

**IMPLEMENTING AGREEMENT**

for the

**BAY DELTA CONSERVATION PLAN**

by and among

THE UNITED STATES FISH AND WILDLIFE SERVICE

THE NATIONAL MARINE FISHERIES SERVICE

THE CALIFORNIA DEPARTMENT OF WATER RESOURCES

THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

AND

STATE WATER PROJECT/CENTRAL VALLEY PROJECT CONTRACTORS

**DRAFT**

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## Exhibits

- Exhibit A: List of Covered Species**
- Exhibit B: BDCP Plan Area**
- Exhibit C: Certificate of Inclusion Template**
- Exhibit D: BDCP Implementation Schedule**
- Exhibit E: Natural Lands Conservation Easement Template**
- Exhibit F: Agricultural Lands Conservation Easement Template**
- Exhibit G: Notice List**
- Exhibit H: SWP/CVP Contractors that are Parties**

## **1.0 PARTIES TO THIS AGREEMENT**

This Implementing Agreement (Agreement) is made and entered into by and among the State of California, acting through the California Department of Water Resources (DWR) and the California Department of Fish and Wildlife (CDFW) of the State of California Natural Resources Agency, certain State Water Project and Central Valley Project contractor water agencies (SWP/CVP Contractors), and the United States, acting through the Fish and Wildlife Service (USFWS) of the United States Department of the Interior and the National Marine Fisheries Service (NMFS) of the United States Department of Commerce. This Agreement governs the implementation of the joint habitat conservation plan (HCP) and natural community conservation plan (NCCP) for the Sacramento–San Joaquin Delta (Bay Delta Conservation Plan, Plan, or BDCP). [Note to Reviewers: the parties will further consider the level of agency signatory prior to the release of the final Implementing Agreement].

The United States Bureau of Reclamation (Reclamation) of the United States Department of the Interior is not a Party to this Agreement. References to Reclamation’s roles and responsibilities in this Agreement reflect those as set forth in the BDCP. There are no obligations on behalf of Reclamation established in this Agreement.

## **2.0 RECITALS AND PURPOSES OF THE AGREEMENT**

### **2.1 Recitals**

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

- 2.1.1** The DWR is a State agency within the California Natural Resources Agency charged with responsibility for operating and maintaining the State Water Project’s existing facilities, including the Clifton Court Forebay and the Banks Pumping Plant. DWR enters into this Agreement pursuant to the Burns–Porter Act and other applicable laws of the State of California.
- 2.1.2** The SWP/CVP Contractors receive water under contract from the State Water Project and the Central Valley Project. The SWP/CVP Contractors will participate in various aspects of the implementation of the BDCP, including the funding and implementation of certain portions of the Conservation Measures.
- 2.1.3** The USFWS is a federal agency within the United States Department of the Interior charged with responsibility for administering the federal Endangered Species Act (ESA) and providing for the conservation of federally listed fresh water aquatic and terrestrial species and their habitat. USFWS is

authorized to issue take permits under Section 10(a)(1)(B) of the ESA for the incidental take of federally listed fresh water aquatic and terrestrial species provided that applicants for such permits submit an HCP that meets permit issuance criteria set forth in Section 10 of the ESA and its implementing regulations. USFWS enters into this Agreement pursuant to the ESA, the Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956.

- 2.1.4** The NMFS is a federal agency within the United States Department of Commerce charged with responsibility for administering the ESA and providing for the conservation of federally listed anadromous and marine species and their habitat. NMFS is authorized to issue take permits under Section 10(a) of the ESA for the incidental take of federally listed anadromous and marine species provided that applicants for such permits submit an HCP that meets permit issuance criteria set forth in Section 10 of the ESA. NMFS enters into this Agreement pursuant to the ESA and its implementing regulations.
- 2.1.5** CDFW is a State agency within the California Natural Resources Agency charged with responsibility for administering the Natural Community Conservation Planning Act (NCCPA). CDFW is authorized to issue permits under Section 2835 of the Fish & Game Code to authorize the take of any species, whether or not it is listed as an endangered, threatened, candidate, or fully protected species under State law, where the conservation and management of the species is provided for in an NCCP approved by CDFW. CDFW enters into this Agreement pursuant to the NCCPA.
- 2.1.6** The U.S. Bureau of Reclamation (Reclamation) is a federal agency within the United States Department of the Interior charged with responsibility for operating and maintaining the Central Valley Project's existing Delta facilities, including the Jones Pumping Plant and Delta Cross Channel. Reclamation is not a permit applicant for the BDCP under the ESA or NCCPA. However, Reclamation is a participant in the BDCP.
- 2.1.7** In October 2006, Reclamation, the Parties and several other entities entered into a Planning Agreement that identified the goals, objectives, guidelines, criteria and procedures for the preparation of a joint HCP and NCCP (Planning Agreement). A First Amendment to the Planning Agreement was executed in 2009. The BDCP and this Agreement have been prepared in accordance with the Planning Agreement.

**2.1.8** The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework. To accomplish this goal, the Plan:

- Provides for the conservation and management of Covered Species within the Plan Area through the preservation, restoration, and enhancement of aquatic, riparian and associated terrestrial natural communities and ecosystems that support these Covered Species and through other conservation actions.
- Includes measures to minimize and mitigate to the maximum extent practicable the effects on the Covered Species.
- Provides a means by which Covered Activities and Associated Federal Actions can be carried out in a manner that complies with applicable State and federal environmental laws.
- Sets out a comprehensive approach to coordinating and standardizing applicable requirements for Covered Activities and Associated Federal Actions within the Plan Area.
- Provides an allocation of responsibility among the Parties for BDCP requirements, taking into account the impacts of the Covered Activities and Associated Federal Actions.
- Establishes a more efficient and effective approach to regulatory compliance with State and federal endangered species laws than through project-by-project, species-by-species permitting.
- Provides clear expectations and Assurances and Protections.

**2.1.9** The provisions of the BDCP were developed to satisfy the requirements of the Sacramento–San Joaquin Delta Reform Act of 2009, California Water Code (Water Code) § 85300 *et seq.*

**2.1.10** DWR and the participating SWP/CVP Contractors have submitted the BDCP to USFWS and NMFS for the purpose of obtaining incidental take authorizations under Section 10(a)(1)(B) of the ESA for the species covered by the BDCP, as appropriate, within the Plan Area.

**2.1.11** Reclamation has incorporated the BDCP into a biological assessment to support a Section 7 consultation for Reclamation’s

actions within the Plan Area and the resulting Integrated Biological Opinion and related Incidental Take Statement that will be issued prior to the execution of this Agreement.

**2.1.12** DWR and the SWP/CVP Contractors have submitted the BDCP to CDFW for the purpose of obtaining a permit for take of the Covered Species within the Plan Area pursuant to Section 2835 of the NCCPA.

**2.1.13** DWR and the participating SWP/CVP Contractors are agreeing to substantial commitments of water, land, other natural resources, financial resources, human resources and other assets to provide for the conservation and management of the Covered Species, their habitats and other natural communities, in exchange for the Fish and Wildlife Agencies providing take authorizations, and the Assurances.

## **2.2 Purposes**

The purposes of this Agreement are to:

- Clarify the provisions of the BDCP and the processes the Parties intend to follow to ensure successful implementation of the BDCP in accordance with the take authorizations and applicable law.
- Ensure that each of the terms and conditions of the BDCP, this Agreement, the Permits, and the Incidental Take Statement are properly implemented.
- Set forth the remedies and recourse should any Party fail to perform its obligations.
- Delineate the responsibilities, financial or otherwise (including the commitment and management of resources), among the entities responsible for the financing and/or implementation of the BDCP.
- Satisfy the requirement that an NCCP include an implementation agreement containing provisions described in the NCCPA.
- Set out the Assurances and Protections provided to the Authorized Entities.

## **3.0 DEFINITIONS**

The following terms as used in this Agreement will have the meanings set forth below. Terms specifically defined in State or Federal statutes, including the ESA or the NCCPA, or the regulations adopted under those statutes, shall have the same meaning when used in this Agreement. Where such terms are defined in this Section 3.0, those definitions may elaborate on, but are not intended to conflict with, such statutory or regulatory definitions.

**3.1** “Adaptive Management Team” means the team that will have primary responsibility for the development of performance measures, effectiveness monitoring and research plans; analysis, synthesis and evaluation of monitoring and research results; solicitation of independent scientific review; development of proposals to modify Conservation Measures and biological objectives and other actions set out in Chapter 3.6. The Adaptive Management Team will be chaired by the Science Manager, and will consist of representatives of DWR, Reclamation, the two participating SWP/CVP Contractors (a single representative of the SWP Contractors, a single representative of the CVP Contractors), CDFW, USFWS and NMFS as voting members. Advisory, non-voting members will be the Lead Scientist for the Interagency Ecological Program, the Lead Scientist for the Delta Science Program or a designee, and the Director of the NOAA Southwest Fisheries Science Center.

**3.2** “Agreement” means this Implementing Agreement, which incorporates the BDCP by reference.

**3.3** “Annual Progress Report” means the annual report prepared by the Implementation Office, as provided in Section 16.3.1.

**3.4** “Associated Federal Actions” means the otherwise lawful activities and projects described in Chapter 4 that may be implemented in the Plan Area by Reclamation for which Incidental Take is authorized by USFWS and NMFS pursuant to the Incidental Take Statement in the Integrated Biological Opinion.

**3.5** “Assurances and Protections” shall mean (1) the assurances provided to the Permittees by USFWS and NMFS pursuant to the “No Surprises” rule and by CDFW pursuant to Fish & Game Code Section 2820(f); and (2) the procedural mechanisms provided to Reclamation by USFWS and NMFS pursuant to the terms of the Memorandum and as described in this Agreement.

**3.6** “Authorized Entities” means DWR, Reclamation, and those SWP/CVP Contractors that receive take authorizations pursuant to the BDCP.

**3.7** “Authorized Entity Group” means the group established to provide program oversight and general guidance to the Program Manager regarding the implementation of the Plan. The Authorized Entity Group will consist of the Director of DWR, the Regional Director for Reclamation, a representative of the participating SWP Contractors, and a representative of the participating CVP Contractors, or their designees.

Such designee shall be duly authorized to exercise the authority of the principal and may include a deputy or principal assistant.

**3.8** “Bay Delta Conservation Plan,” “BDCP” and “Plan” mean the joint HCP and NCCP prepared by the Permittees in coordination with Reclamation and with the technical assistance of the Fish and Wildlife Agencies.

**3.9** “Central Valley Project” or “CVP” means the Central Valley Project, as defined in 3404(d) of Title XXXIV of Public Law 102-575, and operated by Reclamation.

**3.10** “Central Valley Project Improvement Act” or “CVPIA” means Title XXXIV of Public Law 102-575.

**3.11** “CEQA” means the California Environmental Quality Act (Cal. Pub. Res. Code §§ 21000–21177) and all rules, regulations and guidelines promulgated pursuant to that Act.

**3.12** “CESA” means the California Endangered Species Act (Fish & Game Code §§ 2050–2116) and all rules, regulations and guidelines promulgated pursuant to that Act.

**3.13** “Changed Circumstances,” as defined by 50 C.F.R. § 17.3 and § 222.102, means changes in circumstances affecting a species or the geographic area covered by the BDCP that have been reasonably anticipated by the Parties and that have been planned for in the BDCP. “Changed Circumstances” are defined under Fish & Game Code § 2805 (c) to mean reasonably foreseeable circumstances that could affect a Covered Species or the Plan Area. Changed Circumstances and planned responses to those circumstances are described in Chapter 6.4.2. Changes in circumstances that are not identified as Changed Circumstances will be treated as unforeseen circumstances.

**3.14** “Chapter” means a chapter, subchapter, or section of the BDCP.

**3.15** “Consensus” means that either all voting members of the Adaptive Management Team or all voting members of the Real Time Operations Team agree to the proposal at hand, or that no voting member dissents from the proposal.

**3.16** “Conservation Measure” means each action detailed in the Conservation Strategy in Chapter 3 to minimize and mitigate impacts, to the maximum extent practicable, and to provide for the conservation and management of Covered Species.

**3.17** “Conservation Strategy” means the program described in Chapter 3 that consists of four components: (1) biological goals and objectives; (2) Conservation Measures; (3) adaptive management; and (4) monitoring.

**3.18** “Coordinated Operation Agreement” means the Agreement between the United States of America and the State of California for the Coordinated Operation of the Central Valley Project and the State Water Project dated November 24, 1986.

**3.19** “Covered Activities” means the otherwise lawful activities and projects described in Chapter 4 that may be implemented in the Plan Area by non-federal Parties for which take is authorized by the Fish and Wildlife Agencies pursuant to the Permits.

**3.20** “Covered Species” means the species, listed and non-listed, for which take may be authorized and for which the BDCP provides measures to minimize and mitigate, to the maximum extent practicable, the impacts of Covered Activities, and provides for the conservation and management of those species. Covered Species are listed in Exhibit A to this Agreement.

**3.21** “Delta” and “Sacramento–San Joaquin Delta” mean the Sacramento–San Joaquin Delta as defined in Water Code § 12220.

**3.22** “CDFW” means the California Department of Fish and Wildlife, a department of the California Natural Resources Agency.

**3.23** “Effective Date” means the date on which this Agreement takes effect, as provided in Section 21.1.

**3.24** “ESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C §§ 1531–1544) and all rules, regulations and guidelines promulgated pursuant to that Act.

**3.25** “Federally Listed Species” means the species that are listed as threatened or endangered species under the ESA. See 50 C.F.R. § 17.11.

**3.26** “Federal Permits” means the federal Incidental Take Permits issued by USFWS and NMFS to the Permittees, pursuant to Section 10(a)(1)(B) of the ESA.

**3.27** “Fish and Wildlife Agencies” means USFWS, NMFS and CDFW.

**3.28** “Fully Protected Species” means the Covered Species that are identified in Fish & Game Code sections 3511, 4700, 4800, 5050 and 5515.

**3.29** “Implementation Office” means the office that, under the direction of a Program Manager, will manage, coordinate, oversee, and report on all aspects of Plan administration, subject to the oversight of the Authorized Entity Group and certain limitations set out in the BDCP and this Agreement, as further described in Section 15.2.

**3.30** “Incidental Take” under federal ESA means the take of a covered fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity.

**3.31** “Incidental Take Statement” means the statement that is attached to the integrated biological opinion that is issued by USFWS and NMFS. It anticipates and authorizes the amount or extent of take for federally listed species.

**3.32** “Integrated Biological Opinion” means the joint biological opinion that is issued by USFWS and NMFS to complete the Section 7 consultation associated with the BDCP. The Integrated Biological Opinion will also serve as a Conference Opinion for certain Covered Species and proposed critical habitat.

**3.33** “Listed Species” means State Listed Species or Federally Listed Species.

**3.34** “Memorandum” means a separate memorandum, or similar agreement, describing Reclamation’s roles and responsibilities in the implementation of BDCP.

**3.35** “Migratory Bird Treaty Act” means the federal Migratory Bird Treaty Act (16 U.S.C. §§ 703–712) and all rules, regulations and guidelines promulgated pursuant to that Act.

**3.36** “NMFS” means the National Marine Fisheries Service, an agency of the Department of Commerce.

**3.37** “NCCPA” means the California Natural Community Conservation Planning Act (Fish & Game Code §§ 2800–2835), and all rules, regulations and guidelines promulgated pursuant to that Act.

**3.38** “NEPA” means the National Environmental Policy Act (42 U.S.C. §§ 432–4347) and all rules, regulations and guidelines promulgated pursuant to that Act.

**3.39** “Non-listed Species” means a species that is not listed as endangered or threatened under the ESA or is not listed as endangered or threatened, or designated as a candidate for such status, under CESA.

**3.40** “NPPA” means the California Native Plant Protection Act (Fish & Game Code §§ 1900–1913) and all rules, regulations, and guidelines promulgated pursuant to that Act.

**3.41** “Other Authorized Entities” means the entities described in Chapter 7.1.2.2 that receive take authorizations through the Permits issued to DWR.

**3.42** “Other Stressors Conservation Measures” means a certain category of conservation measures, as described in Conservation Measures 13–21.

**3.43** “Party” and “Parties” mean the signatories to this Agreement, individually and collectively.

**3.44** “Permit Oversight Group” means the State and federal fish and wildlife agencies, specifically, the Regional Director of USFWS, the Regional Administrator of NMFS, and the Director of CDFW or their designees. Such designee shall be duly authorized to exercise the authority of the principal and may include a deputy or principal assistant.

**3.45** “Permits” mean the Federal Permits and the State Permit.

**3.46** “Permittees” means DWR and the SWP/CVP Contractors.

**3.47** “Plan Area” means the area covered by the BDCP, as described in Chapter 1 and depicted in Exhibit B of the Plan.

**3.48** “Planning Agreement” means the Planning Agreement regarding the Bay Delta Conservation Plan executed in October of 2006 by the Parties, Reclamation and several other entities, as amended in 2009.

**3.49** “Reserve Unit Management Plan” means a Reserve Management Plan as described in Chapter 3.4.11.2.2.

**3.50** “Reserve System” means the assemblage of land acquired and dedicated in perpetuity by either fee interest or conservation easement that is designed to advance the preservation, conservation, enhancement and restoration objectives of the Conservation Strategy of the BDCP.

**3.51** “Rough Proportionality” means implementation of BDCP Conservation Measures that is roughly proportional in time and extent to the impact on habitat or Covered Species authorized under the BDCP and as required by Fish & Game Code § 2820(b)(9).

**3.52** “State-Listed Species” means the species that are listed as threatened or endangered species, or a candidate for such status, under CESA, as fully protected species under the Fish & Game Code, or as rare species under the NPPA. See Cal. Code Regs., tit. 14, §§ 670.2, 670.5, Fish & Game Code §§3511, 4700, 4800, 5050 and 5515. Published notifications in the California Regulatory Notice Register identify candidate species.

**3.53** “State Permit” means the State NCCPA take Permit issued to the Permittees pursuant to Section 2835 of the Fish & Game Code.

**3.54** “State Water Project” or “SWP” means the State Water Project as authorized by Water Code sections 12930 *et seq.* and Water Code sections 11100 *et seq.* and operated by DWR.

**3.55** “Supporting Entity” means an agency, organization or individual that performs certain Plan implementation tasks, at the request of the Program Manager, as provided in Section 15.7 and further described in Chapter 7.1.9.

**3.56** “SWP/CVP Contractors” means the individual water agencies that hold water delivery contracts with DWR for SWP water (SWP Contractors) or Reclamation for CVP water (CVP Contractors), or an entity comprising such agencies, and that have executed this Agreement. SWP/CVP Contractors may include the State and Federal Water Contractors Agency (SFWCA), a joint exercise of powers agency, and the San Luis & Delta Mendota Water Authority (SLDMWA), a joint exercise of powers agency. The SWP/CVP Contractors are listed on Exhibit H to this Agreement.

**3.57** “Take” and “Taking” mean, in the context of the ESA to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19) and in the context of the Fish & Game Code Section 86 mean to hunt, pursue, catch, capture, or kill or attempt to hunt, pursue, catch, capture, or kill.

**3.58** “Take Authorizations” means the Federal Permits, the State Permit, and the Incidental Take Statement issued with the Integrated Biological Opinion to collectively authorize take associated with Covered Activities and Associated Federal Actions.

**3.59** “Unforeseen Circumstances” means (a), in the context of the ESA, changes in circumstances affecting a Covered Species or geographic area covered by the BDCP that could not reasonably have been anticipated by the Permittees, USFWS or NMFS at the time of the BDCP’s negotiation and development, and that result in a substantial and adverse change in the status of a Covered Species (50 C.F.R. §§17.2 and 222.102), and (b), in the context of the NCCPA, changes affecting one or more species, habitats, natural communities, or the geographic area covered by a conservation plan that could not reasonably have been anticipated at the time of Plan development, and that result in a substantial adverse change in the status of one or more Covered Species (Fish & Game Code § 2805(k)).

**3.60** “USFWS” means the United States Fish and Wildlife Service, an agency of the United States Department of the Interior.

## **4.0 FINDINGS**

### **4.1 Findings by USFWS and NMFS**

As part of their findings, USFWS and NMFS will make certain determinations, after opportunity for public comment, regarding the adequacy of the BDCP to meet the permitting requirements of the ESA. To issue Permits pursuant to the BDCP, USFWS and NMFS must find that: (1) the taking of Covered Species within the Plan Area in accordance with the BDCP will be incidental to the carrying out of otherwise lawful activities; (2) the actions set forth in the BDCP will, to the maximum extent practicable, monitor, minimize and mitigate the impacts of such incidental taking; (3) adequate assurances of funding to implement the BDCP have been provided; (4) the requested taking of Covered Species will not appreciably reduce the likelihood of survival and recovery of such species in the wild or result in the destruction or adverse modification of critical habitat; and (5) the BDCP contains all measures deemed necessary and appropriate by USFWS and NMFS for the purposes of Section 10 of the ESA.

## **4.2 Findings by CDFW**

### **4.2.1 NCCPA**

In a separate document, entitled the “Findings of Fact and NCCPA Permit for the Bay Delta Conservation Plan,” CDFW will make certain findings, after opportunity for public comment, regarding the adequacy of the BDCP and this Agreement to meet the permitting requirements of the NCCPA. To issue a Permit under the NCCPA, CDFW must find that the BDCP adequately provides for the conservation and management of Covered Species and their habitat and otherwise satisfies all legal requirements under Section 2820 of the Fish & Game Code, as follows:

- (1) The BDCP has been developed consistent with the process identified in the Planning Agreements entered into pursuant to Fish & Game Code § 2810.
- (2) The BDCP integrates adaptive management strategies that are periodically evaluated and modified based on the information from the monitoring program and other sources, which will assist in providing for the conservation of Covered Species and ecosystems within the Plan Area.
- (3) The BDCP provides for the protection of habitat, natural communities, and species diversity on a landscape or ecosystem level through the creation and long-term management of habitat reserves or other measures that provide equivalent conservation of Covered Species appropriate for land, aquatic, and marine habitats within the Plan area.
- (4) The development of reserve systems and conservation measures in the Plan Area provides, as needed to provide for the conservation of species, all of the following:

- (A) Conserving, restoring, and managing representative natural and semi-natural landscapes to maintain the ecological integrity of large habitat blocks, ecosystem function, and biological diversity.
  - (B) Establishing one or more reserves or other measures that provide equivalent conservation of Covered Species within the Plan Area and linkages between them and adjacent habitat areas outside of the Plan Area.
  - (C) Protecting and maintaining habitat areas that are large enough to support sustainable populations of Covered Species.
  - (D) Incorporating a range of environmental gradients (such as slope, elevation, aspect, and coastal or inland characteristics) and high habitat diversity to provide for shifting species distributions due to Changed Circumstances.
  - (E) Sustaining the effective movement and interchange of organisms between habitat areas in a manner that maintains the ecological integrity of the habitat areas within the Plan Area.
- (5) The BDCP identifies activities, and any restrictions on those activities, allowed within reserve areas that are compatible with the conservation of species, habitats, natural communities, and their associated ecological functions.
- (6) The BDCP contains specific Conservation Measures that are intended to meet the biological needs of Covered Species and that are based upon the best available scientific information regarding the status of Covered Species and the impacts of permitted activities on those species.
- (7) The BDCP contains a monitoring program.
- (8) The BDCP contains an adaptive management program.
- (9) The BDCP includes the estimated timeframe and process by which the reserves or other Conservation Measures are to be implemented, including obligations of the Plan signatories and consequences of the failure to implement such measures in a timely manner.
- (10) The BDCP contains provisions that ensure adequate funding to carry out the conservation actions identified in the BDCP.
- (11) This Agreement includes provisions defining species coverage, including any conditions of coverage.

(12) This Agreement includes provisions for establishing the long-term protection of any habitat reserve or other measures that provide equivalent conservation of Covered Species.

(13) This Agreement includes specific terms and conditions, which, if violated, would result in the suspension or revocation of the State Permit, in whole or in part. These terms and conditions address, but are not limited to, provisions specifying the actions CDFW shall take under all of the following circumstances:

(A) If the Permittees fail to provide adequate funding.

(B) If the Permittees fail to maintain the Rough Proportionality between impacts on habitat or Covered Species and Conservation Measures.

(C) If the Permittees adopt, amend, or approve any plan or project without the concurrence of the CDFW that is inconsistent with the objectives and requirements of the approved Plan.

(D) If the level of Take exceeds that authorized by the State Permit.

(14) This Agreement includes provisions specifying procedures for amendment of the Plan and this Agreement.

(15) This Agreement includes provisions ensuring implementation of the monitoring program and adaptive management program.

(16) This Agreement includes provisions for oversight of Plan implementation for purposes of assessing mitigation performance, funding, and habitat protection measures.

(17) This Agreement includes provisions for periodic reporting to CDFW and the public for purposes of information and evaluation of Plan progress.

(18) This Agreement includes mechanisms to ensure adequate funding to carry out the conservation actions identified in the Plan.

(19) This Agreement includes provisions to ensure that implementation of Conservation Measures on a Plan basis is roughly proportional in time and extent to the impact on habitat or Covered Species authorized under the Plan.

As required by Fish & Game Code, Section 2821, concurrent with its approval of the BDCP, the CDFW will establish a list of species that are authorized for take pursuant to Fish & Game Code, Section 2835, and make specific findings to support coverage pursuant to Fish & Game Code, Section 2820. CDFW must further determine whether

the mitigation measures specified in the Plan are consistent with Fish & Game Code, Section 2801, subdivision (d).

#### **4.2.2 The Sacramento-San Joaquin Delta Reform Act of 2009**

CDFW has found that the BDCP satisfies the requirements of the Sacramento–San Joaquin Delta Reform Act of 2009, Water Code sections 85300 *et seq.* Specifically, as required by Water Code, Section 85320, CDFW has found:

- The BDCP complies with Chapter 10 (commencing with Section 2800) of Division 3 of the Fish & Game Code such that the BDCP can be approved as an NCCP.
- The Environmental Impact Report (EIR) prepared for the BDCP complies with Division 13 (commencing with Section 21000) of the California Public Resources Code, including by providing a comprehensive review and analysis of all of the following:
  - A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish & Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.
  - A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.
  - The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the EIR.
  - The potential effects on migratory fish and aquatic resources.
  - The potential effects on Sacramento River and San Joaquin River flood management.
  - The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.

- The potential effects of each Delta conveyance alternative on Delta water quality.
- In compliance with Water Code Section 85321, the BDCP includes a transparent, real-time operational decision making process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.

## **5.0 ROLE OF BUREAU OF RECLAMATION IN THE BDCP**

Federal agencies, such as Reclamation, comply with the ESA through the Section 7 consultation process and not through the Section 10 HCP permitting process. Given the scale of Reclamation’s CVP operations and the degree to which these operations are coordinated with the SWP, BDCP has been designed to address both SWP and CVP operations in the Delta. Reclamation will enter into a Memorandum, or similar agreement, with the Parties that sets out Reclamation’s roles and responsibilities pursuant to the BDCP and establishes processes to ensure that Reclamation’s actions are implemented in a manner consistent with the Plan.

## **6.0 INCORPORATION OF THE BDCP**

The BDCP and each of its provisions are intended to be, and by this reference are, incorporated herein; provided, wherever possible, the terms of this Agreement and the terms of the BDCP shall be interpreted to be supplementary to each other; provided further, in the event of a direct conflict between the terms of this Agreement and the BDCP, the terms of this Agreement shall control.

## **7.0 GENERAL OBLIGATIONS OF THE PARTIES**

### **7.1 Authorized Entities**

The Authorized Entities will fulfill all of their respective obligations under this Agreement, the BDCP, the Permits and the Integrated Biological Opinion. The Authorized Entities’ general obligations include:

- Implementing the Conservation Measures and other BDCP actions as specified in the Plan, in Chapter 3 and this Agreement.
- Participating in the Authorized Entity Group as described in Chapter 7.1.3.
- Participating in the Adaptive Management and Monitoring Program.
- Participating in the scientific research program.

- Conferring with the Implementation Office and Permit Oversight Group regarding Plan implementation matters and obtaining concurrence or approval of Permit Oversight Group where required.
- Funding a portion of the Conservation Strategy.

## **7.2 Fish and Wildlife Agencies**

The Fish and Wildlife Agencies will fulfill all of their respective obligations under this Agreement, the BDCP, the Permits and the Integrated Biological Opinion. The Fish and Wildlife Agencies' general obligations include:

- Participating in the Permit Oversight Group.
- Participating in the Adaptive Management and Monitoring Program.
- Participating in the scientific research program.
- Conferring with the Implementation Office regarding Plan implementation matters.
- Providing one written communication, to the maximum extent practicable, for responses, reviews, concurrence, acceptance, or approvals of BDCP reports, plans, and other documents.
- Funding a portion of the Conservation Strategy.
- Adhering to the Assurances and Protections provided under this Agreement.
- Investigating and taking appropriate steps to further reduce the adverse effect of all factors that stress the fish and wildlife species dependent upon the Bay-Delta estuary.
- Providing assistance to third parties engaged in activities in the Delta to help ensure that such activities proceed in compliance with State and federal endangered species laws and in a manner that does not compromise the likelihood of success of the BDCP.
- Implementing, where appropriate, certain BDCP actions as specified in the Plan and this Agreement.

### **7.3 Collaboration Among Parties**

The Parties agree that frequent collaboration is essential to the success of the BDCP. Each Party will use its best efforts and act in good faith to: meet and confer with any other Party upon the request of that Party to address matters pertaining to the BDCP, the Permits, or this Agreement; provide relevant, non-proprietary, non-confidential information pertaining to the BDCP upon the request of any Party; provide timely responses to requests from any Party for advice, concurrence, or review and comment on reports, surveys or other documents, regarding matters pertaining to the BDCP, the Permits, or this Agreement; accomplish implementation tasks assigned to a Party by the Implementation Office consistent with the direction given; and cooperate, to the fullest extent possible, on matters important to the successful implementation of the BDCP and achievement of the purposes of the Plan.

## **8.0 TAKE AUTHORIZATIONS**

The Fish and Wildlife Agencies have found that the BDCP fulfills the requirements of the ESA and the NCCPA for the issuance by the Fish and Wildlife Agencies of Take Authorizations for the Covered Activities and Associated Federal Actions.

### **8.1 Take Authorizations Issued to Authorized Entities**

#### **8.1.1 Permittees**

Concurrent with their execution of this Agreement, the USFWS and NMFS will each issue a Federal Permit to DWR and the SWP/CVP Contractors that authorizes the incidental take of Covered Species resulting from Covered Activities, and CDFW will issue a State Permit to DWR and the SWP/CVP Contractors that authorizes the take of Covered Species resulting from Covered Activities.

The take authorizations will cover the Permittees, including all of their respective officers, directors, employees, agents, subsidiaries, member agencies, contractors, and the Supporting Entities, as applicable, who engage in any Covered Activity. All contracts between Permittees and any such person or entity regarding the implementation of a Covered Activity will require compliance with the Permits, and Permittees shall remain ultimately responsible for compliance with the Permits.

#### **8.1.2 Reclamation**

USFWS and NMFS will issue an Incidental Take Statement in the Integrated Biological Opinion that authorizes take of Federally Listed Covered Species for Associated Federal Actions carried out by Reclamation and/or its agents and contractors, as described in Chapter 4.

## **8.2 Take Authorizations Issued to Other Authorized Entities**

Through CM 21, certain third parties may seek take authorizations under the BDCP for ongoing operation of water diversions that are not associated with the SWP or CVP, and for remediation actions associated with those diversions, as described in Chapter 4. Those third parties who participate in the remediation program described in CM21 will be considered Other Authorized Entities.

Other Authorized Entities will receive take authorizations through DWR for the operation of their non-project diversions and for associated remediation actions through the Permits. An Other Authorized Entity will receive take authorization after executing a Certificate of Inclusion that meets the minimum requirements of the template set forth in Exhibit C of this Agreement and that has been approved by the Fish and Wildlife Agencies as to the specific Other Authorized Entity, to ensure compliance with the terms and conditions of the Plan and Permits. The Implementation Office will issue the Certificates of Inclusion for the State Permit and the Federal Permit issued by USFWS, and NMFS will issue the Certificates of Inclusion for the Federal Permit issued by NMFS after receiving a recommendation from the Implementation Office. The USFWS, NMFS, and CDFW agree and acknowledge that DWR shall not be liable for any violations of the terms and conditions of the Certificate of Inclusion that are committed by an Other Authorized Entity, provided the Fish and Wildlife Agencies have approved or issued the applicable Certificate of Inclusion. The Certificate of Inclusion shall be withdrawn and any Take authorization extended to the Other Authorized Entity shall be terminated by the Implementation Office and/or the Fish and Wildlife Agencies if the Other Authorized Entity fails to comply with such terms and conditions. Other Authorized Entities will not be members of the Authorized Entity Group nor will they have a specific role in the governance of the BDCP, other than as potential members of the Stakeholder Council. Other Authorized Entities shall remain responsible for compliance with other applicable laws.

## **8.3 Timing of Take Authorizations**

As of the Effective Date, the Authorized Entities may take the Covered Species as a result of the implementation of Covered Activities and Associated Federal Actions in the Plan Area consistent with the provisions of this Agreement, the BDCP, the Integrated Biological Opinion, and the take authorizations.

## **8.4 No Take Beyond that Authorized**

If CDFW determines, after conferring with the Implementation Office, that take is occurring beyond that authorized by the State Permit, CDFW, at its discretion, may suspend or revoke the State Permit, in whole or in part, pursuant to the procedures in Section 22.4 of this Agreement. Modifications to the BDCP through adaptive management or other provisions of the Plan that would result in an increase in take of Covered Species beyond that analyzed in the BDCP are not authorized. Any such

modification must be proposed, reviewed, and approved as an HCP and/or NCCP amendment in accordance with Section 23.3 of this Agreement.

## **8.5 Take Authorizations for Non-listed Covered Species**

### **8.5.1 Federal Permits**

Covered Species that have not been listed as of the Effective Date as threatened or endangered under the ESA have been treated in the BDCP as if they are Listed Species. In the event a Non-listed Covered Species becomes a Federally Listed Species in the future, incidental take of that species will, without any further action on the part of the Permittees, be automatically authorized by the Federal Permits pursuant to the terms of the BDCP and this Agreement.

### **8.5.2 Section 7 Consultations**

Under the provisions of Section 7 and its implementing regulations, Incidental Take Statements contained in biological opinions apply only to species listed as endangered or threatened under the ESA. The Integrated Biological Opinion also serves as a conference opinion pursuant to 50 C.F.R. § 402.10(d) and (e) that evaluates all Covered Species as though listed and provides a basis for authorizing incidental take should non-listed Covered Species become listed in the future. In the event a Non-listed Covered Species becomes listed in the future, USFWS and NMFS will adopt the conference opinion as the final biological opinion for that species in accordance with 50 C.F.R. § 402.10(d) for Associated Federal Actions undertaken by Reclamation unless significant changes have occurred in the proposed action or the information used in the conference opinion. If the conference opinion can be adopted pursuant to 50 C.F.R. § 402.10(d), USFWS and NMFS will not request, impose, recommend, or require mitigation, conservation, compensation, enhancement, or other protection for such Covered Species, beyond that expressly provided in this Agreement.

### **8.5.3 State Permit**

Under the NCCPA, take of unlisted species may be authorized under a Section 2835 permit. The State Permit authorizes the take of all Covered Species as of the Effective Date, regardless of whether they have been listed under State law.

## **8.6 Take Authorizations for Fully Protected Species**

CDFW acknowledges and agrees that the BDCP includes measures that are intended to avoid, to the maximum extent practicable, the take of any Fully Protected Species as a result of the implementation of Covered Activities. However, if implementation of Covered Activities causes the take of a Fully Protected Species that is also a Covered Species, CDFW acknowledges and agrees that the take is authorized under the State Permit, pursuant to Fish & Game Code § 2835.

## **8.7 Take Authorizations for Plant Species Under the ESA**

The take of Covered Species that are federally listed plants is not prohibited under the ESA, and therefore take authorization for federally listed plants is not necessary. Plant species included on the list of Covered Species are listed on the Federal Permits in recognition of the Conservation Measures and benefits provided for those plants under the BDCP and for the purpose of demonstrating the avoidance of jeopardy pursuant to the Section 7 Biological Opinion. As of the Effective Date, any reference in this Agreement or the BDCP to the authorized take of Covered Species shall, for the purpose of incidental Take authorized under Section 10(a)(1)(B), exclude plant species. To the extent permitted by law, if at any time during the term of this Agreement and the Federal Permits, any plant listed as a Covered Species becomes subject to the take prohibition under the ESA, the Federal Permits shall automatically become effective as to such species, and the Permittees shall receive incidental take authorization for such species.

## **8.8 Take Authorizations for Rare Plants Covered by the Native Plant Protection Act**

CDFW acknowledges and agrees that the BDCP provides sufficient protection to Covered Species that are listed under the NPPA as rare plants for a finding of compliance with the NPPA.

## **8.9 Take Authorization for Species Covered by the Migratory Bird Treaty Act**

The USFWS agrees to issue a Special Purpose Permit under 50 C.F.R. § 21.27 to authorize take of migratory birds protected by the Migratory Bird Treaty Act (MBTA) that are Covered Species and that are also listed under the ESA as threatened or endangered. The Special Purpose Permit will authorize take in the amount specified in the BDCP, subject to the terms and conditions set forth in the Federal Permits.

The Special Purpose Permit will be valid for three years and will be renewed pursuant to the MBTA, provided the Permittees are in compliance with the Federal Permits. Each renewal of the Special Purpose Permit shall be for a period of three years, or longer if the maximum permit term has been extended by law, provided that the Federal Permits remain in effect for such period. If and when any other Covered Species that is protected under the MBTA is designated a Federally Listed Species, the Federal Permits will automatically constitute a Special Purpose Permit for that species as of the date the Federal Permits become effective as to such species.

The Federal Permit will constitute a Special Purpose Permit under the Migratory Bird Treaty Act as provided at 50 C.F.R. § 21.27 for the Take of migratory birds protected by the MBTA that are Covered Species and that are also listed under the ESA as threatened

or endangered, subject to the terms and conditions specified in the Federal Permit, as of the Effective Date. The Special Purpose Permit will be valid for a period of three (3) years from the Effective Date, provided the Federal Permit remains in effect for such period. The Special Purpose Permit will be renewed in accordance with the Migratory Bird Treaty Act provided that the Permittees remain in compliance with the Federal Permit. Each such renewal will be valid for the maximum period allowable under the applicable regulations at the time of the renewal (which, as of the Effective Date is three (3) years), provided that the Federal Permit remains in effect for such period. If and when any other Covered Species that is a migratory bird becomes a Federal Listed Species, the Federal Permit will automatically constitute a Special Purpose Permit for that species as of the date the Federal Permit becomes effective as to such species as provided in this Agreement.

## **9.0 ACTIVITIES AND ACTIONS COVERED BY THE BDCP**

### **9.1 Introduction**

The BDCP is intended to provide the basis for the issuance of regulatory authorizations under the ESA and the NCCPA for a range of ongoing and anticipated activities in the Plan Area. These actions have been designated as either Covered Activities, which encompass those actions that will be undertaken by non-federal parties, or Associated Federal Actions, which refer to those actions that are authorized, funded, or carried out by Reclamation within the Plan Area. Covered Activities and Associated Federal Actions encompass all actions that are proposed for coverage under the Take Authorizations to be issued by the Fish and Wildlife agencies on the basis of the BDCP.

### **9.2 Covered Activities**

The Covered Activities, as described in Chapter 4, consist primarily of activities related to the development and operation of water conveyance infrastructure associated with the SWP that will occur within the Plan Area. Specifically, those SWP-related actions covered by the BDCP involve the following actions:

- The development and operation of new Delta conveyance facilities, in conjunction with the operation of existing facilities, to transport and deliver water to State Water Project and Central Valley Project contractors.
- The maintenance and monitoring of water infrastructure and other facilities.

The Covered Activities also include actions associated with restoration of aquatic and terrestrial habitats, monitoring of Covered Species, and research and study of species and their habitats.

### **9.3 Associated Federal Actions**

The BDCP Associated Federal Actions comprise those activities that are primarily the responsibility of Reclamation, including actions that are carried out, funded, or authorized by Reclamation in the Plan Area, and that would receive appropriate ESA coverage through Section 7. These actions relate to the operation of the CVP's Delta facilities, and conveyance through the SWP's Delta facilities to meet CVP purposes. These actions include the operation of existing CVP Delta facilities to convey and export water for project purposes, associated maintenance and monitoring activities, and the preservation, restoration and creation of habitat. The CVP is operated in coordination with the SWP under the Coordinated Operation Agreement. Associated Federal Actions are described in Chapter 4.

### **9.4 Integration of the BA and BDCP**

The BDCP is a comprehensive plan designed to provide the basis for the biological assessment submitted by Reclamation to support the Section 7 consultation with USFWS and NMFS regarding its CVP-related actions within the Delta. The BDCP Conservation Strategy described in Chapter 3 and the Associated Federal Actions described in Chapter 4 have been incorporated into the biological assessment by Reclamation as its proposed action. The BDCP does not distinguish precisely between the effects on Covered Species and their habitat attributable to the CVP-related federal actions and to Covered Activities associated with the SWP. Rather, the BDCP includes a comprehensive analysis of the effects related to both the SWP and the CVP within the Plan Area, and sets out a Conservation Strategy that adequately addresses the totality of those effects. The incorporation of the BDCP into the biological assessment and subsequent Integrated Biological Opinion ensures comprehensive take authorization for Associated Federal Actions.

### **9.5 Approval, Adoption or Amendment of Future Plans or Projects by Permittees Inconsistent with the BDCP Objectives and Requirements**

The approval, adoption, or amendment of a future plan or project by any Permittee other than the BDCP, that is substantially inconsistent with the objectives and requirements of the BDCP, without the concurrence of the Fish and Wildlife Agencies, is grounds for suspension or revocation of the State Permit. If CDFW determines, after conferring with the Permittees, that such a plan or project has been approved, adopted, or amended in a manner that is substantially inconsistent with the objectives or requirements of the BDCP, CDFW will provide written notice to the Permittees documenting the nature of the inconsistency.

Within fifteen (15) days of the issuance of such notice, CDFW, the Program Manager, and the Permittees shall meet and confer to consider the basis for CDFW's determination

and to identify steps that may be taken to address any such inconsistency. In the event that the inconsistency is not satisfactorily addressed within forty-five (45) days or within a period mutually agreed to by CDFW and the Permittees, CDFW, at its discretion, may suspend or revoke the State Permit, in whole or in part, pursuant to Section 22.4 of this Agreement. CDFW shall not revoke the State Permit until such time as the review process set forth in Section 15.8 of this Agreement has been completed, provided the process has been invoked by a Permittee.

## **10.0 CONSERVATION STRATEGY**

The Conservation Strategy has been designed to achieve the BDCP's overall goals of restoring and protecting ecosystem health, water supply, and water quality in the Delta within a stable regulatory framework. The Conservation Strategy has been developed to meet the regulatory standards of Sections 7 and 10 of the ESA and the NCCPA. The BDCP describes the intended biological outcomes of the Conservation Strategy and details the means by which these outcomes will be achieved. The Conservation Strategy includes biological goals and objectives and conservation actions that appropriately minimize and mitigate the potential effects of Covered Activities and Associated Federal Actions on these resources and provides for the conservation and management of Covered Species and the natural communities upon which they depend. The Conservation Strategy also includes comprehensive programs for adaptive management, monitoring, and research. Additional details regarding the BDCP Conservation Strategy are found in Chapter 3 of the BDCP.

### **10.1 Biological Goals and Objectives**

The biological goals and objectives reflect the ecological outcomes that are expected to occur through the implementation of the BDCP. Biological goals articulate the broad, intended outcomes of the BDCP. Biological objectives are specific, measurable outcomes that are expected to be achieved through the implementation of the Conservation Strategy. The biological goals and objectives are intended to provide the following functions.

- Describe the desired biological outcomes of the Conservation Strategy and how those outcomes will contribute to the long-term conservation of Covered Species and their habitats.
- Provide, where feasible, quantitative targets, metrics, and timeframes for achieving the desired outcomes.
- Serve as benchmarks by which to measure progress toward achieving those outcomes across multiple temporal and spatial scales.
- Provide metrics that will be used to assess the effectiveness of the Conservation Measures and inform decisions regarding potential

adjustments to the Conservation Measures through the adaptive management process.

Through the implementation of the Plan, including adjustments made through the adaptive management process, Permittees will satisfy their obligation to achieve the biological goals and objectives. Unless otherwise specified in the Plan or this Agreement, failure to achieve a biological goal(s) and/or objective(s) shall not be a basis for a determination by the Fish and Wildlife Agencies of non-compliance with the Plan or for the suspension or revocation of the Permits, provided the Permittees are properly implementing the BDCP and are in compliance with this Agreement and the terms and conditions of the Permits.

### **10.1.1 Relationship to Plan Implementation**

Progress toward achieving the biological goals and objectives will be measured during implementation of the Plan through monitoring and targeted research. Biological objectives may be modified over time.

### **10.1.2 Process to Modify Biological Objectives**

Biological objectives may be modified through either the adaptive management decision-making process as described in Chapter 3.6.3.5 and Section 10.3.4 of this Agreement or through the formal amendment process set out in Chapter 6.5.3 and Section 23.3 of this Agreement.

## **10.2 Conservation Measures**

The Parties agree that the implementation of the Conservation Measures will, to the maximum extent practicable, minimize and mitigate impacts to Covered Species and provide for the conservation and management of Covered Species. These measures have been developed in accordance with the principles of conservation biology and address, among other things, ecological processes, environmental gradients, biological diversity, and regional aquatic and terrestrial linkages.

The Conservation Measures are expected to be sufficient to achieve the biological goals and objectives of the Plan during the 50-year timeframe for Plan implementation. Most of the Conservation Measures address several goals and objectives, and most objectives will be met through a combination of Conservation Measures.

The Conservation Measures are described in Chapter 3.4.

### **10.2.1 Decision Tree Process**

#### **10.2.1.1 Purpose and Function**

The Parties agree that a key area of scientific uncertainty concerns the volume of Delta outflow that is necessary to advance the biological goals and objectives for both delta smelt and longfin smelt. To address these uncertainties, a “decision tree” process will be established to further investigate the role and contribution of fall and spring outflow for these smelt species. The Decision Tree process is a component of an adaptive management process and is described in CM1. The Parties acknowledge that the outflow requirements associated with the Decision Tree may be met through project operations or other means.

The Decision Tree process describes two potential outcomes for spring outflow and two potential outcomes for fall outflow. The outcomes of the Decision Tree are linked to scientific hypotheses. These hypotheses will be tested over the next approximately ten years using the best available scientific information. The specific outflow requirements for both delta smelt and longfin smelt at the time the new conveyance system becomes operational will be based on the best available science that tests these hypotheses associated with spring and fall outflow.

For permitting purposes, the applicants propose a project with operational and flow criteria intended to achieve the biological goals and objectives, which, among other things, include the range of operational and flow criteria for the high-outflow and low-outflow scenarios. It is expected that USFWS, CDFW, and NMFS will issue Permits for the proposed project, which may include as permit terms and conditions the operational and flow criteria related to the high-outflow scenario in the application.

However, all of the Parties, including USFWS, NMFS, and CDFW, agree that future science and improved information will be used as described herein to determine fall and spring outflow criteria applicable when the conveyance facilities become operational. The relevant Fish and Wildlife Agencies will make the final decision about criteria that will be implemented when the conveyance facilities become operational pursuant to the decision-making process set out in Section 10.2.1.2 and the review process described in Section 15.8.

#### 10.2.1.2 Decision-making Process

The Parties agree that the processes established in Chapter 3.6.3.5, and Section 10.3 and 10.4 for the adaptive management and monitoring program will be used to decide matters regarding the Decision Tree process. The decision tree process will involve the following steps.

1. Clearly articulate scientific hypotheses designed to reduce uncertainty about what outflow criteria are needed to achieve the biological objectives for delta smelt and longfin smelt.
2. Development and implementation of a science plan and data collection and analysis program to test the hypotheses, and report the results of the

analysis as well as the robustness of the results and extent and sources of uncertainty.

3. Completion and peer review of a report that (i) incorporates all pertinent and credible available scientific information including, but not limited to, the data, analyses, and results that emerge from the above investigations, (ii) includes a critical assessment and synthesis of such scientific information, and (iii) interprets such scientific information in order to identify a recommended course of action with respect to the alternatives set out through the decision tree process. This step will be administered by the Implementation Office under the direction of the Adaptive Management Team.
4. Prior to the time CM1 operations begin, the Implementation Office will provide the report (including the Adaptive Management Team's recommendation) to the Authorized Entity Group and the Permit Oversight Group for decision pursuant to Chapter 3.6.3.5.3, and Sections 10.3 and 10.4.

#### 10.2.1.3 No Requirement for Plan or Permit Amendment

The Permits and related Section 7 consultation processes will be used to authorize Take associated with Covered Activities and Associated Federal Actions based in part on specific outflow criteria. Neither the BDCP nor the associated regulatory authorizations would need to be amended to allow for the implementation of flow criteria determined through the Decision Tree process.

#### 10.2.1.4 Relationship of Decision Tree Process to the Adaptive Management Program

The Parties acknowledge that changes to CM1 may occur through the adaptive management program, which will go into effect once the BDCP has been permitted. Notwithstanding the foregoing, with respect to changes to CM1 related to outflow requirements for delta and longfin smelt pursuant to the Decision Tree process, such changes may not occur through the adaptive management program until the Authorized Entity Group and Permit Oversight Group act on the recommendation as set out in the Decision Tree report. The outflow criteria applicable to CM 1 may be within the range of outflow criteria analyzed in the decision tree and will be based on the best available science.

#### 10.2.1.5 Relationship of the Decision Tree Process to Other Covered Fish Species

The Parties recognize that other covered fish species, including salmonids and sturgeon, are affected by outflow. As such, the Parties understand that NMFS and CDFW will

consider outflow needs for other Covered Species as part of their review of the Plan. The outflow needs of these species will also be investigated as part of the scientific research and analysis that will be conducted prior to the new conveyance system becoming operational. In the event that information developed during this period indicates that changes to the outflow requirements of CM1 associated with these other fish species are warranted, adjustment will occur in the context of the adaptive management program.

## **10.2.2 Real Time Adjustments to Water Operations**

### **10.2.2.1 Purpose and Function**

The Parties shall establish a “real time operations” mechanism to allow for short-term adjustments to be made to water operations, within the established ranges and criteria as set out in CM1 and CM2, for the purpose of maximizing conservation benefits to covered fish species and maximizing water supplies.

The Parties agree that any real time operational adjustments shall be made in accordance with the following guidelines:

- The primary BDCP agencies (CDFW, USFWS, NMFS, DWR, and Reclamation) will collaborate in making real time operational adjustments.
- The scope of real time operational adjustments will apply only to certain identified operational parameters and will occur within the boundaries of, or consistent with, the operational criteria set out in CM1 and CM2.
- Real time adjustments that are anticipated to be implemented in the coming year will be identified in the Annual Delta Water Operations Plan developed by DWR and Reclamation with input from the RTO Team. The Annual Delta Water Operations Plan will also describe how project reoperations and the Supplemental Resources Fund assets will be used as part of real time operations for the purpose of maximizing conservation benefits to covered fish species and maximizing water supplies.

### **10.2.2.2 Real Time Operations Process**

#### **10.2.2.2.1 Real Time Operations Team**

The Parties shall establish a Real Time Operations Team (“RTO Team”), which will consist of one representative each from USFWS, NMFS, CDFW, Reclamation, and DWR. The RTO Team will also include one representative of the SWP Contractors and one representative of the CVP Contractors, who will serve as non-voting members. The voting members may, by consensus, expand the membership of the RTO Team.

#### **10.2.2.2.2 Function of the RTO Team**

The RTO Team will track and document real time operational adjustments as they are implemented in relation to what was identified in the Annual Delta Water Operations Plan and assess the effect of such adjustments on Covered Species and quantify the effects on water supply. The RTO Team will also document use of the Supplemental Resources Fund as part of real time operations. Documentation of any adjustment that was made to operations, and the effect, if any, of the adjustment on water supply, will include information regarding the circumstances that warranted an adjustment and the expected benefits to the targeted Covered Species and to water supply. The RTO Team shall make such information available to the public through a website or other electronic medium. This information will be used by DWR and Reclamation in the development of subsequent Annual Delta Water Operations Plans. This subsection describes the operations planning expected to occur on an annual basis for the purpose of maximizing conservation benefits to covered fish species and maximizing annual water supplies.

#### 10.2.2.2.3 Decision-Making Process

The RTO Team shall operate by consensus when making recommendations related to real time adjustments to water operations. In the event that consensus cannot be reached among the RTO Team, the matter will be elevated to the director of CDFW and the regional director of the relevant federal Fish and Wildlife Agency and the director of DWR and the regional director of Reclamation. Absent the concurrence of the relevant agency directors, the disputed real time operational adjustment will not be made.

#### 10.2.2.3 Scope of Real Time Operational Adjustments

The Parties recognize and agree that any such operational adjustments effectuated through the real time process shall be limited to the specific parameters and criteria set out in Chapter 3.4.1.4 and shall apply only to those facilities and activities identified in CM1 and CM2. Some operational parameters will not be subject to real time adjustments, as these components of the system would be operated pursuant to discrete criteria set out in the Conservation Measure.

Facilities that will be subject to real time operational adjustments are as follows:

- North Delta Intakes (CM1)
- Delta Cross Channel Gates (CM1)
- Head of Old River Gate (CM1)
- South Delta Diversions (Clifton Court and Jones Pumping Plant) (CM1)
- Fremont Weir Operable Gates (CM2)

The extent to which real time adjustments that may be made to each parameter related to these facilities shall be limited by the criteria and/or ranges set out in CM1 and CM2. That is, operational adjustments shall be consistent with the criteria, and within any ranges, established in the Conservation Measures.

Any modifications to the parameters subject to real time operational adjustments or to the criteria and/or ranges set out in CM1 or CM2 shall occur only through the adaptive management program or by Plan amendment. Similarly, any changes to the facilities or activities subject to real time operational adjustments shall occur only through the adaptive management program or by Plan amendment.

### **10.2.3 Process to Modify Conservation Measures**

Conservation measures may be modified solely through the adaptive management decision-making process as described in Chapter 3.6.3 and Section 10.3.4 of this Agreement or, if necessary, through the formal amendment process set out in Chapter 6.5.3 and Section 23.3 of this Agreement.

## **10.3 Adaptive Management Program**

### **10.3.1 Purpose**

Under the adaptive management and monitoring programs, new information and insight gained during the course of Plan implementation will be used to develop and potentially implement alternative strategies to achieve the biological goals and objectives. Monitoring and research will be used, among other things, to confirm Plan implementation and to measure the efficacy of the Conservation Measures, factors affecting the response of the ecosystem and Covered Species to these measures, and the influence of factors present outside the Plan Area.

The Parties recognize that the some of the Conservation Measures may not achieve their expected outcomes, while others may produce better results than expected. Through monitoring and research efforts, new scientific data, information, and analysis, the Parties will be informed regarding the capacity of the Conservation Measures to meet the biological goals and objectives. The adaptive management program will afford the flexibility to allow for changes to be made to Conservation Measures and biological objectives, including the addition to or elimination of such measures or objectives, to improve the effectiveness of the Plan over time.

### **10.3.2 Adaptive Management Team**

#### **10.3.2.1 Purpose and Function**

An Adaptive Management Team shall be established as set forth in Chapter 3.6.2.2. The Adaptive Management Team shall have primary responsibility for administration of the adaptive management and monitoring program and shall have the authority to make decisions involving certain specified matters; for certain other matters, the role of the Adaptive Management Team will be to develop and make recommendations regarding potential adaptive changes for consideration by the Authorized Entity Group and the

Permit Oversight Group; and for other matters, the Adaptive Management Team will serve as a source of guidance and advice to the Implementation Office.

#### 10.3.2.2 Membership and Composition

The Adaptive Management Team shall be chaired by the Science Manager and shall consist of representatives of DWR, Reclamation, two participating State and federal water contractors (one each representing the SWP and CVP), CDFW, USFWS, and NMFS. Each of the foregoing parties shall be voting members. The Lead Scientist for the Interagency Ecological Program, the Lead Scientist for the Delta Science Program and the Director of the NOAA Southwest Fisheries Science Center shall also be members of the Adaptive Management Team, but shall serve in an advisory capacity only and shall not be eligible to vote on matters. The directors of DWR and CDFW and the regional directors of Reclamation, USFWS, and NMFS will each designate a management-level representative to serve on the Adaptive Management Team, each of whom shall be qualified to represent both policy and scientific perspectives on behalf of their respective agencies.

#### 10.3.2.3 Meetings of the Adaptive Management Team

The Adaptive Management Team shall determine its meeting schedule and administrative matters. The Implementation Office shall ensure that a record of Adaptive Management Team meetings and its actions is posted to a website or other appropriate electronic medium to ensure public access. The record should include a list of meeting attendees, meeting agenda, decisions and/or recommendations made, assignments to conduct additional work on a matter, audiovisual presentations or other materials distributed, and other documents relevant to the deliberations of the Adaptive Management Team.

On a periodic basis, the Adaptive Management Team shall open its meetings to the public. The Adaptive Management Team will institute procedures with respect to public notice of and access to these meetings. The date, time, and location of the meetings will be posted on the BDCP website at least ten (10) days prior to such meetings. The meetings will be held at locations within the City of Sacramento or the legal Delta.

### **10.3.3 Adaptive Management Changes Involving Routine or Administrative Matters**

#### 10.3.3.1 Scope of Routine and Administrative Matters

The Adaptive Management Team shall make decisions involving routine scientific matters associated with adaptive management, effectiveness monitoring, and research activities. The Adaptive Management Team shall also make decisions regarding administrative matters involving the Adaptive Management and Monitoring Program. These matters have been specifically assigned to the Adaptive Management Team in Chapter 3.6. They include: reassessment of and modifications to problem statements and

conceptual models; synthesis of scientific information; preparation and distribution of information pertaining to adaptive management, effectiveness monitoring, and scientific research to various parties, including policy-makers, stakeholders, and the public.

#### 10.3.3.2 Development of Proposals regarding Routine or Administrative Matters

On a periodic basis or otherwise as appropriate, the Adaptive Management Team will consider, based on biological monitoring data and other information available at the time, whether conditions warrant a routine or administrative change to the Adaptive Management and Monitoring Program. As part of its deliberations, the Adaptive Management Team may seek input from independent scientists or from other appropriate sources, including the Technical Facilitation Sub-group of the Stakeholder Council. In the event that the Adaptive Management Team determines that a routine adaptive management change may be warranted, it may develop a proposal for the change. The Authorized Entities, the Fish and Wildlife Agencies, or the Stakeholder Council also may submit for consideration by the Adaptive Management Team, through the Science Manager, proposals for such adaptive changes. The Adaptive Management Team may receive proposals from other interested parties and, at its discretion, may review any such proposals and determine whether such proposals will receive further consideration.

In its consideration of issues and development of recommendations the Adaptive Management Team will identify relevant policy, legal, and regulatory principles and will make decisions regarding routine or administrative matters consistent with the schedule, budget and the adaptive resources available to support the Adaptive Management and Monitoring Program. The Science Manager will work with the Program Manager to define the policy, legal, budget or schedule issues at hand and will provide such information to the Adaptive Management Team prior to any action on the matter. The Adaptive Management Team will consider technical input that may be received from the Technical Facilitation Subgroup of the Stakeholder Council, as described in Chapter 7.1.6.

#### **10.3.4 Adaptive Management Changes to Conservation Measures or Biological Objectives**

The Adaptive Management Team shall be responsible for developing proposals for changes to the Conservation Measures and to the biological objectives for consideration by the Authorized Entity Group and the Permit Oversight Group. On a periodic basis or otherwise as appropriate, the Adaptive Management Team will consider, based on biological monitoring data and other information available at the time, whether conditions warrant a change to a Conservation Measure or a biological objective. As part of its deliberations, the Adaptive Management Team may seek input from independent scientists or from other appropriate sources, including the Technical Facilitation Sub-group of the Stakeholder Council. In the event that the Adaptive Management Team determines that a change in a Conservation Measure or a biological objective may be

warranted, it may develop a proposal for a change. The Authorized Entities, the Fish and Wildlife Agencies, and the Stakeholder Council may submit to the Adaptive Management Team, through the Science Manager, proposals for a change to a Conservation Measure or biological objective, and such proposals shall be considered by the Adaptive Management Team. The Adaptive Management Team may also receive proposals for adaptive changes from other interested parties and, at its discretion, review any such proposals to determine whether such proposals will receive further consideration.

In its consideration of issues and development of recommendations the Adaptive Management Team shall take into account the policy, legal, and regulatory principles that may be relevant to the proposed change to a Conservation Measure or a biological objective and shall make its recommendations consistent with the adaptive resources available under the Plan, as set forth in Section 10.3.7. The Science Manager will work with the Program Manager to define policy, legal, budget, schedule and adaptive resource issues and will provide such information to the Adaptive Management Team prior to any action on the matter. The Adaptive Management Team shall review relevant data and information, and take into account any input from the Authorized Entity Group, the Permit Oversight Group, or the Stakeholder Council, including technical input that may be received from the Technical Facilitation Subgroup of the Stakeholder Council.

Adaptive management actions that are associated with the implementation of the Conservation Measures and are within the scope of the Conservation Measures as described in the Plan will be determined and undertaken by the Implementation Office. Such actions shall not be subject to the processes set out in Section 10.3 and will not require the approval or concurrence of the Authorized Entities, the Fish and Wildlife Agencies, or the Adaptive Management Team.

### **10.3.5 Decision-making Process**

The decision-making process set out in this Section shall be used to effectuate changes to elements of the Adaptive Management and Monitoring Program, including those that are considered to be “routine” or that involve changes to the administration of the Adaptive Management and Monitoring Program, and to the Plan’s Conservation Measures or biological objectives.

#### **10.3.5.1 Decision-Making Process**

##### **10.3.5.1.1 Routine or Administrative Matters**

In the event that the Adaptive Management Team achieves consensus as to whether adopt a routine or administrative change, the decision on the matter shall be considered final. Such decisions of the Adaptive Management Team shall not be subject to review and consideration by the Authorized Entity Group and the Permit Oversight Group, nor shall they be subject to the review process established in Section 15.8 of this Agreement.

In the event that the Adaptive Management Team fails to reach consensus regarding a proposed routine or administrative change, the Adaptive Management Team will document for the Authorized Entity Group and the Permit Oversight Group the change under consideration and the nature of the disagreement, including the divergent positions taken by the voting members of the Adaptive Management Team. The Program Manager will forward the documentation to the Authorized Entity Group and the Permit Oversight Group for their consideration. The Program Manager may supplement the documentation prepared by the Adaptive Management Team with any information the Program Manager believes will assist the Authorized Entity Group and Permit Oversight Group in reaching a determination on the matter. Resolution of the issue in dispute will follow the process set out below pertaining to changes to Conservation Measures or biological objectives; however, with respect to potential routine or administrative changes, if the Authorized Entity Group and Permit Oversight Group are unable to reach agreement, the Permit Oversight Group will decide the matter.

The Program Manager shall be responsible for documenting any routine or administrative changes that are adopted. Such information will be included in the Annual Progress Report, as described in Chapter 6.3.3.

#### 10.3.5.1.2 Matters Involving Potential Changes to Conservation Measures or Biological Objectives

With respect to its consideration of a proposed change to a Conservation Measure or a biological objective, the Adaptive Management Team may or may not reach consensus regarding the matter. In either event, the Adaptive Management Team, upon completing its consideration of the proposed change, shall promptly notify the Authorized Entity Group and the Permit Oversight Group of the outcome of its deliberations.

As part of its notification, the Adaptive Management Team shall include information to assist the Authorized Entity Group and the Permit Oversight Group in their consideration of the proposed change. Specifically, the Adaptive Management Team shall provide the Authorized Entity Group and the Permit Oversight Group with the following information:

- A description of the proposed change, including, as applicable, the extent, magnitude, and timing of the proposed modification.
- A description of the scientific rationale for the proposed change and why it is reasonably expected to better achieve the biological objectives (if the change is to a Conservation Measure) or goals (if the change is to an objective) of the Plan.
- Identification of any alternatives that were considered and the reasons for their rejection.

- A description of any uncertainties associated with the change and potential approaches to reducing any such uncertainties.
- A report describing any information derived from independent science review and an explanation of how that information was addressed in the recommendation.
- An analysis of the potential cost in water, land, money, or other resources associated with the change being proposed.
- An analysis of the means by which the adaptive resources available to support adaptive management actions will be used to fund the proposed change, if applicable.
- A cover letter and any information the Program Manager believes may be helpful in assisting the Authorized Entity Group and Permit Oversight Group in making their decision.

If the Adaptive Management Team has not reached consensus on the recommendation, it will forward to the Program Manager the proposals, each prepared by a member or group of members within the team, which represents the differing views of how the matter should be resolved.

The Authorized Entity Group and the Permit Oversight Group will jointly meet to consider and act on the matter presented by the Adaptive Management Team. In the process of its deliberations, the Authorized Entity Group and Permit Oversight Group may jointly meet and confer with the Adaptive Management Team to discuss the matter at hand. The Authorized Entity Group and the Permit Oversight Group shall decide matters taking into account the policy, legal, and regulatory principles, as set forth below, as well as budgetary and scheduling considerations and the parameters established for the adaptive resources available to support the change under consideration. The Authorized Entity Group and Permit Oversight Group may base their decision on the information provided by the Adaptive Management Team and the Program Manager, or they may gather additional information or commission independent expert review to further inform their decision.

Any member of the Authorized Entity Group or Permit Oversight Group may introduce supplemental information not provided by the Adaptive Management Team or the Program Manager for the purpose of better informing deliberations. The member may further seek independent expert review of the supplemental information. With regard to such information, if any member should so request, it will be provided to the Adaptive Management Team for its review and comment. The Adaptive Management Team may comment on the information either through a report reflecting the consensus of its members or, in the event no such consensus is reached, through individual comments.

As part of their deliberations on changes to Conservation Measures, the Authorized Entity Group and the Permit Oversight Group shall take into account the following legal, policy, and regulatory principles:

- The scope and nature of a proposed adaptive response will be considered within the totality of the circumstances, including the degree to which the change is reasonably expected to offset the impacts of Covered Activities or Associated Federal Actions and Plan implementation or to better achieve the biological objectives.
- The proposed adaptive management action must be consistent with the legal authority of the entity responsible for effectuating the action.
- The Adaptive Management process will be used to help ensure that Conservation Measures are in conformity with the ESA and NCCPA permit issuance criteria throughout the course of Plan implementation. Changes will be limited to those actions reasonably likely to ensure that (1) the impacts (or levels of impacts) of a Covered Activity or Associated Federal Action on Covered Species that were not previously considered or known are adequately addressed or (2) a Conservation Measure or suite of Conservation Measures that are less than effective, particularly with respect to effectiveness at advancing the biological goals and objectives, are modified, replaced or supplemented to produce the expected biological benefit.
- The strength of the scientific evidence linking the proposed change to a Conservation Measure and to the ability of the Plan to achieve the relevant biological objective or objectives.
- An assessment will be made of a potential adaptive change so that the desired outcome(s) will be achieved with the least resource costs. As long as equal or greater biological benefits can be achieved, adaptive responses should favor changes that minimize impacts to water supply or reliability.
- Prior to any decision to change a Conservation Measure in a manner that would potentially result in the modification of water supplies consistent with Section 9.3.7, non-operational alternatives will be considered and, if such alternatives are rejected, the Adaptive Management Team will provide an explanation provided as to why they were not sufficient to address the effects of the Covered Activity, or Associated Federal Action, or achieve the biological objective(s) of the Plan.

If the Authorized Entity Group and the Permit Oversight Group jointly agree that the proposed change to a Conservation Measure or biological objective is warranted, the change will be adopted and incorporated into the Plan.

In the event that the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement on the proposed change to a Conservation Measure or biological objective, the dispute review process described in Chapter 7.1.7 and Section 15.8 of this Agreement will be available to the Parties. If invoked, the appropriate Fish and Wildlife Agency official with authority over the matter, after considering the available information and taking into account the advice of the review panel, shall decide whether the proposed change, or an alternative to the proposed change, will be adopted.

The Program Manager shall be responsible for documenting any changes made to the Conservation Measures or the biological objectives. Such information will be included in the Annual Progress Report, as described in Chapter 6.3.3.

### **10.3.6 No Requirement for Plan or Permit Amendment**

The Parties recognize and agree that a change to a Conservation Measure or to a biological objective shall not require an amendment to the BDCP nor to the regulatory authorizations issued pursuant to the Plan, provided such change is adopted through the adaptive management process, as described in this Section, and in a manner consistent with the adaptive resources available for such changes, as described in Section 10.3.7 and Chapter 3.4.

### **10.3.7 Resources to Support Adaptive Management**

#### **10.3.7.1 Resources Generally Available to Support Changes in Conservation Measures**

Pursuant to the adaptive management process described in Section 10.3.4, the Parties may modify or adjust Conservation Measures and biological objectives. Such changes to Conservation Measures include the following strategies: modifying approaches to the implementation of the measures, shifting resources from less effective to more effective Conservation Measures, adding and/or eliminating Conservation Measures, and using the Supplemental Adaptive Management Fund to fund, if necessary, any such changes to the Conservation Measures.

The Parties agree that any potential adaptive management changes to the Conservation Measures, either individually or cumulatively, shall not require the commitment of resources, including land, water, or money, in excess of those specifically provided for under these strategies, including the Supplemental Adaptive Management Fund, or alter the financial commitments of the Plan participants, as set out in Chapter 8.

#### **10.3.7.2 Resources Available to Support Changes to Water Operations Conservation Measures**

In the event that changes to CM1 are adopted through the adaptive management process, the resources necessary to implement such changes shall be drawn from the following sources, to the extent available, and in the order of priority set out below.

- Adjusting operations on an inter-annual basis.
- Sharing resources derived from water supply improvements.
- Re-allocating resources from less effective Conservation Measures.
- Drawing funds from the Supplemental Adaptive Management Fund.

The limits and constraints associated with each of the foregoing sources are set out in Chapter 3.4 and Chapter 8. Any such changes to CM1 shall be consistent with the funding commitments set out in those chapters.

### 10.3.7.3 The Supplemental Adaptive Management Fund

#### 10.3.7.3.1 Purpose

A Supplemental Adaptive Management Fund, as described in Chapter 3.4.23.5, shall be established to support adaptive management changes to CM1, as well as to other Conservation Measures, determined to be necessary during Plan implementation. The Fund will be made available to support an adaptive management change in the event that sufficient resources cannot be secured through the first three of the approaches identified in Section 10.3.7.2. Funding for the Supplemental Adaptive Management Fund will be as described in Chapter 8 of the Plan and Section 13.1 of this Agreement.

#### 10.3.7.3.2 Availability of the Fund

The Parties agree that the funds within the Supplemental Adaptive Management Fund shall be made available pursuant to the process and criteria set out in the Plan and this Section to support adaptive management changes to any of the Conservation Measures. Prior to any such use of the Supplemental Adaptive Management Fund, the parties shall determine whether sufficient resources to support an adaptive change are available from any of the sources identified in Section 9.3.3.2, subject to the limitations associated with each. If a determination is made that adequate funds are not available through these sources, the Supplemental Adaptive Management Fund may be used at any time, provided the following actions have occurred or determination have been made beforehand.

- A 5-year periodic review has determined that one or more of the biological objectives are unlikely to be achieved through the implementation of the existing Conservation Measures.

- The biological objectives have been assessed to determine their likely achievability through the implementation of the Plan and, adjustments were made on the basis of new circumstances and scientific information.
- A lack of progress toward achieving one or more biological objectives is related to or caused by the Covered Activities or Conservation Measures.
- Adjustments to one or more Conservation Measures (e.g., more flow, changes in habitat restoration targets or locations) are likely to address the problem.
- To the extent appropriate, existing assets have been reallocated to support adequate changes to Conservation Measures (Chapter 3.4.23.3, *Redirected Funding to the Most Effective Conservation Measures*).
- Measures that do not adversely affect water supply, if any, have been implemented.

If the consideration of the foregoing factors confirms the need to use the fund, the Implementation Office, pursuant to the direction provided through the adaptive management process, would initiate actions to deploy the money available through the Supplemental Adaptive Management Fund to provide the additional resources necessary to implement the adaptive management change. The parties anticipate that such funds could be used to acquire water to supplement flows, undertake additional natural community restoration, or implement a range of other actions. In the event that additional outflow was determined to be necessary, supplemental water may be acquired from voluntary sellers. In the event that additional natural community restoration actions or investment in predation reduction activities were determined to be necessary, these actions may also be funded through the Supplemental Adaptive Management Fund.

#### 10.3.7.3.3 Relationship to Regulatory Assurances and Protections

The resources provided for under the Supplemental Adaptive Management Fund, as well as other resources that may be available through actions described in Section 9.3.7.2, reflect the full extent of the commitment of the Parties to support changes made to the Plan through the adaptive management process. These commitments shall be considered part of the overall resource obligations of the Parties in the context of the regulatory Assurances and Protections described in Section 14.0.

### **10.4 Biological Monitoring and Research**

Biological monitoring and research shall be conducted to provide new data and information regarding ecological and scientific matters relevant to the BDCP pursuant to Chapter 3.6. The data and information gathered through these and other efforts will be

used to inform key decisions, including those involving adaptive management actions, and to assess progress toward meeting the Plan’s biological goals and objectives.

#### **10.4.1 Scope of Biological Monitoring**

The purpose of the biological monitoring program is to provide the necessary data, information, and analysis to determine the effect of the Plan on Covered Species and their habitats and to assess the effectiveness of the Plan in advancing the biological goals and objectives. Specifically, “effects” monitoring will provide the basis for evaluating the impacts of Covered Activities, Associated Federal Actions, and Conservation Measures on Covered Species, including the amount of take of Covered Species; “effectiveness” monitoring will provide the basis for determining the effectiveness of the Conservation Measures and identifying the need for adaptive management responses, as described in Chapter 3.6.4.4.

Effectiveness monitoring actions are identified in the descriptions of each Conservation Measure identified in Chapter 3.4, and listed by Conservation Measure in Table 3.E-2 of Appendix 3.E of the Plan. Metrics and protocols for effectiveness monitoring will be developed, under the direction of the Adaptive Management Team, at the early stages of Plan implementation and will be periodically revised to reflect new scientific developments and improved technological capability.

#### **10.4.2 Responsibility of Adaptive Management Team**

The Adaptive Management Team shall have primary responsibility for the overall development and administration of the monitoring and research program, as described in Chapter 3.6.2.2. The Adaptive Management Team will also be responsible for integrating the adaptive management and monitoring activities into one cohesive program.

#### **10.4.3 Annual Monitoring and Research Plan**

The Implementation Office shall prepare an Annual Monitoring and Research Plan, based on the recommendations and guidance provided by the Adaptive Management Team. The plan will identify, among other things, the type, scope, nature and timing of the proposed monitoring and research activities and the rationale and need for such activities, as further described in Chapter 3.6.4.

A draft of the Annual Monitoring and Research Plan will be submitted to Authorized Entity Group and the Permit Oversight Group for their joint approval. In the event that the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement on the Annual Monitoring and Research Plan, the Permit Oversight Group will determine whether the proposed plan, or an alternative to that plan, will be adopted. If a member(s) of the Authorized Entity Group does not agree with the decision of the Permit

Oversight Group, the dispute will be resolved pursuant to the review process described in Chapter 7.1.7.

The Implementation Office will incorporate the Annual Monitoring and Research Plan into the Annual Work Plan and Budget, as described in Chapter 6.3.1.

#### **10.4.4 Role of Independent Science**

The Adaptive Management Team may direct scientific reviews and solicit independent scientific advice to assist the team in its management of the monitoring and research program. The Adaptive Management Team, through the Science Manager, will coordinate monitoring and research efforts with the Delta Science Program, the IEP, the Authorized Entity Group, the Permit Oversight Group, and the Stakeholder Council.

### **11.0 PLAN IMPLEMENTATION**

#### **11.1 Implementation Schedule**

The Implementation Office will ensure that the Conservation Measures are implemented substantially in accordance with the Implementation Schedule, Exhibit D. The Parties agree that implementation of the Conservation Measures in accordance with the Implementation Schedule will help ensure that the impacts of Covered Activities and Associated Federal Actions on Covered Species are minimized and mitigated, to the maximum extent practicable, and that the measures are sufficient to provide for the conservation and management of Covered Species.

##### **11.1.1 Maintaining Rough Proportionality Between Impacts and Conservation Measures**

If the Conservation Measures are implemented in accordance with the Implementation Schedule and procedure as detailed in Chapter 6.1.2 and Tables 6-1 and 6-2 of the Plan, Rough Proportionality will be considered by CDFW to be maintained in accordance with the NCCPA.

##### **11.1.2 Procedure for Addressing Failure to Maintain Rough Proportionality**

If a Fish and Wildlife Agency determines that Rough Proportionality between impacts to Covered Species and the implementation of the Conservation Measures is not being maintained, that agency will invoke the following process. If a Fish and Wildlife Agency determines, after conferring with the Implementation Office, that the conditions of the Implementation Schedule are not being met, the Fish and Wildlife Agencies, the Program Manager, and the Permittees shall meet and confer. Within forty-five (45) days of the determination, the Permittees shall either (a) regain Rough Proportionality by demonstrating substantial implementation of the actions according to the existing

Conservation Strategy and Implementation Schedule; or (b) enter into an agreement with the relevant Fish and Wildlife Agency(ies) to expeditiously regain Rough Proportionality. Such an agreement may include advancing and/or accelerating plans to acquire, restore, or enhance lands of the appropriate land cover type.

If the Implementation Office has not re-established Rough Proportionality within forty-five (45) days or has not entered into and maintained compliance with an agreement with the Fish and Wildlife Agency(ies) within that period that sets a course of action to regain Rough Proportionality in a timely manner, the Fish and Wildlife Agency(ies) may suspend or revoke their Permits, in whole or in part. The partial suspension or revocation may include removal of one or more Covered Species or reduction in the scope of the Take Authorizations. The Fish and Wildlife Agency(ies) may suspend but shall not revoke the Permits until such time as the review process set forth in Section 15.8 of this Agreement has been completed, provided the process has been invoked by a Permittee.

### **11.2 Advance Credit for Interim Implementation Actions**

Implementation actions that have been undertaken or completed prior to the issuance of the Permits, but after the date of execution of the Planning Agreement in October 2006, will be credited toward meeting the overall BDCP conservation requirements, provided that the actions (1) are consistent with the Conservation Measures; (2) advance the BDCP's biological goals and objectives; and (3) do not constitute mitigation associated with projects that are not a Covered Activity or Associated Federal Action.

Interim implementation actions that may meet the three aforementioned conditions include those listed in Table 6-4 of the Plan. These actions may be credited toward the fulfillment of the Conservation Measures set out in Chapter 3, after evaluation by the Fish and Wildlife Agencies.

### **11.3 Credit for Restoration Actions Identified in the CVP/SWP Long-Term Operation Biological Opinions and State Incidental Take Permit**

Notwithstanding the provisions of Section 11.2 above, the Parties agree that 8,000 acres of tidal habitat restoration identified in the USFWS Biological Opinion (issued December 15, 2008) and the CDFW Consistency Determination (issued October 14, 2011), and further discussed in the NMFS Biological Opinion (issued June 4, 2009) and the CDFW Consistency Determination (issued April 27, 2012) and in the Section 2081 permit issued for longfin smelt (issued February 23, 2009), will be credited to the BDCP as restoration actions fulfilling a portion of the obligations identified in Conservation Measure 4 once the required criteria have been met.

### **11.4 Reserve System**

The creation and management of the Reserve System is a component of the Conservation Strategy, as described in Conservation Measure 3 in Chapter 3.4.3. The Implementation Office shall oversee the creation of the Reserve System, which will consist of a number of individual reserve units. The Reserve System will be created through the permanent protection and long-term management of aquatic and terrestrial habitats.

#### **11.4.1 Provisions to Ensure Long-Term Protection of Reserve System Lands**

Reserve System lands shall be permanently protected through acquisition of fee title or conservation easement, or, where there is an identified impediment to transferring fee title or creating a conservation easement, through the use of another site protection mechanism approved by the Fish and Wildlife Agencies. All Reserve System conservation easements will comply with California Civil Code sections 815–816 and California Government Code, section 65965 *et seq.* Conservation easement templates for natural lands and for agricultural lands will be developed by the Authorized Entities and will be subject to the approval of the Fish and Wildlife Agencies. Upon approval by the Fish and Wildlife Agencies, those templates will be deemed to be attachments to this Agreement as Exhibit E for natural lands and Exhibit F for agricultural lands. The easement templates may be revised, subject to approval of the Fish and Wildlife Agencies, without amendment to this Agreement.

The Fish and Wildlife Agencies shall designate which template provisions are to be required in each easement, unless otherwise approved by the Fish and Wildlife Agencies, and which provisions can be amended in individual easements without the further approval of the Fish and Wildlife Agencies. In cases requiring approval of an easement template revision, or a revision to a particular easement, the Implementation Office shall seek and obtain the approval of the applicable Fish and Wildlife Agencies. The Fish and Wildlife Agency(ies) requested to approve a revision to the easement template, or to approve an easement revision specific to a particular parcel of land, shall respond to the Implementation Office within sixty (60) days.

The Implementation Office will ensure that non-wasting endowments, or substantial equivalent as approved by the Fish and Wildlife Agencies, are established for Reserve System lands to ensure funding for long-term management in perpetuity.

The Implementation Office shall carry out the reserve management responsibilities, as further described in Chapter 3.4.11 of the Plan. The Implementation Office may delegate planning and implementation tasks to other Parties or qualified third parties, including but not limited to universities, scientists and other contractors. However, the Permittees shall remain solely responsible for ensuring the management of the reserve lands and the timeliness and quality of all requirements of reserve management during the term of the Permits and ensuring mechanisms are in place for reserve management in perpetuity.

Where the Authorized Entities have funded an endowment to fully satisfy certain conservation obligations under the Plan and the endowment has been reviewed and approved in writing as adequate by the Fish and Wildlife Agencies, funding is deemed adequate to carry out such obligations, and the Fish and Wildlife Agencies shall not require additional funds or resources from the Authorized Entities with regard to those obligations.

## **11.4.2 Reserve Management Plans**

### **11.4.2.1 Reserve Unit Management Plans**

The Implementation Office will prepare and implement management plans for protected natural communities and Covered Species habitats that are found within those communities. Management plans will be prepared by reserve unit, which may be an individual reserve or multiple reserves in a specified geographic area that share common management needs. Within two years of acquiring parcels, the Implementation Office will conduct surveys to collect information to identify actions necessary to achieve the applicable biological objectives related to management and enhancement of the reserve. The Implementation Office will prepare reserve unit management plans in collaboration with the Fish and Wildlife Agencies, and will submit plans to the Fish and Wildlife Agencies for approval within four years of the first acquisition within each reserve unit. Prior to approval of a reserve unit management plan, reserves will be managed using best practices based on successful management of the site prior to acquisition, or based on management at other similar sites.

General enhancement and management actions to be implemented throughout the reserve system are described in Chapter 3.4.11.2.3 and address fire management, recreation, invasive plant control, nonnative animal control, mosquito abatement, pesticides, levee maintenance, reserve system connectivity and permeability, and access control. Management and enhancement actions specific to certain natural communities will be included in reserve management plans, as provided in CM 11.

The Implementation Office shall evaluate each Reserve Management Plan for effectiveness and revise it as appropriate (a) to incorporate new acquisitions within the same reserve unit and to document new best management practices; (b) at least every five (5) years to ensure that the BDCP adaptive management and monitoring program and the results of the latest research are being applied to management in each reserve unit, and (c) whenever necessary under Changed Circumstances pursuant to Section 12.0 of this Agreement.

### **11.4.2.2 Management of Agriculture and Grazing Easements or Leases**

Reserve unit management plans for cultivated lands, grasslands or other natural communities may include ongoing grazing or agricultural activities, if approved by the

Fish and Wildlife Agencies, pursuant to Conservation Measure 11, Chapter 3.4.11.2.7. For reserve units that are acquired through fee title, the Implementation Office shall include the terms of the reserve unit management plan in any lease or other agreement that allows continued grazing or other agricultural use of the land. For lands that are acquired through conservation easement, any key elements related to maintaining or enhancing habitat for Covered Species (i.e., essential requirements, restrictions or other criteria required for the reserve unit management plan) shall be included or referenced in the conservation easement. The reserve unit management plan itself shall be completed within two (2) years after recording the conservation easement.

## **12.0 CHANGED CIRCUMSTANCES**

Ecological conditions in the Delta are likely to change as a result of future events and circumstances that may occur during the course of the implementation of the BDCP. The BDCP identifies changes in circumstances that are reasonably foreseeable and that could adversely affect reserve system lands or waters in the Plan Area, consistent with the “changed circumstances” provisions of the ESA regulations and in the NCCPA. To ensure successful implementation of the Conservation Strategy, the BDCP sets out measures designed to respond to these foreseeable future changes.

The BDCP identifies the specific Changed Circumstances that can reasonably be expected to occur in the Plan Area during the course of Plan implementation and that may compromise the effectiveness of the implementation actions set out in the BDCP. As set out in Chapter 6.4.2, the Plan describes the responses that will be implemented through the BDCP to adequately address such events and discusses their potential to prevent or impede the BDCP from achieving anticipated biological outcomes. The specific approaches and steps related to many of the planned responses will be developed and implemented through the adaptive management program (Chapter 3.6). However, for certain Changed Circumstances, responsive actions will fall outside the scope of the adaptive management program; these actions are specifically described in Chapter 6.4.2. The planned responses to Changed Circumstances have been designed to be practicable yet sufficient to effectively address such events.

### **12.1 Process to Respond to Changed Circumstances**

The Implementation Office and the Fish and Wildlife Agencies shall be responsible for identifying the onset of a Changed Circumstance, using information obtained from system-wide or effectiveness monitoring, scientific study, or information provided by other sources. Once the Implementation Office and/or the Fish and Wildlife Agencies has become aware that a Changed Circumstance has occurred or is likely to occur, they will take immediate steps to investigate and confirm the event. The Implementation Office shall notify the Authorized Entity Group, the Permit Oversight Group and the Stakeholder Council of the change in circumstances.

After documenting the occurrence of a Changed Circumstance, the Implementation Office will determine specific responsive actions that are consistent with the requirements set out in Chapter 6.4.2 and develop a schedule for their implementation. The Implementation Office will confer with the Fish and Wildlife Agencies regarding the details of the response and a timeframe for implementation. For actions implemented through the adaptive management and monitoring program, the decision-making process described in Chapter 3.6 will be used. After implementing such actions, the Adaptive Management Team will oversee monitoring efforts to determine the effectiveness of the responsive actions and report the associated result and finding through the annual reporting process.

### **13.0 FUNDING**

The Parties recognize that the ESA and the NCCPA each require that adequate funding will be assured to implement an HCP and/or an NCCP. The Parties acknowledge that such assurances do not require that all necessary funds be secured at the time of permit issuance, but rather establish that such funding is reasonably certain to occur during the course of Plan implementation.

The Permittees agree to provide such funds as may be necessary to carry out their obligations under the BDCP. Furthermore, as described in Chapter 8 of the Plan, the State and federal governments have committed to provide additional funding to implement the Plan. The Parties agree that the detailed accounting of the estimated costs associated with the various components of the BDCP, as set out in Chapter 8.2 and Tables 8-5 through 8-36, reflect best efforts to determine the level of funding necessary to implement the Plan.

The Parties and Reclamation have identified the various sources from which funding will likely be drawn, as described in Chapter 8.3 and Tables 8-37 through 8-59, sufficient to support a viable funding strategy. Such sources of funding include State and federal water contractor revenue, contractor-issued bonds, State-issued bonds, federal agency appropriations, and State and federal grants.

The Parties acknowledge that the sources of funding identified in the Plan, including bonds for infrastructure, have historically proven to be reliable means by which public projects may be funded. In addition, the primary sources of funding that the Parties intend to rely upon are typical of the type of sources that are generally available to public agencies to fund large-scale infrastructure and mitigation projects.

The Parties agree that the assessment of funding requirements for the BDCP, the viability of the sources identified for such funding, and the commitments made by the Parties in the Plan and this Agreement provide an adequate basis for a finding by the State and federal Fish and Wildlife Agencies that sufficient assurances of funding have been provided pursuant to the ESA and the NCCPA. In the event that certain sources of funds cease to be available or circumstances warrant a reexamination of the viability of the

BDCP funding strategy, Section 13.2 of this Agreement will guide the Parties in their efforts to remedy any actual or imminent shortfall.

### **13.1 Obligations of the Parties**

The overall level of funding required for the implementation of the Plan is set out in Chapter 8 and this Agreement. The Parties acknowledge and agree that the overall level of funding set out in the Plan represents a best estimate of such costs and that the funding obligations of the Parties, as described in the Plan and this Agreement, will be fulfilled over the course of Plan implementation. The Plan and this Agreement contain provisions for periodic evaluation of funding and for addressing any potential for inadequate funding.

#### **13.1.1 Obligations of the Authorized Entities**

The Authorized Entities shall be responsible for funding a share of the overall cost of the BDCP, as set forth in the Plan. The Authorized Entities will provide funding equal to the costs associated with the construction, operation, and maintenance of the new conveyance infrastructure set out in CM1 and for the mitigation associated with such infrastructure, as described in Chapter 8.3.4. The Authorized Entities will contribute towards all other Conservation Measures and related program elements, as described in the column “Amount Paid by Contractors” in Table 8-41 in Chapter 8.3.4.1. [Note to Reviewers: This amount in table 8-41 of the draft BDCP totals \$903 million]. Consistent with the foregoing, the Authorized Entities shall not be obligated to provide, either directly or through another agency, funding to implement any other elements of the Plan.

#### **13.1.2 Obligations of California and the United States**

[Note to Reviewers: no Federal Administration Position on Financing – While the United States has been engaged in the development of this draft Agreement, there is no federal position as of this time regarding potential funding obligations of the United States. The Parties anticipate reaching agreement on a federal and state cost share.]

Subject to the limitations in Section 24.15 of this Agreement, and as described in Chapter 8 Tables 8-37 through 8-40, the State of California, acting through the appropriate State agency or agencies and the United States, acting through the appropriate federal agency or agencies, shall be responsible for funding the implementation of the Plan, except as funded by the Authorized Entities pursuant to 13.1.1, which will include the Supplemental Adaptive Management Fund.

#### **13.1.3 Additional Funding Opportunities**

To provide supplemental funding for Plan implementation, State, federal, and local agencies, including any of the Parties, may pursue funding from sources other than SWP

and CVP contractors. Such sources include those identified in BDCP Chapter 8.3 (including Tables 8-37, 8-39, 8-40, 8-48 through 8-55), as well as other sources that may be available. If Reclamation or DWR, or other State or federal agencies, pursue such funding for purposes of satisfying costs of Plan implementation that are not obligations of the CVP and SWP contractors, then Reclamation and DWR shall not directly, or otherwise charge or pass such costs to the SWP/CVP contractors.

### **13.2 Inadequate Funding**

Subject to the limitations in Section 24.15 of this Agreement, the Parties and Reclamation have committed to provide substantial resources to ensure the proper implementation of the BDCP and, through the Plan and this Agreement, have provided assurances that adequate funding for such purposes will be available and forthcoming.

A Fish and Wildlife Agency determination that the BDCP is not being adequately funded shall require a demonstration that: 1) a funding shortfall exists; and 2) such shortfall either a) prevents a specific action or actions from being implemented in a timely manner, as defined by the rough proportionality criteria set out in Chapter 6, or b) prevents a specific action or actions from being properly and fully implemented, as described in the relevant provisions of the BDCP.

In the event of a funding shortfall from the Authorized Entities, the Fish and Wildlife Agencies will evaluate the impact of the shortfall on Plan implementation and determine whether the funding deficiency should affect the scope or ongoing viability of the regulatory authorizations. The Plan and this Agreement contain provisions that provide for rough proportionality and that are intended to ensure there would be no mitigation debt in the event of inadequate funding. If circumstances warrant suspension or revocation of one or both of the Federal Permits (and/or invalidation of Reclamations' Incidental Take Statement) USFWS and NMFS may proceed pursuant to procedures in Sections 22.1, 22.2 and 22.3 of this Agreement. If CDFW determines adequate funding is not being provided by the Authorized Entities, CDFW may suspend or revoke the State Permit, in whole or in part, pursuant to the procedures in Section 22.4 of this Agreement. If the Authorized Entities elect to institute measures to cure the funding shortfall, implementation of such measures shall begin no later than ninety (90) days from the date of the meeting with the Fish and Wildlife Agencies.

In the event of a shortfall in State or federal funding, a Fish and Wildlife Agency(ies) shall not suspend or revoke the State and/or Federal Permits or invalidate Reclamation's take statement if the shortfall in funding is determined to be likely to have no more than a minimal effect on the capacity of the Plan to advance the biological goals and objectives.

The Parties have committed to provide substantial resources to ensure the proper implementation of the Plan. The Plan is designed to demonstrate that this funding will be adequate for such purposes and will be forthcoming. However, in the unanticipated event

of a shortfall in State or federal funding, the Implementation Office will make reasonable adjustments to expenditures to continue to meet the obligations of the Plan. If these adjustments are inadequate to meet Plan requirements, the Implementation Office will confer with the Fish and Wildlife Agencies to identify alternative courses of action. Actions that may be considered to address such shortfalls include adjusting the scope of the Plan in proportion to the public funding shortfall. Such actions may focus initially on the terrestrial components of the Plan and would be incorporated into the Plan through the formal amendment process described in Chapter 6.5.3 of the Plan and Section 23.3 of this Agreement. The Authorized Entities will not be required to provide land, water, or monetary resources beyond their commitments in this Plan in the event of a shortfall in State or federal funding.

## **14.0 ASSURANCES AND PROTECTIONS**

The ESA regulations and provisions of the NCCPA provide for regulatory and economic assurances to Parties covered by approved HCPs or NCCPs concerning their financial obligations under a plan. Specifically, these assurances are intended to provide a degree of certainty regarding the overall costs associated with mitigation and other Conservation Measures, and add durability and reliability to agreements reached between permit holders and the Fish and Wildlife Agencies. That is, if unforeseen circumstances occur that adversely affect species covered by an HCP or an NCCP, the Fish and Wildlife Agencies will not require of the permit holder any additional land, water, or financial compensation nor impose additional restrictions on the use of land, water, or other natural resources without their consent.

The assurances provided under the ESA and the NCCPA do not prohibit or restrain USFWS, NMFS, CDFW, the Permittees or any other public agency from taking additional actions to protect or conserve species covered by an NCCP or HCP. The State and federal agencies may use a variety of tools at their disposal and take actions to ensure that the needs of species affected by unforeseen events are adequately addressed.

### **14.1 Regulatory Assurances under the ESA – The No Surprises Rule**

Under the No Surprises rule (63 Fed. Reg. 8859 (Feb. 23, 1998)), once an incidental take permit has been issued pursuant to an HCP, and its terms and conditions are being properly implemented, the federal Fish and Wildlife Agencies will not require additional measures for Changed Circumstances not provided for in the plan or for unforeseen circumstances, without the consent of the Permittee, including land, water (including quantity and timing of delivery), financial compensation, or restrictions on the use of those resources (63 Fed. Reg. 8859, 8868 (Feb. 23, 1998)). If the status of a species addressed under an HCP unexpectedly declines because of unforeseen circumstances, the primary obligation for undertaking additional conservation measures rests with the federal government, other government agencies, or other nonfederal landowners who have not yet developed HCPs.

However, the federal Fish and Wildlife Agencies may, in the event of unforeseen circumstances, require additional measures provided they are limited to modifications in conserved natural community areas or to the HCP's operating conservation program (*e.g.*, the Conservation Strategy) for the affected species, and that these measures do not involve additional financial commitments or resource restrictions without the consent of the Permittee. These assurances are provided to all HCP permittees that properly implement their plans. The No Surprises rule, however, does not apply to federal agencies. 50 C.F.R. § 222.307(g).

## **14.2 Regulatory Assurances under the Natural Community Conservation Planning Act**

Under the NCCPA, CDFW provides assurances to permittees commensurate with the long-term conservation assurances and associated implementation measures that will be implemented under a plan (Fish & Game Code § 2820(f)). In its determination of the level and duration of the assurances to be afforded a permittee, CDFW takes into account the conditions specific to the plan, including such factors as:

- The level of knowledge of the status of covered species and natural communities;
- The adequacy of analysis of the impact of take on covered species;
- The use of the best available science to make assessments of the impacts of take, reliability of mitigation strategies, and appropriateness of monitoring techniques;
- The appropriateness of the size and duration of the plan with respect to quality and amount of data;
- The sufficiency of mechanisms for long-term funding of all components of the plan and contingencies;
- The degree of coordination and accessibility of centralized data for analysis and evaluation of the effectiveness of the plan;
- The degree to which a thorough range of foreseeable circumstances are considered and provided for under the adaptive management program; and
- The size and duration of the plan.

The assurances provided to the entities receiving permits under the NCCPA will ensure that if there are unforeseen circumstances, no additional financial obligations or restrictions on the use of resources will be required of the Permittees without their consent. Specifically, the NCCPA directs that,

[i]f there are unforeseen circumstances, additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources shall not be required without the consent of plan participants for a period of time specified in the implementation agreement, unless CDFW determines that the plan is not being implemented consistent with the substantive terms of the implementation agreement (Fish & Game Code § 2820(f)(2)).

The NCCPA requires that CDFW suspend or revoke a permit, in whole or in part, if the continued take of a Covered Species would jeopardize its continued existence.

### **14.3 USFWS and NMFS**

#### **14.3.1 Permittees**

Pursuant to the No Surprises Rule at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5), and 222.307(g), and provided that the BDCP is being implemented consistent with the terms of this Agreement, the Plan, and the Federal Permits, the USFWS and NMFS shall not require the Permittees to provide additional land, water or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level provided for under the BDCP, this Agreement and the Federal Permits with respect to Covered Activities without the consent of the Permittees. Adaptive management modifications and planned responses to Changed Circumstances are provided for under the BDCP, as set out in Chapter 3.6 and Chapter 6.4.2. Accordingly, the resources identified to support such modifications and planned responses, together with the other resources commitments of the Permittees reflected in the Plan, this Agreement and the associated regulatory authorizations, constitute the extent of the obligations of the Permittees pursuant to the No Surprises Rule.

#### **14.3.2 Reclamation**

The No Surprises Rule does not apply to federal agencies. In light of Reclamation's integral role in the BDCP, it is appropriate to provide to Reclamation a degree of certainty regarding its obligation to fund Conservation Measures, and to provide durability and reliability regarding BDCP implementation. In that regard, USFWS and NMFS agree that once the Integrated Biological Opinion has been issued: (1) to the maximum extent allowed by law, Reclamation's ongoing responsibilities for Associated Federal Actions under Section 7(a)(2) of the ESA will be fulfilled through Reclamation's participation in the BDCP, including through the obligations it has assumed under the adaptive management and the Changed Circumstances provisions of the Plan; and (2)

USFWS and NMFS agree that Reclamation will not be required to provide additional commitments or measures for Associated Federal Actions beyond those set forth in the BDCP without first attempting to resolve issues through the review process in Section 15.8, if invoked by an Authorized Entity, and exhausting processes set forth in Section 22.5 of this Agreement.

### **14.3.3 Unforeseen Circumstances**

Under the ESA regulations and this Agreement, if unforeseen circumstances arise during the life of the BDCP, USFWS and/or NMFS may not require the commitment of additional land or financial compensation, or additional restrictions on the use of land, water, or other natural resources other than those agreed to in the Plan.

Within these constraints, USFWS and/or NMFS may require additional measures, but only if the following conditions apply:

- The agencies prove an unforeseen circumstance exists.
- Such measures are limited to modifications within any conserved habitat areas or to the Conservation Measures for affected Covered Species.
- The original terms of the Plan will be maintained to the maximum extent possible.
- The overall cost of implementing the BDCP is not increased by the modification.

Pursuant to 50 C.F.R. §§ 17.22(b)(5)(iii)(C), 17.32(b)(5)(iii)(C), and 222.307(g)(3)(iii), the USFWS or NMFS has the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. The USFWS and NMFS will consider input submitted by the Authorized Entities prior to making that determination. A finding of unforeseen circumstances must be made considering the following six factors: (1) size of the current range of the affected species; (2) percentage of range adversely affected by the conservation plan; (3) percentage of range conserved by the conservation plan; (4) ecological significance of that portion of the range affected by the conservation plan; (5) level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and (6) whether failure to adopt additional Conservation Measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild. If such a finding is made and additional measures are required, the Authorized Entities will work with CDFW, USFWS and/or NMFS to appropriately redirect resources to address the unforeseen circumstances, consistent with the intent of the BDCP.

If USFWS or NMFS believe an unforeseen circumstance exists, it shall provide written notice of its proposed finding of unforeseen circumstances to the Implementation Office. The USFWS or NMFS shall clearly document the basis for the proposed finding regarding the existence of unforeseen circumstances pursuant to the requirements of 50 C.F.R. §§ 17.22(b)(5)(iii)(C), 17.32(b)(5)(iii)(C), and 222.307(g)(3)(iii). Within fifteen (15) days of receiving such notice, the Authorized Entities, the Program Manager, and the USFWS and NMFS shall meet and confer to consider the facts cited in the notice and potential changes to the Conservation Strategy.

## **14.4 CDFW**

### **14.4.1 Permittees**

Provided the BDCP is being implemented consistent with the substantive terms of this Agreement, the Plan, and the State Permit, CDFW agrees that it will not require from the Permittees additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources for the 50 year term of the State Permit without the consent of Permittees. Adaptive management modifications and Plan responses to Changed Circumstances are provided for under the BDCP, as set out in Chapter 3.6, and Chapter 6.4.2. Accordingly, the resources identified to support such modifications and planned responses, together with the other resources commitments of the Permittees reflected in the Plan, constitute the extent of the obligations of the Permittees, pursuant to the assurances provided for in the NCCPA. Section 2823 of the NCCPA provides, however, that CDFW shall suspend or revoke any permit, in whole or in part, issued for the take of a species subject to Section 2835 if the continued take of the species would result in jeopardizing the continued existence of the species. Responses to a jeopardy determination are addressed in Section 22.6 of this Agreement.

### **14.4.2 Unforeseen Circumstances**

As specified in Section 14.4.1, CDFW agrees that it will not require of the Permittees additional land, water, or financial compensation or additional restrictions on those resources without the consent of the Permittees for the 50 year term of the BDCP and this Agreement. In the event of unforeseen circumstances, CDFW shall make an unforeseen circumstances finding based on the best scientific evidence available, after considering any responses submitted by the Permittees. If such a finding is made and additional measures are required, the Authorized Entities will work with CDFW, USFWS and NMFS to appropriately redirect resources to address the unforeseen circumstances, consistent with the intent of the BDCP.

If CDFW believes an unforeseen circumstance exists, it shall provide written notice of its proposed finding of unforeseen circumstances to the Implementation Office. CDFW shall clearly document the basis for the proposed finding regarding the existence of unforeseen circumstances. Within fifteen (15) days of receiving such notice, the

Authorized Entities, the Program Manager, and CDFW shall meet and confer to consider the facts cited in the notice and potential changes to the Conservation Strategy.

#### 14.4.2.1 Interim Obligations upon a Finding of Unforeseen Circumstances under the ESA or NCCPA

If a Fish and Wildlife Agency finds that an Unforeseen Circumstance has occurred with regard to a Covered Species and that additional measures are required for the Covered Species as a result, during the period necessary to determine the nature, scope and location of any additional measures, the Permittees will avoid causing an appreciable reduction in the likelihood of the survival and recovery of the affected species. The Permittees will not be responsible for implementing any additional measures unless the Permittees consent to do so.

## **15.0 IMPLEMENTATION STRUCTURE**

### **15.1 Approach to BDCP Governance and Implementation**

The implementation of the BDCP will generally be effectuated through an Implementation Office, which will be managed by a Program Manager and governed by the Authorized Entities through the “Authorized Entity Group.” The Authorized Entities shall have ultimate responsibility for the actions undertaken by the Implementation Office. The Fish and Wildlife Agencies will maintain an ongoing role in Plan implementation, including participation in a Permit Oversight Group, to ensure that such implementation proceeds in a manner consistent with the BDCP and its associated regulatory authorizations. Through the Permit Oversight Group, the Fish and Wildlife Agencies will be involved in certain specified implementation decisions and will lend technical and scientific expertise to the implementation process. In addition, a “Stakeholder Council” shall be created and regularly convened to enable public agencies, non-governmental organizations, interested parties, and the general public to provide ongoing input into the implementation process and to effectively discuss and resolve issues in dispute.

### **15.2 Implementation Office**

#### **15.2.1 Purpose and Function**

The Program Manager will establish, organize, and direct the Implementation Office. To ensure that the commitments reflected in the BDCP are carried out in a timely and efficient manner, the Program Manager, through the Implementation Office, will institute processes and procedures to adequately address planning, budgeting, sequencing, and scheduling needs related to Plan implementation. The Implementation Office will function with a significant level of independence from its member entities. However, the Program Manager and the Implementation Office staff will work closely with these entities on a range of matters, particularly with respect to actions that affect water

operations, and will be responsive to the Authorized Entity Group, regardless of the entity through which the Program Manager and the Implementation Office staff have established employment relationships. In addition, for those activities involving functions that, under State and federal law, cannot be delegated (e.g., water operations, water contracting, procurement, expenditures of State and federal funds), the Program Manager will coordinate with the appropriate designated State or federal official to ensure that the necessary function is carried out. The Program Manager will also, to the extent appropriate, solicit input from the Stakeholder Council on a range of implementation matters.

Specifically, under the direction of the Program Manager, the Implementation Office shall assume responsibility for the implementation of a broad range of actions, as identified in Chapter 7, including:

- Oversight and coordination of administration of program funding and resources.
- Preparation of annual budgets and work plans.
- Establishment of procedures and approaches to implement Plan actions.
- Planning, oversight, and implementation of actions set out in the Conservation Measures.
- Technical and logistical support to the Adaptive Management Team with respect to the administration of the Adaptive Management and Monitoring Program.
- Coordination with Delta-wide governance entities, including the Delta Stewardship Council, the Delta Science Program, and the Delta Conservancy.
- Implementation of public outreach program.
- Fulfillment of compliance monitoring and reporting requirements, including the preparation of annual reports.
- Reporting, at least on an annual basis, to the Delta Stewardship Council on the status of Plan implementation, including on matters related to the adaptive management and monitoring activities.

The Implementation Office shall not be responsible for certain implementation actions. Specifically, the Implementation Office will have limited, if any, involvement in the following matters:

- The Implementation Office shall not be involved in the construction or operation of SWP and/or CVP facilities other than to monitor infrastructure development and water operations for the purpose of assembling the information necessary to evaluate and report on compliance with the terms and conditions of the Plan, the Implementing Agreement, and the associated regulatory authorizations, as described in Chapter 6.4. The BDCP sets out the parameters within which DWR and Reclamation will conduct SWP and CVP operations and infrastructure development. DWR and Reclamation may choose to operate the SWP and CVP and develop new project infrastructure using their current organizational capacity or by contract with other entities.
- The Implementation Office shall not administer the Adaptive Management and Monitoring Program. Rather, the program will generally be administered by the Adaptive Management Team, which will be chaired by the Science Manager (See Chapter 3.6.2.1). The Implementation Office will provide logistical and technical support to the Adaptive Management Team.

The Program Manager will also organize, convene, and provide support to the Authorized Entity Group and its proceedings, including its meetings with the Permit Oversight Group. In the event that the Program Manager position is vacant, then DWR and Reclamation will designate agency staff to serve this role until such time as the position has been filled. The Program Manager will further ensure that the Authorized Entity Group receives and reviews all proposed work plans, reports, budgets, and other relevant information generated by the Implementation Office, the Fish and Wildlife Agencies, the Adaptive Management Team, and other sources. The Program Manager will further ensure that the Authorized Entity Group has sufficient opportunity to provide input regarding these documents.

The Implementation Office shall implement a public outreach and education program to promote public awareness and provide opportunities for public input on matters concerning Plan implementation, as described in Chapter 7.5. The outreach program shall meet the following objectives.

- Promote public awareness of and understanding about the Plan's purpose, specific Conservation Measures and their implementation.
- Provide streamlined and timely access to information.
- Provide opportunities to engage with decision-makers.
- Maintain a transparent process for understanding, clarifying and addressing public input and comments.

Particular emphasis will be placed on outreach efforts focused on the following stakeholders: Delta residents, including landowners, farmers, and business owners; environmental community; agricultural community; boaters; commercial fishing interests; recreational anglers; local governments; reclamation districts; irrigation districts; public utilities; public and private landowners adjacent to BDCP conservation areas; and Native American tribes. In addition, to further facilitate access to information and promote transparency in decision-making, the Implementation Office shall maintain a public, on-line database of key documents and information, such as annual implementation reports, work plans, and budgets.

### **15.2.2 Legal Status**

The Implementation Office will not be a legal entity and, therefore, will not be authorized to enter into contracts directly or hold property in its own name. As such, the Implementation Office will administer the implementation of the BDCP under the existing authorities of the Authorized Entities.

### **15.2.3 No Delegation of Authority**

The assignment of responsibility to the Program Manager and the Implementation Office will not alter or modify existing authorities, mandates, and obligations of the Authorized Entities or any other State and federal agency participating in Plan implementation. No general delegation of authority by the Authorized Entities to the Implementation Office, including the Program Manager or to any employee assigned to the Implementation Office will occur, although specific delegation may occur in the event that it is considered by the delegating Authorized Entity to be beneficial to the efficient operation of the Implementation Office. Any such delegation will be conferred, in writing, by the delegating Authorized Entity to the Program Manager, and will be reviewed by that agency from time to time. No unauthorized delegation of State or federal authority to the Program Manager or the Implementation Office will occur.

### **15.2.4 Implementation Office Management and Other Staff**

#### **15.2.4.1 Program Manager**

The Program Manager will manage, coordinate, oversee, and report on all aspects of Plan implementation, subject to the oversight of the Authorized Entity Group and consistent with certain limitations related to the development, operation, and maintenance of the SWP and CVP facilities and the administration of the Adaptive Management and Monitoring Program. The Program Manager will report to the Authorized Entity Group, and act in accordance with the Group's direction.

The Authorized Entity Group will select the Program Manager. Prior to making its selection, the Authorized Entity Group will: solicit qualified candidates for the Program Manager position; confer with the Permit Oversight Group regarding the selection

process and the qualifications of the candidates; invite the Permit Oversight Group to participate in the interview process; and confer with the Stakeholder Council regarding the selection process. The Program Manager shall meet the qualifications set out in Chapter 7.1.1.1.

#### **15.2.4.2 BDCP Science Manager**

The Program Manager will select a Science Manager. Prior to making the selection, the Program Manager will: consult with the Authorized Entity Group and the Permit Oversight Group regarding the selection process and the qualifications of the candidates; invite the Authorized Entity Group and the Permit Oversight Group to participate in the interview process; and confer with the Stakeholder Council regarding the selection process. The Science Manager must meet the qualifications set out in Chapter 7.1.1.2. The Science Manager will report to the Program Manager.

The responsibilities of the Science Manager will include:

- Serve as Chair of the Adaptive Management Team and assist the team in the development and administration of the Adaptive Management and Monitoring Program, in coordination with the Interagency Ecological Program and other science programs.
- Serve as a member of the IEP Coordinators.
- Engage in regular communication and coordination with the Delta Science Program and the Independent Science Board, in a manner consistent with Water Code § 85820, as well as other outside scientists and, with guidance from the Adaptive Management Team, coordinate or contract with the Independent Science Board, the Delta Science Program, or other scientists to obtain input and review, to support the Adaptive Management and Monitoring Program.
- Support the Program Manager in the preparation of plans, reports and other technical documents.
- Assist in building sufficient scientific capacity and resources within the Implementation Office and the IEP to advance the goals and objectives of the BDCP.
- Assist the Adaptive Management Team in synthesizing and presenting the results of studies and research, compiling the findings of monitoring efforts, and summarizing the current scientific knowledge on relevant Delta resources to the Program Manager, Authorized Entity Group, Permit Oversight Group, Stakeholder Council, and others.

### **15.2.4.3 Staff**

The Program Manager will fulfill the staffing needs of the Implementation Office by drawing from existing personnel at DWR, Reclamation, State and Federal Water Contractors Agency (SFWCA), and from other sources, including from sources outside of agencies, if appropriate and if such personnel possess the expertise and experience necessary to carry out the tasks associated with implementation. The specific staffing needs of the Implementation Office will be determined by the Program Manager, with input from the Authorized Entity Group and the Permit Oversight Group. Staff assigned to the Implementation Office will act under the direction of the Program Manager. The engagement of personnel from DWR, Reclamation, and other entities, however, will not affect or modify the existing authorities of federal, State, and local agencies or nongovernmental organizations that pertain to personnel matters. Personnel may be retained under the Intergovernmental Personnel Act (5 U.S.C. §§ 3371–3375); through personal services contracts, or other appropriate mechanisms. The Authorized Entities and the Fish and Wildlife Agencies will each designate a representative from their respective agencies to serve as liaisons to the Implementation Office.

### **15.2.4.4 Conservation Measure Implementation Actions**

The Implementation Office shall be responsible for planning, design and implementation of Conservation Measures, as described in more detail in Chapter 3.6.3.5.1 of the Plan. As such, these activities shall not be subject to the processes set out in Section 10.3 and will not require the approval or concurrence of the Authorized Entities, the Fish and Wildlife Agencies, or the Adaptive Management Team.

## **15.3 BDCP Authorized Entity Group**

### **15.3.1 Purpose and Function**

The Authorized Entity Group shall be established to provide program oversight and general guidance to the Program Manager regarding the implementation of the Plan. The Authorized Entity Group will consist of the Director of DWR, the Regional Director for Reclamation, a representative of the SWP contractors and a representative of the CVP contractors. The Authorized Entity Group will be responsible for ensuring that the management and implementation of the BDCP are carried out consistent with its provisions, this Agreement, and the associated regulatory authorizations.

The Authorized Entity Group will provide oversight and direction to the Program Manager on matters concerning the implementation of the BDCP, provide input and guidance on general policy and program-related matters, monitor and assess the effectiveness of the Implementation Office in implementing the Plan, and foster and maintain collaborative and constructive relationships with the Fish and Wildlife Agencies, other public agencies, stakeholders and other interested parties, and local government throughout the implementation of the BDCP.

The Authorized Entity Group will engage in a number of specific matters including, but not limited to, the following:

- Provide oversight of the administration and funding of implementation activities.
- Provide oversight regarding the implementation of non-water related Conservation Measures by the Implementation Office.
- Approve, jointly with the Permit Oversight Group, changes to Conservation Measures or biological objectives proposed by the Adaptive Management Team.
- Decide, jointly with the Permit Oversight Group, all other adaptive management and monitoring program matters for which concurrence has not been reached by the Adaptive Management Team.
- Approve, jointly with the Permit Oversight Group, the Annual Monitoring and Research Plan.
- Select the Program Manager and provide input into the selection of the Science Manager.
- Review and approve the Annual Work Plan and Budget.
- Review and approve Annual Progress Reports, including Annual Delta Water Operations Reports, and other compliance-related documents.
- Review and approve submission of Plan amendments to the Permit Oversight Group.

### **15.3.2 No Delegation of Authority**

The participation of the Authorized Entities on the Authorized Entity Group will not trigger or otherwise cause a delegation of authority or responsibility for any of the implementation actions described in the BDCP from one Authorized Entity to another or to the Implementation Office. Rather, the specific roles and level of involvement in implementation actions are defined either by existing statutory or regulatory authorities or by provisions set out in the Plan and this Agreement. For many of the BDCP actions and commitments, a specific Authorized Entity will have the sole responsibility for implementation; for other actions and commitments established by the Plan, the Authorized Entities may be jointly and severally responsible for their implementation. For instance, the operation of the SWP will remain under the control and responsibility solely of DWR; likewise, the operation of the CVP will continue to be under the control

and responsibility of Reclamation. As such, while it is expected that the Authorized Entity Group will express a single position of the group regarding a matter under its consideration, the entity(ies) with vested statutory or regulatory authority over the matter will make the final determination.

### **15.3.3 Meetings of the Authorized Entity Group**

The Authorized Entity Group will meet on a schedule of its own choosing, but at a minimum on a quarterly basis. The Authorized Entity Group may also be convened by the Program Manager, as needed, to review issues that arise during the implementation of the Plan, including proposed amendments to the Annual Work Plan and Budget. The Authorized Entity Group will also meet with the Permit Oversight Group (Chapter 7.1.3), at least on a quarterly basis to review Plan implementation issues, including those related to the adaptive management and monitoring program and the restoration and preservation of habitat.

The Authorized Entity Group shall have the responsibility to inform the public of its deliberations and decisions. As such, the Program Manager will ensure that the public receives notice of upcoming meetings of the Authorized Entity Group, that meeting agendas are posted prior to such meetings, and that any decisions of the Authorized Entity Group are made available through the BDCP website. On a periodic basis, the Authorized Entity Group will hold meetings that are open to the public. The Authorized Entity Group will institute procedures with respect to public notice of and access to these meetings and to any public meetings it holds with the Permit Oversight Group. The date, time, and location of the meetings will be posted on the BDCP website at least ten (10) days prior to such meetings. The meetings will be held at locations within the City of Sacramento or the legal Delta.

## **15.4 Permit Oversight Group**

### **15.4.1 Purpose and Function**

The Permit Oversight Group will consist of the Fish and Wildlife Agencies, specifically, the Regional Director of USFWS, the Regional Administrator of NMFS, and the Director of CDFW. Consistent with their authorities under the ESA and the NCCPA, the Fish and Wildlife Agencies will retain responsibility for monitoring compliance with the BDCP, approving certain actions, and enforcing the terms and conditions of their respective regulatory authorizations. In addition to fulfilling those regulatory responsibilities, the Fish and Wildlife Agencies will also provide technical input on a range of implementation actions that will be carried out by the Implementation Office.

To ensure that the BDCP is being properly implemented, the Permit Oversight Group will coordinate agency review of the actions being implemented under the Plan and assessments of compliance with the provisions of the Plan, this Agreement, and associated regulatory authorizations. The Permit Oversight Group will be involved in

certain decisions relating to the implementation of water operations and other Conservation Measures, actions proposed through the adaptive management program or in response to Changed Circumstances, approaches to monitoring and scientific research. The Implementation Office will work with the Permit Oversight Group and the Authorized Entity Group to institute mutually agreeable processes to enhance opportunities for such collaboration and engagement.

The Permit Oversight Group will have the following roles, among others, in implementation matters:

- Approve, jointly with the Authorized Entity Group, changes to Conservation Measures or biological objectives proposed by the Adaptive Management Team.
- Decide, jointly with the Authorized Entity Group, all other adaptive management and monitoring program matters for which concurrence has not been reached by the Adaptive Management Team.
- Approve, jointly with the Authorized Entity Group, the Annual Monitoring and Research Plan.
- Participate in decision-making regarding real-time operations, consistent with the criteria of *CMI Water Facilities and Operation* and other limitations set out in the BDCP and annual Delta water operations plans.
- Provide input into the selection of the Program Manager and the Science Manager.
- Provide input and concurrence with respect to the consistency of specified sections of the Annual Work Plan and Budget with the BDCP and with certain agency decisions.
- Provide input and concur with the consistency of the Annual Delta Water Operations Plan with the BDCP.
- Provide input and accept Annual Progress Reports, including Annual Delta Water Operations Reports.
- Provide input and approve Plan amendments.

#### **15.4.2 Positions of the Permit Oversight Group**

For those actions that are regulatory in nature or require the concurrence and/or approval of the Permit Oversight Group, there will be one written communication, to the maximum extent practicable, relaying the position of the Permit Oversight Group on the

issue in question. In developing this communication, the three member agencies will coordinate with each other to evaluate interspecies conflicts and determine actions that meet the needs of all Covered Species, and they will ensure consistency among the federal agencies and, to the extent possible, among all three agencies in the application of their respective regulatory authority. Subject to the requirements for consistency above, nothing in this Agreement will limit the ability of any Permit Oversight Group agency to exercise its discretion through individual correspondence in circumstances where project operating agency action is imminent and there is not sufficient time to coordinate correspondence. Nothing in the this Agreement will limit application of authorities with respect to necessary Section 7 correspondence related to annual or seasonal operations of the CVP.

## **15.5 Adaptive Management Team**

The Adaptive Management Team will have primary responsibility for administration of the adaptive management and monitoring program. The specific roles and responsibilities of the Adaptive Management Team are described in Chapter 3.6.2 and Section 10.3.2 of this Agreement.

## **15.6 BDCP Stakeholder Council**

### **15.6.1 Purpose and Function**

The Stakeholder Council will be formed to provide opportunities for interested parties to consider, discuss, and provide input on matters related to the implementation of the BDCP. The primary purpose of the Stakeholder Council is to provide a forum for the BDCP stakeholders to assess the implementation of the Plan, and to propose to the Implementation Office ways in which Plan implementation may be improved. The BDCP Stakeholder Council will be organized and convened by the Program Manager, who will also serve as a member of the Stakeholder Council.

For the benefit of the Stakeholder Council members and the general public, the Program Manager will provide information and conduct briefings regarding Plan implementation. Briefings will include presentations of drafts of the Annual Progress Report, Annual Work Plan and Budget, Annual Delta Water Operations Plan, the Annual Water Operations Report, Five Year Comprehensive Review, and the Five Year Implementation Plan, as described in Chapter 6.

The Stakeholder Council will develop its own process to consider and provide input regarding the various aspects of BDCP implementation, including matters related to work plans and budgets, the Annual Delta Water Operations Plan, implementation of Conservation Measures, adaptive management changes, monitoring and reporting activities, scientific research and review processes, and annual reports. A Technical Facilitation subgroup will be established to provide input to the Implementation Office and the Adaptive Management Team on technical and scientific matters. The

Stakeholder Council process will complement, but not substitute for, ongoing collaboration and communication between stakeholders and the Implementation Office, Authorized Entities, the Authorized Entity Group, the Permit Oversight Group, and the Fish and Wildlife Agencies. The Implementation Office will organize, help convene, and provide support to the Stakeholder Council and its proceedings.

### **15.6.2 Membership**

The Stakeholder Council will consist of representatives from a range of entities and organizations with an interest in BDCP-related issues or otherwise engaged in BDCP matters. At a minimum, representatives of the following entities will be invited to participate on the Council:

- Representatives of DWR and Reclamation
- Representatives of SWP/CVP Contractors
- Representatives of Other Authorized Entities
- Representatives of USFWS, NMFS, and CDFW
- Representatives of other State and federal regulatory agencies, including the Army Corps of Engineers, the U.S. Environmental Protection Agency, and State Water Resources Control Board
- A representative of the Delta Stewardship Council
- A representative of the Delta Protection Commission
- A representative of the Delta Conservancy
- A representative of the Central Valley Flood Protection Board
- Representatives of the counties of San Joaquin, Sacramento, Solano, Yolo, and Contra Costa

Additional members will be selected from the following categories by the Secretary of the California Natural Resources Agency, in consultation with the directors of the relevant departments comprising the Agency, such as DWR and CDFW. The public may submit nominations to the Secretary for these additional members. Each member will serve a term of four years, and may be reappointed without limit and may serve until such time as they are replaced.

- At least three representatives from conservation groups with expertise in fish and wildlife management and/or the management of aquatic habitats and other natural lands
- At least three representatives of local government agencies within the Delta.
- At least one representative of fishing organizations
- At least one representative of hunting organizations
- At least one representative of recreational organizations
- At least two representatives of Delta reclamation districts
- At least two representatives of Delta agriculture
- At least three scientists with expertise in the management of natural lands, and native plant and animals species
- At least one representative of water agencies located in the Sacramento valley
- At least one representative of water agencies in the San Joaquin River watershed
- One representative from organized labor working in the building trades
- One representative from the exclusive representatives of State-employed scientific or engineering professionals
- Other stakeholders whose assistance will increase the likelihood of the success of Plan implementation, including Delta civic organizations and members of the general public

### **15.6.3 Meetings of the Stakeholder Council**

The Program Manager will convene and facilitate the Stakeholder Council on at least a quarterly basis to exchange information and provide input to the Program Manager concerning the current significant issues at hand. Stakeholders will have opportunity to inquire about implementation matters, be apprised by the Program Manager of issues of interest, and make recommendations concerning pending decisions and other implementation matters. Stakeholder Council meetings will be open to the public.

## **15.7 Supporting Entities**

### **15.7.1 Purpose and Function**

The Implementation Office, through the Program Manager, may request that other entities, referred to as “Supporting Entities,” perform certain implementation tasks, where such entities have the authority, resources, expertise, and willingness to successfully and timely undertake and complete the task. Where specific tasks are so assigned, the Program Manager will ensure that tasks and associated responsibilities are carried out properly and in coordination with other BDCP actions. The Authorized Entities and the Fish and Wildlife Agencies may also be Supporting Entities. Other Supporting Entities may include the following entities:

- The Delta Conservancy, which has been designated by statute as a primary State agency to implement ecosystem restoration in the Delta.
- Sponsors of regional conservation planning programs, including those engaged in NCCP and/or HCP development or implementation, or of other similar conservation programs, that overlap or are adjacent to the Plan Area.
- State and federal agencies.
- Other public agencies and private entities that have authority, capacity, or expertise to implement actions described in the Conservation Strategy in a cost-effective, reliable, and timely manner.

### **15.7.2 Administration and Oversight**

The Program Manager will oversee each Supporting Entity’s performance of its responsibility for carrying out a specific task. Decisions by the Program Manager to engage another entity in the implementation of specific Plan elements or actions will be accomplished by written contract (through the existing authorities of an Authorized Entity) and will be based on the entity’s jurisdictional authority, level of expertise, and its capacity to carry out the element or action in a timely and successful manner. The Program Manager, with the concurrence of the Authorized Entity Group, may terminate a Supporting Entity’s role in Plan implementation in the event that the Supporting Entity does not perform a task adequately. The Supporting Entity will be responsible, subject to oversight by the Program Manager, for entering into the necessary contracts and acquiring interests in real and personal property, in some cases obtaining permits or other authorizations, and taking all other steps needed to complete the implementation task.

The Take authorizations that will be issued pursuant to the BDCP will provide regulatory coverage under the ESA and the NCCPA for all activities and actions covered by the Plan. As such, no additional Take authorizations will be required to implement these

activities, regardless of whether the action is carried out by the Implementation Office or a Supporting Entity. The Permittees shall remain ultimately responsible for compliance with the Plan, this Agreement, and the associated regulatory authorizations.

## **15.8 Review of Disputes Regarding Implementation Matters**

### **15.8.1 Matters Subject to Review**

The Parties will be responsible for making various decisions with regard to the implementation of the BDCP. With respect to implementation matters for which the Authorized Entity Group and the Permit Oversight Group have joint decision-making authority and are unable to reach agreement, the review process described in this Section may be invoked to help resolve matters in dispute.

### **15.8.2 Review Process**

In the event of a dispute between the Authorized Entity Group and the Permit Oversight Group, the Parties will describe the basis for the dispute and identify options that may be available to help resolve the matter. The Parties will meet and confer to consider these options and to determine whether agreement can be reached on the matter. If after the meeting the matter remains unresolved, the entity with decision-making authority, as set out in Table 7-1 of the Plan, will make a final decision.

Prior to that final decision by the entity with decision-making authority, any member of the Authorized Entity Group or the Permit Oversight Group may initiate a non-binding review process concerning the matter in dispute. A member of either group may trigger this process by providing the Authorized Entity Group and the Permit Oversight Group with a written notice of dispute that describes the nature of the dispute and a proposed approach to resolution. Such notice must be provided to the Parties within fourteen (14) days of the announcement of a tentative decision by the entity with decision-making authority. The entity with decision-making authority over the matter shall refrain from taking any actions to implement its decision until the review process has been completed.

Within fourteen (14) days of the issuance of the written notice of dispute, the Parties, with the assistance of the Implementation Office, will form a three member panel of experts. One member of the panel will be selected by the Authorized Entity Group, one member will be selected by the Permit Oversight Group, and a third member will be selected by mutual agreement of the first two panel members. Sixty (60) days after written notice of dispute, both Parties will submit letter briefs and documentary evidence. No discovery will be allowed. At its discretion, the panel may require rebuttals or responses from the Parties. If so required, the Parties will submit rebuttals or responses within thirty (30) days of the request. Also, at its discretion, the panel may meet and confer with any of the Parties regarding the matter and gather whatever available information it deems necessary and appropriate. Within sixty (60) days of the submittal of the written positions of the Parties, or rebuttals if so required, a non-binding

recommendation will be issued by a majority of the panel, in writing, which will include a statement explaining the basis for the recommendation. If the recommendation is not issued by that date, the entity with decision-making authority may make its final decision. The timely completion of the review process is important to the effective implementation of the BDCP. The schedule described above shall be adjusted as necessary to inform the decisions in a timely manner.

Within thirty (30) days of issuance of the panel's non-binding recommendation, the entity with final decision-making authority over the matter shall consider those recommendations, as well as any other relevant information concerning the issue at hand, and convey its final decision regarding the matter to the Authorized Entity Group and the Permit Oversight Group.

### **15.8.3 Availability of Legal Remedies**

The availability of this review process will have no effect on the ability of a party to pursue legal remedies that may otherwise be available regarding a disputed matter. The recommendations of the panel are not intended to be given special deference by a reviewing court relative to the expert judgment of the agency making the final decision.

## **16.0 COMPLIANCE MONITORING AND REPORTING**

### **16.1 Purpose of Compliance Monitoring**

The purpose of compliance monitoring is to track progress of BDCP implementation in accordance with established timetables and to ensure compliance with terms and conditions of the BDCP and its associated regulatory authorizations. Compliance monitoring actions associated with specific Conservation Measures are set out in Chapter 3.4, and in Table 3.E-1 of Appendix 3.E of the Plan. Compliance monitoring will be conducted for all Conservation Measures, whether implemented directly by the Implementation Office or by Supporting Entities.

### **16.2 Responsibilities of the Implementation Office**

The Implementation Office shall be responsible for ensuring that the compliance monitoring and reporting requirements of the Plan are met and for carrying out the tasks required to meet these obligations, as further described in Chapters 6 and 7. The Implementation Office may enlist the Adaptive Management Team or Supporting Entities, including the IEP and the Delta Science Program, to perform certain monitoring and reporting tasks. However, the Implementation Office shall remain solely responsible for fulfilling all monitoring and reporting requirements.

### **16.3 Compliance and Progress Reports**

The Implementation Office shall prepare, on a periodic basis, reports documenting compliance with the provisions of the BDCP and its associated regulatory authorizations and the progress being made toward meeting the biological goals and objectives of the Plan. The Implementation Office shall, over the term of the BDCP, submit various reports and plans to the Fish and Wildlife Agencies that serve the following purposes:

- Provide the data and information sufficient to demonstrate that the BDCP is being properly implemented.
- Provide assessments regarding the effects of Plan implementation on Covered Species and the effectiveness of the Conservation Strategy at advancing the biological goals and objectives.
- Identify actions, if any, taken pursuant to the adaptive management and monitoring program and/or in response to changed or unforeseen circumstances.
- Disclose issues and challenges concerning implementation, and the potential modifications or amendments to the BDCP that may be taken to address these issue and challenges.
- Provide schedules and budget estimates associated with the implementation of Plan actions over 1-year and 5-year timeframes.

The Program Manager shall post on the BDCP website the reports and other information identified in this Section, including any subsequent revisions to those reports. As part of those postings, the Program Manager will include information, on a daily basis, about planned and actual water diversions, including updates on revisions to the Annual Delta Water Operations Plan. An accounting of actual diversions, including daily, weekly, monthly, and yearly operational levels, shall also be posted. The Program Manager will describe and explain operational changes, including departures from planned or anticipated diversion levels, in terms that are understandable to the general public.

Throughout the course of BDCP implementation and for the purpose of demonstrating compliance with the provisions of the BDCP, this Agreement, and the associated regulatory authorizations, the Implementation Office shall prepare and submit to the Fish and Wildlife Agencies the following reports.

### **16.3.1 Annual Progress Report**

At the end of each implementation year,<sup>1</sup> the Implementation Office shall begin the preparation of an Annual Progress Report. The report will document the Plan actions carried out during the implementation year and provide information sufficient to demonstrate that the BDCP is being implemented consistent with the provisions of the Plan, this Agreement, and the associated regulatory authorizations. The report will include, as provided for in Chapter 6.3, information relating to the implementation of Conservation Measures, actions taken or changes to Conservation Measures or biological objectives adopted pursuant to the adaptive management and monitoring program, expenditures of funds, occurrences of any Changed Circumstances or unforeseen circumstances, and modifications or amendments to the BDCP or its associated regulatory authorizations. The Annual Progress Report shall also include an evaluation of the progress being made toward meeting the biological goals and objectives of the Plan. The Annual Progress Report shall incorporate the Annual Delta Water Operations Report.

The Program Manager shall solicit input on the draft of the Annual Progress Report from the Permit Oversight Group and the Stakeholder Council, and submit the report to the Authorized Entity Group for review and approval. The Implementation Office shall finalize and submit the Annual Progress Report to the Fish and Wildlife Agencies for their acceptance within six months of the close of the reporting year.

### **16.3.2 Annual Delta Water Operations Report**

Beginning in the first year that the north Delta diversions and conveyance facilities become operational, and for each year thereafter, the Implementation Office shall prepare an Annual Delta Water Operations Report. The report will document the operations of the SWP and the CVP within the Plan Area over the course of the prior implementation year and provide sufficient information to demonstrate that such operations were implemented in a manner consistent with the provisions of the Plan, this Agreement, and the associated regulatory authorizations. The report will include, as described in Chapter 6.3, a summary of the prior year's operations, including a comparison of the actual operations to planned operations, and an evaluation of the effects of water operations on Covered Species and ecological processes, including the responses of those species to real-time operational changes.

The Implementation Office will seek input from the Authorized Entities, Fish and Wildlife Agencies, and the Stakeholder Council on the draft Annual Delta Water Operations Report. Within six months of the close of the reporting year, the Implementation Office shall complete the report and incorporate it into the Annual Progress Report.

### **16.3.3 Five-Year Comprehensive Review**

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<sup>1</sup> The Implementation Office will decide how the planning year will be bounded (e.g., calendar year, federal fiscal year, state fiscal year, or water year).

At increments of five years, the Implementation Office shall undertake a Five-Year Comprehensive Review of the BDCP. The purpose of these reviews is to assess, on a periodic, program-level basis, the overall effectiveness of the BDCP, including the progress made toward achieving the biological goals and objectives and water supply reliability targets. As such, these reviews will focus on identifying and evaluating broad ecological trends in the Delta and changes in the status of Covered Species. The scope of the Five-Year Comprehensive Review is described in Chapter 6.3.5.

The Five-Year Comprehensive Review will be carried out by the Implementation Office, in coordination with the Interagency Ecological Program, Delta Science Program, and Independent Science Board. The Implementation Office will work with the Interagency Ecological Program lead scientist and the Delta Science Program Science Manager to consolidate data and information from a range of sources. The Program Manager shall solicit input on the draft findings of the Five-Year Comprehensive Review from the Permit Oversight Group and the Stakeholder Council, and submit the review report to the Authorized Entity Group for review and approval. The Implementation Office shall complete and submit the Five-Year Comprehensive Review report to the Fish and Wildlife Agencies for their acceptance within six months of the close of the five year period subject to the review.

## **16.4 Inspections by Fish and Wildlife Agencies**

The Fish and Wildlife Agencies may conduct inspections and monitoring of the site of any Covered Activity, and may inspect any data or records required by this Agreement, the BDCP or the Permits, in accordance with applicable law and regulations. The USFWS and NMFS may also inspect and monitor the site of any Associated Federal Action for the purpose of verifying Reclamation's compliance with the Integrated Biological Opinion and Incidental Take Statement.

## **17.0 PLANNING DOCUMENTS**

### **17.1 Purpose of Planning Documents**

The Authorized Entities intend for several types of plans to be developed throughout the course of BDCP implementation. Although not a mandatory element of the BDCP, the Parties acknowledge that such plans will improve coordination, enhance the effectiveness of Plan implementation, and increase transparency regarding the administration and implementation of the Plan. Accordingly, the Authorized Entities commit to the development of such plans.

### **17.2 Types of Planning Documents**

#### **17.2.1 Annual Work Plan and Budget**

On an annual basis, the Implementation Office will prepare an Annual Work Plan and Budget for the upcoming implementation year. The work plan will describe the activities, including those related to the implementation of Conservation Measures and the Adaptive Management and Monitoring program, which are expected to be implemented. The budget will set out projected expenditures and identify the sources of funding for those expenditures.

The Program Manager shall solicit input on the draft Annual Work Plan and Budget from the Permit Oversight Group and the Stakeholder Council, and submit the Annual Work Plan and Budget to the Authorized Entity Group for review and approval. As part of this process, the Permit Oversight Group will review the draft plan and provide written concurrence, within thirty (30) days, or as soon as practicable thereafter, that the draft plan accurately sets forth and makes adequate provision for the implementation of the applicable joint decisions of the Authorized Entity Group and the Permit Oversight Group or decisions of an agency with authority over the matter.

If the Permit Oversight Group concludes that the draft plan does not do so, it will provide written notification to the Program Manager and the Authorized Entity Group, within the 30 day timeframe, or as soon as practicable thereafter, of the specific reasons for its conclusion. In such event, the Authorized Entity Group may direct the Program Manager to modify the draft plan to the satisfaction of the Permit Oversight Group. If the Authorized Entity Group does not, the Program Manager, Authorized Entity Group and the Permit Oversight Group will, in a timely manner, meet and confer in an effort to resolve the matter in dispute. If the Parties are unable to reach resolution, the review process described in Chapter 7.1.7 and Section 15.8 of this Agreement may be invoked by any member of the Authorized Entity Group or the Permit Oversight Group.

The draft Annual Work Plan and Budget will be submitted for review and comments to the Authorized Entity Group no later than three months, and the Permit Oversight Group and the Stakeholder Council no later than two months, prior to the release of the final Annual Work Plan and Budget. A final Annual Work Plan and Budget will be completed no later than one month prior to the beginning of the implementation year. The Program Manager will utilize the foregoing process with respect to any proposed amendments to the Annual Work Plan and Budget.

### **17.2.2 Annual Delta Water Operations Plan**

On an annual basis, DWR and Reclamation will jointly develop an Annual Delta Water Operations Plan. The Annual Delta Water Operations Plan will set out the operational priorities and strategies to address biological objectives and water supply targets for the upcoming year, and include other information as set forth in Chapter 6.3. The first of such plans will be prepared in the year prior to the initiation of operations of the north Delta diversion and conveyance facilities (assumed to be year nine). Subsequent plans will be prepared and finalized no later than one month prior to each implementation year.

DWR and Reclamation will seek input from other members of the Authorized Entity Group, the Implementation Office, Permit Oversight Group, Adaptive Management Team, and the Stakeholder Council regarding the draft Annual Delta Water Operations Plan. The Annual Delta Water Operations Plan will include: 1) operational priorities for both fisheries and water supply for the upcoming year for the purpose of maximizing conservation benefits to covered fish species and maximizing water supplies; 2) expected operations, including consideration of real time operational adjustments, consistent with the criteria established in CM1 and CM2; 3) monitoring, data collection, research efforts, and potential adaptive management actions associated with water operations for the upcoming year and 4) the potential need for the Supplemental Resources Fund to assist in achieving the overall goals of the BDCP for the coming year due to anticipated operating conditions. DWR and Reclamation will retain final approval authority over the plan; however, the Permit Oversight Group will, within thirty (30) days of receipt of the draft plan, or as soon as practicable thereafter, review the draft plan and provide written concurrence that the draft plan is consistent with the provisions of the BDCP, this Agreement, and the associated regulatory authorizations.

If the Permit Oversight Group concludes that the draft plan is not consistent, it will notify DWR and Reclamation in writing within the 30-day timeframe, or as soon as practicable thereafter, of the specific reasons for its conclusion. In such event, DWR and Reclamation may modify the plan to the satisfaction of the Permit Oversight Group. If they do not, DWR, Reclamation and the Permit Oversight Group will, in a timely manner, meet and confer in an effort to resolve the matter in dispute. If these Parties are unable to reach resolution, the review process in Chapter 7.1.7 and Section 15.8 of this Agreement may be invoked by any of these parties. In the event that the Permit Oversight Group invokes the elevation process, DWR and Reclamation may nonetheless begin to implement the plan, provided that their operations do not substantially preclude a potential resolution of the issue in dispute. The Implementation Office will incorporate the final Annual Delta Water Operations Plan into the Annual Work Plan and Budget (Chapter 6.3).

### **17.2.3 Five-Year Implementation Plan**

Based on the Five-Year Comprehensive Review, the Implementation Office will prepare a Five-Year Implementation Plan that identifies and assesses prospective issues likely to arise over the upcoming five-year period. The Five-Year Implementation Plan will contain, among other things, a summary of the planned actions and timeframe for those actions, including potential revisions to those actions and timeframes, related to the implementation of the Conservation Strategy; a description of expected long-term and system-wide monitoring actions and anticipated research efforts; and budget projections reflecting the estimated costs of implementing future actions.

The Program Manager shall solicit input on the draft Five-Year Implementation Plan from the Permit Oversight Group and the Stakeholder Council, and submit the draft plan to the Authorized Entity Group for review and approval. As part of this process, the

Permit Oversight Group will review the draft plan and provide written concurrence, within thirty (30) days, or as soon as practicable thereafter, that the draft plan accurately sets forth and makes adequate provision for the implementation of the applicable joint decisions of the Authorized Entity Group and the Permit Oversight Group or decisions of an agency with authority over the matter.

In years when Five-Year Implementation Plans are prepared, the Annual Work Plan and Budget may be included with or prepared separately from the Five-Year Implementation Plan.

## **18.0 RELATIONSHIP OF THE BDCP TO OTHER REGIONAL CONSERVATION PLANS**

The Plan Area adjoins or overlaps with six other regional conservation plans that are being implemented or are under development. The Parties expect that implementation of the BDCP will not adversely affect or be incompatible with overlapping and adjoining plans that have been approved or are under development. To ensure the successful implementation of the BDCP and these other regional conservation plans, the Implementation Office will undertake the following efforts:

- Encourage local government participation on the Stakeholder Council.
- Establish processes to enhance opportunities for collaboration and coordination between the Implementation Office and the regional plan sponsors on matters relating to, among other things, the acquisition and management of lands preserved as habitat within areas common to both plans.
- Enlist local governments to serve as Supporting Entities to assist in the acquisition and management of habitat lands.
- Encourage joint acquisitions of land to realize economies of scale and to secure large, contiguous blocks of habitat.
- Explore opportunities to identify the range of easement values serving one or more conservation objectives of the BDCP and other regional plans.
- Identify key acquisition areas that meet the full complement of conservation objectives (e.g., intrinsic habitat value, connectivity, reducing exposure to the effects of climate change) and that may be available for support of existing plans in conjunction with the BDCP.
- Explore opportunities for the Implementation Office to facilitate funding for “advance” conservation actions (i.e., habitat acquisition and

restoration) that may benefit both the BDCP and other regional conservation plans.

- Work with the sponsors of the regional conservation plans in California to encourage an increase in federal appropriations to support HCP implementation through existing federal grant programs and to help ensure that sufficient funds are available to all eligible plans in California.

## **19.0 RELATIONSHIP OF THE BDCP TO THE DELTA PLAN**

The Sacramento–San Joaquin Delta Reform Act of 2009 (Act) (Water Code §§ 85300 *et seq.*), provides for the establishment of an independent State agency, the Delta Stewardship Council, which is charged with the development and implementation of a comprehensive Delta Plan, and is vested with the authority to review actions of State and local agencies and advise on their consistency with the Delta Plan.

The Act sets out conditions for the inclusion of the BDCP into the Delta Plan. To ensure that the BDCP is incorporated into the Delta Plan in a timely manner, CDFW, upon execution of this Agreement and issuance of Permits, shall immediately notify the Delta Stewardship Council that the BDCP meets the requirements of the NCCPA. USFWS and NMFS shall similarly provide timely notification to the Delta Stewardship Council that the BDCP has been permitted under ESA Section (10)(a)(1)(B).

## **20.0 SPECIFIC OBLIGATIONS OF THE FISH AND WILDLIFE AGENCIES**

### **20.1 Obligations of USFWS and NMFS**

#### **20.1.1 Future Section 7 Consultations for Covered Activities and Associated Federal Actions**

The BDCP is intended to meet the requirements of the ESA and provide the basis for regulatory coverage for a range of activities identified in the Plan. Some of the Covered Activities and Associated Federal Actions may require funding or regulatory authorizations or approvals from other federal agencies. In such instances, these federal agencies may need to consult with USFWS and/or NMFS under Section 7 of the ESA with respect to the effect of the activity on listed species and critical habitat.

Unless otherwise required by law or regulation, in any future Section 7 consultation on a Covered Activity or Associated Federal Action, USFWS and NMFS will each ensure that the Section 7 consultation(s) is(are) consistent with the Integrated Biological Opinion provided that the action as proposed in the consultation is consistent, and will be implemented in accordance with the Plan, and this Agreement. Unless otherwise required by law or regulation, USFWS and NMFS will not require through the Section 7 consultation additional land, water or other natural resources, or financial compensation

or additional restrictions on the use of land, water, or other natural resources for Covered Activities and Associated Federal Actions beyond the measures provided for under the BDCP, the Implementing Agreement, the Permits, and the Integrated Biological Opinion.

### **20.1.2 Section 7 Consultations for Other Activities**

In any Section 7 consultation that occurs subsequent to the issuance of take authorizations under the BDCP and involves actions other than Covered Activities and Associated Federal Actions that may have an effect upon Covered Species and their habitats within the Plan Area, USFWS and NMFS shall give notice thereof to the Authorized Entities, Implementation Office, and the Authorized Entity Group. For these biological opinions issued in connection with projects that are independent of the Covered Activities and Associated Federal Actions, USFWS and NMFS agree to make every effort to avoid rendering opinions or taking actions that would cause additional restrictions on the use of land, money, or water for the Authorized Entities with respect to their obligations under the BDCP or this Agreement.

### **20.1.3 Reinitiation of Consultation on Integrated Biological Opinion**

The Parties acknowledge that circumstances may arise under which Reclamation and USFWS and NMFS determine that it is necessary to reinitiate Section 7 consultation with regard to the Integrated Biological Opinion. Reinitiation of Section 7 consultation on the Integrated Biological Opinion shall occur in accordance with the criteria set forth at 50 C.F.R. § 402.16. The Parties agree the BDCP includes provisions that provide for adjustments to Conservation Measures and Plan implementation through adaptive management and through planned responses to Changed Circumstances if new information reveals the Covered Activities and Associated Federal Actions may affect Covered Species in a manner or to an extent not previously considered. Therefore, Reclamation, USFWS and NMFS will not re-initiate consultation on the Integrated Biological Opinion without first evaluating the BDCP provisions that provide for a response to these newly identified effects, and making a determination that the BDCP provisions are not sufficient to address those effects. Prior to any reinitiation of consultation regarding the Integrated Biological Opinion, the Authorized Entities and USFWS and NMFS shall meet and confer and attempt to resolve any disagreements regarding whether such reinitiation of consultation is warranted.

### **20.1.4 Reinitiation of Consultation on Other CVP/SWP-Related Biological Opinions**

Prior to the reinitiation of consultation regarding a biological opinion involving CVP or coordinated CVP/SWP operations other than those addressed in the BDCP and the Integrated Biological Opinion, the Authorized Entities and USFWS and NMFS will meet and confer regarding any disagreements over the need to reinitiate consultation. If Reclamation or FWS and/or NMFS reinitiates consultation on a Biological Opinion involving CVP or coordinated CVP/SWP operations, to the maximum extent allowed by

law, Reclamation will prepare the Biological Assessment and the USFWS and/or NMFS, as applicable, will prepare the Biological Opinion consistent with the BDCP, the permits, the Integrated Biological Opinion and this Agreement including the Assurances and Protections.

#### **20.1.5 Process for Review of Draft Biological Assessments and Draft Biological Opinions Prepared During Reinitiation of Consultation on the Integrated Biological Opinion or Other CVP/SWR-Related Biological Opinions**

In the event of reinitiation of consultation on actions addressed in the Integrated Biological Opinion or on actions related to the CVP operations or coordinated CVP/SWP operations that may substantially affect the BDCP, the Permittees, as well as other affected parties as determined by the action agency, shall be given the opportunity to participate, within the timeframes required by the action agency, in such consultation, and allowed to (i) submit information for consideration during consultation, (ii) review and comment on draft biological assessments and draft biological opinions prepared for such consultation, and, (iii) participate in the development of reasonable and prudent alternatives that would substantially affect BDCP, in the event a jeopardy or adverse modification determination is made.

#### **20.1.6 Critical Habitat Designation for Covered Species**

The BDCP and this Agreement provide a comprehensive, habitat-based approach to the protection of Covered Species by focusing on the land and water necessary to provide for the long-term conservation and management of the Covered Species. This approach is consistent with the overall purposes of the ESA to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved. At the time critical habitat is considered for a species proposed for listing under the ESA or currently listed under the ESA, the Services will consider whether habitat protections under the BDCP adequately protect habitat that would be deemed essential to the species' recovery and survival. If the finding is that the habitat is adequately protected, and the benefits of exclusion outweigh the benefits of inclusion, such critical habitat would not be designated in BDCP Plan Area. If critical habitat is designated within the BDCP Plan Area subsequent to issuance of the permits, no compensation, mitigation, or minimization measures will be required of the Permittees as a result of the designation.

#### **20.1.7 Future Recovery Plans for Covered Species**

Recovery plans under the ESA delineate actions necessary to recover and protect federally listed species. During the preparation of the BDCP, these plans provided useful information and recommendations that informed the development of the Conservation Strategy. Recovery plans are not, however, intended to establish or define the obligations of permit applicants under the ESA.

The Parties acknowledge that ESA recovery plans have no effect on the implementation of the BDCP, except to the extent that they may contribute information that supports the Adaptive Management and Monitoring Program. With respect to any recovery plan applicable to any Covered Species within the Plan Area that is developed after the approval of the BDCP the parties agree that:

- Recovery plans cannot require any additional land or financial compensation or otherwise diminish the take authorization for Covered Species granted to the Authorized Entities pursuant to the Federal Permits or the Integrated Biological Opinion.
- Be finalized only after USFWS and NMFS will provide an opportunity for input from the Authorized Entity Group on the draft recovery plan.

#### **20.1.8 Agencies Responsible for Conducting the NEPA Analysis**

Reclamation, USFWS, and NMFS have served as federal lead agencies under NEPA regarding the preparation of the joint EIR/Environmental Impact Statement (EIS) for the BDCP. Prior to the Effective Date, the lead agencies prepared an EIS that fully analyzed the actions proposed in the BDCP and a full range of alternatives to ensure that decision makers and the public were fully informed of the potentially significant effects of the proposed BDCP, and the alternatives to the Plan, on the quality of the human environment.

#### **20.1.9 Future Environmental Review Under NEPA**

To the maximum extent possible in accordance with NEPA and applicable law, Reclamation, USFWS, and NMFS shall rely on and use relevant portions of the EIS and NEPA findings when conducting future environmental review of Covered Activities and Associated Federal Actions. In the event that USFWS or NMFS participate as a lead or cooperating agency under NEPA with respect to subsequent environmental review related to the implementation of a Covered Activity or Associated Federal Action, USFWS or NMFS will not recommend or request the imposition of any additional or more stringent minimization or mitigation measures related to the protection or conservation of Covered Species or their habitat unless required by applicable law. Except in those instances, USFWS and NMFS will notify the lead NEPA agency that the Conservation Measures in the BDCP fully address any impact to or incidental take of any Covered Species or habitat resulting from Covered Activities or Associated Federal Actions.

### **20.2 Obligations of CDFW**

#### **20.2.1 CEQA**

##### **20.2.1.1 Agencies Responsible for CEQA Analysis**

CDFW has served as a responsible agency under CEQA regarding the development of the joint EIR/EIS for the BDCP. Prior to or concurrent with the Effective Date, DWR and CDFW each evaluated the BDCP pursuant to CEQA and issued findings addressing whether the implementation of the BDCP would cause significant adverse impacts to the environment.

#### **20.2.1.2 Future Environmental Review Under CEQA**

Unless otherwise required by CEQA or other applicable law, the Permittees and CDFW shall rely on and use relevant portions of the EIS/EIR and the CEQA findings when conducting future environmental review of Covered Activities. In the event that CDFW participates as a lead, responsible, or trustee agency under CEQA with respect to the implementation of Covered Activities, CDFW will not require, recommend, or request the imposition of any additional or more stringent minimization or mitigation measures directed at the protection or conservation of Covered Species or their habitats. As a responsible or trustee agency under CEQA, CDFW will further notify the lead CEQA agency that any avoidance, minimization, and mitigation measures otherwise required for any impact to or take of any Covered Species or habitat resulting from Covered Activities will be satisfied through the implementation of the BDCP.

#### **20.2.2 Lake and Streambed Alteration Agreements for Covered Activities**

CDFW acknowledges and agrees that the BDCP, this Agreement, and the State Permit shall be deemed to provide an equivalent level of protection for wildlife, habitat, or other biological resources as the measures that would otherwise be required or recommended to address the impacts of Covered Activities on Covered Species pursuant to Fish & Game Code §§ 1600–1616.

In any future notification provided to CDFW under Section 1602 related to a Covered Activity, CDFW will ensure that any Streambed Alteration Agreement issued in response to the notification is consistent with the BDCP, this Agreement, and the State Permit. Unless otherwise required by law or regulation, CDFW will not require through the Streambed Alteration Agreement additional land, water or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources to address impacts of Covered Activities on Covered Species beyond the measures provided for under the BDCP, this Agreement, and the State Permit.

### **21.0 TERM**

#### **21.1 Effective Date**

This Agreement shall be effective upon execution by all Parties and issuance of all Permits.

## **21.2 Term of the Permits**

The Permits will be in effect for a term of fifty (50) years, unless extended pursuant to Section 21.3. The terms of the Permits will begin from the Effective Date.

## **21.3 Extension of Permit Duration**

Prior to expiration of the Permits, the Permittees may apply to the Fish and Wildlife Agencies to renew the Permits. The Permittees will initiate the Permit renewal process prior to the expiration of the initial 50-year period and with sufficient time to allow for the review and processing of the Permit renewal.

## **21.4 Withdrawal**

Upon ninety (90) days written notice to the Parties, any Permittee may unilaterally withdraw from the BDCP and this Agreement. Such withdrawal of a Permittee from this Agreement shall be deemed to constitute a surrender of the Permittee's authorization under the Permits. In the event of withdrawal by any Permittee other than DWR, the remaining Permittees would remain obligated to meet all Permittee requirements under the Plan and this Agreement. In the event of withdrawal by DWR, the Permits will be terminated.

### **21.4.1 Obligations in the Event of Withdrawal**

As a condition of withdrawal, the withdrawing Party(ies) shall remain obligated to ensure implementation of all existing and outstanding Conservation Measures required under this Agreement, the BDCP and the Permits to address all impacts of any take caused by the withdrawing Party(ies) that occurred prior to such withdrawal. Such obligations would include long-term management of Reserve Lands established prior to withdrawal.

### **21.4.2 Mitigation Credit in the Event of Withdrawal**

In the event of withdrawal, the withdrawing Party(ies) shall receive mitigation credit for any mitigation attributable to the withdrawing Party(ies) that occurs prior to withdrawal and that is not required to offset take that occurred prior to withdrawal.

## **22.0 REMEDIES AND COMPLIANCE**

Each Party will have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement, the BDCP and the Permits, and to seek redress for any breach or violation thereof; except to the extent that equitable relief in contract (including specific performance) is not available against the United States, and except that:

- none of the Parties will be liable in damages to any other Party or to any other person or entity for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement;
- in the event that the Authorized Entities are wholly or partially prevented from performing obligations under this Agreement because of causes beyond their reasonable control and without their fault or negligence (force majeure), including, but not limited to, acts of God, labor disputes, sudden actions of the elements not identified as Changed Circumstances, or actions of non-participating federal or State agencies or local jurisdictions, the Authorized Entities, as applicable, will be excused from whatever performance is affected by such cause to the extent so affected, and such failure to perform will not be considered a material violation or breach, provided that nothing in this Section will be deemed to authorize any Authorized Entities to violate the ESA, CESA or NCCPA, and provided further that:
  - The suspension of performance is of no greater scope and no longer duration than is required by the force majeure;
  - Within fifteen (15) days after the occurrence of the force majeure, the Authorized Entities, as applicable, provide the Fish and Wildlife Agencies written notice describing the particulars of the occurrence;
  - The Authorized Entities use their best efforts to remedy their inability to; and
  - When the Authorized Entities are able to resume performance of their obligations, the Authorized Entities, as applicable, shall give the Fish and Wildlife Agencies written notice to that effect.

Nothing in this Agreement is intended to limit the authority of the federal and State government to seek civil or criminal penalties, equitable relief, or otherwise fulfill enforcement responsibilities under the ESA, NCCPA or other applicable law.

## **22.1 Suspension of Federal Permits**

USFWS or NMFS may suspend the Federal Permits, in whole or in part, for cause in accordance with 50 C.F.R. § 13.27 and 222.306(e) and other applicable laws and regulations in force at the time of such suspension. Unless emergency suspension is necessary to avoid jeopardy to a Covered Species, USFWS or NMFS shall not issue a notice of proposed suspension in accordance with 50 C.F.R. § 13.27(b) without first (1) attempting to resolve, in accordance with Section 15.8, any disagreements regarding the implementation or interpretation of the BDCP, this Agreement or the Permits; and (2)

identifying the facts or conduct which may warrant the suspension and requesting the Implementation Office to take appropriate remedial actions. Unless emergency suspension is necessary, USFWS and NMFS shall not suspend a Federal Permit, in whole or in part, to avoid the likelihood of jeopardy to a Covered Species, without first following the dispute resolution process in Section 22.5 of this Agreement. Any proposed decision to suspend the USFWS permit must be reviewed and approved in writing by the Assistant Secretary for Water and Science and the Assistant Secretary for Fish Wildlife and Parks, before it is effective. Any proposed decision to suspend the NMFS permit must be reviewed and approved in writing by the appropriate Under Secretary at the Department of Commerce. This responsibility shall not be delegated.

## **22.2 Reinstatement of Suspended Federal Permits**

In the event USFWS or NMFS suspends a Federal Permit, in whole or in part, as soon as possible but no later than ten (10) days after such suspension, USFWS or NMFS, as applicable, will meet and confer with the Implementation Office concerning how the suspension can be ended. At the conclusion of any such conference, USFWS or NMFS will identify reasonable, specific actions, if any, necessary to effectively redress the suspension. In making this determination, USFWS or NMFS will consider the requirements of the ESA and its regulations, the conservation needs of the Covered Species, the terms of the Federal Permit and of this Agreement and any comments or recommendations received from the Implementation Office. As soon as possible, but not later than thirty (30) days after the conference, USFWS/NMFS will send the Implementation Office written notice of any available, reasonable actions necessary to effectively redress the deficiencies giving rise to the suspension. Upon performance or completion, as appropriate, of such actions, USFWS/NMFS will immediately reinstate the Federal Permit. It is the intent of the Parties that in the event of any total or partial suspension of a Federal Permit, all Parties will act expeditiously and cooperatively to reinstate the Federal Permit.

## **22.3 Revocation of Federal Permits**

USFWS and NMFS each agree that it will not revoke or terminate a Federal Permit, in whole or in part, pursuant to 50 C.F.R. §§ 13.28–13.29 and 50 C.F.R. §§ 17.22(b)(8) and 17.32(b)(8) unless the Permittees fail to fulfill their obligations under the BDCP, this Agreement, or the Federal Permits, and only after identifying the facts or conduct which may warrant the revocation and requesting the Implementation Office to take appropriate remedial actions, and following the review process in Section 15.8 if invoked by a Permittee, unless immediate revocation is necessary to avoid the likelihood of jeopardy to a Covered Species. USFWS and NMFS each agree that it will not revoke or terminate a Federal Permit, in whole or in part, to avoid the likelihood of jeopardy to a Covered Species, without first following the dispute resolution process in Section 22.5 of this Agreement.

Any proposed decision to revoke the USFWS permit must be reviewed and approved in writing by the Assistant Secretary for Water and Science and the Assistant Secretary for Fish Wildlife and Parks, before it is effective. Any proposed decision to revoke the NMFS permit must be reviewed and approved in writing by the appropriate Under Secretary at the Department of Commerce. This responsibility shall not be delegated.

## **22.4 Suspension or Revocation of the State Permit**

CDFW may suspend or revoke, in whole or in part, the State Permit in the event that it determines that the Permittees have failed to fulfill their obligations under the BDCP, this Agreement, or the State Permit. Unless an immediate suspension is necessary to avoid jeopardy, CDFW shall not suspend or revoke the State Permit without first notifying in writing the Implementation Office and Permittees of the basis for its determination and the proposed action to revoke or suspend and meeting and conferring with the Program Manager and the Permittees regarding the matter. The Parties shall meet and confer within fifteen (15) days of issuance of such notice to assess the action or inaction that warranted CDFW's determination and to identify any appropriate responsive measures that may be taken. Within forty-five (45) days of receiving notice from CDFW, Permittees shall either satisfy CDFW that they are in compliance with the State Permit or reach an agreement with CDFW to expeditiously obtain compliance.

Following this forty-five (45) day period, CDFW may suspend, but shall not revoke the State Permit until such time as the review process set forth in Section 15.8 of this Agreement has been completed, provided the process has been invoked by a Permittee. Any decision to suspend or revoke the State Permit must be in writing and must be signed by the Director of CDFW. This responsibility shall not be delegated. Situations related to a jeopardy determination are addressed under Section 22.6 of this Agreement.

## **22.5 Dispute Resolution Process for Revocation or Suspension of the Federal Permits or Invalidation of the Incidental Take Statement Related to a Jeopardy Determination**

In the event that USFWS or NMFS determine, after following the process to address unforeseen circumstances set forth in Section 14.3.3 of this Agreement, that circumstances warrant suspension or revocation of one or both of the Federal Permits or invalidation of the Incidental Take Statement to avoid jeopardy to a Covered Species, USFWS and/or NMFS, as applicable, shall meet and confer with the Program Manager and the Authorized Entity Group within thirty (30) days of such determination to identify potential actions that may be available to forestall the suspension or revocation. Such actions that may include, but would not be limited to, the following:

- Identify and secure other State and/or federal resources that had not been previously identified.

- Identify voluntary implementation actions that the Authorized Entities may undertake to remedy the situation. Such measures may include (1) adjustments of project operations to reduce or avoid impacts; (2) operational changes at the points of diversions; (3) water transfers or purchase of water rights involving third parties; (4) new water storage or banking arrangements; (5) payments from the federal and State governments to the Authorized Entities for reduced allocations; and (6) additional funding for wildlife agency staff to increase enforcement against third party activities causing unlawful take.

If no such remedies are identified, and USFWS and/or NMFS determine that the continuation of a Covered Activity or Associated Federal Action will result in jeopardy to a Covered Species, any member of the Authorized Entity Group may invoke the review process in Section 15.8 of this Agreement.

## **22.6 Dispute Resolution Process for Revocation or Suspension of the State Permit Related to a Jeopardy Determination**

Section 2823 of the NCCPA provides that CDFW shall suspend or revoke any permit, in whole or in part, issued for the take of a species subject to Section 2835 if the continued take of the species would result in jeopardizing the continued existence of the species. CDFW agrees that it will not revoke the State Permit pursuant to Section 2823 without first (a) requesting that the Permittees take appropriate remedial action, and (b) providing the Permittees with notice in writing of the facts or conduct which warrant the revocation and a reasonable opportunity (but not less than forty-five (45) days) to take remedial action. CDFW shall meet and confer with the Program Manager and the Permittees within fifteen (15) days of such notice to identify potential actions that may be available to forestall the revocation. Such actions may include, but would not be limited to, the following:

- Identify and secure other State and/or federal resources that had not been previously identified.
- Identify voluntary implementation actions that the Permittees may undertake to remedy the situation. Such measures may include (1) adjustments of project operations to reduce or avoid impacts; (2) operational changes at the points of diversions; (3) water transfers or purchase of water rights involving third parties; (4) new water storage or banking arrangements; (5) payments from the federal and State governments to the Authorized Entities for reduced allocations; and (6) additional funding for wildlife agency staff to increase enforcement against third party activities causing unlawful take.

If no such remedies are identified, and CDFW determines that continued take of a Covered Species would result in jeopardizing the continued existence of the species, CDFW shall suspend or revoke the State Permit, in whole or in part, under Fish & Game Code Section 2823. CDFW shall not revoke the State Permit, however, until such time as the review process set forth in Section 15.8 of this Agreement has been completed, provided the process has been invoked by a Permittee.

## **22.7 Obligations in the Event of Permit Suspension or Revocation**

In the event of suspension or revocation of the Permits, the Permittees will remain obligated to fulfill any existing and outstanding minimization and mitigation measures required of them under this Agreement or the BDCP related to any Take that occurs prior to such suspension, revocation, or termination. Such obligations would include the obligation to provide for the long-term management or Reserve System Lands that were established prior to suspension or termination of the Permits or that would otherwise be required under the Plan for impacts of any act that would cause the permitted Take.

## **23.0 MODIFICATIONS AND AMENDMENTS**

The BDCP may be modified during implementation in accordance with CDFW, USFWS, and NMFS regulations, the Plan, and the terms of this Agreement. Plan modifications may be needed periodically to clarify provisions or correct unanticipated inconsistencies in the documents. Plan changes fall into three broad categories: administrative changes, minor modifications, and formal amendments. Certain changes to the BDCP will also require an amendment to the Permits.

### **23.1 BDCP Administrative Changes**

The administration and implementation of the BDCP will require frequent and ongoing interpretation of its provisions by the Implementation Office and the Parties. Actions taken on the basis of these interpretations that do not substantively change the purpose, intent, or terms of the Plan or this Agreement will not require modification or amendment of the Plan, this Agreement, or its associated authorizations. Such actions related to the ordinary administration and implementation of the Plan may include, but are not limited to, the following:

- Clerical corrections to typographical, grammatical, and similar editing errors that do not change the intended meaning; or to maps or other exhibits to address insignificant errors.
- Variations in the day-to-day management of reserve system lands.

- Adjustments to monitoring protocols to incorporate new protocols approved by the Fish and Wildlife Agencies.
- Administration of the Implementation Office.
- Changes in the representatives of member entities of the Stakeholder Council.
- Minor corrections to land ownership descriptions.
- Changes to survey, monitoring, reporting, restoration, and/or management protocols or techniques that do not adversely affect Covered Species or habitat functions and values.
- Updates or corrections to the land cover or other resource maps or species occurrence data.

### **23.2 Minor Modifications or Revisions**

As part of the process of Plan implementation, the Implementation Office may need to make minor modifications or revisions to the Plan and/or this Agreement from time to time to respond appropriately to new information, scientific understanding, technological advances, and other such circumstances. Minor modifications or revisions are likely to be technical in nature and will not involve changes that will adversely affect Covered Species, the level of take, or the obligations of Authorized Entities.

Minor modifications or revisions may include, but are not limited to, the following circumstances:

- Transfers of targeted acreages between Resource Opportunity Areas consistent with criteria set out in Chapter 3.
- Transfers of targeted natural community acreages among Conservation Zones, provided such change does not preclude meeting preserve assembly requirements, significantly increase the cost of Plan management, or preclude achieving biological goals and objectives.
- Adjustments of Conservation Measures or biological objectives developed through and consistent with the adaptive management program, as described in Chapter 3.6.
- Extensions of earth-moving or ground disturbance outside the right-of-way limits analyzed in the effects analysis for the Plan regarding Covered

Activities and Associated Federal Actions involving infrastructure development or natural community restoration.

- Other proposed changes to the Plan that the Fish and Wildlife Agencies have determined to be insubstantial and appropriate for implementation as a minor modification.

### **23.2.1 Procedures for Minor Modifications**

The Implementation Office, the Authorized Entities, or the Fish and Wildlife Agencies may propose minor modifications or revisions by providing written notice to the other Parties. Such notice will include a description of the proposed minor modifications or revisions, an explanation of the reason for the proposed minor modifications or revisions, an analysis of their environmental effects including any impacts on Covered Species, and an explanation of why the effects of the proposed minor modifications or revisions will have the following characteristics.

- They will not significantly differ from, and will be biologically equivalent or superior to, the effects described in the Plan.
- They will not conflict with the terms and conditions of the Plan.
- They will not significantly impair implementation of the Conservation Strategy.

The Fish and Wildlife Agencies and/or the Authorized Entities may submit comments on the proposed minor modification or revision in writing within sixty (60) days of receipt of notice. The Authorized Entities must agree to any proposed minor modification.

If the Fish and Wildlife Agencies do not concur that the proposed minor modification or revision meets the requirements for a minor modification or revision, the proposal must be processed as a formal amendment as described in Section 23.3. Any Authorized Entity or Fish and Wildlife Agency may invoke the review process set forth in Section 15.8 of this Agreement to resolve disagreements concerning a proposed minor modification or revision.

If the Fish and Wildlife Agencies concur that the requirements for a minor modification or revision have been met and the modification or revision should be incorporated into the Plan, the BDCP shall be modified accordingly. If any Fish and Wildlife Agency fails to respond to the written notice within the 60-day period, the agency will be deemed to have approved the proposed minor modification or revision.

Notwithstanding the foregoing, agreement of the Authorized Entities shall not be required for minor modifications that involve changes to Conservation Measures or biological

objectives adopted through the adaptive management process, as described in Chapter 3.6.

### **23.3 Formal Amendment**

Under some circumstances, it may be necessary to substantially amend the Plan and this Agreement. Any proposed changes to the Plan that do not qualify for treatment as described in Chapters 6.5.1 or 6.5.2 will require a formal amendment. Formal amendment to the Plan and this Agreement also will require corresponding amendment to the authorizations/Permits, in accordance with applicable laws and regulations regarding permit amendments. The Implementation Office will be responsible for submitting any proposed amendments to the Permit Oversight Group.

Amendments to the Plan likely will occur infrequently and will follow the process set forth in Chapter 6.5.3. Formal amendments include, but are not limited to, the following changes.

- Substantive changes to the boundary of the Plan Area, other than those associated with the acquisition of terrestrial natural communities in the surrounding Delta counties, as described in Chapter 1.4.1.
- Addition of species to the Covered Species list.
- Increase in the take of Covered Species beyond that authorized.
- Adding new Covered Activities and Associated Federal Actions to the Plan.
- Substantial changes in implementation schedules that are likely to have significant adverse effects on the Covered Species.
- Changes in Conservation Measures that would require additional obligations of the Authorized Entities beyond those provided for within the adaptive resources established under the Plan and this Agreement.
- Changes to Biological Goals.

#### **23.3.1 Process for Formal Amendment**

Formal amendments will involve the same process that was required for the original approval of the Plan. In most cases, an amendment will require public review and comment, CEQA and NEPA compliance, and intra-Service Section 7 consultation. Amendments will be prepared by the Implementation Office, subject to review and approval of the Authorized Entity Group prior to submission to the Permit Oversight Group. Each Fish and Wildlife Agency, for which the proposed amendment is

applicable, will use reasonable efforts to process proposed amendments within one-hundred eighty (180) days.

### **23.3.2 Additions to Covered Species List**

In the event the Authorized Entities desire to add species to the list of Covered Species, the Authorized Entities will propose an amendment to the BDCP and request an amendment to the Permits and the Integrated Biological Opinion. Any such request will be supported by sufficient evidence to meet the requirements of the ESA and the NCCPA. The Fish and Wildlife Agencies shall give due consideration to, and full credit for, Conservation Measures previously implemented as part of the Plan that benefit such species.

## **24.0 MISCELLANEOUS PROVISIONS**

### **24.1 No Delegation of Authority**

Nothing in this Agreement shall cause, or shall be deemed to cause, any delegation of authority from any Party to this Agreement to any other Party.

### **24.2 Relationship to Other Regulatory Requirements**

The terms of this Agreement are consistent with and will be governed by and construed in accordance with the ESA, the NCCPA and other applicable State and federal laws. In particular, nothing in this Agreement is intended to limit the authority of USFWS, NMFS and CDFW to seek penalties for violations of, or otherwise fulfill its responsibilities under, the ESA, CESA and NCCPA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of USFWS or NMFS as agencies of the federal government or CDFW as an agency of the State of California.

### **24.3 Changes in Environmental Laws**

It is acknowledged and agreed by the Fish and Wildlife Agencies that the Authorized Entities are agreeing to perform substantial avoidance, minimization, mitigation, conservation, and management measures as set forth in this Agreement. If a change in, or an addition to, any federal or State law governing or regulating the impacts of development on land, water or biological resources as they relate to Covered Species, including, but not limited to, the ESA, NEPA, NCCPA, CESA, and CEQA, the Fish and Wildlife Agencies shall give due consideration to the measures required under the BDCP in applying the new laws and regulations to the Authorized Entities.

### **24.4 References to Regulations**

Any reference in this Agreement, the BDCP, or the Permits to any regulation or rule of the Fish and Wildlife Agencies will be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

## **24.5 Applicable Laws**

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

## **24.6 Notices**

The Implementation Office will maintain a list of individuals responsible for ensuring BDCP compliance for each of the Parties, along with addresses at which those individuals may be notified (Notice List). The Notice List as of the Effective Date is provided in Exhibit G. Each Party will report any changes of names or addresses to the Implementation Office and the other Parties in writing.

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

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

## **24.7 Entire Agreement**

This Agreement, together with the BDCP, the Permits, the Integrated Biological Opinion, and the Memorandum, constitutes the entire agreement among the Parties, 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. Each Party acknowledges that no representation, inducement, promise of agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied in this Agreement, the BDCP, the Permits, the Integrated Biological Opinion, or the Memorandum.

## **24.8 Severability**

In the event one or more of the provisions contained in this Agreement is held to be invalid, illegal or unenforceable by any court of competent jurisdiction, the Parties will meet and confer to determine whether such portion will be deemed severed from this Agreement and the remaining parts of this Agreement will remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been a part of this Agreement.

#### **24.9 Independent State and Federal Permits**

The State and Federal Permits are independent such that revocation of the State Permit or one of the Federal Permits does not automatically cause revocation of the other Permits.

#### **24.10 Assignment or Transfer**

This Agreement will be binding on and inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the Permits or any rights or authorities granted thereunder will be governed by provisions of the ESA, and the NCCPA pertaining to the assignment or transfer of Permits.

Any obligation of an Authorized Entity may be assigned to any other Authorized Entity consistent with applicable law and upon written execution of an agreement of assignment. Such an assignment shall relieve these respective Parties of their pre-existing obligations under this Agreement only to the extent consistent herewith. Any assignment or other transfer of the Permits must be approved by the applicable Fish and Wildlife Agency.

#### **24.11 Amendments**

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

#### **24.12 No Partnership**

Neither this Agreement nor the BDCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

#### **24.13 No Third Party Beneficiaries**

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

#### **24.14 Elected Officials not to Benefit**

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

#### **24.15 Availability of Funds**

All Actions required of the United States or its agencies in implementing this Agreement are subject to appropriations by Congress. Nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that the United States or its agencies obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or other applicable law. Nothing in this Agreement is intended or shall be construed to commit a Federal official to expend Federal funds not appropriated for that purpose by Congress. To the extent that the expenditure or advance of any money or the performance of any obligation of the United States or its agencies, or any Secretary under this Agreement is to be funded by appropriation of funds by Congress, the expenditure, advance, or performance shall be contingent upon the appropriation of funds by Congress that are available for this purpose and the apportionment of such funds by the Office of Management and Budget. No breach of this Agreement shall result and no liability shall accrue to the United States or its agencies or any Secretary in the event such funds are not appropriated or apportioned. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, reprogramming, or expenditure of any funds by the United States or its agencies, except as otherwise permitted by applicable law.

Implementation of this Agreement and the BDCP by DWR and CDFW is subject to the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of California. The Parties acknowledge and agree that DWR and CDFW will not be required under this Agreement to expend any State-appropriated funds unless and until an authorized official of that agency affirmatively acts to commit such expenditure as evidenced in writing.

#### **24.16 Duplicate Originals**

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement will be maintained in the official records of each of the Parties hereto.

#### **24.17 Calendar Days**

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

### **24.18 Response Times**

Except as otherwise set forth herein or as statutorily required by CEQA, NEPA, CESA, the ESA, NCCPA or any other laws or regulations, the Parties will use reasonable efforts to respond to written requests from any Party within a forty-five (45) day time period.

### **24.19 Attorney’s 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 will bear its own attorneys’ fees and costs. Notwithstanding the foregoing, attorneys’ fees and costs that may be recoverable against the United States may be sought as provided by applicable federal law.

### **24.20 Governing Law**

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

### **24.21 Headings**

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

### **24.22 Defense**

Upon request by any Party, other Parties hereto shall reasonably cooperate in defending lawsuits regarding the BDCP, this Agreement, or the Permits. Such cooperation may include, but is not limited to, entering into a joint defense agreement and cooperation among the DWR, SWP/CVP Contractors, CDFW, USFWS and NMFS in the preparation of an administrative record.

### **24.23 Due Authorization**

Each Party represents and warrants that (1) the execution and delivery of this Agreement has been duly authorized and approved by all requisite action, (2) no other authorization or approval, whether of governmental bodies or otherwise, will be necessary in order to enable it to enter into and comply with the terms of this Agreement, and (3) the person executing this Agreement on behalf of each Party has the authority to bind that Party.