biological Opinions, will define an adequate manner and level of ERP implementation for each stage of Program implementation. The Parties agree to seek funding for and to implement the ERP so as to ensure that the Milestones are achieved. To be successfully implemented, the ERP must be funded in the amount of at least \$150 million annually through Stage 1.

VIII. Regulatory Commitments

A. Program-level Regulatory Commitments

The Parties agree that the following regulatory commitments are being made as a part of the Program:

1. Federal Program-level Regulatory Commitments

There will be no reductions in Central Valley Project (“CVP”) and State Water Project (“SWP”) Delta exports beyond those required under the Regulatory Baseline resulting from measures to protect fish required under FESA, provided that the conditions in Section VIII-B are met.

(a) Fishery Protection Assets

(1) Tier 1

Tier 1 measures are measures comprised by the Regulatory Baseline.

(2) Tier 2

Tier 2 measures are measures comprised by the EWA as described in the EWA Agreement, and the ERP.

(3) Tier 3

Tier 3 measures are additional water assets for fishery resources provided by the Parties without uncompensated reductions in water deliveries to CVP or SWP water users, as described in the EWA Agreement. Tier 3 measures may include water acquisitions from willing sellers or the consensual borrowing of water.

(b) Use of Tiered Fishery Protection Measures

To protect fishery resources under FESA, measures within Tier 1 and Tier 2 will be used first. Tier 3 measures will be used only when Tier 1 and Tier 2 measures are insufficient to avoid jeopardy, as determined by the USFWS or NMFS. Before Tier 3 measures are used, the USFWS and NMFS will consider the views of an independent science panel.

(c) Jeopardy

If, notwithstanding the use of all three tiers of fishery protection assets, the USFWS or NMFS conclude that the Program is likely to jeopardize the continued existence of a species listed as endangered or threatened under FESA, programmatic consultation regarding the Program will be re-initiated. In issuing its opinion on reinitiation, the Services will consider all available information, including the views of the independent science panel, and will specifically address the views of the panel. These programmatic regulatory commitments shall not apply to the resulting FESA consultation. However, if as a result of the consultation, it is determined that additional reductions in CVP/SWP Delta exports will be necessary to avoid jeopardy, the USFWS or NMFS, as applicable, will identify reasonable and prudent alternatives that require the minimum level of additional reductions in CVP and SWP exports necessary to avoid jeopardy.

2. State Program-level Regulatory Commitments

The Resources Agency has concluded that the fishery benefits of federal regulation, the ERP, the EWA and the commitment and ability of the Program Agencies to make additional water available should it be needed, will be adequate to protect Bay-Delta fisheries. The Resources Agency therefore commits to ensure that there will be no reductions beyond existing regulatory levels in exports to SWP and CVP water users resulting from measures to protect fish under CESA or the NCCPA. This commitment is intended to provide certainty and stability to water users, to the extent permitted by law.

3. Program Review

(a) Annual Review

To ensure that the Milestones are substantially achieved, the Fishery Agencies will collaborate with the Science Program in the annual process of developing annual, near and long-term ERP implementation plans and priorities and the assessment of the implementation of ERP actions, including progress toward achieving the Milestones. The Fishery Agencies will also collaborate with the Science Program in the annual review of the EWA.

(b) Milestone Revisions

The Fishery Agencies expect that the Milestones will need to be revised to reflect new information derived in the annual review process identified above. The Fishery Agencies will not approve revisions to the Milestones that would either cause or allow an effect upon Covered Species or habitat designated as critical under the FESA that was not considered in the Biological

Opinions, or which would otherwise require the reinitiation of formal consultation pursuant to 50 CFR 402.16. Consequently, the USFWS and NMFS expect that proposed revisions to the Milestones that they may approve will result in equal or better protection for Covered Species. Consequently, such revisions may be appended to the USFWS' and/or NMFS' Biological Opinions, as appropriate, through informal, rather than formal consultation pursuant to 50 CFR 402.13. DFG will incorporate its approved revisions to the Milestones by amending its Natural Communities Conservation Plan.

4. Duration

The program-level regulatory commitments provided in this Section VIII extend from the Effective Date until September 30, 2004. Not later than 180 days prior to September 30, 2004, the applicable Parties will reinitiate formal consultation on the Program. The purpose of the reinitiation is to evaluate the efficacy of the EWA and progress toward achieving the Milestones in conserving and promoting the recovery of Covered Species. The reinitiation of consultation is expected to result in supplemental Biological Opinions, which could be appended to the original Biological Opinions. The Parties anticipate that sufficient fishery protection assets, either from existing sources or from water supply augmentation, will be available after September 30, 2004, in which event, this Agreement may be amended to extend the program-level regulatory commitments subsequent to and consistent with the findings of the supplemental Biological Opinions.

B. Conditions for Regulatory Commitments

In order for the regulatory commitments described in this Section VIII to be effective, the following commitments must be met:

1. The fishery protection elements of the Program must be implemented as described in the EIS/EIR, the Biological Opinions, and the ROD, including ERP and EWA implementation and full funding (at least \$150 million annually for the ERP, and an additional \$50 million annually for the EWA);
2. The Parties must provide Tier 3 measures if and when needed, as described in Section VIII.A.1;
3. Implementation of the Milestones in accordance with the Biological Opinions must be demonstrated; and
4. The initial and annual assets described in Article I, Section 2 of the EWA Agreement must be acquired for the EWA.

The Parties agree to take the actions necessary to meet these conditions. The Parties shall continuously monitor Program implementation to assure that the conditions set out above are met. In the event that any Party receives information from monitoring or any other source indicating that any of the conditions is not being met or will not be met, that Party shall notify the other Parties.

Upon such notification, the Parties will meet promptly to identify and assess measures which can be taken to remedy any noncompliance or anticipated noncompliance with the conditions, and shall immediately implement such measures. If the Fishery Agencies determine that a situation of noncompliance exists and the Parties are unable to remedy such noncompliance within such reasonable time as the Fishery Agencies may prescribe, not to exceed 60 days, the regulatory commitments will be suspended or terminated. Upon such a determination of noncompliance, formal consultation will be reinitiated and the Federal Fishery Agencies will issue new or amended biological opinions with conditions prescribing alternative regulatory requirements. If the compliance with the conditions set out above is subsequently achieved, the initial regulatory commitments may be revived and reflected through new or amended programmatic biological opinions.

Nothing in this provision will prevent the Fishery Agencies from exercising their authority described in Section VIII.A.1(c) of this Agreement.

IX. General Provisions

A. Public Officials Not To Benefit

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

B. Availability of Appropriated Funds

1. Federal Agencies

The commitments and obligations under this Agreement of each Party that is a federal agency is subject to the requirements of the federal Anti-Deficiency Act and the availability of appropriated funds. The Parties acknowledge that this Agreement does not require any federal agency to expend its appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

The project schedules described in this document depend upon certain assumptions about state and federal budgets, optimized construction schedules, willing sellers and other contingencies. These assumptions may change as the CALFED Program progresses and appropriate revisions to the CALFED Program may be necessary. Consistent with federal law, nothing in this document constrains the discretion of the President or his successor from making whatever budgetary or legislative proposals he or his successors deem appropriate or desirable.

2. State Agencies

The commitments and obligations under this Agreement of each Party that is a State agency is subject to the availability of appropriated funds. The Parties acknowledge that this Agreement does not require any State agency to expend its appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

C. Statutory Authority

The Parties shall not construe this Agreement to require any Party to act beyond, or inconsistent with, its statutory authority.

D. Effective Date

The Effective Date of this Agreement is August 28, 2000.

E. Duration

This Agreement shall be in effect for thirty years following the Effective Date, unless extended by amendment or terminated.

F. Amendments

This Agreement may be amended by written agreement of all the Parties.

G. Addition of New Parties

Any Program Agency may execute this Agreement and thereby become a Party. Execution by a Program Agency shall not be construed as an amendment to this Agreement.

H. Withdrawal

Any Party may withdraw from this Agreement upon thirty days written notice to the other Parties. Notwithstanding withdrawal by any Party or Termination of the Agreement pursuant to Section I, below, each Party's agreement to meet the conditions set out in Section VIII.B shall remain in effect pending concurrence by the Fishery Agencies following appropriate consultation.

I. Termination

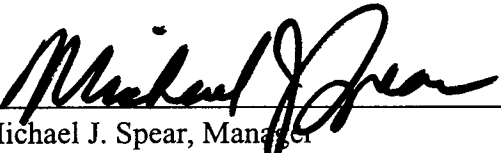
Only the Resources Secretary or the Secretary of the Interior may terminate this Agreement. Each may do so unilaterally upon thirty days written notice to the other Parties.

EXECUTION

Having considered the contents of this document, its attachments and the documents supporting this decision, we hereby adopt this Agreement. By signing this document together, we exercise our respective authorities over only those portions relevant to our authority.

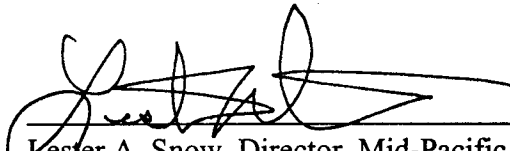
Signed and dated:

United States of America




Michael J. Spear, Manager
California-Nevada Operations
U.S. Fish and Wildlife Service

8/28/00
Date




Lester A. Snow, Director, Mid-Pacific Region
U.S. Bureau of Reclamation

8/28/00
Date



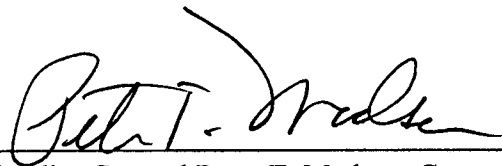
Al Wright, Acting State Director
U.S. Bureau of Land Management

8/30/00
Date




Felicia Marcus, Regional Administrator
U.S. Environmental Protection Agency

8/28/00
Date




Brigadier General Peter T. Madsen, Commander
South Pacific Division
U.S. Army Corps of Engineers

8/28/00
Date



Jeffrey E. York, State Conservationist
Natural Resources Conservation Services

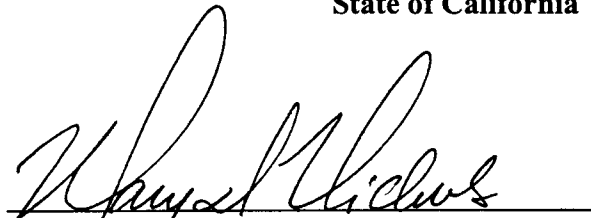
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Rebecca Lent, Ph.D., Regional Administrator
National Marine Fisheries Service

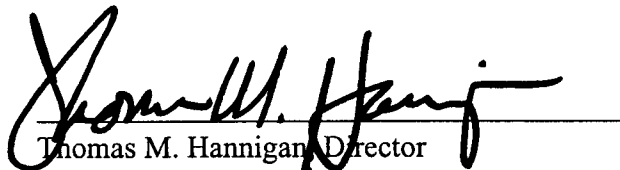
8/28/00
Date

State of California




Mary D. Nichols, Secretary
California Resources Agency

8/28/00
Date



Thomas M. Hannigan, Director
California Department of Water Resources

8/28/2000
Date



Robert C. Hight, Director
California Department of Fish and Game

8/28/00
Date