IMPLEMENTING AGREEMENT

by and between

UNITED STATES FISH AND WILDLIFE SERVICE

CALIFORNIA DEPARTMENT OF FISH AND GAME

CITY OF SAN DIEGO

TO ESTABLISH A MULTIPLE SPECIES CONSERVATION PROGRAM ("MSCP") FOR THE CONSERVATION OF THREATENED, ENDANGERED AND OTHER SPECIES IN THE VICINITY OF SAN DIEGO, CALIFORNIA

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This Implementing Agreement ("Agreement") is entered into as of the 16th day of July, 1997, by and among the UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), an Agency of the United States Department of the Interior; the CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG"), a Subdivision of the California Resources Agency; and THE CITY OF SAN DIEGO, hereinafter collectively called the "Parties."

AGREEMENT

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

1.0 RECITALS

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

1.2 The MSCP Area is depicted on the map attached to this Agreement as Exhibit A. The MSCP Area includes the territory of 12 general purpose agencies of government, listed in Exhibit B. These agencies may elect to participate in the MSCP, and upon preparing a Subarea Plan and entering into an Implementing Agreement similar in form and content to this Agreement such agencies will become a "Participating Local Jurisdiction." Some regional public facility providers and special districts which operate within the MSCP Area may also elect to participate in the MSCP. Upon entering into an Implementing Agreement similar in form and content to this Agreement, such entities will become a "Participating Special Entity."

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

1.4 Pursuant to the federal Endangered Species Act ("ESA") and the California Endangered Species Act ("CESA"), the United States and the State of California, respectively, have identified certain plant and animal species which are or may be found in the MSCP Area and which, pursuant to the ESA or CESA or other laws or

programs, have been listed as threatened or endangered, have been proposed for listing as threatened or endangered, are candidates for listing as threatened or endangered, or which are otherwise of concern. Of such species, those which will be adequately conserved by the MSCP when the MSCP is fully implemented through Subarea Plans are referred to in the MSCP and this Agreement as Covered Species. Those Covered Species which are adequately conserved by the Subarea Plan, and other Subarea Plans in effect within the MSCP Area, are subject to the Take Authorization being granted pursuant to this Agreement and are referred to as Covered Species Subject to Incidental Take.

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

1.6 THE CITY OF SAN DIEGO is sponsoring the development of the MSCP to meet the requirements of the ESA, the CESA, the Natural Communities Conservation Planning Act of 1991 ("NCCP Act"), the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA") related to the upgrading of the Metropolitan Sewerage System and the potential obstacles to public and private development in the greater San Diego area posed by the current system of project-by-project review under the ESA and CESA. Consistent with the NCCP Act, the MSCP is a broad-based planning effort intended to provide for effective protection and conservation of the region's wildlife and plant heritage while continuing to allow appropriate development and growth. Such planning is an effective tool in protecting the region's biodiversity while reducing conflicts between protection of wildlife and plants and the reasonable use of natural resources for economic development. The MSCP has been developed through a cooperative effort involving the USFWS, CDFG, local government agencies, property owners, development interests, environmental groups, and the public within the MSCP Area.

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

1.8 The MSCP as implemented through THE CITY OF SAN DIEGO's Subarea Plan and this Agreement establishes the conditions under which THE CITY OF SAN DIEGO, for the benefit of itself and of public and private landowners and other land

development project proponents within its Subarea boundaries, will receive from the USFWS and the CDFG certain long-term Take Authorizations (and an acknowledgment that the MSCP satisfies the conditions established in the Section 4(d) Special Rule for the coastal California gnatcatcher) which will allow the taking of certain Covered Species incidental to land development and other lawful land uses which are authorized by THE CITY OF SAN DIEGO.

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

1.10 Implementation of the MSCP will allow the Participating Local Jurisdictions and Participating Special Entities to maintain development flexibility by proactively planning a regional preserve system which can meet future development project mitigation needs, while recognizing the independent land use planning and permitting authority of those entities.

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

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

1.13 The purposes of this Agreement are:

A. To ensure the implementation of the MSCP and the Subarea Plan;

B. To contractually bind each of the Parties to fulfill and faithfully perform the obligations, responsibilities, and tasks assigned to it pursuant to the terms of the MSCP, the Subarea Plan and this Agreement; and,

C. To provide remedies and recourse should any of the Parties fail to perform its obligations, responsibilities, and tasks as set forth in the MSCP, the Subarea Plan and this Agreement.

2.0 DEFINITIONS

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

2.1 "Additional Conservation Measures" means the conservation measures beyond those provided by the MSCP and the Subarea Plan which the USFWS and CDFG may seek from THE CITY OF SAN DIEGO under the circumstances described in Sections 9.6 and 9.7 of this Agreement.

2.2 "Agreement" means this document.

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

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

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

2.6 "Covered Species" means those species within the MSCP Area which will be adequately conserved by the MSCP when the MSCP is implemented through the subarea plans or which will be adequately conserved through the permitting process pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. These species are listed in Exhibit C.

2.7 "Covered Species Subject to Incidental Take" means those Covered Species which are adequately conserved by the Subarea Plan, and which are therefore

subject to Incidental Take under the Take Authorizations issued in conjunction with this Agreement. These species are listed in Exhibit D. As indicated in Section 5.0, the inclusion of species on the list of Covered Species Subject to Incidental Take as of the Effective Date is not dependent in any way on the contemporaneous or subsequent approval or any other MSCP Subarea Plans. As indicated in Section 23.2, additional Covered Species (from Exhibit C) may be added to the list of Covered Species Subject to Incidental Take (Exhibit D) after the Effective Date. Adequate conservation for certain Covered Species Subject to Incidental Take shall include the measures contained in the "findings" for those species in Table 3-5 of the MSCP Plan.

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

2.9 "Effective Date" means the date when all of the Parties to this Agreement have signed this Agreement.

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

2.11 "Extraordinary Circumstances" is defined in Section 9.6 of this Agreement.

2.12 "Habitat Conservation Plan" and "HCP" mean the Multiple Species Conservation Program ("MSCP") prepared by THE CITY OF SAN DIEGO for the MSCP Area pursuant to Section 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)), and dated August, 1996, and each Subarea Plan.

2.13 "Incidental Take" means both the Take of a Covered Species incidental to and not the purpose of the carrying out of an otherwise lawful activity, and the Take of a Covered Species pursuant to a NCCP Authorization.

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

2.15 "Multi-Habitat Planning Area" or "MHPA" means the area within the MSCP Area within which preserve planning is focused and within which permanent conservation of habitat lands will be accomplished through implementation of the Subarea Plan. The MHPA is defined by mapped boundaries and/or by quantitative targets for habitat conservation and other criteria as specified in the Subarea Plan.

2.16 "MSCP" means the Multiple Species Conservation Program, a comprehensive habitat conservation planning program which addresses multiple species habitat needs and the preservation of native vegetation for a 900-square mile area in southwestern San Diego County, California.

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

2.18 "MSCP Plan" means the plan, dated August, 1996, which describes the MSCP.

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

2.20 "NCCP Authorization" means any authorization issued in accordance with this Agreement by CDFG under the NCCP Act (including but not limited to, California Fish and Game Code §§ 2825(c) or 2835), or by the California Fish and Game Commission under the NCCP Act (including but not limited to California Fish and Game Code § 2830), to permit the Take of a species listed under CESA as threatened or endangered, or of a species which is a candidate for such a listing, or of a species identified pursuant to Section 2835.

2.21 "NCCP Plan" means a plan developed in accordance with the NCCP Act which provides comprehensive management and conservation of multiple wildlife species, and which identifies and provides for the regional or area-wide protection and perpetuation of natural wildlife diversity while allowing compatible and appropriate development and growth.

2.22 "Participating Local Jurisdiction" means any of the local governments identified in Exhibit B which prepares and receives USFWS and CDFG approval of a Subarea Plan, and which enters into an Implementing Agreement with the

USFWS and CDFG. It is anticipated that such Implementing Agreement will be substantially similar in form to this Agreement.

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

2.24 "Party" and "Parties" mean the signatories to this Agreement, namely the United States Fish and Wildlife Service, the California Department of Fish and Game, and THE CITY OF SAN DIEGO.

2.25 "Section 4(d) Special Rule" means the regulation concerning the coastal California gnatcatcher, published by the USFWS on December 10, 1993 (58 Federal Register 65088) and codified at 50 C.F.R. § 17.41(b), which defines the conditions under which the Incidental Take of the coastal California gnatcatcher in the course of certain land use activities is lawful.

2.26 "Section 10(a) Permit" means the permit issued in accordance with this Agreement by the USFWS to THE CITY OF SAN DIEGO under section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)) to allow the Incidental Take of Covered Species Subject to Incidental Take.

2.27 "Significantly Conserved Vegetation Communities" means those vegetation communities listed in Exhibit G and described in Section 4.2.4 of the MSCP Plan which will be significantly conserved through implementation of the MSCP and the approved Subarea Plans, as set forth in Section 9.7.C of this Agreement and Section 3.4 of the MSCP Plan.

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

2.29 "Subarea Plan" means the plan prepared by THE CITY OF SAN DIEGO, and reviewed and approved by the USFWS and CDFG, to implement the MSCP within its jurisdictional boundaries, pursuant to this Agreement. The Subarea Plan for THE CITY OF SAN DIEGO is contained in Volume II of the MSCP Plan.

2.30 "Sufficiently Conserved Vegetation Communities" means those vegetation communities listed in Exhibit G and described in Section 4.2.4 of the MSCP

Plan which will be sufficiently conserved through implementation of the MSCP and the approved Subarea Plans, as set forth in Section 9.7C of this Agreement and Section 3.4 of the MSCP Plan.

2.31 "Take" and "Taking" shall have the meanings provided by the ESA, CESA and the NCCP Act.

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

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

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

3.0 HABITAT CONSERVATION PLAN/NCCP PLAN

3.1 Pursuant to Section 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)) , THE CITY OF SAN DIEGO has prepared a Habitat Conservation Plan known as the "Multiple Species Conservation Program" or "MSCP." The MSCP Plan, in conjunction with THE CITY OF SAN DIEGO's Subarea Plan which implements it, qualifies as an NCCP Plan under the NCCP Act. The MSCP proposes a program of conservation for the Covered Species and protection of their habitat in perpetuity through land use regulation, acquisition and management. THE CITY OF SAN DIEGO has submitted the MSCP and the Subarea Plan to the USFWS and the CDFG, and THE CITY OF SAN DIEGO has requested that the USFWS issue a Section 10(a) Permit and that the CDFG issue a NCCP Authorization, each of which actions will allow the Incidental Take within the Subarea of those Covered Species determined by USFWS and CDFG to be adequately conserved by the MSCP and the Subarea Plan in accordance with this Agreement (such species are designated as Covered Species Subject to Incidental Take, and are listed in Exhibit D). THE CITY OF SAN DIEGO has also requested that the USFWS acknowledge that the MSCP and the Subarea Plan satisfy the conditions under the Section 4(d) Special Rule to allow the Incidental Take of the coastal California gnatcatcher within the Subarea.

3.2 The MSCP and Subarea Plan and each of their provisions are intended to be and by this reference are incorporated herein. This Agreement is intended to specify, in contract language, the obligations of the Parties under the MSCP and Subarea Plan, recognizing that the MSCP and Subarea Plans set forth in planning documents the components of a conservation plan and were not drafted as contract

documents. In the event of any direct contradiction, conflict or inconsistency between the MSCP Plan and the Subarea Plan, the Subarea Plan shall control. In the event of any direct contradiction, conflict or inconsistency between the MSCP Plan or the Subarea Plan on the one hand, and this Agreement on the other, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the MSCP and Subarea Plan shall be interpreted to be consistent with and complimentary to each other. The three-volume MSCP Resource Document, and all MSCP-related drafts, position papers, working documents and other documents, are specifically not incorporated into this Agreement.

4.0 PHASED IMPLEMENTATION

The MSCP Area includes land within the jurisdictional boundaries of twelve local jurisdictions listed in Exhibit B. The USFWS and CDFG recognize and agree that the entire MSCP will not be implemented simultaneously. Some local jurisdictions may be prepared to implement the MSCP before others. Implementation of the MSCP as a whole can and may be phased, with some local jurisdictions joining as Participating Local Jurisdictions (and some regional public facility providers and special districts joining as Participating Special Entities) earlier than others. Nevertheless, those local jurisdictions which become Participating Local Jurisdictions will receive Take Authorizations, and will obtain the benefits of and incur the obligations imposed by the Implementing Agreement which they sign, irrespective of whether other local jurisdictions have also joined as and/or currently serve as a Participating Local Jurisdiction. The Take Authorization will cover only those Covered Species determined by USFWS and CDFG to be adequately covered by the Subarea Plan and other approved Subarea Plans, and such species will be referred to as Covered Species Subject to Incidental Take and will be specifically identified in each Implementing Agreement. The USFWS and CDFG also recognize and agree that the implementation of each Participating Local Jurisdiction's Subarea Plan will likewise be phased in over time in accordance with the schedule provided in each Implementing Agreement.

5.0 SEVERABILITY

The USFWS and CDFG recognize and agree that the Take Authorizations received by THE CITY OF SAN DIEGO pursuant to this Agreement are independent and severable from the other Take Authorizations which have been or will be issued to other Participating Local Jurisdictions or Participating Special Entities. THE CITY OF SAN DIEGO's Take Authorization will remain effective so long as THE CITY OF SAN DIEGO fulfills its obligations under this Agreement to implement the MSCP through the Subarea Plan, including its obligation under Section 9.19 to enforce the terms of this Agreement as to itself and to all Third Party Beneficiaries, who will receive Incidental

Take authorization through THE CITY OF SAN DIEGO's Take Authorization. THE CITY OF SAN DIEGO's Take Authorization may not be suspended, revoked or terminated against its will due solely to the actions or inactions of any other person or entity, including the other local jurisdictions identified in Exhibit B (whether or not they have become Participating Local Jurisdictions). Likewise, the list of Covered Species Subject to Incidental Take (Exhibit D), as it exists as of the Effective Date, is in no way dependent upon the contemporaneous or subsequent approval of any other MSCP Subarea Plans, or the continued participation in the MSCP of any other Participating Local Jurisdiction or Participating Special Entity. The list of Covered Species Subject to Incidental Take, as it exists as of the Effective Date, will not be amended to remove any species from that list so long as THE CITY OF SAN DIEGO fulfills its obligations under this Agreement. However, if the addition of a species to the List of Covered Species Subject to Incidental Take after the Effective Date (pursuant to Section 23.2 of this Agreement) is dependent, in whole or in part, upon the implementation of any other MSCP Subarea Plan(s), and the Participating Local Jurisdiction(s) associated with such Subarea Plan(s) terminates its participation in the MSCP or fails to implement its Subarea Plan, then the removal of such added species from the List of Covered Species Subject to Incidental Take may be required.

6.0 LEGAL AUTHORITY OF THE USFWS

The USFWS enters into this Agreement pursuant to the ESA, the Fish and Wildlife Coordination Act (16 U.S.C. § 661 - 666c), and the Fish and Wildlife Act of 1956 (16 U.S.C. § 742(f) et seq.). Section 10(a)(1)(B) of the ESA, 16 U.S.C. § 1539(a)(1)(B), expressly authorizes the USFWS to issue a Section 10(a) Permit to allow the Incidental Take of species listed as threatened or endangered under the ESA. The legislative history of Section 10(a)(1)(B) clearly indicates that Congress also contemplated that the USFWS would approve Habitat Conservation Plans that protect unlisted species as if they were listed under the ESA, and that in doing so the USFWS would provide Section 10(a)(1)(B) assurances for such unlisted species. The relevant excerpt from such legislative history states as follows:

> The Committee intends that the Secretary [of the Interior] may utilize this provision [on habitat conservation plans] to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved

> conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act.
>
> It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances.

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

7.0 LEGAL AUTHORITY OF THE CDFG

The CDFG enters into this Agreement pursuant to its separate and independent authorities under both the CESA and NCCP Act. CDFG may authorize the Take of Covered Species pursuant to Fish and Game Code section 2835, and the California Fish and Game Commission may authorize the Take of Covered Species under Fish and Game Code sections 2084 and 2830.

8.0 SATISFACTION OF LEGAL REQUIREMENTS

In order to fulfill the legal requirements that will allow the USFWS to issue the Section 10(a) Permit, an HCP must provide measures that are intended to ensure that any Take occurring within the Subarea will be incidental; that the impacts of such Incidental Take will, to the maximum extent practicable, be minimized and mitigated; that adequate funding to implement the HCP will be provided; and that the Incidental Take will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild. The USFWS finds that the MSCP and the Subarea Plan as implemented pursuant to this Agreement do provide such measures, and do satisfy the legal requirements necessary for the USFWS to issue a Section 10(a) Permit authorizing the Incidental Take of Covered Species Subject to Incidental Take, and to provide certainty in the form of specific assurances contained in this Agreement. Likewise, the CDFG finds that the Subarea Plan as implemented pursuant to this Agreement satisfies the legal requirements necessary for the CDFG to issue a NCCP Authorization authorizing the Incidental Take of Covered Species Subject to Incidental Take, and to provide certainty in the form of specific assurances contained in this Agreement.

9.0 MUTUAL ASSURANCES

9.1 Purpose. The primary purpose of this Agreement is to provide for the long-term reconciliation of new land development within the MSCP Area with the conservation and protection of the Covered Species. Based on and in consideration of this Agreement, the MSCP, and the Subarea Plan, the Parties hereby agree on and the USFWS and CDFG hereby provide assurances to THE CITY OF SAN DIEGO, other Participating Local Jurisdictions, Participating Special Entities, and Third Party Beneficiaries with regards to the following provisions contained in this Section 9.0.

9.2. Compliance with Applicable Laws. Compliance with the terms of this Agreement, the MSCP, and the Subarea Plan, and compliance with the land use regulation, mitigation, compensation, and habitat management obligations contained in this Agreement and/or imposed by THE CITY OF SAN DIEGO on proponents of land development projects within the Subarea in accordance with the MSCP, the Subarea Plan and this Agreement, constitute compliance with the Incidental Take and related provisions of the ESA, the CESA, the NCCP Act, and the California Native Plant Protection Act (California Fish and Game Code § 1900 et seq.).

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

9.4. No Additional Land or Money Required. The USFWS and CDFG shall not require THE CITY OF SAN DIEGO or Third Party Beneficiaries to commit additional land, additional land restrictions, or additional financial compensation for the Covered Species Subject to Incidental Take beyond that provided pursuant to this Agreement, provided that THE CITY OF SAN DIEGO is in compliance with its obligations under this Agreement. If the USFWS and/or the CDFG subsequently determine that additional land, additional land restrictions, or additional financial compensation beyond that required pursuant to the MSCP and this Agreement are necessary to provide for the conservation of a Covered Species Subject to Incidental Take, the obligation for such additional measures shall not rest with THE CITY OF SAN DIEGO or the Third Party Beneficiaries.

9.5. Additional Conservation Measures. Moreover, the USFWS and the CDFG shall not seek "Additional Conservation Measures" from THE CITY OF SAN

DIEGO or the Third Party Beneficiaries for Covered Species Subject to Incidental Take except in the event of Extraordinary Circumstances as defined in Section 9.6 of this Agreement, and in compliance with the Extraordinary Circumstances procedures contained in Section 9.6.

9.6. Extraordinary Circumstances.

A. Definition. For the purposes of this Agreement, the term "Extraordinary Circumstances" shall mean either (1) a significant, unanticipated adverse change in the population of any Covered Species or their habitat within the MSCP Area; or (2) any significant new or additional information relevant to the MSCP that was not anticipated by the Parties at the time the MSCP was approved and that would likely result in a significant adverse change in the population of any Covered Species or their habitat within the MSCP Area. The term "Extraordinary Circumstances" as used in this Agreement shall have the same meaning as "Unforeseen Circumstances" under 50 C.F.R. §§ 17.22 and 17.32. The occurrence of one or more of the events identified under Section 5 of this Agreement shall not be considered an Extraordinary Circumstance.

B. Relevant Factors. In deciding whether Extraordinary Circumstances exist which might warrant requiring Additional Conservation Measures, the USFWS and CDFG shall consider, but not be limited to, the following factors: (1) the size of the current range of the affected species, (2) the percentage of range adversely affected by the MSCP, (3) the percentage of range conserved by the MSCP, (4) the ecological significance of that portion of the range affected by the MSCP, (5) the level of knowledge about the affected species and the degree of specificity of the species' conservation program under the MSCP, and (6) whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

C. Burden and Documentation. The USFWS and CDFG shall have the burden of demonstrating that Extraordinary Circumstances exist, using the best scientific and commercial data available that is clear and convincing. Any findings of Extraordinary Circumstances must be clearly documented and based upon reliable technical information regarding the biological status and habitat requirements of the affected species. Any finding of Extraordinary Circumstances must be made by the Director or Regional Director of the USFWS, or the Director of the CDFG, after consideration of all information submitted by THE CITY OF SAN DIEGO in accordance with paragraph D, below.

D. Advance Notice. Except where there is a substantial threat of imminent, significant adverse impacts to a Covered Species, the USFWS and CDFG shall provide THE CITY OF SAN DIEGO with at least sixty (60) days advance written

notice of a proposed finding of Extraordinary Circumstances, the specific facts that may constitute Extraordinary Circumstances, and the evaluation of the factors described in Section 9.6.B of this Agreement, during which time the USFWS and CDFG shall meet with THE CITY OF SAN DIEGO to discuss the proposed finding and to provide THE CITY OF SAN DIEGO with an opportunity to submit information to rebut the proposed finding. Only where the USFWS or CDFG concludes, following consultation with THE CITY OF SAN DIEGO, that existing measures available under the MSCP and Subarea Plan cannot adequately address the situation and that Additional Conservation Measures are necessary shall the USFWS or CDFG proceed to finalize a finding of Extraordinary Circumstances. Where advance notice need not be given in accordance with this paragraph, the USFWS or CDFG shall consider any additional information submitted by THE CITY OF SAN DIEGO after a finding of Extraordinary Circumstances and shall be required to issue a written response to this information within 120 days of its receipt.

E. Limits on Additional Conservation Measures. If the USFWS or CDFG makes a finding of Extraordinary Circumstances in accordance with the procedures described above, and determines that Additional Conservation Measures are warranted, such Additional Conservation Measures shall conform to the maximum extent possible to the original terms of the MSCP and Subarea Plan. Additional Conservation Measures shall be limited to modifications of THE CITY OF SAN DIEGO's preserve management program or habitat acquisition program as set forth in the Subarea Plan and this Agreement, and shall not involve the commitment of additional land or additional land restrictions or additional financial compensation on the part of THE CITY OF SAN DIEGO, or Third Party Beneficiaries without their consent.

F. Effects on Take Authorization. A finding of Extraordinary Circumstances shall not be grounds to terminate, suspend, or otherwise revoke the Take Authorizations issued pursuant to this Agreement provided that THE CITY OF SAN DIEGO cooperates with the USFWS and CDFG in identifying and implementing fair, reasonable, and necessary modifications to the preserve management and habitat acquisition program, as specified in subsection E, above. The USFWS retains the right, as authorized under Section 5 of the ESA, 16 U.S.C. § 1534, and the CDFG retains the right as authorized by the CESA and/or NCCP Act, to purchase habitat within the MSCP Area to conserve Covered Species or any other species of concern.

G. The USFWS and CDFG may take any of the actions described in this Section 9.6 either jointly, or separately and independently of each other.

9.7 Future Listings.

A. Consideration of the MSCP and Similar Plans. To the extent required and permitted by the ESA, the CESA and the NCCP Act, the USFWS and

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

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

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

1. Adequate Conservation Measures Already in MSCP. If the conservation measures already contained in the MSCP, as implemented through this Subarea Plan and other approved Subarea Plans, are adequate to fulfill the conservation

measures identified pursuant to subsection 9.7.C above, then upon application by THE CITY OF SAN DIEGO for Take Authorization for such species and following satisfaction of applicable review procedures as required by the ESA, CESA and the NCCP Act, the Parties will amend this Agreement to add such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take, and the USFWS and CDFG shall issue Take Authorizations for such species, effective for the remaining term of this Agreement.

2. Inadequate Conservation Measures in the MSCP.

a. Additional Conservation Measure Priorities. If the conservation measures already contained in the MSCP, the Subarea Plan, this Agreement and other approved Subarea Plans do not adequately fulfill the conservation measures identified pursuant to subsection 9.7.C above, then the USFWS and CDFG will work with THE CITY OF SAN DIEGO and other Participating Local Jurisdictions to identify and jointly implement the Additional Conservation Measures necessary to add such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take. In developing a set of Additional Conservation Measures, the Parties will look to the following, in order of preference:

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

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

b. Developing Additional Conservation Measures. If the foregoing options are not adequate to fulfill the conservation measures identified pursuant to subsection 9.7.C above, then the USFWS and CDFG will determine, consistent with the ESA, CESA and/or the NCCP Act, the Additional Conservation Measures necessary to add such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take, including measures beyond those required by the MSCP. Preference will be given by the USFWS and CDFG to Additional Conservation Measures that do not require additional mitigation or dedications of land. Although the Additional Conservation Measures necessary to add such species to the list of Covered Species may be identified at or after the species is proposed for listing, THE

CITY OF SAN DIEGO will not be required to approve or implement these Additional Conservation Measures until such time as the species is actually listed.

c. Significantly Conserved Vegetation Communities. If any species described in subsection 9.7.C.2.a, above, is dependent upon a Significantly Conserved Vegetation Community, and if the USFWS and CDFG approve Subarea Plans for THE CITY OF SAN DIEGO and the County of San Diego, then the USFWS and CDFG will, subject to the availability of appropriated funds, contribute in partnership, to the same extent committed within the MSCP for Covered Species, with THE CITY OF SAN DIEGO toward the land acquisition, management, and monitoring required to achieve the level of conservation necessary within the Significantly Conserved Vegetation Communities, for such species to be added to the list of Covered Species and the list of Covered Species Subject to Incidental Take once such species become listed under the ESA and/or CESA. The commitment of the USFWS and CDFG to contribute their proportionate share(s) to the conservation of the species shall be contingent on THE CITY OF SAN DIEGO's commitment of its proportionate share. In addition, if the USFWS or CDFG fail to provide their proportionate contributory share(s), neither THE CITY OF SAN DIEGO nor Third Party Beneficiaries will be obligated to provide the USFWS and/or CDFG share(s), in which case the species would not be added to the list of Covered Species or the list of Covered Species Subject to Incidental Take.

d. Sufficiently Conserved Vegetation Communities. If any species described in subsection 9.7.C.2.a, above, is dependent upon a Sufficiently Conserved Vegetation Community, and if the USFWS and CDFG approve subarea plans for THE CITY OF SAN DIEGO, City of Chula Vista, City of Poway and the County of San Diego, then the USFWS and CDFG will use all of their legal authorities to provide for the conservation and management, maintenance and monitoring of the habitat of such species, within the Sufficiently Conserved Vegetation Communities, sufficient to enable the addition of such species to the list of Covered Species and the list of Covered Species Subject to Incidental Take, and to enable the issuance of Take Authorizations for such species in the event they become listed under the ESA or CESA. For purposes of this paragraph, steps within the legal authority of USFWS include, but are not limited to, USFWS-funded habitat acquisition, USFWS-funded species relocation, and land exchanges to secure necessary habitat. For purposes of this paragraph, steps within the legal authority of CDFG include, but are not limited to, CDFG-funded acquisition, CDFG-funded species management and CDFG-funded species relocation. Consequently, THE CITY OF SAN DIEGO shall not be required, without its consent, to provide any conservation or management, maintenance and monitoring for such species beyond that provided in the MSCP and the Subarea Plan.

e. Application for Take Authorization. THE CITY OF SAN DIEGO makes no representation or commitment to pursue a Section 10(a) Permit from the USFWS or a NCCP Authorization from the CDFG for such non-covered species, and in the absence of any such Take Authorization, the Take of such species will be governed by applicable state and federal law. The USFWS and CDFG shall process any applications which may be submitted for Take Authorization for such species in accordance with the requirements of the ESA, CESA and/or the NCCP Act.

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

Dean's milk vetch	*Astragalus deanei*
Orcutt's spineflower	*Chorizanthe orcuttiana*
Mexican flannelbush	*Fremontodendron mexicanum*
Mission Canyon bluecup	*Githopsis diffusa ssp. Filicaulis*
Tecate tarplant	*Hemizonia floribunda*
Little mousetail	*Myosurus minimus ssp. Apus*
Quino checkerspot butterfly	*Euphydryas editha quino*
Hermes copper butterfly	*Lycaena thornei*
Grasshopper sparrow	*Ammondramus savannarum*

The following evaluated species identified in Table 3-5 of the MSCP Plan are covered by the assurances in subsection c, above (Significantly Conserved Vegetation Communities), and are not covered by the assurances in subsection d, above (Sufficiently Conserved Vegetation Communities):

Harbison's dun skipper	*Euphyes vestris harbisoni*
Townsend's western big-eared bat	*Plecotus townsendii*
California mastiff bat	*Eumops perotis californicus*

9.8 Other Regulatory Permitting.

A. Other Permits. The Parties acknowledge that proponents of land development projects in the Subarea may be subject to permit requirements of agencies not party to this Agreement, and to separate permit requirements which may be imposed by the USFWS or the CDFG, such as under Fish and Game Code sections 1601

and 1603. Except as provided in Section 9.6 ("Extraordinary Circumstances"), Section 15.3 ("Failure to Provide State or Federal Contribution"), and this paragraph, compliance with the terms of this Agreement, the MSCP Plan and the Subarea Plan, the federal policy of "no net loss" of wetland functions and values, and the U.S. Environmental Protection Agency's Section 404(b)(1) guidelines (40 C.F.R. Part 230) shall constitute the full extent of mitigation measures directed specifically at the Incidental Take of Covered Species Subject to Incidental Take required or recommended by the USFWS pursuant to the ESA and NEPA, and by the CDFG pursuant to CESA, the NCCP Act, and CEQA, in conjunction with other federal and state permits within the Subarea. Furthermore, the USFWS and CDFG will coordinate with THE CITY OF SAN DIEGO, the U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency to further streamline the process for issuance of permits pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) for those projects that are in conformance with the MSCP, the Subarea Plan and this Agreement. The Parties intend to begin work on creating this streamlined process within six months of the Effective Date, with the goal of being able to implement this streamlined process within two years of the Effective Date. The public and affected stakeholders will be invited to participate in this effort.

B. Migratory Bird Treaty Act.

1. Migratory Birds other than Bald Eagle. The Section 10(a) Permit issued pursuant to this Agreement also constitutes a Special Purpose Permit under 50 C.F.R. § 21.27 for the Take of those Covered Species Subject to Incidental Take which are listed as threatened or endangered under the ESA and which are also protected by the Migratory Bird Treaty Act, except for the Bald Eagle. The Take of such species in conjunction with any public or private land development project authorized and approved by THE CITY OF SAN DIEGO in accordance with this Agreement 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 Section 10(a) Permit remains in effect for such period. Such Special Purpose Permit shall be renewed, provided that THE CITY OF SAN DIEGO continues to fulfill its obligations under this Agreement. Each such renewal shall be valid for the maximum period of time allowed by 50 C.F.R. § 21.27 or its successor at the time of renewal.

2. Bald Eagle. Should the Take of the Bald Eagle occur incidental to any public or private land development project authorized and approved by THE CITY OF SAN DIEGO in accordance with this Agreement, the USFWS agrees not to refer such Take for prosecution under either the MBTA or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668 - 668d).

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

D. Use of EIR/EIS as "Program EIR/EIS". The Parties understand and intend that the EIR/EIS prepared in conjunction with the MSCP and Subarea Plan will operate as a "program" EIR and EIS pursuant to applicable provisions of the Council on Environmental Quality's NEPA regulations (40 C.F.R. § 1500 et seq.), the CEQA Guidelines (14 C.C.R. § 15000 et seq.), and the NCCP Act. Accordingly, THE CITY OF SAN DIEGO shall, consistent with the provisions of CEQA, rely on and utilize the EIR prepared in conjunction with the MSCP and Subarea Plan in evaluating future land use decisions, and in issuing any permits or other approvals within the Subarea. Subsequent activities will be examined in light of the program EIR/EIS to determine if additional environmental documentation is required.

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

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

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

9.12 Mitigation Guidelines. THE CITY OF SAN DIEGO has established or will establish, and agrees to implement, mitigation guidelines known as "*THE CITY OF SAN DIEGO Biology Guidelines for the Environmentally Sensitive Lands Regulations (ESL), the Open Space Residential (OR-1-2) Zone, and the California Environmental Quality Act (CEQA)*." These mitigation guidelines, which are attached as Exhibit I and which may be modified with the concurrence of the USFWS and CDFG without the need to amend this Agreement, will be applied to all new private and public land development projects within the Subarea which are subject to THE CITY OF SAN DIEGO's jurisdiction. THE CITY OF SAN DIEGO will approve these mitigation guidelines by separate resolution of the City Council, which resolution will stipulate that any subsequent changes to the adopted guidelines must be approved by the City Council, thereby ensuring a public process for such changes. Provided that the annual accounting and reporting requirements set forth in Section 14.0 of this Agreement demonstrate that conservation of particular habitat types is occurring in the anticipated proportion to the loss of those habitat types, the USFWS and CDFG agree that THE CITY OF SAN DIEGO may allow the losses within one tiered habitat to be compensated for with mitigation from a different tiered habitat in accordance with the Subarea Plan and Section 10 of this Agreement.

9.13 Contribution and Banking of Excess Mitigation. Lands contributed to the MHPA preserve system by public or private owners in excess of the mitigation requirements imposed by THE CITY OF SAN DIEGO in accordance with Section 10 of this Agreement may either be used by such owner as mitigation for that owner's subsequent development project(s), or it may be "banked" by those owners in accordance with Sections 9.14 and 10 of this Agreement. Such banked lands can later be used to provide mitigation for future development projects of other owners within the MSCP Area consistent with applicable USFWS and CDFG conservation banking policies.

9.14 Conservation Banks. The USFWS and CDFG agree that THE CITY OF SAN DIEGO is authorized to enter into agreements to establish and implement Conservation Banks for land contributed in perpetuity to the MHPA in excess of any mitigation requirement imposed by THE CITY OF SAN DIEGO in accordance with Section 10 of this Agreement. These Conservation Banks shall comply with the "Official

Policy on Conservation Banks" issued by the California Resources Agency (April 7, 1995) and the "Supplemental Policy Regarding Conservation Banks Within the NCCP Area of Southern California" issued by the USFWS and CDFG (January 24, 1996), as they may be modified. The Parties agree that existing Conservation Bank agreements approved by the USFWS and CDFG prior to the Effective Date shall remain in full force and effect and be honored by the Parties after execution of this Agreement. This Section 9.14 shall apply to any public lands banked as mitigation for future development by THE CITY OF SAN DIEGO, in accordance with Section 10 of this Agreement.

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

9.16 Growth Inducing Impacts. Once mitigation has been imposed upon THE CITY OF SAN DIEGO or a Third Party Beneficiary for a proposed land development project in conformance with Sections 10 and 17.1.A of this Agreement, THE CITY OF SAN DIEGO or a Third Party Beneficiary shall not be required to provide any additional mitigation for any growth inducing impacts such project may have on a Covered Species Subject to Incidental Take and its habitat within that portion of the MSCP Area covered by approved Subarea Plans.

9.17 Projects in the Approval Process. Prior to the Effective Date, the Parties have considered proposals or applications for those land development projects identified in Exhibit H. For those projects in Category 1 of Exhibit H, the Parties have determined that the design of such projects conforms to the MSCP Plan and the Subarea Plan preserve design specifications. Mitigation related to Covered Species has not yet been determined, and will be determined consistent with the MSCP, the Subarea Plan and this Agreement. For those projects in Category 2 of Exhibit H, the Parties have determined that both the design of such projects and the mitigation related to Covered Species conforms to the MSCP Plan and the Subarea Plan, and consequently those projects will not require any further approvals from the Parties for purposes of Incidental Take of Covered Species Subject to Incidental Take, and the Parties shall not seek further mitigation related to Covered Species. For those projects in Category 3 of Exhibit H, the proponents of such projects have received all necessary approvals from THE CITY OF SAN DIEGO and are considered vested under California law, and no additional mitigation related to Covered Species will be sought by the Parties except to the extent required by the ESA, CESA or other applicable federal and state laws; such additional mitigation, if so

required, may at the proponent's option be identified and enforced by THE CITY OF SAN DIEGO consistent with the Subarea Plan and this Agreement, or may be identified and enforced independently by the USFWS and CDFG through their respective procedures under the ESA and CESA.

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

9.19 Duty to Enforce. THE CITY OF SAN DIEGO agrees to take appropriate actions to enforce the terms of the Take Authorizations, the Subarea Plan, and this Agreement as to itself and to all persons or entities subject to the requirements established by this Agreement, specifically including the land development permitting and approval requirements set forth in Section 10 of this Agreement. Furthermore, consistent with Section 9.3 of this Agreement THE CITY OF SAN DIEGO shall exercise the full extent of its legal authority to ensure that its local share of lands identified for preservation under the Subarea Plan are conserved in perpetuity. Notwithstanding the term of this Agreement, if at any time following the end of the term of this Agreement THE CITY OF SAN DIEGO proposes to exercise its discretionary authority to modify the regulatory protections or legal encumbrances provided for such lands under the Subarea Plan, the proposed modifications must be accomplished through a public process in which the public, the USFWS and CDFG receive advance notice and the opportunity to comment, and must be consistent with the MSCP Plan and the Subarea Plan such that there is no net loss of habitat value or acreage for the Covered Species. THE CITY OF SAN DIEGO must promptly notify USFWS and CDFG or their respective successor agencies of such proposed modifications in advance, and explain how they achieve such consistency.

9.20 Annexation of Lands. Upon an annexation of lands, THE CITY OF SAN DIEGO shall amend its Subarea Plan to insure that any development of the annexed lands proceeds in accordance with the conservation goals of the MSCP and

Subarea Plan. Amendment of THE CITY OF SAN DIEGO's Take Authorization may also be required in certain instances involving an annexation of lands.

9.21 Agricultural Uses. The Take Authorizations shall apply to those lands within the Subarea Plan actively being used for agricultural purposes. For purposes of this paragraph, the phrase "agricultural purposes" includes crop production, animal production, forage production and grazing; and the phrase "actively being used for" means those lands shown on the MSCP vegetation database depicted on Figure 2-1 of the MSCP Plan for so long as they are maintained in active agricultural use. The Take Authorization will become effective as to such lands upon an application by the owner of such lands to THE CITY OF SAN DIEGO for a Certificate of Inclusion, and the issuance by THE CITY OF SAN DIEGO of a Certificate of Inclusion to such owner. This Certificate shall depict on an attached map the lands (by parcel number, acreage and owner) to which the Take Authorizations apply and shall specify the parcel number(s) and the acreage that the Certification of Inclusion covers. THE CITY OF SAN DIEGO commits to enforce the applicable provisions of the MSCP, Subarea Plan, Take Authorizations and this Agreement as to each recipient of a Certificate of Inclusion.

9.22 Existing Mining Operations. The MSCP Plan does not impose any new obligations on owners or operators of mining operations which are active as of the Effective Date. However, if the owner or operator of such an operation should desire to obtain the benefits of the Take Authorizations, that owner or operator may apply to THE CITY OF SAN DIEGO for an amendment of any conditional use permit which is in effect as of the Effective Date and, subject to imposition of any necessary mitigation and approval from the USFWS and CDFG, may obtain Third Party Beneficiary status and authorization for Take from THE CITY OF SAN DIEGO.

9.23 New or Expanded Mining Operations. Mining operations which are newly established or are expanded after the Effective Date shall be approved by THE CITY OF SAN DIEGO consistent with Section 6.2.4 of the MSCP Plan and the Subarea Plan.

10.0 IMPLEMENTATION RESPONSIBILITIES OF THE CITY OF SAN DIEGO

10.1 Introduction. The MSCP establishes a plan to conserve the Covered Species by ultimately providing permanent protection for Covered Species habitat through implementation of individual subarea plans. The USFWS and CDFG agree to phased implementation of THE CITY OF SAN DIEGO's portion of the MSCP based on the Agreement of THE CITY OF SAN DIEGO to take the following specific actions to implement the MSCP with respect to lands within its jurisdictional boundaries or which it otherwise controls within the Subarea.

10.2 Compliance and Implementation.

A. Lands to be Preserved. In order to obtain and maintain its Take Authorizations, THE CITY OF SAN DIEGO agrees to comply with and implement the MSCP Plan, Subarea Plan, and this Agreement. Specifically, as provided in the Subarea Plan THE CITY OF SAN DIEGO commits to preserve permanently, in accordance with Section 10.8 of this Agreement, approximately 52,012 acres (90%) of the approximately 56,831 acres of MHPA lands within the Subarea and identified on Figure 1 of the Subarea Plan. Of the total lands committed to permanent preservation under the Subarea Plan, approximately 5,806 acres are owned by the federal and state governments and approximately 33,074 acres are public lands owned by THE CITY OF SAN DIEGO and other local jurisdictions, 5,012 acres consist of negotiated open space on private lands, approximately 7,903 acres are expected to be preserved through future application of the *Environmentally Sensitive Lands Regulations* and other zoning regulations, and the remaining 2,400 acres are anticipated to be acquired with public funds and by application of mitigation requirements for development impacts outside the MHPA. The numbers above are approximate and may vary by mechanism since the amount, timing and location of land conservation through regulations, mitigation and public acquisition is not known. The amount, timing and location of conservation by any one method will affect the same factors for the other methods. While THE CITY OF SAN DIEGO's overall land preservation commitment under the Subarea Plan shall not change, the number of acres committed to the MHPA through any one of the mechanisms identified in Section 10.8 may vary from the above estimates.

B. Habitat Conservation Accounting Model. THE CITY OF SAN DIEGO agrees that the Habitat Conservation Accounting Model attached as Exhibit F to this Agreement shall be utilized by THE CITY OF SAN DIEGO, the USFWS, and CDFG as a tool to assess whether THE CITY OF SAN DIEGO is meeting its obligation to ensure that habitat preservation is proceeding in rough step with development, within the context of the acreage accounting and annual reporting process set forth in Section 14 of this Agreement.

10.3 Compliance with Preserve Guidelines. THE CITY OF SAN DIEGO agrees to implement those *General Preserve Guidelines* and *Specific Preserve Guidelines* set forth in Sections 1.2.1, 1.2.2, 1.2.3, 1.2.4 and 1.2.5 of the Subarea Plan.

10.4 Compliance with Land Use Adjacency Guidelines. THE CITY OF SAN DIEGO agrees to adopt and implement those *Land Use Adjacency Guidelines* set forth in Section 1.4.3 of the Subarea Plan.

10.5 Compliance with Planning Policies and Design Guidelines. THE CITY OF SAN DIEGO agrees to implement those General Planning Policies and Design Guidelines set forth in Section 1.4.2 of the Subarea Plan.

10.6 Preserve Management.

A. Lands to be Managed. THE CITY OF SAN DIEGO agrees to be responsible for managing the following lands within the MHPA in perpetuity: lands which it owns within the MHPA as specified in the Subarea Plan; any lands within that portion of the MHPA which is within THE CITY OF SAN DIEGO jurisdictional boundaries which are acquired for permanent preservation with MSCP regional funds or local funding sources; and other lands within that portion of the MHPA which is within THE CITY OF SAN DIEGO jurisdictional boundaries which are obtained as mitigation pursuant to the Subarea Plan where those lands have been dedicated to THE CITY OF SAN DIEGO in fee title, or a conservation easement has been granted to THE CITY OF SAN DIEGO, or a covenant of easement has been granted to THE CITY OF SAN DIEGO which allows access for management purposes.

B. Preserve Management Program. Within six months of the Effective Date, THE CITY OF SAN DIEGO shall submit to the USFWS and CDFG for review a draft framework management plan for that portion of the MHPA which is within the Subarea, in accordance with Section 6.3.1 of the MSCP Plan. Within nine months of the Effective Date THE CITY OF SAN DIEGO shall submit a final framework management plan to the USFWS and CDFG for approval. The framework management plan shall incorporate the species-specific management actions set forth in Table 3-5 of the MSCP Plan as appropriate, as well as preserve-wide management actions which shall not exceed the cost for management set forth in Section 7.3.2 of the MSCP Plan as adjusted annually for inflation. The framework management plan shall also incorporate a requirement for the subsequent preparation and implementation of area-specific management directives, which shall be prepared in a phased manner for logical and discrete areas of land within the Subarea as those lands are committed to permanent preservation. Until such time that area-specific management directives are formulated and applied to logical and discrete areas within the Subarea Plan, THE CITY OF SAN DIEGO agrees to maintain for habitat value those lands it is obligated to manage, as specified above in Section 10.6.A of this Agreement.

10.7 Boundary Line Adjustments. Adjustments to THE CITY OF SAN DIEGO's MHPA boundaries may be made in limited circumstances. Such adjustments require the concurrence of the USFWS and CDFG as set forth in Section 5 of the MSCP Plan and Section 1.1.1 of the Subarea Plan, and require public notice and an opportunity to comment in those instances where THE CITY OF SAN DIEGO will exercise its

discretionary authority in making an adjustment. This Agreement need not be amended to reflect such adjustments.

10.8 Assembly and Protection of the MHPA.

A. General Conservation Methods. In general, MHPA lands within THE CITY OF SAN DIEGO will be conserved by the following methods, consistent with the MSCP and the Subarea Plan: (1) conservation of existing public lands as specified in the Subarea Plan; (2) conservation of private property located within the MHPA using zoning regulations; (3) conservation of lands within the MHPA through mitigation requirements for new private or public projects outside of the MHPA; (4) conservation of privately-owned open space within the MHPA which was previously set aside for conservation purposes pursuant to prior land development approvals as specified in Section 1.2 of the Subarea Plan; and (5) acquisition of private lands within the MHPA using public funds. The specific actions THE CITY OF SAN DIEGO will utilize to achieve such conservation are described below.

B. Conserved Habitat Acreage. Within its portion of the MHPA, THE CITY OF SAN DIEGO shall permanently conserve approximately the amount of acreage specified in Table 1 of the Subarea Plan (attached as Exhibit M) for each listed vegetation community, with the exception that the Cornerstone Lands shall be conserved as described in the *Cornerstone Lands Conservation Bank Agreement*, described in subsection E, below.

C. Core and Linkage Areas. THE CITY OF SAN DIEGO will conserve a minimum of approximately 77% of the overall habitat within the core biological resource areas and approximately 77% of the habitat within wildlife corridors and linkages, as depicted in the City's Subarea Plan. The targeted percentage of preservation for each specific core biological resource area is set forth in Section 1.2 of the Subarea Plan.

D. Amendments to General Plan and Community Plans. No later than 180 days after the Effective Date, the Council of THE CITY OF SAN DIEGO shall adopt amendments to applicable elements of THE CITY OF SAN DIEGO's General Plan and Community Plans, in order to make such plans consistent with the MSCP Plan and the Subarea Plan. These amendments shall be substantially similar to the draft amendments attached as Exhibit J.

E. Contribution of Cornerstone Lands. Pursuant to the *Cornerstone Lands Conservation Bank Agreement* executed by the Parties, incorporated herein and attached as Exhibit K, THE CITY OF SAN DIEGO will contribute to the MHPA and manage in accordance with the Subarea Plan, approximately 10,400 acres of

land owned by THE CITY OF SAN DIEGO Water Utilities Department, minus the exclusions identified for specific development activities, watershed management activities and uses described in Section 1.2.5 of the Subarea Plan and the *Cornerstone Lands Conservation Bank Agreement*. THE CITY OF SAN DIEGO will grant conservation easements in phases and manage the identified Cornerstone Lands in accordance with the *Cornerstone Lands Conservation Bank Agreement*. [**Note: The Agreement attached as Exhibit K is in draft form and has not yet been agreed to by the USFWS and CDFG.**]

F. Short Term Interim Regulation. Prior to the adoption of the permanent zoning and resource protection regulations described in Section 10.8G, below, and to the extent permitted by law, in its discretionary land use approval process THE CITY OF SAN DIEGO shall apply and enforce existing regulations in the San Diego Municipal Code (including, but not limited to, the *Resource Protection Ordinance* (RPO), the *Sensitive Coastal Resource Overlay Zone* (SCR), and the *Hillside Review* (HR) regulations), CEQA, and the biological impacts analysis and mitigation procedures of Section 3 of *THE CITY OF SAN DIEGO Biology Guidelines for the Environmentally Sensitive Lands Regulations (ESL), the Open Space Residential (OR-1-2) Zone, and the California Environmental Quality Act (CEQA)* (attached as Exhibit I) to all development to achieve the same level of protection for Covered Species and their habitats as that provided by the MSCP Plan and the Subarea Plan.

G. Permanent Zoning and Resource Protection Regulations. No later than 180 days after the Effective Date, and following any environmental review required by CEQA, the Council of THE CITY OF SAN DIEGO shall amend the San Diego Municipal Code to adopt the *Environmentally Sensitive Land Regulations* and the *Open Space Residential Zone (OR-1-2)* in a form substantially similar to Exhibit L to achieve the level of protection for Covered Species and their habitats provided by the MSCP Plan and the Subarea Plan. Also within 180 days of the Effective Date THE CITY OF SAN DIEGO will rezone properties as necessary to implement the MSCP Plan and the Subarea Plan. THE CITY OF SAN DIEGO will also utilize *THE CITY OF SAN DIEGO Biology Guidelines for the Environmentally Sensitive Lands Regulations (ESL), the Open Space Residential (OR-1-2) Zone, and the California Environmental Quality Act (CEQA)*, attached as Exhibit I, in connection with the implementation of these amendments to the San Diego Municipal Code in order to achieve the conservation targets set forth in Section 1.5.4 of the Subarea Plan. THE CITY OF SAN DIEGO, in consultation with the USFWS and CDFG, shall ensure that any discretionary modifications of the *Environmentally Sensitive Lands Regulations* or the *Open Space Residential Zone (OR-1-2)* are consistent with the MSCP and the Subarea Plan. Rezoning of property from OR-1-2 to a zone which allows greater intensity of development may only occur on land outside of the MHPA and must be accompanied with tentative map or permit conditions consistent with the MSCP and the Subarea Plan.

1. Habitat Conservation and Mitigation Ratios. The Parties agree that the classifications of habitat types into tiers, and mitigation ratios by tier, as shown in Exhibit N, shall be adopted by THE CITY OF SAN DIEGO. Modifications to these ratios may be made upon mutual Agreement of the Parties and following all legally required public hearings and environmental review, without the need to amend this Agreement, provided that such modifications provide for the same or higher levels of conservation and are consistent with the MSCP Plan and the Subarea Plan. All Tier I impacts will require mitigation with Tier I habitat types. Tier II and III impacts may be mitigated with habitat types of either tier, provided that the mitigation occurs within the MHPA. Mitigation that occurs outside the MHPA must be of a habitat type from the same tier as the impacted habitat. The City will assure that a 90% level of protection is achieved within the MHPA for each habitat within Tier I.

2. Application of Mitigation Ratios to Development. THE CITY OF SAN DIEGO shall apply the mitigation ratios shown in Exhibit N to all project impacts located outside the MHPA and, within the MHPA, to all impacts resulting from that portion of project development allowed through the deviation process which exceed the 25% encroachment allowance, plus additional encroachment allowed for community plan public facilities. No mitigation will be required for the 25% encroachment. The Parties agree that lands used to mitigate impacts will be located within THE CITY OF SAN DIEGO jurisdictional boundaries, except as may otherwise be agreed to by the Parties in circumstances where the preserve function would be significantly enhanced.

3. Narrow Endemic Species. For vernal pools in naturally occurring complexes, and wetlands, impacts will be avoided to the maximum extent practicable both within and outside the MHPA. For certain species identified as "narrow endemic species," impacts will be avoided to the maximum extent practicable inside the MHPA, and additional measures for their protection outside the MHPA shall be required as provided for in the *Environmentally Sensitive Lands Regulations* and the MSCP. Impacts that cannot be avoided shall be minimized and mitigated in accordance with the MSCP, the Subarea Plan and implementing regulations consistent with this Agreement. Narrow endemic species are identified in Exhibit O.

4. Development within the MHPA. THE CITY OF SAN DIEGO will revise existing development regulations for biological resources to include an encroachment allowance of 25% on the least sensitive portion of parcels located within the MHPA. THE CITY OF SAN DIEGO may permit, on a case-by-case basis, additional encroachment to accommodate public facilities within community plans, provided that the overall level of preservation of habitat within the MHPA does not fall

below 90% and that the biological objectives of the MHPA are not compromised. No mitigation will be required for the 25% encroachment. The additional encroachment will require mitigation within the MHPA consistent with the ratios described in subsection 10.8.G.2, above. THE CITY OF SAN DIEGO will obtain a covenant of easement, a conservation easement, fee title, or an irrevocable offer of dedication for the remainder of the parcel which will be recorded with the County Recorder and run with the land. The indirect impacts of development will be addressed in the Environmentally Sensitive Lands permit to ensure protection of the sensitive biological resources remaining on the premises outside of the development area.

5. Specific Conditions for Species Coverage. The City shall implement those conditions identified in the Conditions portion of Table 3-5 of the MSCP Plan and Section 1.3 of the Subarea Plan that are applicable to any Covered Species.

H. City Compliance with Subarea Plan Provisions. The City Manager of THE CITY OF SAN DIEGO will take all actions within his authority to ensure that all CITY OF SAN DIEGO departments comply with the policies, regulations and management obligations established as a result of the MSCP Plan and Subarea Plan on all CITY OF SAN DIEGO projects and day-to-day operations.

11.0 FUNDING RESPONSIBILITIES OF THE CITY OF SAN DIEGO

11.1 Introduction. The MSCP Plan contains estimates for the costs of habitat acquisition, management and monitoring on a regional basis. To fully implement the MSCP Plan and the Subarea Plan, THE CITY OF SAN DIEGO estimates that it must acquire approximately 2,400 acres of private property within the MHPA. THE CITY OF SAN DIEGO estimates that approximately 1,000 acres of that amount will be obtained through mitigation of land development projects within the Subarea, in accordance with the Subarea Plan and Section 10 of this Agreement. The remaining approximately 1,400 acres will likely have to be purchased using funds raised as described in Section 11.2 below.

11.2 Regional Funding.

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

B. Short-term Regional Funding. In the short-term, prior to voter approval of a long-term regional financing mechanism as discussed in Section 11.2C below, THE CITY OF SAN DIEGO will participate with the other Participating Local Jurisdictions to seek financing for the acquisition of private lands within the MHPA during the first three years following the Effective Date. Prior to the establishment of a regional financing mechanism, THE CITY OF SAN DIEGO agrees to fund the costs of managing and monitoring those lands identified in Section 10.6A of this Agreement. The management of Cornerstone Lands shall be subject to the *Cornerstone Lands Conservation Bank Agreement* attached as Exhibit K.

C. Long-term Regional Funding.

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

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

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

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

12.0 ISSUANCE OF THE TAKE AUTHORIZATIONS

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

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

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

12.4 Section 10(a) Permit and Future Listings. As to any Covered Species Subject to Incidental Take that is not listed as threatened or endangered under the ESA as of the Effective Date, the Section 10(a) Permit shall become effective with respect

to such species concurrent with its listing as threatened or endangered under the ESA. As to any other Covered Species, the Section 10(a) Permit shall become effective with respect to that species (and it will be added to the list of Covered Species Subject to Incidental Take) when (1) the USFWS approves the subarea plans that the USFWS determines adequately conserve such species, (2) such species becomes listed as threatened or endangered under the ESA, and (3) the USFWS notifies THE CITY OF SAN DIEGO in writing that the Section 10(a) Permit is effective with respect to such species.

12.5 Findings - CDFG. The CDFG has found, following opportunity for public comment, that the MSCP, the Subarea Plan and this Agreement (1) adequately provide for the conservation and management of the Covered Species Subject to Incidental Take and their habitat within the MSCP Area and the Subarea, (2) satisfy all legal requirements under the NCCP Act necessary for the CDFG to issue a NCCP Authorization for the Covered Species Subject to Incidental Take, and (3) are consistent with the NCCP Process and Conservation Guidelines. The CDFG has found that the Subarea Plan, in combination with the MSCP Plan, meets the requirements of the NCCP Act for an NCCP Plan, and has approved the Subarea Plan as an NCCP Plan. The CDFG has found further that the MSCP, the Subarea Plan and this Agreement provide adequately for the mitigation of potential "significant effects on the environment" (as defined in California Public Resources Code § 21068) which may result to Covered Species Subject to Incidental Take and their habitat (pursuant to California Government Code § 66474) that may result from the land development activities in the Subarea.

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

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

California gnatcatcher within that portion of the MSCP Area covered by approved Subarea Plans (including THE CITY OF SAN DIEGO's Subarea Plan), is lawful.

13.0 CONSULTATIONS WITH OTHER PUBLIC AGENCIES

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

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

14.0 REPORTING, BIOLOGICAL MONITORING AND PRESERVE MANAGEMENT

14.1 Continual Habitat Acreage Accounting. So long as this Agreement and the Take Authorizations remain in effect, THE CITY OF SAN DIEGO will continually account, by project and cumulatively, for the amount and location of habitat acreage (by habitat type) lost and preserved within the Subarea, including acres conserved within the MHPA and acres committed to land development both within and outside of the MHPA. The results of such accounting will be applied to the Habitat Conservation Accounting Model attached as Exhibit F to this Agreement to assure that adequate progress toward implementation of the MSCP Plan and the Subarea Plan is being achieved and that habitat preservation is proceeding in rough step with development.

14.2 Annual Reporting and Public Workshop. In accordance with Section 6.4.1 of the MSCP Plan, THE CITY OF SAN DIEGO shall prepare and submit to the USFWS and the CDFG by February 15 of each year a public report containing an annual accounting, by project and cumulatively, of habitat acreage lost and conserved within the Subarea during the previous calendar year. This accounting shall specify acres conserved within the MHPA by habitat type, as well as acres committed to land development both within and outside of the MHPA, and compare these figures with results obtained utilizing the Habitat Conservation Accounting Model attached as Exhibit F to this Agreement. This report shall also describe how habitat preservation is proceeding in rough step with development. The report will be used by the USFWS and CDFG to evaluate whether adequate progress toward implementation of the MSCP and the Subarea Plan is being achieved. A public workshop or meeting will be jointly conducted on an annual basis by staff from the USFWS, the CDFG and THE CITY OF SAN DIEGO to disseminate and discuss the annual report.

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

14.4 Public Report/Hearing. Every three years THE CITY OF SAN DIEGO, in conjunction with the other Participating Local Jurisdictions, shall prepare a

public report on the status of the MSCP and shall hold a public hearing in conjunction with the issuance of the report. The report shall incorporate information on the amount of land preserved within the MHPA and otherwise to date, the amount of land added to the MHPA or otherwise preserved within the previous three years, and the total expenditures made toward habitat acquisition to date and over the preceding three years. This report shall also include a subarea by subarea accounting of all funds received and expended during the previous three years to implement the Subarea Plan, including the amounts received and expended on habitat acquisition, management and monitoring.

14.5 Biological Monitoring. The Parties agree that biological monitoring, which involves the collection and analysis of data on specific species and habitats, is necessary to determine whether Covered Species and their habitats are being maintained by the MSCP as expected. Biological monitoring will be jointly funded by the federal and state governments and the Participating Local Jurisdictions and Participating Special Entities through the federal, state and regional funding programs. As described in the Subarea Plan, THE CITY OF SAN DIEGO will be responsible for the biological monitoring of its own, specified public lands, as well as mitigation lands obtained by it in fee title or easement, and lands acquired by it for the MSCP using the regional funding program or other local sources. The federal and state agencies will monitor their present identified lands and those acquired for the MSCP with federal and state funds, as described in the MSCP Plan. Proper management of the MHPA will require ongoing and detailed analysis of the data collected through biological monitoring activities. To ensure uniformity in data gathering and analysis, the USFWS and CDFG will assume primary responsibility for coordinating the monitoring program, analyzing data, and providing information and technical assistance to the Participating Local Jurisdictions and Participating Special Entities. Biological monitoring will focus on selected Covered Species and representative habitats. The USFWS and CDFG will prioritize specific monitoring activities based on available budget and specific needs of individual species and habitats, and will produce a summary report on monitoring activities every three years at the same time as the report described in Section 14.4, above.

14.6 Audit. Once every three or more years, as needed, the USFWS and CDFG may conduct an audit of (1) all development approvals and mitigation imposed through land use regulations or otherwise within approved Subareas; (2) all lands acquired by each Participating Local Jurisdiction toward meeting its habitat acquisition obligation under the MSCP; and (3) all monies received, invested and expended on acquisition, management and monitoring activities within approved Subareas during the previous three years or other applicable time period. THE CITY OF SAN DIEGO shall cooperate fully with USFWS and CDFG to insure a complete and accurate audit.

14.7 Coordination of Preserve Management.

A. Regional Habitat Management Technical Committee. Within 120 days of the Effective Date, a regional habitat management technical committee or equivalent entity separately agreed upon by the Parties will be formed by THE CITY OF SAN DIEGO and all other Participating Local Jurisdictions to serve as a coordination forum for technical issues associated with MHPA management. The USFWS and CDFG will work with this committee to furnish information and advice on habitat management. The committee will have the responsibilities identified in Section 5.8.3 of the MSCP Plan.

B. Federal and State Obligations. Federal and state agencies will manage, maintain and monitor all lands they contribute to the MSCP (whether owned or administered by them as of the Effective Date or later acquired) consistent with the MSCP.

C. Private Owners of Land Within the MHPA. This Agreement, the MSCP and the Subarea Plan do not impose upon private owners of land within the MHPA, who are not Third Party Beneficiaries, any additional obligations for the management or maintenance of their land.

15.0 USFWS AND CDFG OBLIGATIONS

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

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

15.3 Failure to Provide State or Federal Contribution. The USFWS and CDFG acknowledge that the MSCP is long-term in nature, and that the MHPA will be established over a 50 year period. Contributions of the USFWS and CDFG will be made at varying levels throughout the life of the program, with contributions to habitat acquisition to occur within the first 30 years of the program. State and federal contributions may include, but are not limited to, state and federally funded habitat acquisitions, land exchanges, personnel, and habitat restoration and enhancement. If, following the exercise of all available authority and utilization of all available resources the state and/or federal contribution committed to the MSCP cannot be provided, the MSCP will be reevaluated, with possible adjustments to permit coverage and assurances, in light of the extent of the state and federal contribution. Prior to such reevaluation of the MSCP, the USFWS and CDFG shall first attempt to address the shortfall in the state and/or federal contribution through (1) habitat management practices and enhancement opportunities within the

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

16.0 REMEDIES AND ENFORCEMENT

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

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

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

16.2 The Section 10(a) Permit.

A. Permit Suspension. Consistent with 50 C.F.R. §§ 13.27-13.29, in the event of any material violation of the Section 10(a) Permit or material breach of this Agreement by THE CITY OF SAN DIEGO, the USFWS may suspend the Section 10(a) Permit in whole or in part; provided, however, that it may not suspend the Section 10(a) Permit without first (1) requesting THE CITY OF SAN DIEGO take appropriate remedial actions, and (2) providing THE CITY OF SAN DIEGO with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for THE CITY OF SAN DIEGO to demonstrate why suspension is not warranted or to take steps necessary to cure the violation or breach.

B. Reinstatement of Suspended Permit. In the event the USFWS suspends the Section 10(a) Permit, in whole or in part, as soon as possible but no later than ten (10) days after such suspension, the USFWS shall confer with THE CITY OF SAN DIEGO concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, the USFWS shall identify reasonable

specific actions necessary to effectively redress the violation or breach. In making this determination the USFWS shall consider the requirements of the ESA, regulations issued thereunder, the conservation needs of the Covered Species, the terms of the Section 10(a) Permit and of this Agreement and any comments or recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, the USFWS shall send THE CITY OF SAN DIEGO written notice of the reasonable actions necessary to effectively redress the violation or breach. Upon performance of such necessary actions, the Service shall immediately reinstate the Section 10(a) Permit, or the suspended portion thereof. It is the intent of the Parties that in the event of any total or partial suspension of the Section 10(a) Permit all Parties shall act expeditiously and cooperatively to reinstate the Section 10(a) Permit.

C. Permit Revocation or Termination.

1. Consistent with 50 C.F.R. §§ 13.27-13.29, the USFWS agrees that it will only revoke or terminate the Section 10(a) Permit for a material violation of the Section 10(a) Permit or material breach of this Agreement by THE CITY OF SAN DIEGO, and only if (a) THE CITY OF SAN DIEGO refuses to cure the violation or breach after receiving actual notice of it from the USFWS and a reasonable opportunity to cure it, or (b) the USFWS determines in writing that such violation or breach cannot be effectively redressed by other remedies or enforcement action.

2. The USFWS agrees that it will not revoke or terminate the Section 10(a) Permit without first (a) requesting THE CITY OF SAN DIEGO take appropriate remedial action, and (b) providing THE CITY OF SAN DIEGO with notice in writing of the facts or conduct which warrant the revocation or termination and a reasonable opportunity (but not less than sixty (60) days) to demonstrate or achieve compliance with the ESA, the Section 10(a) Permit and this Agreement.

16.3 The CESA/NCCP Authorization.

A. Authorization Suspension. In the event of any material violation of the NCCP Authorization or material breach of this Agreement by THE CITY OF SAN DIEGO the CDFG may suspend the NCCP Authorization in whole or in part; provided, however, that it may not suspend the NCCP Authorization without first (1) requesting THE CITY OF SAN DIEGO take appropriate remedial actions, and (2) providing THE CITY OF SAN DIEGO with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for THE CITY OF SAN DIEGO to demonstrate why suspension is not warranted or to take steps necessary to cure the violation or breach.

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

C. Authorization Revocation or Termination.

1. The CDFG may only revoke or terminate the NCCP Authorization for a material violation of the NCCP Authorization or material breach of this Agreement by THE CITY OF SAN DIEGO, and only 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 the CESA and/or the NCCP Act.

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

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

16.4 Circumstances Likely to Constitute Jeopardy to Listed Species. In the event of a material violation of the Take Authorizations or material breach of this Agreement by THE CITY OF SAN DIEGO and the existence of circumstances which are

likely to jeopardize the continued existence of a Covered Species listed as threatened or endangered under the ESA or CESA, the USFWS and/or CDFG may, as a last resort, and after meeting and conferring with THE CITY OF SAN DIEGO and describing those circumstances in writing, suspend or revoke the Take Authorizations without resorting to the procedures specified above.

16.5 THE CITY OF SAN DIEGO's Obligations In The Event of Suspension or Revocation. In the event that the USFWS and/or CDFG suspend or revoke the Take Authorizations issued to THE CITY OF SAN DIEGO under this Agreement, THE CITY OF SAN DIEGO will remain obligated to fulfill its mitigation, enforcement and management obligations, and its other MSCP and Subarea Plan obligations, in accordance with this Agreement for all land development activities undertaken or approved prior to the breach which led to the suspension or revocation.

17.0 THIRD PARTY BENEFICIARIES

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

A. Creation of Third Party Beneficiary Status. The creation of Third Party Beneficiary status shall occur during THE CITY OF SAN DIEGO's permitting process at the point in time when (1) review of the project's impacts on biological resources and a determination of necessary mitigation has occurred in compliance with Section 10 of this Agreement (i.e., certification of the CEQA environmental document), (2) the determined mitigation includes an immediately-effective requirement to maintain the biological values of the land committed for mitigation, and (3) the mitigation has been imposed through a condition of development (such as a development Agreement or a tentative map condition) that is recorded and runs with the land and is enforceable against and binding upon the Third Party Beneficiary and any successor in interest to the Third Party Beneficiary. Third Party Beneficiary status may be attained for a project as a whole, or for a discrete phase(s) of a project so long as the mitigation for the discrete phase(s) is not functionally dependent in the context of the MSCP and Subarea Plan upon the mitigation proposed for subsequent phases.

B. Maintenance of Third Party Beneficiary Status. Third Party Beneficiary status will remain in effect unless, prior to the issuance of take authorization in accordance with paragraph 17.1.D, below, the Third Party Beneficiary alters the project in

a manner that increases or substantially alters impacts to biological resources evaluated pursuant to Paragraph 17.1.A, above, or fails to maintain the biological values of the land committed for mitigation pursuant to Paragraph 17.1.A, above. In such circumstance, the Third Party Beneficiary status is automatically extinguished, and the subsequent creation of Third Party Beneficiary status will require biological review and imposition of mitigation for the increased or altered impacts, pursuant to Paragraph 17.1.A above. However, Third Party Beneficiary status shall not be extinguished as a result of impacts to biological values resulting from natural or other causes beyond the Third Party Beneficiary's control, as determined by the USFWS and CDFG, including fire, flood, storm, and earth movement, or from any prudent action taken by the Third Party Beneficiary to prevent, abate, or mitigate significant injury to the land evaluated pursuant to Paragraph 17.1.A, above, resulting from such causes.

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

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

17.2 Effect of Take Authorization Revocation, Termination or Suspension. In the event that the USFWS and/or CDFG revoke, terminate or suspend the Take Authorizations issued to THE CITY OF SAN DIEGO pursuant to this Agreement, the assurances provided to Third Party Beneficiaries under this Agreement and the right to Take Covered Species Subject to Incidental Take authorized under THE CITY OF SAN DIEGO's development approvals pursuant to the Take Authorizations, will remain in effect as to every individual Third Party Beneficiary which fulfills the mitigation obligations

imposed upon it by THE CITY OF SAN DIEGO in compliance with this Section and Section 10 of this Agreement.

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

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

18.0 ENVIRONMENTAL REVIEW

18.1 Federal Law - NEPA. Issuance of a Section 10(a) Permit to THE CITY OF SAN DIEGO by USFWS is an action subject to NEPA review. USFWS is a lead agency under NEPA. An Environmental Impact Statement has been prepared pursuant to NEPA. Additional environmental review will be required for future subarea plans.

18.2 State Law - CEQA. Implementation of the MSCP is an action subject to CEQA review. THE CITY OF SAN DIEGO is a lead agency for the project and has completed an Environmental Impact Report addressing the MSCP in accordance with CEQA requirements. CDFG is a responsible agency under CEQA for purposes of approving the MSCP and the Subarea Plan under the NCCP Act.

19.0 COOPERATIVE EFFORT

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

20.0 TERMS USED

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

21.0 TERM

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

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

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

22.0 TERMINATION

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

1. THE CITY OF SAN DIEGO and all Third Party Beneficiaries have complied with all mitigation obligations incurred under the Take Authorizations in full compliance with the Habitat Conservation Accounting Model attached as Exhibit F to this Agreement, the MSCP, Subarea Plan and this Agreement up to the date of withdrawal, and THE CITY OF SAN DIEGO provides written evidence of such compliance to USFWS and CDFG; and

2. THE CITY OF SAN DIEGO and Third Party Beneficiaries shall remain obligated to carry out all of their long term management and monitoring obligations assumed under the MSCP, Subarea Plan and this Agreement with respect to habitat conservation lands included in, or required to be included in, the MHPA as a result of land development approved by THE CITY OF SAN DIEGO prior to withdrawal from the Agreement.

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

the MHPA, provided that the obligations of THE CITY OF SAN DIEGO with respect to the Cornerstone lands as set forth in the Cornerstone Lands Agreement attached as Exhibit K, shall be controlled by the terms of that Agreement.

C. Any Incidental Take associated with land development projects approved by THE CITY OF SAN DIEGO for which mitigation has been assured as provided in Section 17, shall continue to be authorized under the terms of the Take Authorizations provided THE CITY OF SAN DIEGO continues to carry out its obligations under this Agreement with respect to such Take as provided in Sections 9.19, 10, 14 and 17 of this Agreement.

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

23.0 AMENDMENTS

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

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

24.0 FORCE MAJEURE

In the event that THE CITY OF SAN DIEGO is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of THE CITY OF SAN DIEGO ("force majeure"), including but not limited to acts of God, labor disputes, sudden actions of the elements, or actions of federal or state agencies or other local jurisdictions, THE CITY OF SAN DIEGO shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that

nothing in this Section shall be deemed to authorize any Party to violate ESA or CESA, and provided further that:

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

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

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

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

25.0 MISCELLANEOUS PROVISIONS

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

25.2 Successors and Assigns. This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. THE CITY OF SAN DIEGO may only assign its rights and obligations under this Agreement with the approval of the USFWS and CDFG, which approval shall not be unreasonably withheld. Assignment or other transfer of the Section 10(a) Permit shall be governed by then-current USFWS regulations; under the applicable regulations in place on the Effective Date, a Section 10(a) Permit may not be assigned or otherwise transferred.

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

United States Fish and Wildlife Service
Assistant Regional Director
911 Northeast 11th Avenue
Portland, Oregon 97232-4181

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

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

THE CITY OF SAN DIEGO
Office of the City Manager
202 "C" Street, 9th Floor
San Diego, California 92101

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

25.5 Attorneys' Fees. If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees and costs, provided that attorneys' fees and costs recoverable against the United States shall be governed by applicable federal law.

25.6 Duplicate Originals. This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties.

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

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

25.9 Consistency with Authorizing Statutes. This Agreement is consistent with the statutory authority of the USFWS under the ESA and other applicable federal laws, and of the CDFG under the CESA, the NCCP Act and other applicable state laws. Likewise, nothing in this Agreement is intended to nor shall be construed to limit or compromise the statutory authority of the USFWS or the CDFG under such laws.

25.10 Counterparts. This Agreement may be executed in counterparts. This Agreement shall become operative as soon as one counterpart hereof has been executed by each member. The counterparts so executed shall constitute one Agreement notwithstanding that the signatures of all members do not appear on the same page.

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

BY: Acting Vicki M. Finn **Date** 7/15/97

Regional Director
United States Fish and Wildlife Service
Portland, Oregon

*BY: _____ Date _____

Director
California Department of Fish and Game
Sacramento, California

*BY: _____ Date _____

City Manager
The City of San Diego
San Diego, California

***Crossed-out signature blocks signed in counterpart on pages 49 and 50.**

*BY: _____ Date _____

Regional Director
United States Fish and Wildlife Service
Portland, Oregon

BY: _____ **Date** July 16, 1997

Director
California Department of Fish and Game
Sacramento, California

*BY: _____ Date _____

City Manager
The City of San Diego
San Diego, California

***Crossed-out signature blocks signed in counterpart on pages 48 and 50.**

*BY: _____ Date_____

Regional Director
United States Fish and Wildlife Service
Portland, Oregon

*BY: _____ Date_____

Director
California Department of Fish and Game
Sacramento, California

BY: _____ **Date** 7-14-97

City Manager
The City of San Diego
San Diego, California

***Crossed-out signature blocks signed in counterpart on pages 48 and 49.**

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