

IMPLEMENTING AGREEMENT

for the

SAN DIEGO COUNTY WATER AUTHORITY  
NATURAL COMMUNITY CONSERVATION PLAN/  
HABITAT CONSERVATION PLAN

by and between

SAN DIEGO COUNTY WATER AUTHORITY,  
UNITED STATES FISH AND WILDLIFE SERVICE  
and  
CALIFORNIA DEPARTMENT OF FISH AND GAME

October 18, 2010

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**EXHIBITS**

**A: Water Authority Plan Area**

**B: Covered Species List**

## **AGREEMENT**

### **1.0 PARTIES**

This Implementing Agreement (“Agreement”), made and entered into by and among the United States Fish and Wildlife Service (“USFWS”) of the United States Department of the Interior, the California Department of Fish and Game (“CDFG”) of the State of California Natural Resources Agency and the San Diego County Water Authority (the “Water Authority”) implements the San Diego County Water Authority Natural Community Conservation Plan/Habitat Conservation Plan (“NCCP/HCP”) as of the Effective Date.

These entities may be referred to collectively as the “Parties” and individually as a “Party.” The USFWS and CDFG may be referred to collectively as the “Wildlife Agencies.”

### **2.0 RECITALS**

The Parties have entered into this Agreement in consideration of the following facts:

- 2.1** The Water Authority NCCP/HCP provides a comprehensive framework to protect natural resources in western San Diego and southwestern Riverside counties, and improves and streamlines the environmental permitting process for activities likely to result in impacts to endangered, threatened and other sensitive species. The objective of the NCCP/HCP is to provide comprehensive species, wetlands, and ecosystem conservation and to provide for the conservation and management of endangered, threatened, and other sensitive species within western San Diego County and southwestern Riverside County. The NCCP/HCP also facilitates water infrastructure construction and operations to serve development approved by land use agencies through commitments that provide for the conservation and management of, and actions to avoid, minimize, and mitigate to the maximum extent practicable, impacts on Covered Species and their habitats while allowing for planned development in certain regions of the counties and cities.
- 2.2** The Water Authority is a government agency created pursuant to the provisions of Cal. Stats. 1943, chapter 595, as amended. The Water Authority will implement the NCCP/HCP and this Agreement.
- 2.3** The NCCP/HCP Plan Area covers western San Diego County and a small portion of southwestern Riverside County, approximately 992,000 acres, including the Water Authority’s Service Area (920,463 acres within San Diego County), in which impacts from development projects and other activities are evaluated, and in which conservation will occur (Exhibit A).
- 2.4** The area covered by the NCCP/HCP has been determined to provide, or potentially provide, habitat for sixty-six (66) species (“Covered Species”) that are listed as endangered or threatened, or that carry other special status

under federal and state laws, or are otherwise considered sensitive, and for which the Water Authority has requested coverage (Exhibit B).

- 2.5** The Water Authority is seeking an incidental take permit and an NCCP authorization from USFWS and CDFG, respectively, (incidental take permit and NCCP authorization are collectively referred to as “Permits”) covering sixty-three (63) special-status species. Three additional species, Orcutt’s grass (*Orcuttia californica*), Munz’s onion (*Allium munzii*) and vernal pool fairy shrimp (*Branchinecta lynchi*), could potentially have all their impacts occur within the NCCP/HCP’s Major Amendment Area in Riverside County. Take Authorization for these three species will require a Major Amendment to the NCCP/HCP and Permits. The Wildlife Agencies’ Permits will cover Water Authority activities consistent with County Water Authority Act Cal. Stats. 1943, chapter 595, as amended, including maintenance and repair activities within the Plan Area. The Wildlife Agencies’ Permits will also apply to land management activities carried out on certain Habitat Management Area (HMA) lands that are protected and managed by the Water Authority or third parties under its direct control as the NCCP/HCP “Preserve Area,” as described in the NCCP/HCP.
- 2.6** The USFWS has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants and habitat necessary for biologically sustainable populations of those species under various federal laws, including the Federal Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) (“FESA”), the Migratory Bird Treaty Act (16 U.S.C. §701 et seq.), the Bald and Golden Eagle Protection Act (16 U.S.C. §668 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. §§661-666(c)), and the Fish and Wildlife Act of 1956 (16 U.S.C. §742(a) et seq.).
- 2.7** FESA prohibits the Take of animal species listed as endangered or threatened under FESA, as Take is defined under federal law. Under Section 10(a)(1)(B) of FESA (16 U.S.C. §1539(a)), USFWS may issue a permit authorizing the incidental Take of endangered or threatened animal species during otherwise lawful activities if certain statutory requirements are met by the applicant and such Take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. To obtain a federal incidental Take permit, the applicant must submit a habitat conservation plan (“HCP”) describing, among other things, the steps the applicant will take to minimize and mitigate to the maximum extent practicable the impact of such “taking.” The Water Authority submitted the NCCP/HCP to USFWS, and applied for a Federal permit for incidental Take of Covered animal Species within the Permit Area. The incidental Take permit issued by USFWS based on the NCCP/HCP will be issued concurrently with the USFWS’ execution of this Agreement. Take of federally listed plant species is not prohibited under FESA and cannot be authorized under a federal incidental take permit. Covered Species of plants are listed on the Federal incidental take permit in recognition of the conservation benefits provided for them under the NCCP/HCP and receive

assurances pursuant to the Federal “No Surprises” rule. “Take” when used in this Agreement with reference to Take authorized under the federal incidental take Permit refers only to Take of animal species; however, in assessing mitigation or other plan obligations, if any, owed on account of “Take” of Covered Species, “Take” shall be interpreted to encompass impacts to all Covered Species, including Covered plant Species and non-listed Covered animal species. CDFG has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants and habitat necessary for biologically sustainable populations of those species under various state laws, including the California Endangered Species Act (Fish & G. Code, §2050 et seq.) (“CESA”), the Natural Community Conservation Planning Act (Fish & G. Code, §2800 et seq.) (“NCCPA”), the Native Plant Protection Act (Fish & G. Code, §1900 et seq.), and other statutes including, but not limited to, California Fish and Game Code sections 1600 et seq., 1801, 1802, 3511, 3513, 4700, 5050 and 5515.

- 2.8** CESA generally prohibits the Take of species listed as endangered, threatened or candidate species under CESA. The NCCPA allows CDFG to authorize by permit the Take of any species, whether or not they are listed as endangered or threatened under CESA, where the conservation and management of the species are provided for in a Natural Community Conservation Plan (“NCCP”) approved by CDFG (Fish & Game Code, §2835). The Water Authority submitted the NCCP/HCP to CDFG for approval and permitting for Take pursuant to NCCPA. The Take authorization issued by CDFG based on the NCCP/HCP will be issued concurrently with CDFG’s execution of this Agreement.
- 2.9** The Water Authority obtained and has entered into agreements with various management entities to manage more than 1,920 acres of natural habitat lands (HMAs, which comprise the Preserve Area) in San Diego County to provide mitigation for its past projects and to provide mitigation credit for its future projects and operations. The Water Authority also previously entered into similar agreements with other entities to manage 1,147 acres of other conserved mitigation lands (Managed Mitigation Area or MMA properties) that comprise part of the environmental baseline of conserved lands. All of the HMA and MMA habitat properties were acquired to meet required and future mitigation obligations. All of these habitat properties complement regional conservation efforts to create a high quality, diverse system of interconnected conservation lands.
- 2.10** The NCCP/HCP was developed by the Water Authority and contains a series of measures to minimize and mitigate to the maximum extent practicable the effects of specified categories of activities on certain special-status species. The NCCP/HCP also includes measures to provide for the conservation and management of the species and certain natural communities.
- 2.11** The Water Authority contracts or will contract with management entities to administer and manage certain HMA properties under the Authority’s



direction and control. These management entities shall receive coverage for approved management (covered) activities that may result in incidental Take when consistent with the NCCP/HCP pursuant to Sections 2.6 and 13.2 of this Agreement. FWS and CDFG have agreed to manage other HMAs in a manner consistent with the HCP. FWS and CDFG will obtain separate incidental take authorization under the Federal and State Endangered Species Acts for their HMA management activities. To streamline other environmental regulatory programs, the NCCP/HCP shall serve as the basis for a Streambed Alteration Agreement issuance program with CDFG, under Section 1602 of the California Fish and Game Code, and is intended to serve as a Regional General Permit, or other programmatic permitting program with the United States Army Corps of Engineers under Section 404 of the federal Clean Water Act, although the Parties acknowledge that the approval of the Army Corps of Engineers is independent of this Agreement.

- 2.12 The NCCP/HCP, including Section 6.7.2, will serve as the basis for CDFG's issuance of Lake or Streambed Alteration Agreements under Section 1602 of the California Fish and Game Code or for a Master Streambed Agreement for Covered Activities conducted in compliance with the NCCP/HCP.
- 2.13 The NCCP/HCP was developed in conformance with Fish and Game Code Section 2830(f). The planning process included intensive study of the species covered by the NCCP/HCP, their habitats, and other natural communities, and proposed development and other activities within the NCCP/HCP area; discussions between the Water Authority and the Wildlife Agencies; input from independent science advisors and the public; and environmental review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.) ("NEPA") and the California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) ("CEQA").
- 2.14 The Water Authority has committed substantial land, natural resources, financial resources, human resources and other assets to conserve and manage the special-status species, their habitats and other natural communities, in order to obtain the authorizations and regulatory assurances identified in this Agreement

### **3.0 DEFINITIONS**

The following terms as used in this Agreement will have the meanings set forth below. Terms specifically defined in FESA, CESA or NCCPA or the regulations adopted by USFWS and DFG under those statutes shall have the same meaning when used in this Agreement. Definitions used in this Agreement may elaborate on, but are not intended to conflict with, such statutory or regulatory definitions.

- 3.1 **"Adaptive Management"** means to use the results of new information gathered through the monitoring program of the NCCP/HCP and from other sources to adjust management strategies and practices to assist in

providing for the conservation of Covered Species. Implementation of the Adaptive Management measures in the NCCP/HCP will respond to monitoring program information, contingencies, Changed Circumstances, and Unforeseen Circumstances affecting Covered Species. The Adaptive Management measures are to be consistent with the goals and objectives of the NCCP/HCP and the terms and conditions of the Permits.

- 3.2** “**Agreement**” means this Implementing Agreement, which incorporates the NCCP/HCP and the Permits by reference.
- 3.3** “**Authorized Take**” means the extent of incidental Take of Covered animal Species authorized by the USFWS in the Federal Permit issued to the Water Authority pursuant to Section 10(a)(1)(B) of FESA, and the extent of Take of Covered Species authorized by CDFG in the State Permit issued to the Water Authority pursuant to California Fish and Game Code §2835.
- 3.4** “**CDFG**” means the California Department of Fish and Game, a department of the California Natural Resources Agency.
- 3.5** “**CEQA**” means the California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.6** “**CESA**” means the California Endangered Species Act (Fish & Game Code, §2050 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.7** “**Changed Circumstances**” for purposes of the Federal Permit means, changes in circumstances affecting a species or the geographic area covered by the NCCP/HCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the NCCP/HCP (e.g., the listing of a new species, or a fire or other natural catastrophic event in areas prone to such events)(50 C.F.R 17.3).  
“**Changed Circumstances**” for purposes of the State Permit means reasonably foreseeable circumstances that could affect a Covered Species or Plan Area covered by the NCCP (Fish & G. Code, §2805, subd. (c).). Changed Circumstances and planned responses to Changed Circumstances are more particularly defined in Section 12.2 of this Agreement and Section 8.5.1 of the NCCP/HCP. Changed Circumstances do not include Unforeseen Circumstances.
- 3.8** “**Conserve,**” “**Conserving,**” or “**Conservation**” means to use, and the use of, methods and procedures within the NCCP/HCP Plan Area that are necessary to maintain and improve the status of Federal and state-listed Covered Species, and to maintain or enhance the condition of the non-listed Covered Species
- 3.9** “**Conservation Goal(s)**” means a broad statement of intent that describes how the NCCP/HCP will accomplish the protection of habitat, ecological processes, biological corridors and linkages to ensure that the Covered Species are conserved. Conservation Goals are also designed to ensure the persistence of natural communities.

- 3.10 “Conservation Measure”** means each action detailed in Section 6 and Appendix B of the NCCP/HCP that is a component of the Conservation Strategy.
- 3.11 “Conservation Objectives(s)”** means measurable statements of actions or measures that will lead to attainment of Conservation Goals.
- 3.12 “Conservation Strategy”** means all of the conservation and management measures described in Section 6 and Appendix B of the NCCP/HCP and as further required by the Permits to minimize, mitigate, conserve, and monitor the impacts of Take of the Covered Species, plus all reporting requirements described in Sections 6.12 and 8.10 of the NCCP/HCP, and the Water Authority’ responses to Changed Circumstances described in Section 8.8.1 of the NCCP/HCP. The Conservation Strategy is more particularly defined in Section 7, below.
- 3.13 “Covered Activities”** means those project activities, facility operations and management, and conservation and management activities (including all ground-disturbing projects and activities that may occur within the Plan Area described in Sections 5 and 6 of the NCCP/HCP) to be carried out by the Water Authority or third parties under the Authority’s direct control in the Permit Area that may result in Authorized Take of Covered Species during the term of the NCCP/HCP, and that are otherwise lawful.
- 3.14 “Covered Species”** means the species, listed and non-listed, whose conservation and management are provided for by the NCCP/HCP and for which limited Take is authorized by the Wildlife Agencies pursuant to the Permits. Covered Species are listed in Section 6 of the NCCP/HCP. The Covered Species are listed on Exhibit B.
- 3.15 “Effective Date”** means the date, following execution of this Agreement, on which the State Permit or the Federal Permit is issued, whichever is later.
- 3.16 “Federal Listed Species”** means the Covered Species which are listed as threatened or endangered species under FESA as of the Effective Date, and the Covered Species which are listed as threatened or endangered pursuant to FESA during the term of the NCCP/HCP as of the date of such listing.
- 3.17 “Federal Permit”** means the Federal incidental Take permit issued by USFWS to the Water Authority pursuant to section 10(a)(1)(B) of FESA, as it may be amended from time to time.
- 3.18 “FESA”** means the Federal Endangered Species Act of 1973, as amended (16 U.S.C § 1531 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.19 “Fully Protected Species”** means any species identified in California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515 that occur within the Plan Area.
- 3.20 “Habitat Management Area(s)” (HMA)** means specific individual land and/or water areas subject to active intervention for management purposes so as to ensure the maintenance of habitats and/or to meet the requirements of specific species. HMAs may support habitat credits or

upland and/or wetland areas that are eligible to be used as mitigation for Covered Activities pursuant to this Plan. The HMAs collectively comprise the Preserve Area (see 3.37).

- 3.21 **“HCP”** means a habitat conservation plan prepared pursuant to Section 10 of FESA.
- 3.22 **“Jurisdictional Wetlands and Waters”** means State and federally regulated wetlands and other water bodies that cannot be filled or altered without permits from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act (33 U.S.C. §1251 et seq.), from the State Water Resources Control Boards under either Section 401 of the Clean Water Act or the Porter-Cologne Water Quality Act (California Water Code, §13000 et seq.), or from CDFG under Section 1602 of the California Fish and Game Code, as further explained in Section 6.7 of the NCCP/HCP.
- 3.23 **“Listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under FESA or CESA.
- 3.24 **“Major Amendment Area”** means that portion of the Plan Area within Riverside County that is not authorized for Take of Covered Species until a Major Amendment is approved by the Wildlife Agencies.
- 3.25 **“Managed Mitigation Area(s)” (MMA)** means those properties that were acquired and/or funded by the Water Authority as biological resource mitigation for the Emergency Storage Project or other projects, and that provide baseline conservation associated with this Plan. Property selection was conducted in coordination with the Wildlife Agencies and/or local governments participating in regional conservation, assuring that each MMA was a priority acquisition that significantly contributed to regional conservation. MMAs are not mitigation for covered activities under the NCCP/HCP and therefore do not provide mitigation credits.
- 3.26 **“Management Activities”** means all management actions provided for under the NCCP/HCP to achieve NCCP/HCP biological goals and objectives.
- 3.27 **“Migratory Bird Treaty Act”** means the federal Migratory Bird Treaty Act (16 U.S.C. §703 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.28 **“NCCP”** means a Natural Community Conservation Plan prepared according to the NCCPA.
- 3.29 **“NCCPA”** means the California Natural Community Conservation Planning Act (Fish & G. Code, §2800 et seq.), as amended on January 1, 2003, and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.30 **“NCCP/HCP”** means the Natural Community Conservation Plan/Habitat Conservation Plan prepared by the Water Authority and submitted to the Wildlife Agencies under Section 2835 of the California Fish and Game Code and Section 10 of FESA in support of the Water Authority’s Permit applications.

- 3.31 **“NEPA”** means the National Environmental Policy Act (42 U.S.C. §4321 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.32 **“Non-listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under FESA or CESA.
- 3.33 **“Party”** or **“Parties”** means any or all of the signatories to this Agreement.
- 3.34 **“Permit Area”** means the portion of the Plan Area where the Water Authority has obtained authorization from the Wildlife Agencies for the Authorized Take of Covered Species while carrying out Covered Activities.
- 3.35 **“Permits”** means the Federal Permit and the State Permit.
- 3.36 **“Permittee”** means the Water Authority.
- 3.37 **“Plan Area”** means the geographic area analyzed in the NCCP/HCP and SDCWA NCCP/HCP EIS/EIR, located in western San Diego County and southwestern Riverside County (Exhibit A). The Plan Area is further described in detail in Section 1 of the NCCP/HCP.
- 3.38 **“Preserve Lands”** means those geographic areas that are dedicated as permanent habitat conservation areas and are managed for biological resources.
- 3.39 **“Preserve Area”** means the geographic area that has been dedicated by the Water Authority for permanent habitat/species conservation and management. The Preserve Area is collectively comprised of the individual HMAs.
- 3.40 **“Preserve Area Management Plan”** means a site-specific implementation and management plan for each Habitat Management Area prepared pursuant to Section 10.3.2 of this Agreement.
- 3.41 **“San Diego County Water Authority (SDCWA) NCCP/HCP EIS/EIR”** means the Joint Environmental Impact Statement and Environmental Impact Report prepared to analyze the environmental impacts of the NCCP/HCP and Permits under NEPA and CEQA.
- 3.42 **“Section 1600”** means Section 1600 et seq. of the California Fish and Game Code, which regulates alteration of streambeds through issuance of Lake or Streambed Alteration Agreement.
- 3.43 **“State Listed Species”** means the Covered Species which are listed as threatened or endangered species, or a candidate for such status, under CESA, as of the Effective Date, and the Covered Species that are listed as threatened or endangered, or a candidate for such status pursuant to CESA during the term of the NCCP/HCP, as of the date of such listing.
- 3.44 **“State Permit”** means the state Take authorization issued to the Water Authority pursuant to Section 2835 of the California Fish and Game Code, as it may be amended from time to time.
- 3.45 **“Survey Area”** means the lands within one-mile on either side of the aqueducts, pipelines and facilities that were analyzed for potential take by Planned and Future Covered Activities.

- 3.46** “**Take**” and “**Taking**” have the same meaning provided by FESA and its implementing regulations with regard to activities subject to FESA, and also have the same meaning provided in the California Fish and Game Code, section 86, with regard to activities subject to CESA and NCCPA. Take of listed plant species is not prohibited under the FESA and cannot be authorized under the federal permit.
- 3.47** “**Unforeseen Circumstances**” under the Federal Permit means, pursuant to 50 C.F.R. 17.3, changes in circumstances affecting a species or geographic area covered by the NCCP/HCP that could not reasonably have been anticipated by the plan developers and USFWS at the time of the plan’s negotiation and development, and that result in a substantial and adverse change in the status of the Covered Species (Plan Section 8.5.2). “**Unforeseen Circumstances**” under the State Permit means changes affecting one or more species, habitat, natural community, or the geographic area covered by a conservation plan that could not reasonably have been anticipated at the time of plan development, and that result in a substantial adverse change in the status of one or more Covered Species.
- 3.48** “**USFWS**” means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.
- 3.49** “**Water Authority**” means the San Diego County Water Authority.
- 3.50** “**Wildlife Agencies**” means USFWS and CDFG.

#### **4.0** **PURPOSES**

This Agreement defines the Parties’ roles and responsibilities and sets forth actions that will be undertaken to avoid, minimize and mitigate the effects on the Covered Species caused by the Covered Activities within the Plan Area, and to provide for the conservation of the Covered Species within the Plan Area. The purposes of this Agreement are:

- 4.1** To ensure implementation of each of the terms and conditions of the NCCP/HCP, this Agreement, and the Permits;
- 4.2** To provide assurances to the Water Authority that (1) pursuant to the federal “No Surprises” provisions of 50 Code of Federal Regulations, sections 17.22(b)(5) and 17.32(b)(5), as long as the terms and conditions of this Agreement, the NCCP/HCP, and the Permits are fully satisfied, the USFWS will not require additional measures to the extent restricted or proscribed in the No Surprises rule from the Water Authority without its consent unless required by law; and (2) pursuant to California Fish and Game Code section 2820, subdivision (f) .....no additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources will be required of the Water Authority, either to minimize and mitigate the impacts of Authorized Take, or to provide for the conservation and management of the Covered Species in the Plan Area, except as provided in this Agreement and the NCCP/HCP, or required by law; and

**4.3** To describe remedies and recourse should any Party fail to perform its obligations as set forth in this Agreement.

## **5.0 INCORPORATION OF THE NCCP/HCP**

The NCCP/HCP and each of its provisions, including any subsequent amendments authorized pursuant to Section 17 of this Agreement, are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction, conflict or inconsistency between this Agreement and the NCCP/HCP, the terms of this Agreement shall control. In the event of any direct contradiction, conflict or inconsistency between this Agreement and the Permits, the Permits will control. In all other cases, the provisions of this Agreement, the NCCP/HCP, and the Permits shall be interpreted to be consistent with and complementary to each other.

## **6.0 LEGAL FINDINGS AND REVIEW BY THE WILDLIFE AGENCIES**

### **6.1 USFWS Findings**

As further described in the Federal Findings issued by USFWS, USFWS has found that the NCCP/HCP satisfies the permit issuance criteria under Section 10(a)(2)(B) of FESA for each Covered Species. The Findings support the Take authorization for the Covered Species issued to the Water Authority as of the Effective Date.

For each Covered animal Species that is not a Federal Listed Species as of the Effective Date, the Take authorization for Federal Non-listed animal Species shall automatically become effective if and when the species is listed pursuant to FESA.

Concurrent with the USFWS' execution of this Agreement, and on satisfaction of all other requirements, USFWS will issue the Water Authority a Federal Permit under Section 10(a)(1)(B) of FESA, authorizing the incidental Take by the Water Authority of each Covered animal Species within the jurisdiction of USFWS resulting from Covered Activities in the Permit Area. The Federal Permit is conditioned on compliance with the terms and conditions of this Agreement, the NCCP/HCP, and the Federal Permit.

### **6.2 CDFG Findings**

#### **6.2.1 State Listed and Non-Listed Species**

As further described in the State Permit and the findings issued by CDFG pursuant to the NCCPA, CDFG has found that the NCCP/HCP satisfies the permit issuance criteria listed in Sections 2820, 2821, 2830 and 2835 of the California Fish and Game Code for each Covered Species, both State Listed Species and Non-listed Species. This finding supports the

Take authorization for State Listed Species and Non-Listed Species conferred to the Water Authority as of the Effective Date.

Concurrent with CDFG's execution of this Agreement, and on satisfaction of all other requirements, CDFG issued the Water Authority a State Permit under Section 2835 of the California Fish and Game Code, authorizing the Take by the Water Authority of each Covered Species, both State Listed Species and Non-listed Species, within the jurisdiction of CDFG resulting from Covered Activities in the Permit Area. The State Permit is conditioned on compliance with the terms and conditions of this Agreement, the NCCP/HCP, and the State Permit.

### **6.2.2 State Fully Protected Species**

The current Plan does not include Fully Protected Species (Fish and Game Code sections 3511, 4700, 5050, 5515) in the list of Covered Species. Take of Fully Protected Species is not authorized by the State permit. If at any time there is a change in state law such that CDFG may issue a Section 2835 Permit or other permit or authorization allowing the incidental Take of any of Fully Protected Species, the Water Authority may request an amendment to the Permit or apply for a new permit to authorize Take of such species, as provided in Section 17.4 of this Agreement.

## **6.3 Environmental Review**

### **6.3.1 Federal Law – National Environmental Policy Act**

Issuance of the Federal Permit under Section 10(a)(1)(B) of FESA to the Water Authority by USFWS is an action subject to review under NEPA. USFWS is the lead agency under NEPA. Prior to the Effective Date, USFWS evaluated the NCCP/HCP pursuant to NEPA in the San Diego County Water Authority NCCP/HCP EIS/EIR and issued a record of decision addressing the impacts of the NCCP/HCP and Federal Permit on the environment. To the extent consistent with applicable Federal law, USFWS shall rely on and use relevant portions of the San Diego County Water Authority NCCP/HCP EIS/EIR and the NEPA Findings when conducting future environmental review of Covered Activities.

### **6.3.2 State Law – California Environmental Quality Act**

Approval of the NCCP/HCP and issuance of the State Permit under Section 2835 of the California Fish and Game Code is an action subject to review under CEQA. Prior to the Effective Date, the Water Authority and CDFG each evaluated the NCCP/HCP and NCCP/HCP EIS/EIR pursuant to CEQA and issued findings addressing whether the implementation of the NCCP/HCP would cause significant adverse impacts to the



environment. Unless otherwise required by CEQA or other applicable law, the Water Authority and CDFG shall rely on and use relevant portions of the San Diego County Water Authority NCCP/HCP EIS/EIR and the CEQA Findings when conducting future environmental review of Covered Activities.

## **7.0 CONSERVATION STRATEGY**

NCCP/HCP Section 6 describes a Conservation Strategy that includes: the biological goals and objectives of the NCCP/HCP; avoidance and minimization measures to reduce impacts resulting from Covered Activities; land acquisition and assembly of the Preserve Area; Preserve Area management that includes habitat creation, enhancement and restoration and species population enhancement; Plan Area monitoring and reporting; and adaptive management; and measures described in this paragraph and elsewhere in this Agreement and the NCCP/HCP that contribute to the conservation of Covered Species. As further provided in this Agreement, the NCCP/HCP and the Permits, the Water Authority shall implement every applicable Conservation Measure and other measures described in the NCCP/HCP (including the species-specific measures described in Appendix B of the NCCP/HCP) when engaging in Covered Activities and when otherwise required, as they may be modified through adaptive management, whether or not such measures are specifically referenced in this Agreement. For the purposes of this Agreement, all of these measures are collectively referred to as the “Conservation Strategy.”

## **8.0 AVOIDANCE & MINIMIZATION OF IMPACTS**

### **8.1 General Framework**

As required by FESA and NCCPA, the Conservation Strategy includes measures to avoid and minimize Take of Covered Species and to conserve natural communities and Covered Species at the landscape-, habitat- and species-level. Avoidance and minimization measures include species surveys and specific conditions on Covered Activities, as detailed in NCCP/HCP Section 6. Section 6 provides further instructions to determine which avoidance and minimization measures are applicable to particular Covered Activities. The Water Authority shall implement all applicable avoidance and minimization measures as required by the NCCP/HCP. Prior to approving or carrying out any Covered Activity, the Water Authority shall evaluate the Covered Activity and apply the above referenced provisions to ensure that all applicable avoidance and minimization measures are incorporated into the Covered Activity, as provided by this Agreement.

### **8.2 Surveys**

The Water Authority shall require a Pre-Activity Survey form (PSF) for each Covered Activity/Covered Project in accordance with NCCP/HCP Section 6.4.1.2

prior to carrying out the Covered Activity. However, a Preserve Area management entity that is implementing an approved management plan will not be required to complete a PSF. The Water Authority will ensure that the Covered Activity is implemented and complies with all applicable preconstruction surveys and construction monitoring requirements described in Section 6.4 of the NCCP/HCP.

### **8.3 Plan Minimization Measures**

The Water Authority shall ensure that all Covered Activities (land management, operations and maintenance) within or adjacent to the existing or future preserve lands and development and all other Covered Activities within the Plan Area incorporate plan minimization measures set forth in NCCP/HCP Section 6.4 for development and O&M activities generally and Section 6.11 for HMA management and monitoring, which requires design and operational elements to minimize the impacts of the development on all preserve lands. The Water Authority shall ensure that each Covered Activity incorporates adequate design elements, and shall be responsible for enforcing compliance with all minimization measures. For Covered Activities within or adjacent to preserve lands, all applicable design elements to establish a satisfactory interface shall be within the footprint of the development and not within preserve lands unless the activity is otherwise allowed within preserve lands under the NCCP/ HCP. As described in Section 6.0 of the NCCP/HCP, the Water Authority will prepare a Pre-activity Survey From PSF for each Covered Activity, and shall submit a proposed Minor Amendment for Wildlife Agency review for all Future Projects or activities that fall within the definition of Covered Activities, are outside the Survey Area, but are not specifically identified in the Plan to confirm that the Future Project or activity complies with the Plan.

### **8.4 Jurisdictional Wetlands and Waters**

When Jurisdictional Wetlands and Waters are potentially present within the footprint of a Covered Activity, the Water Authority shall comply with all applicable statutory and regulatory requirements of the U.S. Army Corps of Engineers and the appropriate State regulatory agency. The Water Authority shall implement all avoidance, minimization and mitigation requirements pursuant to this Plan in carrying out the Covered Activity.

## **9.0 LAND ACQUISITION & ASSEMBLY OF PRESERVE AREAS**

### **9.1 General Framework**

The Water Authority has assembled a Preserve Area that supports regional habitat and species conservation by acquiring land and dedicating it in perpetuity for conservation uses through either a fee interest or conservation easement. The Water Authority may also include in the Preserve Area lands acquired through

partnerships with other entities in accordance with Section 9.4, and lands acquired in accordance with Section 9.5 of this Agreement. Where the Water Authority acquires and/or retains a fee interest in land, and if requested by the Wildlife Agencies, preservation shall be ensured through Wildlife Agency approved restrictive covenants, deed restrictions, conservation easements or equivalent title restrictions, recorded in favor of CDFG or a third party approved by the Wildlife Agencies. Where acquisition is by conservation easement, each conservation easement shall provide for the permanent protection and dedication of the land to the Preserve Area. The easement shall be recorded in favor of one or both of the Wildlife Agencies if so requested by the Wildlife Agencies, and the form of conservation easement shall be approved in writing by the Wildlife Agencies. All acquisitions intended to fulfill the requirements of the NCCP/HCP shall be approved by the Wildlife Agencies prior to acquisition and shall adhere to the principles and priorities for preserve design, and for species population and habitat preservation and enhancement, as set forth in NCCP/HCP. The addition of properties to the Preserve Area shall follow the process described in Sections 6.5 and 6.10 of the NCCP/HCP, which allows for some flexibility in how the Preserve Area is ultimately assembled, including the acceptance of credits from approved mitigation or conservation banks, to account for availability and funding. The Water Authority shall also comply with the steps and guidelines for land acquisition described in NCCP/HCP Section 6.10 and the Minor Amendment process (Section 8.3.1).

As detailed in NCCP/HCP Section 6, the Habitat Mitigation Areas (HMAs) currently total 1,920 acres. Within the HMA properties, approximately 704 acres of mitigation credits exist or are proposed to be created to satisfy, as needed, the Water Authority's commitments under the NCCP/HCP.

#### **9.1.1 Assembly of Preserve Areas – Water Authority's and Wildlife Agencies' Responsibilities for Mitigation and Conservation**

Under FESA, the Water Authority is required to mitigate the impacts of Take resulting from the Covered Activities to the maximum extent practicable, and under the NCCPA the Water Authority is required to provide for the conservation and management of the Covered Species. To meet these legal requirements, the Water Authority has acquired or shall acquire all land necessary to mitigate foreseeable impacts and assemble the Preserve Area according to the assumptions and criteria set forth in NCCP/HCP Tables 5-3, 6-5, 6-6, 6-7, and 6-8 and Conservation Goals and Objectives 1 and 2.

All 1,920 acres of Preserve Area lands will be dedicated and managed in perpetuity as conservation lands under the Plan. The Wildlife Agencies have agreed to directly manage certain HMA properties (NCCP/HCP Section 6.8) with funds provided by the Water Authority (Section 7.2 of the NCCP/HCP).

## **9.2 Stay Ahead Commitment**

The Water Authority shall ensure that the assembly and enhancement/restoration/creation of conservation and mitigation habitats and use of credits within the Preserve Area stay ahead of impacts to the Covered Species authorized under the Permits as described in NCCP/HCP Section 6.5.1.1. The Water Authority shall report the status of the Preserve Area habitats and mitigation credits/use in each Annual Report (see Section 11.4 of this Agreement). Documentation of compliance with the stay ahead commitment shall be based on each Annual Report. If, based on any Annual Report, the stay ahead commitment has not been met or may not be met during the subsequent two year period for any vegetation community requiring mitigation (Table 6-5 of the NCCP/HCP), the Water Authority and the Wildlife Agencies shall meet and/or confer within thirty (30) days of the Wildlife Agencies' receipt of the Annual Report to develop and implement a strategy to remedy the deficiency and achieve compliance. The Water Authority acknowledges that failure to implement responsive actions in accordance with the stay ahead and rough step commitment may result in suspension or termination of the Permits.

## **9.3 Rough Step Proportionality Commitment**

Pursuant to section 2820, subdivision (b)(9) of the California Fish and Game Code, the Water Authority must "ensure that implementation of mitigation and conservation measures on a plan basis is roughly proportional in time and extent to the impact on habitat or Covered Species authorized under the Plan." Section 2820, subdivision (c) also requires a statement of consequences of the failure to acquire lands in a timely manner.

For purposes of the NCCP/HCP, "rough step proportionality" shall be determined pursuant to Section 6.5.1.2 of the NCCP/HCP. If at any time CDFG provides written notification that rough proportionality on a plan basis has not been met, then the Water Authority will either: (1) regain rough proportionality within forty-five (45) days; or (2) enter into an agreement with CDFG within forty-five (45) days, which will set a course of action to expeditiously regain rough proportionality. The agreement may include any of a variety of commitments or adjustments to the NCCP designed to regain rough proportionality, including but not limited to, a plan to acquire, restore, or enhance lands of appropriate vegetation or land-cover type expeditiously.

If the Water Authority does not regain rough proportionality within forty-five (45) days or enter into an agreement with CDFG within forty-five (45) days setting a course of action to regain rough proportionality, CDFG may suspend or revoke the State Permit, in whole or in part, pursuant to California Fish and Game Code section 2820, subdivision (c). The Parties agree that partial suspension or revocation may include but may not be limited to removal of one or more species

from the Covered Species list for purposes of the Permits or reducing the geographic scope of the Take authorization provided by the Permits. Before suspending or revoking the State Permit in whole or part, due to a failure to maintain rough proportionality, CDFG shall meet with the Water Authority to determine whether mutually agreeable modifications to the NCCP/HCP would obviate a suspension or revocation in whole or part. Any amendments to the NCCP/HCP agreed to by the Water Authority and CDFG must also be concurred with in writing by USFWS and must comply with the minor/major amendment provisions of Sections 8.3 and 8.4 of the NCCP/HCP and Section 17 of this Agreement. The Parties agree that if CDFG suspends or revokes any or all of the State Permit, the Water Authority may, based on the NCCP/HCP, apply for one or more CESA incidental Take permits under section 2081, subdivision (b), of the California Fish and Game Code to replace the State Permit, in which case CDFG shall expeditiously review the application in accordance with CESA. Notwithstanding suspension or revocation of the State Permit, in whole or in part, the Water Authority remains obligated to implement the NCCP/HCP under the Federal Permit.

Under FESA, the Water Authority must assure that all mitigation owing for any impacts to Covered Species resulting from Covered Activities under the NCCP/HCP is in place or assured at the time such impacts occurs. Failure to abide by the stay ahead and rough proportionality requirements outlined in this section may also subject the Federal permit to suspension or revocation in whole or in part.

#### **9.4 Land Acquired Through Partnerships with Other Agencies and Organizations**

The Water Authority may enter into agreements and other partnerships involving land acquisitions within the Plan Area with other land management agencies and organizations where those acquisitions meet the goals and objectives of the NCCP/HCP. However, such acquisitions will be formally credited towards the obligations set forth in NCCP/HCP only where the Wildlife Agencies approve the acquisition and concur that the acquisition (a) contributes to meeting the goals and objectives of the NCCP/HCP, (b) contains a conservation easement or other permanent dedication of land to the Preserve Area (unless owned in fee by the Wildlife Agencies) that has been approved in writing by the Wildlife Agencies as a Minor Amendment (Section 8.3), and (c) will be managed in perpetuity pursuant to a Preserve Area Management Plan, as described below in Section 10.3.2 of this Agreement. Such acquisitions may initially be credited toward the obligations set forth in the NCCP/HCP before the Preserve Area Management Plan has been completed, provided the conditions described in Sections 6.10 and 8.3 of the NCCP/HCP are met.

## **9.5 Lands Acquired Before Issuance of the Permits**

The Plan's Preserve Area (Section 6.8 of the NCCP/HCP) includes lands acquired before issuance of the Permits that the Wildlife Agencies have agreed may be credited towards the land commitments and obligations of the NCCP/HCP. The Parties agree that lands acquired as part of the Preserve Area during preparation of the NCCP/HCP and identified at Section 6.8 of the NCCP/HCP shall be formally credited towards the obligations set forth in Tables 6-6, 6-7, and 6-8 and described in Chapter 6.5 of the NCCP/HCP.

## **10.0 PRESERVE AREA MANAGEMENT**

### **10.1 Responsibility of the Water Authority**

The Water Authority shall ensure that it or a Preserve Area (HMA) management entity designated by it and approved by the Wildlife Agencies carries out the preserve management responsibilities described in this Section 10.0 and NCCP/HCP Sections 6 and 8 and Appendix B. The Water Authority may delegate and contract for management planning, plan preparation, and implementation tasks to other qualified parties, land use agencies (cities and counties), non-profit organizations, for-profit land management companies, and other contractors. However, the Water Authority shall remain solely responsible for ensuring the management of the HMAs in perpetuity in accordance with Wildlife Agency-approved Preserve Area Management Plans (PAMP), as those plans may be revised over time and for the timeliness and quality of all requirements of preserve management, except where the Wildlife Agencies have assumed that responsibility as provided in Section 10.2, below.

Management activities on all Preserve Area lands that are formally credited toward the obligations of the Plan, including future additions as described in Section 9.4 above, shall be a Covered Activity, with the exception of management activities undertaken by either Wildlife Agency on Preserve Area lands managed by that agency.

### **10.2 Management of Preserve Area Properties by the Wildlife Agencies**

The Wildlife Agencies have committed to manage several HMAs (Crestridge, San Miguel, and Rancho Canada) in accordance with Preserve Area Management Plans, as described in Section 10.3.2. Nothing in this Agreement shall preclude the Wildlife Agencies from managing other HMAs. Where the Wildlife Agencies have or in the future do assume management of HMAs, the Wildlife Agencies shall be responsible for preparing and implementing management plans for those areas.

### **10.3 Preserve Area Management Plans**

#### **10.3.1 System-Wide Preserve Management**

The Water Authority shall ensure that each of its Preserve Area Managers prepares and implements a Wildlife-Agency approved management plan in conformance with the NCCP/HCP Conservation Goals/Objectives 4 and 5, and Sections 6.11 and 6.12, except as noted in Sections 10.1 and 2 of this Agreement. The Water Authority shall evaluate the individual Preserve Area Management Plans for system-wide effectiveness and revise them or have them revised as appropriate: (a) every five (5) years after preserve land acquisition is completed and a management plan has been prepared and (b) whenever necessary under Changed Circumstances pursuant to Section 12.2 of this Agreement.

#### **10.3.2 Preserve Area Management Plans**

Within two (2) years of the dedication of any parcel of land to the Preserve Area, the Water Authority shall ensure that a Preserve Area Management Plan (PAMP) is prepared (unless otherwise noted in NCCP/HCP Section 6.8) pursuant to NCCP/HCP Conservation Goals/Objectives 4 and 5 and consistent with Sections 6.11 and 6.12. When a particular parcel of land is dedicated to the Preserve Area, the Water Authority will determine whether an existing Preserve Area Management Plan provides sufficient implementing mechanisms and management guidance to satisfy the requirements of the NCCP/HCP, or whether a new or revised Wildlife Agency-approved Preserve Area Management Plan must be prepared. A new or revised plan shall be prepared within two years of dedication of the property to the Preserve Area. During the preparation of any new or revised Preserve Area Management Plan, the Water Authority shall be responsible for ensuring the land is managed in accordance with the NCCP/HCP to maintain and improve Covered Species habitat using the best available information and management methods in practice within the Plan Area until the Preserve Area Management Plan is completed.

#### **10.3.3 Recreational Uses**

The Parties acknowledge that providing low-intensity recreational opportunities on Preserve Area lands may be acceptable, subject to appropriate constraints to protect Covered Species and natural communities. The Parties therefore agree the Water Authority, in consultation with the management entities, may integrate recreation planning goals and objectives into the Preserve Area Management Plans to the extent consistent with the NCCP/HCP's land management goals and objectives and the requirements of this Agreement and the Permits and

subject to the concurrence of the Wildlife Agencies described in Section 10.4.

#### **10.4 Review and Concurrence By the Wildlife Agencies**

All Preserve Area Management Plans other than those plans developed and implemented by the Wildlife Agencies, and updates or revisions to such plans, must be reviewed and receive the written concurrence of the Wildlife Agencies. The Water Authority shall submit such plans or revisions to such plans in writing with a cover sheet explaining the plan or revisions and the rationale for such plan or revisions. The Wildlife Agencies shall review the submission and use their reasonable efforts to provide a written response within sixty (60) days. The Wildlife Agencies shall either concur that the plan or revision thereto is adequate or shall describe additional information needed to determine the plan's adequacy or reasonable modifications needed to render the plan adequate along with a written statement explaining the additional information needed or modifications required. Preserve management shall continue according to the NCCP/HCP and best scientific practices during the preparation and agency review of plans and revisions. At the request of either the Wildlife Agencies or the Water Authority, the Parties shall meet to discuss and attempt to resolve any differences over the contents of the Preserve Area Management Plan. Either following such discussion, or if such meeting is not requested, within 30 days of receipt of a Wildlife Agency response that identifies necessary modifications, the Water Authority shall promptly modify the plan as directed by the Wildlife Agencies.

### **11.0 PLAN AREA MONITORING & REPORTING**

#### **11.1 Responsibility of the Water Authority**

The Water Authority shall carry out and, within the HMAs, ensure that Preserve Area managers carry out, the compliance and effectiveness monitoring and reporting required by NCCP/HCP Section 6.12. The Water Authority shall remain solely responsible for all monitoring and reporting requirements in perpetuity, including submission to the Wildlife Agencies of the monitoring and reporting plans, and for the timeliness and quality of the monitoring and reporting plan.

#### **11.2 Compliance Monitoring**

The Water Authority, in association with the Preserve Area managers of the HMAs, shall conduct compliance monitoring within the Plan Area to track key implementation elements as set forth in NCCP/HCP Section 6.12 and as further provided herein.



### **11.2.1 Compliance Monitoring**

The Water Authority shall develop a data reporting process conforming to the requirements of NCCP/HCP Section 6.12 to organize all required compliance monitoring data. The Water Authority shall create or utilize an existing data repository accessible to the Parties. The Water Authority will consider using the HabiTrak database developed by CDFG or a Geographic Information System-based data repository that is transferable to HabiTrak. The Wildlife Agencies shall safeguard sensitive species information to the extent permitted by the Freedom of Information Act and the California Public Records Act.

### **11.3 Effectiveness Monitoring**

The Water Authority will ensure that the Preserve Area managers of the HMAs, shall conduct effectiveness monitoring of the NCCP/HCP within the Plan Area by implementing all elements of the integrated monitoring and adaptive management program described in NCCP/HCP Section 6.12.2 and 6.12.3.

### **11.4 Annual Report and Public Workshop**

By January 31 of each year following the Effective Date (or other date as agreed upon by the Parties), the Water Authority shall prepare and submit an Annual Report to the Wildlife Agencies that summarizes: the previous calendar year's monitoring results; an accounting, by project and cumulatively, of habitat acreage lost and conserved by Water Authority actions within the Plan Area by habitat type or vegetation community; and an assessment of the rough proportionality under Section 9.3 of this Agreement. The first Annual Report shall be prepared no later than March 15 (or other date agreed to by the Parties) following the first full calendar year of NCCP/HCP implementation and shall report on all applicable activities and results from the Effective Date to the end of the first full calendar year. Each Annual Report shall address, at a minimum, the descriptions and analyses detailed in NCCP/HCP Section 6.12. The Water Authority shall make the latest Annual Report accessible to the public via the Internet, and at a publicly noticed open meeting jointly conducted by the Parties on an annual basis to disseminate and discuss the annual report.

### **11.5 Annual Implementation Review and Meeting**

The Parties will review the Annual Report described in Section 11.4 above and evaluate the implementation of the NCCP/HCP during the preceding year and the adequacy of the overall progress being made towards reaching the conservation goals of the NCCP/HCP. The Annual Report will include information on all contributions towards the assembly of the Preserve Area system, such as use of HMA credits, mitigation or conservation bank credits, land acquisitions, and management activities undertaken or proposed on habitat lands. Habitat

management activities undertaken or proposed will also be discussed. In addition, the Parties will review relevant information prepared and available from other NCCP/HCP efforts involved in preserve management and monitoring. If, based on the Annual Report, Wildlife Agencies determine that adequate progress towards implementation of the NCCP/HCP is not being achieved, Wildlife Agencies shall provide their findings and the basis for such findings in writing to the Water Authority; and the Water Authority will take the actions specified in the NCCP/HCP and this Agreement to remedy that situation. If Wildlife Agencies determine that adequate progress towards implementation of the NCCP/HCP is being achieved, but that it is nevertheless not providing sufficient protection to the Covered Species, the Wildlife Agencies shall provide their findings and the basis for such findings in writing to the Water Authority; and then the Parties shall work cooperatively and take appropriate actions consistent with the NCCP/HCP and this Agreement (such as altering management activities or redirecting mitigation and acquisition) in order to remedy the situation. At least once each year, the Water Authority shall meet with Wildlife Agencies to review and coordinate implementation of the NCCP/HCP.

## **11.6 Other Reports**

Within thirty (30) days of receipt of a written request from the Wildlife Agencies, the Water Authority will provide any additional information in its possession or control related to implementation of the NCCP/HCP for the purpose of assessing whether the terms and conditions of this Agreement, the NCCP/HCP and the Permits are being fully implemented.

### **11.6.1 Certification of Reports**

All reports from the Water Authority pursuant to this section 11 shall include the following certification from the agency responsible official who supervised or directed preparation of the report:

“I certify under penalty of perjury that, to the best of my knowledge, after appropriate inquiries of all relevant persons in the preparation of this report, the information submitted here is true, accurate, and complete.”

## **11.7 Monitoring by the Wildlife Agencies**

The Water Authority acknowledges that the Wildlife Agencies may conduct monitoring of any Covered Activity and may inspect any data or records required by the NCCP/HCP, this Agreement or the Permits in accordance with applicable laws and regulations. See 50 C.F.R. 13.21(e)(2), 13.47. The Water Authority shall cooperate fully with such monitoring and inspections.

## **12.0 ADAPTIVE MANAGEMENT AND CHANGED CIRCUMSTANCES**

### **12.1 General Framework of Adaptive Management**

The Water Authority shall implement or ensure the implementation of an adaptive management program as described in NCCP/HCP Section 6.12.3, in order to gauge the effectiveness of the NCCP/HCP, propose and modify conservation measures as the need arises, and address Changed Circumstances. The adaptive management program will be based on biological monitoring results and directed studies. The specific responsibilities of the Water Authority and Preserve Area managers in carrying out the adaptive management program are further defined in NCCP/HCP Section 6.12.3.

#### **12.1.1 Adaptive Management Initiated by the Water Authority and Preserve Area Managers**

Within the Plan Area the Water Authority shall implement, and within the Preserve Area lands shall work with the Preserve Area Managers to implement, the PAMP adaptive management program when changes in management practices are necessary to achieve the NCCP/HCP's biological objectives, or to respond to monitoring results or new scientific information, as described more particularly in NCCP/HCP Section 6.12.3. The Water Authority and non-Wildlife Agency Preserve Area Managers will make such changes without awaiting notice from the Wildlife Agencies, and will report to the Wildlife Agencies on any adaptive management actions taken.

#### **12.1.2 Adaptive Management Initiated by the Wildlife Agencies**

If the Wildlife Agencies determine that one or more of the adaptive management provisions in the PAMP have been triggered and that the Water Authority or Preserve Area Managers has not changed management practices in accordance with NCCP/HCP Section 6.12.3, the Wildlife Agencies shall notify the Water Authority and direct it to make the required changes. Within thirty (30) days after receiving such notice, the Water Authority and management entities shall initiate the required changes and report to the Wildlife Agencies on its actions. Such changes are provided for in the NCCP/HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permits or NCCP/HCP, except as otherwise provided in this section. The Wildlife Agencies will implement appropriate adaptive management changes on the Preserve Area lands they manage.

## **12.2 Changed Circumstances**

### **12.2.1 Identification of Changed Circumstances**

Changed Circumstances and the planned responses to Changed Circumstances are identified in NCCP/HCCP Section 8.5.1. They include the listing of a new species, fire impacts to natural communities, invasion by exotic species, flooding impacts to riparian or upland natural communities, impacts to natural communities caused by extended periods of reduced precipitation, and toxic spills/dumping that impacts natural communities. If a Changed Circumstance occurs, the Water Authority and Preserve Area management entities shall implement the remedial conservation measures identified in NCCP/HCP Section 8.5.1 for the specific Changed Circumstance. The Parties agree that Section 8.5.1 of the NCCP/HCP addresses all reasonably foreseeable Changed Circumstances and describes specific preventive measures and responses for them. Such responses are provided for in the NCCP/HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permits or NCCP/HCP.

### **12.2.2 Responses to Changed Circumstances Initiated by the Water Authority and Preserve Area Management Entities**

The Water Authority shall notify the Wildlife Agencies in writing within thirty (30) days after occurrence of a Changed Circumstance listed in NCCP/HCP Section 8.5.1. The Water Authority or non-Wildlife Agency Preserve Area Manager will use all reasonable efforts to respond as soon as practicable thereafter within thirty (30) days of learning of the Changed Circumstances and will develop a remediation plan in the manner described in Section 8.5.1, as necessary to mitigate the effects of the Changed Circumstances on Covered Species and will report to the Wildlife Agencies on its actions. The Water Authority or non-Wildlife Agency Preserve Area Manager will initiate such actions without awaiting notice from the Wildlife Agencies. The Wildlife Agencies will implement planned responses to Changed Circumstances on Preserve Areas they manage.

### **12.2.3 Responses to Changed Circumstances Initiated by the Wildlife Agencies**

If the Wildlife Agencies determine that Changed Circumstances have occurred and that the Water Authority has not responded in accordance with NCCP/HCP Section 8.5.1, the Wildlife Agencies shall notify the Water Authority about the specific changes that must be made. The Water Authority shall make the required changes expeditiously. Within thirty (30) days after receiving the Wildlife Agencies' notice, the Water Authority or non-Wildlife Agency Preserve Area management entity shall

report on the Water Authority' action(s).

#### **12.2.4 Listing of Species that are Not Covered Species or Designation of Critical Habitat within the Plan Area**

In the event that a non-Covered Species that may be affected by a Covered Activity becomes listed under FESA or CESA or critical habitat that may be affected by a Covered Activity is designated or revised for a Covered Species or a non-Covered Species, the Water Authority will consult with the Wildlife Agencies, and following such consultation will initiate necessary responsive actions or measures, if any, identified by the Wildlife Agencies to avoid Take of or jeopardy to a listed species, or adverse modification of critical habitat as provided in NCCP/HCP Section 8.5.1.6.

### **12.3 No Increases In Take**

This section 12 does not authorize any modifications that would (1) result in an increase in the level of incidental take or other impacts to Covered Species, or (2) a change in the nature of incidental take or in the impacts of Covered Activities beyond those analyzed under the original NCCP/HCP and SDCWA NCCP/HCP EIS/EIR. Any modification resulting in increased Take or new or significant impacts to the environment that were not analyzed in the SDCWA NCCP/HCP EIS/EIR must be reviewed and processed as a Major Amendment under Section 8.4 of the NCCP/HCP and Section 17.4.1 of this Agreement.

## **13.0 IMPLEMENTING MECHANISMS**

As of the Effective Date, the Water Authority shall be responsible for overseeing and managing the implementation of the NCCP/HCP. The Water Authority is ultimately responsible for compliance with all applicable terms and conditions of this Agreement, the NCCP/HCP and the Permits including all applicable conservation measures, management plans, monitoring and reporting requirements, and funding.

### **13.1 Role of the Water Authority**

The Water Authority's responsibilities for implementing the NCCP/HCP include, but are not limited to:

- Overseeing the assembly and management of the Preserve Area;
- Funding and overseeing NCCP/HCP implementation, including all take minimization, mitigation and other conservation measures applicable to Covered Activities both within and outside of the Preserve Area;
- Ensuring mitigation and conservation measures are being implemented roughly proportional in time and extent to the impact of Authorized Take, as provided in Section 9.3 of this Agreement, and ensuring compliance with the

stay ahead commitment and the rough step proportionality commitment, as provided in Sections 9.2 and 9.3 of this Agreement;

- Providing technical support and advice to Preserve Area (HMA) Managers about what NCCP/HCP measures apply to Covered Activities and how they should be applied, including, but not limited to, avoidance and minimization measures and the amount of fee payments;
- Promoting coordination among Preserve Area Managers to ensure that the NCCP/HCP is implemented consistently and effectively;
- Preparing or ensuring the preparation of Preserve Area Management Plans, as further described in Section 10.3 of this Agreement and Section 6.12 of the NCCP/HCP; and
- Preparing the Annual Report.

### **13.1.1 Covered Activities Implemented by Water Authority**

Covered Activities will be implemented by the Water Authority and its management entities in conformance with the NCCP/HCP, the Permits, and this Agreement. The Water Authority shall be responsible for ensuring compliance with the terms of this Agreement, the NCCP/HCP and the Permits with regard to any Covered Activity it implements directly or indirectly through third party entities over which it exercises control. To document its compliance, the Water Authority shall complete a PSF (for capital improvement projects/maintenance related activities) in accordance with Section 6.4.1.2 of the NCCP/HCP for each Covered Activity it implements, including implementing Preserve Area management activities not anticipated by the approved Preserve Area Management Plan. A summary of Covered Activities will be reported annually. Copies of each PSF will be retained by the Water Authority in its files for (5) years, or as required by its administrative procedures, whichever period is longer.

## **13.2 Extension of Take Authorization to Preserve Area Managers**

### **13.2.1 General Provisions**

The Water Authority acknowledges and commits that it has sufficient legal control over all non-Wildlife Agency Preserve Area Managers and all other third party entities who conduct Covered Activities under the NCCP/HCP, including contractors and consultants retained by the Water Authority to carry out a Covered Activity, to enforce the provisions of the NCCP/HCP, this Agreement and the Permits against such Managers and third party entities and ensure that the NCCP/HCP provisions are carried out. Consequently, as further provided by this Agreement, the NCCP/HCP and the Permits, the Take authorization extends to all non-Wildlife Agency Preserve Area Managers and other third party entities over which the Water Authority exercises sufficient legal control for

purposes of ensuring implementation of the NCCP/HCP. As necessary, the Water Authority commits that it will enter into or modify existing written agreements with such entities to confer upon the Water Authority legal control sufficient to ensure compliance by the third party entities with all applicable conservation measures and other terms and conditions of this Agreement, the NCCP/HCP and the Permits. Notwithstanding such third party entity agreements, the Water Authority is ultimately responsible for ensuring that all NCCP/HCP measures applicable to the Preserve Area other than those Preserve Areas managed by USFWS or CDFG are carried out and shall be legally liable under the Permits for any noncompliance.

### **13.2.2 Specific Provisions**

To be included under the Permits, the Preserve Area Manager must enter into an agreement with the Water Authority and assume the obligation to comply with all applicable terms and conditions of this Agreement, the NCCP/HCP and the Permits. Provided the Preserve Area Manager is obligated under an agreement or conditions of project approval to comply with such terms and conditions and the Water Authority retains legal authority under such agreement to enforce the provisions of the NCCP/HCP against such Preserve Area Manager, the Permits shall extend to the Preserve Area manager as an agent of the Water Authority. Take authorization for Wildlife Agency Preserve Area managers will be separately granted through appropriate federal and state and regulatory mechanisms. If for any reason the Take authorization is suspended in part, such suspension shall not affect the Take authorization for Covered Activities carried out by Preserve Area managers on Preserve Area lands, unless the cause(s) for such suspension arise out of Preserve Area Covered Activities. The Take Authorization shall remain in effect for Preserve Area Covered Activities for as long as the Preserve Area Manager fully complies with the applicable terms and conditions of this Agreement, the NCCP/HCP, and the Permits, subject to applicable federal and state laws and regulations governing Permit administration. If the Water Authority elects to terminate the Permits early or the Wildlife Agencies take action to revoke the Permits, then the Water Authority commits to transfer the Permits in part to the Preserve Area managers as the Permits apply to Preserve Area Covered Activities in accordance with applicable federal and state regulatory requirements to ensure that Covered Activities required to be conducted within the Preserve Area under the NCCP/HCP, this Agreement and the Permits, may continue.

### **13.3 Conservation Easements**

In addition to acquiring lands for the Preserve Area by fee title, the Water Authority may negotiate conservation easements. The terms of all conservation

easements must be approved in writing by the Wildlife Agencies and identify the Wildlife Agencies and the Water Authority as third party beneficiaries with a right of access to the easement areas and to enforce the terms of the conservation easement. All conservation easements shall be recorded in perpetuity pursuant to Civil Code section 815 et seq. and shall be subject to the Preserve Area commitments of the NCCP/HCP. If requested by the Wildlife Agencies, conservation easements shall be dedicated to the CDFG or another entity approved by the Wildlife Agencies, including but not limited to land trusts, parks agencies, and other qualified nonprofit organizations.

#### **13.4 Coordination between Water Authority and Other NCCP/HCPs**

The Parties agree that effectively coordinating the Water Authority's Plan with other NCCP/HCPs will make it possible to create and manage the Preserve Area properties in a cost-efficient manner, allow for better integration of information sharing, and help promote implementation of management activities that have potential benefits to Covered Species and their habitats. As noted in NCCP/HCP Section 3, coordination of the conservation strategies and preserve lands would be beneficial: activities may include, without limitation, developing standard terms and conditions for real property transactions and management plans; acquisition planning; a process for developing joint grant applications; and a strategy for coordinating long-term management among the preserve areas. The Water Authority may participate in regional conservation planning and implementation efforts to make recommendations regarding land acquisitions, land management and monitoring, grant applications and other actions to create or manage the preserve areas. Nothing in this Agreement is intended to prohibit or prevent the Water Authority from collaborating with other public agencies or private entities to help to create and manage the Preserve Area or for any other purpose.

### **14.0 FUNDING**

#### **14.1 General Commitment**

The Water Authority shall ensure that all required mitigation, conservation, monitoring, reporting and adaptive management measures are adequately funded during the term of this Agreement, and that management, maintenance and monitoring activities on conservation easement and fee interest habitat lands, monitoring, reporting and adaptive management measures are adequately funded in perpetuity. NCCP/HCP Section 7 describes the Water Authority's funding capacity and process. The Water Authority will promptly notify the Wildlife Agencies of any material change in the Water Authority's financial ability to fulfill its obligations under this Agreement. The Water Authority will also include in its Annual Report to the Wildlife Agencies reasonably available financial information to demonstrate the Water Authority's ability to fulfill existing obligations.



The Water Authority has provided or shall provide sufficient funds to the appropriate Wildlife Agency to pay in perpetuity for land management costs incurred to meet the land management obligations set forth in the management plans, in conformance with a Property Analysis Record (PAR) or equivalent cost-estimating method acceptable to the Wildlife Agencies and the guidance presented in NCCP/HCP Sections 6.11 and 6.12. Where the Wildlife Agencies have already received funds to manage the HMA to meet pre-existing NCCP commitments, funds will only be provided under this Plan to pay for additional obligations under this Plan for Covered Species or for obligations not already addressed by those pre-existing commitments.

#### **14.2 Effect of Inadequate Funding**

If funding is inadequate to implement the NCCP/HCP, USFWS and CDFG will assess the impact of the funding deficiency on the scope and validity of the Permits. Unless the Water Authority withdraws pursuant to Section 20.0 of this Agreement or the Wildlife Agencies revoke the Permits pursuant to Section 19.0 of this Agreement, the Parties agree to meet and confer to develop a strategy to address the funding shortfall, and to undertake all practicable efforts to maintain the level of conservation and Take authorization afforded by the Permits until the funding situation can be remedied.

Where the Water Authority has funded an endowment or has provided a supplemental endowment to fully satisfy certain mitigation obligations under the NCCP/HCP and the endowment or supplemental endowment has been reviewed and approved in writing as adequate by the Wildlife Agencies, the endowment and any supplemental endowment are deemed adequate funding to carry out such obligations and the Wildlife Agencies shall not require additional funds or resources.

### **15.0 RIGHTS, OBLIGATIONS & ASSURANCES**

#### **15.1 Rights & Obligations of the Water Authority**

##### **15.1.1 Rights**

As of the Effective Date, the Water Authority may Take the Covered Species while carrying out Covered Activities in the Plan Area, as further authorized by and subject to the conditions of this Agreement, the NCCP/HCP, and the Permits. The Covered Activities include all activities listed in NCCP/HCP Sections 5 and 6.

The Take authority issued to the Water Authority applies to all respective elected officials, officers, directors, employees, agents, subsidiaries, non-Wildlife Agency Preserve Area managers, contractors and other third persons or entities under the direct control of the Water Agency who

engage in any Covered Activity. The Water Authority shall periodically, but not less than once every two years or as this Agreement, NCCP/HCP, or the Permits are amended, educate all such persons and entities of the terms and conditions of the NCCP/HCP, Permits and this Agreement. The Water Authority shall supervise such persons' and entities' compliance with applicable terms and conditions of this Agreement, the NCCP/HCP and the Permits and shall be legally liable under the Permits for all instances of non-compliance by such persons or entities. All contracts between the Water Authority and such persons and entities regarding the implementation of any Covered Activity or the NCCP/HCP shall require Permit compliance.

### **15.1.2 General Obligations**

The Water Authority will fully and faithfully perform all obligations under this Agreement, the NCCP/HCP, and the Permits, including but not limited to the NCCP/HCP obligations assigned in the following sections: Section 5.0 (Covered Activities), Section 6.0 (Conservation Plan), Section 7.0 (Funding of the Plan) and Section 8.0 (Amending the Plan and Addressing Changed and Unforeseen Circumstances).

The Water Authority's Take authorization shall extend to the Preserve Area managers for Covered Activities that are undertaken by or with the written approval of the Water Authority in accordance with this Agreement, including Section 13.2.1, the Permits and the NCCP/HCP.

### **15.1.3 Obligations In The Event of Suspension or Revocation**

If USFWS and/or CDFG suspend or revoke the Permits, in whole or in part, pursuant to Sections 19.0 and 21.0 of this Agreement, the Water Authority will remain obligated to fulfill its mitigation, enforcement, management, and monitoring obligations, and its other NCCP/HCP obligations, in accordance with this Agreement and applicable statutory and regulatory requirements for all Covered Activities authorized for Take prior to the suspension or revocation.

### **15.1.4 Assurances for Water Authority**

The Water Authority will receive assurances regarding additional mitigation pursuant to the federal "No Surprises" regulations at 50 C.F.R. 17.22(b)(5) and 17.32(b)(5). Likewise, in the event of Unforeseen Circumstances, CDFG shall not require Water Authority to provide, without its consent, additional land, water or financial compensation, or additional restrictions on the use of land, water, or other natural resources, for the purpose of conserving Covered Species with respect to Covered Activities provided the Water Authority is properly implementing this

Agreement, the NCCP/HCP and the terms and conditions of the State Permit.

#### **15.1.5 Interim Obligations upon a Finding of Unforeseen Circumstances**

If either Wildlife Agency makes a finding of Unforeseen Circumstances with regard to a Covered Species, then during the period necessary to determine the nature and location of additional or modified mitigation, the Water Authority will avoid contributing to an appreciable reduction in the likelihood of the survival and recovery of the affected species.

### **15.2 USFWS Obligations and Assurances**

#### **15.2.1 General Obligations**

Concurrent with its execution of this Agreement and satisfaction of all other applicable legal requirements, USFWS will issue Water Authority a Federal Permit under Section 10(a)(1)(B) of FESA, authorizing incidental Take by the Water Authority of each Federal Listed Covered Species resulting from Covered Activities in the Plan Area. Subject to Section 24.8, USFWS shall monitor the Water Authority's implementation of the NCCP/HCP and compliance with the Federal Permit and also provide technical assistance and timely review, collaboration and consultation to the Water Authority regarding implementation of the NCCP/HCP, as provided in this Agreement and the NCCP/HCP, throughout the duration of the Federal Permit. USFWS shall manage those Preserve Area HMA's over which it has assumed or will assume management responsibility consistent with the provisions of the NCCP/HCP, this Agreement and the Permits.

USFWS shall use its reasonable efforts to respond to all Water Authority submittals within 60 days, unless another time period is specified in this Agreement or the Plan for a particular response. For Water Authority submittals other than proposed plan amendments or permit amendments which are governed by Section 17 of this Agreement, the following procedure shall apply in order to facilitate a timely response by USFWS. USFWS shall either respond to the submittal within 30 days of receipt of a submittal or, within that 30 day period, shall notify the Water Authority of the date by which the USFWS intends to provide a response. Either the Water Authority or USFWS may at any time request a meeting to discuss a submittal.

### **15.2.2 No Surprises Assurances**

Upon issuance of the Federal Permit, the Water Authority shall receive regulatory assurances pursuant to the “No Surprises” regulations at 17.22(b)(5) and 17.32(b)(5). Pursuant to the “No Surprises” regulations, as long as the NCCP/HCP, this Agreement and the federal Permit are being properly implemented, USFWS shall not require additional conservation and mitigation measures that 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 NCCP/HCP without the consent of the Water Authority.

### **15.2.3 Critical Habitat Designations in the Plan Area**

Portions of the Plan Area are designated Critical Habitat, or have been proposed as Critical Habitat for San Diego thornmint, thread-leaved brodiaea, willowy monardella, Otay tarplant, spreading navarretia, San Diego fairy shrimp, Riverside fairy shrimp, Quino checkerspot, southwestern willow flycatcher, least Bell’s vireo, San Diego ambrosia, Southwestern arroyo toad and California gnatcatcher. The USFWS acknowledges that the Permit and NCCP/HCP incorporate special management requirements to protect habitat features on the Covered Lands essential for these species. Based on information available to USFWS, the USFWS believes that the NCCP/HCP incorporates special management considerations and protections for each of the Covered Species and their essential habitat within the Covered Lands necessary to provide for the conservation of the species and their habitats within the Covered Lands to the extent such species and habitat may be affected by the Covered Activities. Pursuant to the “No Surprises” rule, no measures, to the extent proscribed or restricted in the rule, in addition to those provided under this Agreement, the NCCP/HCP or the Permits, shall be required of the Water Authority in a future ESA section 7 consultation evaluating the impacts of a Covered Activity on the designated Critical Habitat of a Covered Species unless required by law

### **15.2.4 Migratory Bird Treaty Act**

The Federal Permit issued in reliance on the NCCP/HCP and this Agreement also constitutes a Special Purpose Permit under 50 C.F.R. 21.27 for the Take of listed Covered Species also listed under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. Sections 702 et seq., as amended. The take of any of these birds as the result of any Covered Activity carried out in accordance with the NCCP/HCP, this Agreement and the federal Permit will not constitute a violation of the MBTA. Such Special Purpose Permit shall be valid for a period of three years from the

Effective Date, provided the Permit issued in reliance on this Agreement remains in effect for such period. Such Special Purpose Permit shall be renewed without application provided that the terms of the NCCP/HCP, this Agreement and the Permit are being properly implemented. Each such renewal shall be valid for the maximum period of time allowed under 50 C.F.R. 21.27 or its successor at the time of renewal.

### **15.3 CDFG Obligations and Assurances**

#### **15.3.1 General Obligations**

Concurrent with its execution of this Agreement and satisfaction of all other applicable legal requirements, CDFG will issue Water Authority a State Permit under Section 2835 of the California Fish and Game Code authorizing Take by the Water Authority of each State Listed and Non-listed Covered Species resulting from Covered Activities in the Permit Area, to the extent permitted by law and according to the conditions of the NCCP/HCP, the Permits, and this Agreement. CDFG shall monitor the Water Authority's implementation of the NCCP/HCP and compliance with the State Permit. CDFG shall also provide technical assistance and timely review, collaboration and consultation to the Water Authority regarding implementation of the NCCP/HCP, as provided in this Agreement and the NCCP/HCP, throughout the duration of the State Permit. CDFG shall timely review Water Authority submittals required by the NCCP/HCP, the Permits and this Agreement.

#### **15.3.2 Lake or Streambed Alteration Agreement Obligations**

Concurrent with its execution of this Agreement and satisfaction of all other applicable legal requirements, CDFG will process associated Section 1600 notifications and agreements for Covered Activities pursuant to Section 6.7.2 of the NCCP/HCP, applying the vegetation communities mitigation ratios (NCCP/HCP Tables 6-6, 6-7, and 6-8), the Wetland Habitat Management Areas (NCCP/HCP Section 6.8.2) as the mitigation locations for permanent and temporal (when applicable) impacts to amend, delete or add conditions of work to Appendix I, and such changes will be processed per Section 8.2 (Administrative Changes) of the NCCP/HCP.

#### **15.3.3 Long-Term Assurances**

In the event of Unforeseen Circumstances and provided the Water Authority is implementing the terms and conditions of the NCCP/HCP, this Agreement, and the Permits, CDFG shall not require the Water Authority to provide additional land, water, or other natural resources, or financial compensation, or additional restrictions on the use of land, water or other natural resources without the consent of the Water Authority,

unless CDFG determines that without such additional measures existence of a Covered Species would be jeopardized, which would warrant revocation or suspension of the State Permit. The provisions of this Agreement and the NCCP/HCP that address adaptive management and Changed Circumstances, including changes to the legal status of Fully Protected Species and non-Covered Species, are not Unforeseen Circumstances and therefore are not subject to these assurances. However, CDFG acknowledges that such adaptive management and Changed Circumstances provisions are not intended to require modifications to the NCCP/HCP's mitigation program that would require additional funding or to impose significant additional burdens on Water Authority.

## **16.0 CONSULTATIONS WITH OTHER PUBLIC AGENCIES**

### **16.1 Section 7 Consultations with USFWS**

Nothing in this Agreement alters the obligation of a federal agency to consult USFWS pursuant to Section 7 of FESA (16 U.S.C. §1536(a)). To the maximum extent appropriate, , in any conference or consultation under section 7 subsequent to the date of the biological opinion issued by USFWS on the Federal Permit that evaluates a Covered Activity of the Water Authority that is likely to result in impacts to a Covered Species, USFWS shall ensure that the biological opinion for the proposed project is consistent with the biological opinion issued for the NCCP/HCP and the Federal Permit, provided that the Covered Activity, as proposed in the consultation, is consistent and will be implemented in accordance with the NCCP/HCP, this Agreement and the Federal Permit . Unless otherwise required by law or regulation, USFWS shall not impose measures on the Water Authority in excess of those that have been or will be required by this Agreement, the NCCP/HCP, and the Permits. Any reasonable and prudent measures and implementing terms and conditions included in the incidental take statement accompanying such biological opinion issued with regard to Take of a Covered Species resulting from a Covered Activity, shall, to the maximum extent allowable, be consistent with the NCCP/HCP, this Agreement and the Permits.

### **16.2 Consultations by CDFG**

Except as otherwise required by law, CDFG shall not recommend or otherwise seek to impose through consultation with other public agencies any mitigation, compensation or habitat enhancement requirements regarding impacts of Covered Activities on Covered Species within the Permit Area that are in excess of those that have been or will be required by this Agreement, the NCCP/HCP, and the Permits.

## **17.0 AMENDMENTS TO THE NCCP/HCP AND THE FEDERAL AND STATE PERMITS**

### **17.1 Clerical and Administrative Changes to the NCCP/HCP**

Clerical and administrative changes to the NCCP/HCP that are not substantial shall be made by the Water Authority on its own initiative or in response to a written request submitted by a Wildlife Agency, which includes documentation supporting the proposed administrative change. Administrative changes shall not require any amendment to this Agreement, the NCCP/HCP or the Permits. Clerical/administrative changes made by the Water Authority shall be submitted in writing to the Wildlife Agencies at least 30 days before they become effective and such changes shall not take effect if either Wildlife Agency disagrees, but shall be processed as Minor or Major amendment, as appropriate. Annual Reports shall include a summary of administrative changes made to the NCCP/HCP during the preceding calendar year. Administrative changes shall be processed in accordance with Section 8.2 of the NCCP/HCP. Administrative changes include, but are not limited to:

- (a) minor changes to survey protocols;
- (b) minor changes to reporting and monitoring requirements;
- (c) revisions of maps or exhibits to correct errors in mapping or to reflect previously approved changes in the NCCP/HCP or Permits;
- (d) corrections of typographic, grammatical and similar editing errors that do not change the intended meaning;
- (g) other types of modifications that the Parties agree are minor in relation the NCCP/HCP.

### **17.2 Regional or Master Wetland Permits**

The Water Authority and CDFG acknowledge that NCCP/HCP Section 6.7.2 is consistent with existing State process to obtain master streambed agreements that pertain to water quality impacts to Jurisdictional Wetlands and Waters and that address species, habitat, or natural community conservation needs. Nothing in this Agreement shall prohibit the Water Authority from seeking regional wetland permits, authorizations, agreements or permit program assurances based on the NCCP/HCP.

### **17.3 Exceptions to the Conservation Strategy**

Nothing in the Adaptive Management or Changed Circumstances provisions of this Agreement or the NCCP/HCP, nor any other provision that provides for an exception for the application of any measure included in the Conservation Strategy, authorizes an increase in the amount of Take, or an increase of the

impacts of Take, of Covered Species beyond that authorized by the Permits. Any modification that would result in such an increase in Take beyond that authorized by the Permits must be approved as a Permit Amendment under Section 17.4 of this Agreement.

## **17.4 Amendments**

### **17.4.1 Amendment of this Agreement**

This Agreement may be amended only with the written concurrence of all of the Parties.

### **17.4.2 Major Amendment of the NCCP/HCP**

A Major Amendment to the NCCP/HCP may be made only with the written concurrence of all of the Parties and will require an amendment to the Federal [and State Permit[s]] .

### **17.4.3 Minor Amendment to the NCCP/HCP**

#### **17.4.3.1 Scope and Processing of Minor Amendments**

Either the Water Authority or either of the Wildlife Agencies may propose a Minor Amendment to the NCCP/HCP by providing a written submission to the other Parties in accordance with Section 8.3 of the NCCP/HCP. The other Parties will use their reasonable efforts to respond to proposed Minor Amendments within 60 days of receipt of such submission by either approving or denying the Minor Amendment or by notifying the proposing party that the proposed Minor Amendment must be processed as a Permit Amendment in accordance with Section 17.3.4. Proposed Minor Amendments will become effective upon the other Parties' written approval. The Wildlife Agencies will not approve Minor Amendments to the NCCP/HCP if they determine that such Minor Amendments would result in operations under the NCCP/HCP that are different from those analyzed, or may result in adverse effects on the environment that are new or significantly different from those analyzed or may result in additional take that was not analyzed in connection with the original NCCP/HCP. Subject to the provisions of this paragraph, Minor Amendments to the NCCP/HCP may include the following:

- a) Addition of habitat credits to the Preserve Area and acquisition or transfer of Preserve Area properties to an entity approved by a legal mechanism and on terms acceptable to the Wildlife Agencies that ensure the



permanent protection of such lands for conservation purposes consistent with the NCCP/HCP and within the Plan Area;

- (b) future projects within the definition of Covered Activities that are proposed outside the Survey Area and that would not result in additional take;
- (c) modifications to designs to or implementation of Covered Activities that result in equivalent reduced impacts to Covered Species;
- (d) revisions to adaptive management activities developed in response to management and monitoring plan implementation.

#### **17.4.3.1.1 Objection by a Wildlife Agency**

Where possible, before denying a proposed Minor Amendment, the Wildlife Agency shall first consult with the Water Authority and suggest reasonable conditions or alterations to the proposal which, if agreed to by the Water Authority, would permit the Wildlife Agency to approve the proposed Minor Amendment

#### **17.4.3.1.2 Objection by Water Authority**

The Water Authority may object to a proposed Minor Amendment upon any reasonable basis. Where possible, before objecting to a proposed Minor Amendment, the Water Authority shall first consult with the Wildlife Agencies and suggest reasonable conditions or alterations to the proposal which, if agreed to by the Wildlife Agencies, would permit the Water Authority to agree to the proposed Minor Amendment.

#### **17.4.3.1.3 Date that a Minor Amendment Becomes Effective**

A Minor Amendment shall become effective on the last date on which each of the Parties has provided written approval. Written approval may be in the form of a written proposed Minor Amendment that includes a concurrence signature from all Parties.

### **17.4.4 Major Amendment**

Any change to this Agreement or the NCCP/HCP that does not qualify as Clerical or Administrative Change to the NCCP/HCP or a Minor

Amendment under this Section is considered a Major Amendment and shall be processed as a Permit Amendment in accordance with all applicable laws and regulations, including but not limited to FESA, NEPA, NCCPA and CEQA. The Water Authority may, in its sole discretion, reject any Major Amendment proposed by the Wildlife Agencies; however, the Water Authority will state in writing its rationale for any such rejection within thirty (30) days of communicating such rejection to the Wildlife Agencies.

## **18.0 TERM OF AGREEMENT**

### **18.1 Effective Date**

This Agreement shall be effective, on the date following execution by all Parties, on which the later of the federal and state Permits is issued.

### **18.2 Term of the Agreement**

This Agreement shall run for a term of fifty five years (55) from the Effective Date unless both Permits are permanently terminated pursuant to Sections 19.0 or 20.0 of this Agreement, in which case this Agreement shall automatically terminate.

### **18.3 Term of the Permits**

The Permits shall run for a term of fifty-five (55) years from the Effective Date unless terminated as provided for in this Agreement.

## **19.0 REVOCAION, SUSPENSION BY USFWS or CDFG or SURRENDER OF PERMIT BY WATER AUTHORITY**

### **19.1 Federal Permit**

USFWS may suspend or revoke the Federal Permit, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. Such suspension or revocation may apply to the entire Permit or only to specified Covered Lands, Covered Species or Covered Activities. USFWS agrees that it will not suspend the permit without first completing the meet and confer process set forth in Section 21.1 Where USFWS proposes to suspend the Federal Permit based on potential jeopardy to, or adverse modification of the designated critical habitat of, a listed species, USFWS, to the maximum extent practicable, will notify the Water Authority of those measures, if any, that the Water Authority may undertake to prevent jeopardy to the listed species and maintain the Federal Permit and give the Water Authority a reasonable opportunity to implement such measures prior to suspending the Permit.. USFWS will not revoke the Federal Permit if the Water Authority is in

compliance with the terms and conditions of this Agreement, the NCCP/HCP and the Federal Permit unless revocation is necessary to avoid jeopardy to, or adverse modification of the designated critical habitat of, a listed species.

## **19.2 State Permit**

CDFG may revoke the State Permit for a material violation of the State Permit or material breach of this Agreement by the Water Authority if the CDFG determines in writing that (a) such violation or breach cannot be effectively redressed by other remedies or enforcement action, or (b) revocation or termination is required to avoid jeopardizing the continued existence of a Covered Species and to fulfill a legal obligation of the CDFG under CESA or NCCPA.

CDFG agrees that it will not revoke the State Permit without first (a) requesting that the Water Authority take, when possible, appropriate remedial action, and (b) providing the Water Authority with notice in writing of the facts or conduct which warrant the revocation and a reasonable opportunity (but not less than forty-five (45) days) to demonstrate or achieve compliance with CESA, NCCPA, the State Permit and this Agreement.

However, in the event that CDFG has determined that the Water Authority has failed to meet the rough proportionality standard in Section 9.3 of this Agreement, and if the Water Authority has failed to cure the default or to enter into an agreement to do so within forty-five (45) days of the written notice of such determination, CDFG may revoke the State Permit in whole or in part in accordance with California Fish and Game Code section 2820.

## **19.3 Continuing Obligations in the event of suspension or revocation by USFWS or CDFG or surrender by Water Authority**

Pursuant to 50 C.F.R. 17.22(b)(7) and 17.32(b)(7) and applicable state law, in the event of suspension, revocation or surrender of the Permits, the Water Authority will remain obligated to fulfill any existing and outstanding minimization and mitigation measures required under this Agreement, the NCCP/HCP and the Permits for any Take that occurs prior to such suspension, revocation, or surrender until the Wildlife Agencies determine that all Take of Covered Species that occurred under the Permits has been fully mitigated in accordance with the NCCP/HCP. USFWS shall not cancel the Federal Permit until it determines that Take of Covered Species has been fully mitigated; however no further take of Covered Species under the Federal Permit shall be authorized upon suspension, revocation or surrender of the federal Permit. Regardless of whether the Permits are suspended, revoked or surrendered, the Water Authority acknowledges that lands dedicated to the Preserve Area system are required to be protected, managed and monitored in perpetuity and commits to such permanent protection, management and monitoring.

**20.0 WITHDRAWAL FROM AGREEMENT AND SURRENDER OF THE PERMITS**

Upon ninety (90) days written notice to USFWS and CDFG, the Water Authority may unilaterally withdraw from this Agreement and surrender the Permits. As a condition of withdrawal and surrender, the Water Authority shall remain obligated to ensure implementation of all existing and outstanding minimization and mitigation measures required under this Agreement, the NCCP/HCP and the Permits for any Take that occurred prior to withdrawal and surrender. If the Water Authority withdraws and surrenders before causing or authorizing any Take under the Permits as determined by the Wildlife Agencies, it shall have no obligation to ensure implementation of any minimization or mitigation measures. With the exception of all lands dedicated to the Preserve Area prior to surrender of the Permit. With regard to such dedicated Preserve lands, the Water Authority remains obligated to protect, manage and monitor such lands in accordance with the NCCP/HCP in perpetuity. Following surrender of the Permits, any unused credits assigned to such Preserve lands shall remain available for appropriate use by the Water Authority. Withdrawal of the Water Authority from this Agreement or surrender of the Permits shall be deemed a surrender of the Water Authority's Take authorization under the Permits.

If the Water Authority notifies the USFWS in writing that it plans to withdraw from this Agreement or to discontinue the Covered Activities, it shall surrender the Federal Permit pursuant to the requirements of 50 Code of Federal Regulations Sections 13.26, 17.22(b)(7) and 17.32(b)(7). If the Water Authority notifies the CDFG in writing that it plans to withdraw from this Agreement or to discontinue the Covered Activities, it shall surrender the State Permit in accordance with California Fish and Game Code section 2820. Regardless of withdrawal and surrender of the Permits, the Water Authority acknowledges that it remains obligated to protect, manage and monitor all lands dedicated to the Preserve Area in perpetuity, and any unused mitigation credits will be retained for use by the Water Authority for future projects, as needed.

**21.0 NCCP/HCP IMPLEMENTATION AND INTERPRETATION, REMEDIES AND ENFORCEMENT**

**21.1 NCCP/HCP Implementation and Interpretation**

The Parties recognize that disputes concerning implementation or interpretation of this Agreement, the NCCP/HCP, and the Permits may arise from time to time. The Parties agree to work together in good faith to resolve such disputes using the informal dispute resolution procedure set forth in this section or such other procedures upon which the Parties may later agree. Any Party may seek any available remedy without regard to this Section 21.1 if the Party concludes that circumstances so warrant. However, unless the Parties agree upon another dispute resolution process, or unless a Party has initiated administrative proceedings or litigation related to the subject of the dispute in federal or state court, the Parties agree to use the following procedures to attempt to resolve disputes.

### **21.1.1 Notice of Dispute; Meet and Confer**

If the USFWS or CDFG objects to any action or inaction by the Water Authority on the basis that the action or inaction is inconsistent with the NCCP/HCP, the Permits, or this Agreement, it shall notify the Water Authority and the other Wildlife Agency in writing, explaining the basis of such objection. The Water Authority shall respond to the notice by sending a response to both Wildlife Agencies within fifteen (15) business days of receiving it, stating what actions it proposes to take to resolve the objection or, alternatively, explaining why the objection is unfounded. If the response resolves the objection to the satisfaction of the objecting Party, the Party shall notify the Water Authority and the other Wildlife Agency, and the Water Authority, shall implement the actions, if any, proposed in the response to the Party. If the response does not resolve the objection to the Party's satisfaction, the Party shall notify the Water Authority and the other Wildlife Agency, and the Party and the Water Authority shall meet and confer to attempt to resolve the dispute. The meeting shall occur as soon as practicable, and no later than 30 (days) after the Water Authority receives the objecting Party's response, or at such later time as the Water Authority and the Party may agree. A representative of the Water Authority shall take notes at the meeting, summarize the outcome, and distribute meeting notes to each Party in attendance.

The Water Authority shall use the same procedure to raise and to resolve objections to any action or inaction of the USFWS or CDFG, and the USFWS and CDFG shall use their reasonable efforts to respond in the same manner to notices delivered by the Water Authority.

#### **21.1.1.1 Disputes Regarding Specific Projects**

If a dispute among the Parties pertains to a specific project (Covered Activity), each Party shall be allowed to provide input into the dispute resolution process by reviewing the initial notice of objection and submitting its own response and, if applicable, by participating in the meeting referenced in Section 21.1.1 among the Water Authority and the USFWS and/or CDFG. For purposes of this provision, a dispute exists if the USFWS or CDFG objects to an action or inaction by the Water Authority with regard to a specific project.

#### **21.1.1.2 Elevation of Dispute**

If the Parties do not resolve a dispute after completing the dispute resolution procedure in Section 21.1.1, any one of the Parties may

elevate the dispute to a meeting of the chief executives of the involved Parties. For purposes of this provision, “chief executive” shall mean the General Manager of the Water Authority, the CDFG Regional Manager, and the USFWS Field Supervisor. Each Party shall be represented in person by its chief executive at the meeting, and the meeting shall occur within forty-five (45) days of a request by any Party following completion of the dispute resolution procedure or via telephone or another live electronic medium.

## **21.2 Remedies in General**

Except as set forth below, each Party shall have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement, the NCCP/HCP and the Permits, and to seek redress and compensation for any breach or violation thereof, except that none of the Parties shall be liable in damages to any other Party 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. The Parties acknowledge that the Covered Species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of the NCCP/HCP, this Agreement and the Permits. Nothing in this Agreement is intended to limit the authority of the Federal and State governments to seek civil or criminal penalties or otherwise fulfill their enforcement or other responsibilities under FESA, CESA or other applicable law.

## **21.3 Federal Permit**

### **21.3.1 Permit Suspension**

USFWS may suspend the Federal Permit, in whole or in part, for cause in accordance with 50 Code of Federal Regulations section 13.27 and other applicable laws and regulations in force at the time of such suspension. Except where USFWS determines that emergency action is necessary to avoid irreparable harm to a Covered Species, it will not suspend the Federal Permit without first (1) requesting the Water Authority to take appropriate remedial actions, and (2) providing the Water Authority with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for the Water Authority to demonstrate why suspension is not warranted.

### **21.3.2 Reinstatement of Suspended Permit**

In the event USFWS suspends the Federal Permit, in whole or in part, USFWS will use its reasonable efforts to meet and confer with the Water Authority within ten (10) days after such suspension, concerning how the suspension can be ended. Following the conference, USFWS shall identify reasonable, specific actions, if any exist, that are necessary to effectively redress the suspension. In making this determination, USFWS shall consider the requirements of FESA and its regulations, the conservation needs of the Covered Species, the terms of the Federal Permit, the NCCP/HCP and of this Agreement and any comments or recommendations received during the meet and confer process. USFWS will use its reasonable efforts to send the Water Authority written notice of any available, reasonable actions required to effectively redress the deficiencies giving rise to the suspension as soon as possible, but not later than thirty (30) days following the conference. If USFWS determined that the deficiencies giving rise to the suspension are redressable by the Water Authority, then, upon a determination that the Water Authority has corrected the deficiencies in accordance with the agency's written notice, USFWS shall promptly reinstate the Federal Permit. It is the intent of the Parties that in the event of any total or partial suspension of the Federal Permit, all Parties shall act expeditiously and cooperatively to reinstate the Federal Permit consistent with applicable Federal law.

## **21.4 The State Permit**

### **21.4.1 Permit Suspension**

In the event of any material violation of the State Permit or material breach of this Agreement by the Water Authority, CDFG may suspend the State Permit in whole or in part; provided, however, that it shall not suspend the State Permit without first (1) attempting to resolve any disagreements regarding the implementation or interpretation of the NCCP/HCP or this Agreement in accordance with Section 21.1, (2) requesting the Water Authority, when possible, to take appropriate remedial actions, and (3) providing the Water Authority with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for the Water Authority to demonstrate why suspension is not warranted or to take steps necessary to cure the violation or breach.

### **21.4.2 Rough Step Proportionality**

As provided in Section 9.3, in the event that CDFG determines that the Water Authority has failed to meet the rough step proportionality standard provided in Section 9.3 of this Agreement, and if the Water Authority has

failed to cure the default or entered into an agreement to do so within forty-five (45) days of the written notice of such determination, CDFG may suspend the State Permit in whole or in part in accordance with California Fish and Game Code section 2820.

### **21.4.3 Reinstatement of Suspended Permit**

In the event CDFG suspends the State Permit, as soon as possible but no later than ten (10) days after such suspension, CDFG shall confer with the Water Authority concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, CDFG shall identify reasonable specific actions necessary to effectively redress the violation or breach. In making this determination, CDFG shall consider the requirements of NCCPA, the conservation needs of the Covered Species, the terms of the State Permit, the NCCP/HCP and this Agreement and any comments or recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, CDFG shall send the Water Authority written notice of the reasonable actions required to effectively redress the violation or breach when such actions are available. Upon performance of such actions, CDFG shall immediately reinstate the State Permit. It is the intent of the Parties that in the event of any suspension of the State Permit, all Parties shall act expeditiously and cooperatively to reinstate the State Permit.

### **21.5 Circumstances Likely to Constitute Jeopardy to Species**

In the event of circumstances which appreciably reduce the likelihood of survival and recovery of a species in the wild, USFWS or CDFG may suspend the Permits on an emergency basis, in whole or in part, without resorting to the procedures specified above. The period of such emergency suspension shall not last longer than ninety (90) days unless during the 90 day period, the USFWS and CDFG have complied with Section 21.3 and Section 21.4 of this Agreement, or, with regard to the federal Permit, unless during such 90-day period, USFWS has initiated formal suspension of the federal Permit in accordance with 50 C.F.R. section 13.27. In the event USFWS initiates formal suspension of the federal Permit under the emergency circumstances in this section 21.5, the federal permit shall remain suspended until and unless reinstated by the USFWS in accordance with 50 C.F.R. 13.27.

### **22.0 FORCE MAJEURE**

In the event that the Water Authority is wholly or partially prevented from performing its obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Water Authority (“Force Majeure”), including, but not limited to, acts of God, labor disputes, sudden actions of the elements



not identified as Changed Circumstances, or actions of non-participating federal or state agencies or local jurisdictions, the Water Authority 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 FESA, CESA or NCCPA, and provided further that:

- The suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure;
- Within fifteen (15) days after the occurrence of the Force Majeure, the Water Authority shall give the Wildlife Agencies written notice describing the particulars of the occurrence;
- Water Authority shall use 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 Water Authority are contrary to their interest); and
- When Water Authority is able to resume performance of its obligations, the Water Authority shall give the Wildlife Agencies written notice to that effect.
- If the Water Authority is not able to perform within 45 days of the notice provided to the Wildlife Agencies under bullet 2 above, the Parties shall meet and confer to determine whether the Permits should be suspended. If a satisfactory resolution is not achieved, the Wildlife Agencies reserve the right to suspend the affected Permit or Permits.

## **23.0 LEGAL AUTHORITY OF THE WILDLIFE AGENCIES**

### **23.1 Legal Authority of USFWS**

USFWS enters into this Agreement pursuant to FESA, the Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956. Section 10(a)(2)(B) of FESA expressly authorizes USFWS to issue a Section 10(a) Permit to allow the incidental Take of animal species listed as threatened or endangered under FESA. The legislative history of Section 10(a)(1)(B) clearly indicates that Congress also contemplated that USFWS would approve a habitat conservation plan that protects non-listed species as if they were listed under FESA, and that in doing so, USFWS would provide assurances for such non-listed species.

### **23.2 Legal Authority of CDFG**

CDFG enters into this Agreement pursuant to its separate and independent authority under NCCPA. CDFG may authorize the Take of Covered Species pursuant to California Fish and Game Code section 2835.

## **24.0 MISCELLANEOUS PROVISIONS**

### **24.1 Calendar Days**

Throughout this Agreement and the NCCP/HCP, the use of the term “day” or “days” means calendar days, unless otherwise specified.

### **24.2 Response Times**

Except as otherwise set forth herein or as statutorily required by CEQA, NEPA, CESA, FESA, NCCPA or any other laws or regulations, the Wildlife Agencies and the Water Authority shall use reasonable efforts to respond to written requests from a Party within a thirty (30) day time period and the Wildlife Agencies shall use reasonable efforts to provide timely review of proposals for Covered Activities to be implemented by the Water Authority, where such review is required by this Agreement, the NCCP/HCP, or the Permits.

### **24.3 Notices**

The Water Authority shall maintain a list of individuals responsible for ensuring NCCP/HCP compliance for each of the Parties, along with addresses at which those individuals may be notified (“Notice List”). The Notice List as of the Effective Date is provided below. Each Party shall report any changes of names or addresses to the Water Authority and the other Parties in writing.

Any notice permitted or required by this Agreement shall be in writing, and delivered personally, by overnight mail, or by United States mail, certified and postage prepaid, return receipt requested. Notices may be delivered by facsimile or electronic mail, provided they are also delivered by one of the means listed above. Delivery shall be to the name and address of the individual responsible for each of the Parties, as stated on the most current Notice List.

Notices shall be transmitted so that they are received within deadlines specified in this Agreement, where any such deadlines are specified. Notices delivered personally shall be deemed received on the date they are delivered. Notices delivered via overnight delivery shall be deemed received on the next business day after deposit with the overnight mail delivery service. Notice delivered via certified mail, return receipt requested, shall be deemed received as of the date on the return receipt or five (5) days after deposit in the United States mail, whichever is sooner. Notices delivered via non-certified mail shall be deemed received seven (7) days after deposit in the United States mail. Notices delivered by facsimile or other electronic means shall be deemed received on the date they are received.

The following Notice List contains the names and notification addresses for the individuals currently responsible for overseeing and coordinating NCCP/HCP compliance:

Mr. Jim Bartel, Field Supervisor  
Carlsbad Field Office  
United States Fish & Wildlife Service  
6010 Hidden Valley Road  
Carlsbad, CA 92009

Mr. Kevin Hunting  
Deputy Director, Ecosystem Conservation Division  
California Department of Fish and Game  
1416 9<sup>th</sup> Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

Mr. Ed Pert, Regional Manager  
South Coast Region  
California Department of Fish and Game  
4949 Viewridge Avenue  
San Diego, CA 92123

Mr. Ken Weinberg, Director, Water Resources Department  
San Diego County Water Authority  
4677 Overland Avenue  
San Diego, CA 92123

With a copy to:

Mr. Daniel Hentschke, General Counsel  
San Diego County Water Authority  
4677 Overland Avenue  
San Diego, CA 92123

Ms. Ann Malcolm, General Counsel  
California Department of Fish and Game  
1416 9<sup>th</sup> Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

#### **24.4 Entire Agreement**

This Agreement, together with the NCCP/HCP and the Permits, constitutes the entire agreement among the Parties. It 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 of agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein. Pre-existing agreements between the Parties will not be impacted by this Agreement.

#### **24.5 Defense**

Upon request, CDFG, to the extent authorized by California law and as funds are provided by the State of California, shall cooperate with the Water Authority in defending, consistent with the terms of the NCCP/HCP, lawsuits arising out of the Water Authority's adoption of this Agreement and the NCCP/HCP. Upon request and subject to Section 24.8 and to the responsibilities of the U.S. Department of Justice in the conduct of litigation, USFWS will cooperate in providing appropriate support to the Water Authority in defending, consistent with the terms of the NCCP/HCP, this Agreement and the federal Permit, lawsuits arising out of the USFWS's approval of the federal Permit.

#### **24.6 Attorneys' Fees**

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

#### **24.7 Officials Not to Benefit**

No member of, or delegate to, the California State Legislature, the United States Congress, or the governing board of the Water Authority shall be entitled to any share or part of this Agreement or to any benefit that may arise from it.

#### **24.8 Availability of Funds**

Implementation of this Agreement and the NCCP/HCP by USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the United States Treasury. The Parties acknowledge and agree that USFWS will not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

Implementation of this Agreement and the NCCP/HCP by CDFG is subject to the availability of appropriated funds. Nothing in this Agreement shall be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of California. The Parties acknowledge and agree that CDFG shall not be required under this Agreement to expend any state

appropriated funds unless and until an authorized official of that agency affirmatively acts to commit such expenditure as evidenced in writing.

#### **24.9 Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of the United States and the State of California, as applicable.

#### **24.10 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 hereto.

#### **24.11 Relationship to the FESA, CESA, NCCPA and Other Authorities**

The terms of this Agreement shall be governed by and construed in accordance with FESA, CESA, NCCPA and other applicable state and federal laws and regulations. In particular, nothing in this Agreement is intended to limit the authority of the USFWS and CDFG to seek penalties or otherwise fulfill their responsibilities under FESA, CESA and NCCPA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the USFWS as an agency of the federal government or CDFG as an agency of the State of California.

#### **24.12 No Third Party Beneficiaries**

Without limiting the applicability of rights granted to the public pursuant to FESA, CESA, NCCPA or other applicable law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary thereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages under the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third party beneficiaries shall remain as imposed under existing state and federal law.

#### **24.13 References to Regulations**

Any reference in this Agreement, the NCCP/HCP, or the Permits to any regulation or rule of the Wildlife Agencies shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

#### **24.14 Applicable Laws**

All activities undertaken pursuant to this Agreement, the NCCP/HCP, or the Permits must be in compliance with all applicable local, state and federal laws and regulations.

#### **24.15 Severability**

In the event one or more of the provisions contained in this Agreement is held to be invalid, illegal or unenforceable by any court of competent jurisdiction, such portion shall be deemed severed from this Agreement and the remaining parts of this Agreement shall remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been a part of this Agreement. The Permits are severable such that revocation of one does not automatically cause revocation of the other.

#### **24.16 Assignment**

Except as otherwise provided herein, the Parties shall not assign their rights or obligations under this Agreement, the Permits, or the NCCP/HCP to any other individual or entity. The Water Authority may assign its rights and obligations to a joint exercise of powers agency with powers sufficient to carry out the Water Authority's obligations under this Agreement, the Permits and the NCCP/HCP and may replace Preserve Area managers, with the prior written concurrence from the Wildlife Agencies, provided however that transfer in whole or in part of the Federal Permit shall be governed by applicable Federal law and regulations. Such regulations are currently found at 50 C.F.R. 13.25(b).

#### **24.17 Headings**

Headings are used in this Agreement for convenience only and do not affect or define the Agreement's terms and conditions.

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

Dated: \_\_\_\_\_, 20\_\_

WATER AUTHORITY

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

APPROVED AS TO FORM

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

Dated: \_\_\_\_\_, 20\_\_

PACIFIC SOUTHWESTERN REGION,  
UNITED STATES FISH & WILDLIFE  
SERVICE

By: \_\_\_\_\_  
Ken McDermond, Deputy Regional  
Director,

APPROVED AS TO FORM

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

Dated: \_\_\_\_\_, 20\_\_

CALIFORNIA DEPARTMENT OF FISH  
AND GAME

By: \_\_\_\_\_  
Kevin Hunting, Deputy Director,  
Ecosystem Conservation Division

APPROVED AS TO FORM

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

Dated: \_\_\_\_\_, 20\_\_

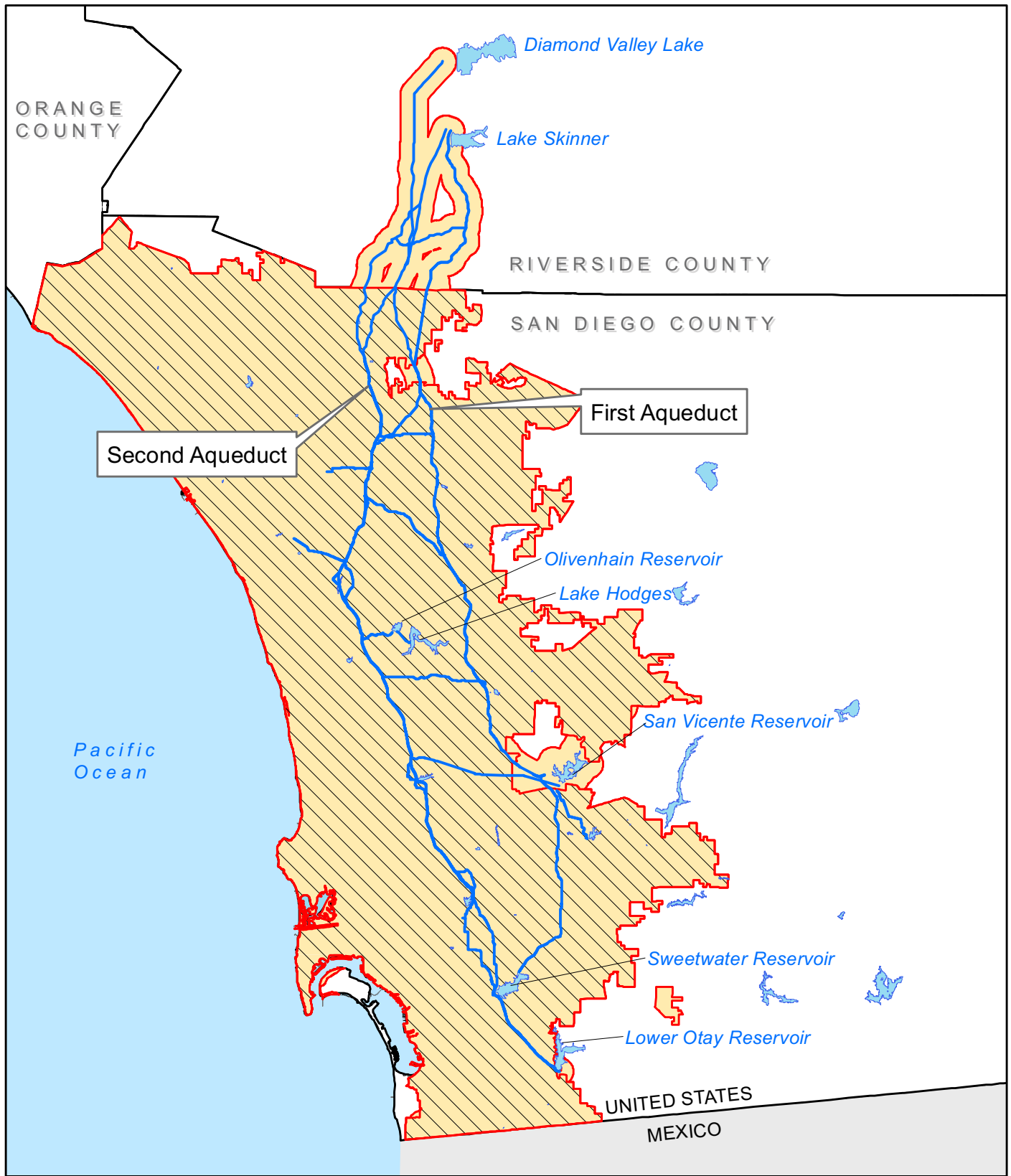
CALIFORNIA DEPARTMENT OF FISH  
AND GAME

By: \_\_\_\_\_  
Ed Pert, Regional Manager, South  
Coast Region

APPROVED AS TO FORM

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





- NCCP/HCP Plan Area
- Water Authority Service Area Boundary
- Existing/Planned Aqueducts and Pipelines

**EXHIBIT B  
COVERED SPECIES LIST**

Scientific Name	Common Name	Federal/State Status	CNPS List	Plan Policies
<b>PLANTS</b>				
<i>Acanthomintha ilicifolia</i>	San Diego thorn-mint	CE/FT/CH	1B	NE
<i>Adolphia californica</i>	California adolphia	-/-	2	--
<i>Allium munzii</i>	Munz's onion <sup>†</sup>	CT/FE/CH	1B	NE
<i>Ambrosia pumila</i>	San Diego ambrosia	-/FE/CH	1B	NE
<i>Baccharis vanessae</i>	Encinitas baccharis	CE/FT	1B	NE
<i>Brodiaea filifolia</i>	Thread-leaved brodiaea	CE/FT/CH	1B	NE, VP
<i>Brodiaea orcuttii</i>	Orcutt's brodiaea	-/-	1B	--
<i>Calochortus dunnii</i>	Dunn's mariposa lily	CR/-	1B	NE
<i>Ceanothus cyaneus</i>	Lakeside ceanothus	-/-	1B	NE
<i>Centromadia parryi</i> ssp. <i>australis</i>	Southern tarplant	-/-	1B	--
<i>Centromadia pungens</i> ssp. <i>laevis</i>	Smooth tarplant	-/-	1B	--
<i>Deinandra conjugens</i>	Otay tarplant	CE/FT/CH	1B	NE
<i>Dudleya variegata</i>	Variegated dudleya	-/-	1B	NE
<i>Dudleya viscida</i>	Sticky-leaved dudleya	-/-	1B	--
<i>Eryngium aristulatum</i> var. <i>parishii</i>	San Diego button-celery	CE/FE	1B	NE, VP
<i>Ferocactus viridescens</i>	San Diego barrel cactus	-/-	2	--
<i>Iva hayesiana</i>	San Diego marsh-elder	-/-	2	--
<i>Monardella hypoleuca</i> ssp. <i>lanata</i>	Felt-leaved monardella	-/-	1B	NE
<i>Monardella viminea</i>	Willow monardella	CE/FE/CH	1B	NE
<i>Muilla clevelandii</i>	San Diego goldenstar	-/-	1B	--
<i>Navarretia fossalis</i>	Spreading navarretia	-/FT/CH	1B	NE, VP
<i>Nolina cismontana</i>	Chaparral nolina	-/-	1B	--
<i>Orcuttia californica</i>	California Orcutt grass <sup>†</sup>	CE/FE	1B	NE, VP
<i>Pogogyne abramsii</i>	San Diego mesa mint	CE/FE	1B	NE, VP
<i>Pogogyne nudiuscula</i>	Otay Mesa mint	CE/FE	1B	NE, VP
<i>Quercus dumosa</i>	Nuttall's scrub oak	-/-	1B	--
<i>Salvia munzii</i>	Munz's sage	-/-	2	--
<i>Tetracoccus dioicus</i>	Parry's tetracoccus	-/-	1B	--
<b>INVERTEBRATES</b>				
<i>Branchinecta lynchi</i>	Vernal pool fairy shrimp <sup>†</sup>	FT, CH	--	VP
<i>Branchinecta sandiegonensis</i>	San Diego fairy shrimp	FE, CH	--	NE, VP
<i>Euphydryas editha quino</i>	Quino checkerspot butterfly	FE, CH	--	--
<i>Euphyes vestris harbisoni</i>	Harbison's dun skipper	*	--	NE
<i>Lycaena hermes</i>	Hermes copper butterfly	*	--	--
<i>Streptocephalus woottoni</i>	Riverside fairy shrimp	FE, CH	--	NE, VP
<b>AMPHIBIANS</b>				
<i>Anaxyrus</i> (= <i>Bufo</i> ) <i>californicus</i>	Arroyo toad	FE, CSC, CH	--	--
<i>Spea hammondi</i>	Western spadefoot toad	CSC	--	VP
<b>REPTILES</b>				
<i>Actinemys marmorata pallida</i>	Southern Pacific (southwestern) pond turtle	CSC	--	--
<i>Aspidoscelis hyperythra beldingi</i>	Belding's orange-throated whiptail	CSC	--	--
<i>Aspidoscelis tigris stejnegeri</i>	Coastal (western) whiptail	*	--	--
<i>Coleonyx variegatus abbottii</i>	San Diego banded gecko	*	--	--
<i>Crotalus ruber ruber</i>	(Northern) red-diamond rattlesnake	CSC	--	--
<i>Diadophis punctatus similis</i>	San Diego ring-neck snake	*	--	--
<i>Eumeces skiltonianus interparietalis</i>	Coronado skink	CSC	--	--
<i>Lichanura trivirgata roseofusca</i>	Coastal rosy boa	*	--	--
<i>Phrynosoma coronatum blainvillii</i>	Coast (San Diego) horned lizard	CSC, *	--	--
<b>BIRDS</b>				
<i>Agelaius tricolor</i>	Tricolored blackbird	CSC	--	--
<i>Aimophila ruficeps canescens</i>	Southern California rufous-crowned sparrow	*	--	--
<i>Ammodramus savannarum</i>	Grasshopper sparrow	CSC	--	--

**EXHIBIT B**  
**COVERED PLANT SPECIES (continued)**

Scientific Name	Common Name	Federal/State Status	CNPS List	Plan Policies
<i>Amphispiza belli belli</i>	Bell's sage sparrow	*	--	--
<i>Athene cunicularia hypugaea</i>	Western burrowing owl	CSC	--	--
<i>Campylorhynchus brunneicapillus sandiegensis</i>	San Diego cactus wren	CSC, *	--	NE
<i>Dendroica petechia brewsteri</i>	Yellow warbler	CSC	--	--
<i>Empidonax traillii extimus</i>	Southwestern willow flycatcher	FE, CE, CH	--	--
<i>Eremophila alpestris californica</i>	California horned lark	CSC	--	--
<i>Icteria virens</i>	Yellow-breasted chat	CSC	--	--
<i>Lanius ludovicianus</i>	Loggerhead shrike	CSC	--	--
<i>Polioptila californica californica</i>	Coastal California gnatcatcher	FT, CH, CSC	--	--
<i>Vireo bellii pusillus</i>	Least Bell's vireo	FE, CE, CH	--	--
<b>MAMMALS</b>				
<i>Chaetodipus californicus femoralis</i>	Dulzura (California) pocket mouse	CSC	--	--
<i>Chaetodipus fallax fallax</i>	Northwestern San Diego pocket mouse	CSC	--	--
<i>Dipodomys stephensi</i>	Stephens' kangaroo rat	FE, CT	--	--
<i>Felis concolor</i>	Mountain lion	*	--	--
<i>Lepus californicus bennettii</i>	San Diego black-tailed jackrabbit	CSC	--	--
<i>Neotoma lepida intermedia</i>	San Diego desert woodrat	CSC	--	--
<i>Onychomys torridus ramona</i>	Southern grasshopper mouse	CSC	--	--
<i>Perognathus longimembris brevinasus</i>	Los Angeles pocket mouse	CSC	--	--

California Native Plant Society (CNPS) Lists

- 1B = Species rare, threatened, or endangered in California and elsewhere.  
 2 = Species rare, threatened, or endangered in California, but more common elsewhere.  
 3 = Species for which more information is needed (a review list).  
 4 = A watch list of species of limited distribution.

Federal and State Status

- FE = Federally listed, endangered  
 FT = Federally listed, threatened  
 FC = Federal Candidate for listing  
 CH = Critical Habitat  
 CE = State listed, endangered  
 CT = State listed, threatened  
 CR = State listed, rare

Other

- CFP = California Fully Protected Species. No take of individuals is permitted.  
 CSC = CDFG Species of Special Concern  
 \* = Taxa listed with an asterisk fall into one or more of the following categories:
  - Taxa considered under Section 15380(d) of CEQA guidelines.
  - Taxa that are biologically rare, very restricted in distribution, or declining throughout their range
  - Population(s) in California that may be peripheral to the major portion of a taxon's range, but which are threatened with extirpation within California.
  - Taxa closely associated with a habitat that is declining in California.  
 (e.g., wetlands, riparian, old growth forests, desert aquatic systems, native grasslands).

Plan Policies

- NE = Narrow Endemic Policy  
 VP = Vernal Pool Protection Policy

† Covered Species not subject to take.