

## **10.1 Introduction**

This chapter discusses the assurances requested by Permittees that will accompany the ESA Section 10(a)(1)(B) permit issued by USFWS and the NCCP permit issued by CDFG. This chapter also discusses assurances that will be provided to private landowners bordering HCP/NCCP preserves and outlines the process for changing or amending the HCP/NCCP.

## **10.2 Assurances Requested by Permittees**

The following assurances are requested by the Permittees of both USFWS and CDFG. Assurances requested by the Permittees from one agency follow in Sections 10.2.3 (USFWS) and 10.2.6 (CDFG).

### **10.2.1 Changed Circumstances**

Changed circumstances are defined by USFWS in the No Surprises Regulation as those circumstances affecting a species or geographic area covered by the HCP that can be reasonably anticipated by the applicant or USFWS and to which the parties can plan a response. The No Surprises Regulation requires that potential changed circumstances be identified in the Plan along with measures that would be taken by the Permittee to respond to those changes. The changed circumstances that could arise in the permit area have been identified and are described below.

If a changed circumstance occurs within the permit area as defined by this section, the Implementing Entity will notify USFWS and CDFG of this changed circumstance. In this event, USFWS and CDFG may determine that additional conservation or mitigation measures are necessary. Pursuant to the No Surprises Regulation, if such measures were addressed in the HCP/NCCP, their implementation is required. If such measures were absent from the Plan, USFWS and CDFG will not require any additional conservation or mitigation without the consent of the Permittee, as long as the Plan is found to be properly

implemented. *Properly implemented* means that the commitments and the provisions of the Plan and the EIS, Implementing Agreement, and permits have been or are being fully implemented. The following changed circumstances are recognized and funded by this Plan, each of which is described below.

- Covered Species Listed.
- New Non-Covered Species Listed.
- Natural Communities Lost to Fire.
- Invasion by New Exotic Species or Diseases.
- Pond or Wetland Control Structures Fail.
- Flooding Destroys Riparian Plantings.
- Prolonged Drought.
- Vandalism of Preserves.

Other potential changed circumstances were also considered but rejected. For example, earthquakes are a rare but expected occurrence in the San Francisco Bay Area. The location, magnitude, and effects of an earthquake with the potential to adversely affect the HCP/NCCP Preserve System is unknown, highly speculative, and not reasonably anticipated. Although unlikely, a strong earthquake may damage structures such as preserve offices, fences, or pond levees. Any damage to these structures from earthquakes would be repaired by the Implementing Entity as a matter of course.

## Covered Species Listed

Each covered species in the HCP/NCCP has been treated as though it is listed under ESA and CESA. The Permittees propose that all listed and unlisted species be included on the permits. Take of listed plant species is not prohibited under the Federal ESA and cannot be authorized under a Section 10 permit. The following plant species are proposed to be included on the federal permits in recognition of the conservation benefits provided for them under the Plan. These species would also receive no surprises assurances under the Service's "No Surprises" regulation (63 FR 8859; and see Section 10.2.3 in this chapter).

- Mount Diablo manzanita (*Arctostaphylos auriculata*)
- Britblescale (*Atriplex depressa*)
- San Joaquin spearscale (*Atriplex joanquiniana*)
- Big tarplant (*Blepharizonia plumose*)
- Mount Diablo fairy lantern (*Calochortus pulchellus*)
- Recurved larkspur (*Delphinium recurvatum*)
- Round-leaved filaree (*Erodium macrophyllum*)

- Diablo helianthella (*Helianthella castanea*)
- Brewer's dwarf flax (*Hesperolinon breweri*)
- Showy madia (*Madia radiata*)
- Adobe navarretia (*Navarretia nigelliformis* ssp. *nigelliformis*)

The Permittees propose that the Section 10(a)(1)(B) permit be effective for all covered species immediately upon issuance. Should USFWS list a covered species during the permit term, take coverage will become effective for that species at the time of listing. No changes to the terms and conditions of the Implementing Agreement or modifications to conservation measures are required.

Under Section 2835 of the California Fish and Game Code, CDFG may issue take authorization for covered species (plants or wildlife) regardless of their listing status.

## Non-Covered Species Listed

USFWS or CDFG may list additional species as threatened or endangered under ESA or CESA, respectively, that are not covered species. Measures that will be taken for new listings include the following.

- Evaluation of the potential impacts of covered activities on the newly listed species including assessment of the presence of suitable habitat in impact areas.
- Implementation of measures by the Implementing Entity within the Preserve System to avoid impacts on the newly listed species until the Plan is amended to include the newly listed species.

Should a species not covered by the Plan be listed, proposed, or petitioned for listing, the Permittee may request that USFWS and CDFG add the species to the Section 10(a)(1)(B) permit and NCCP permit, respectively. In determining whether or not to seek incidental take coverage for the species, the Permittee will consider, among other things, whether the species is present in the permit area and if otherwise lawful activities could result in incidental take of the species. If incidental take coverage is desired, the Plan and permits could be modified or amended. Alternatively, the Permittee could apply for new and separate permits. Procedures for modifications and amendments to the Plan are outlined in *Modifications and Amendments to the Plan*, below.

## Natural Communities Lost to Fire

Historically, fire is a natural component of many ecosystems and natural community types. Within the inventory area, a historic fire regime of frequent

(5–10 years) stand-replacing fires would have occurred across most of the vegetation communities. The California Department of Forestry and Fire Prevention (CDF) has rated the undeveloped portions of the inventory area as high to very high fire return intervals. Examining the large (>100 acres) fire history, the current fire return interval under a suppression regime is approximately 200 years. This substantial alteration from the historic condition causes unnaturally high fuel loads and increased encroachment by woody species into grassland and woodland systems. These conditions result in increased fire intensities, greater rates of spread, and larger fires. In turn, this can have a detrimental effect on habitat components, including loss or collapse of the community.

Fire potential within the inventory area is typically greatest in the months of June through September when dry vegetation co-occurs with low humidity. Generally, the vegetation communities within the Preserve System are adapted to a more frequent historic fire regime and would naturally recover from fire. However, unnaturally intense fires could damage biological resources. The HCP/NCCP preserve management plans will include fire management and protection measures that will minimize the risk of damage to habitats and natural communities from fire outside the normal range of wildfires. Preventative measures include the following actions.

- Create or redesign fuel breaks to limit fire spread.
- Consider the reintroduction of low-intensity prescribed fires to encourage fire-adapted species and discourage non-fire-adapted invasive species.
- Work with local fire agencies to improve fire suppression preparedness and strategies to protect habitat during fire response.
- Incorporate public awareness programs into recreational plans and preserve management plans.

Should a fire take place, preserve managers will follow protocols established in preserve management plans and work closely with local fire response crews to ensure that impacts on sensitive communities and covered species are minimized within safety limits. In addition, landscape-level monitoring will assess changes to land cover type, and natural community-level monitoring will assess the response of exotic plants. In the event of habitat loss, land management and habitat restoration measures will be implemented within affected preserves to ensure the reestablishment of native vegetation through active or passive management, as appropriate.

For the purposes of assessing changed circumstances, fire history data indicate that the average number of fires per year in the inventory area for the last 50 years is 0.62<sup>1</sup>. The average size of these fires in the inventory area is approximately 700 acres. During the 30-year life of the HCP, these data suggest approximately 19 fires, burning approximately 13,000 acres, will occur within

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<sup>1</sup> California Department of Forestry and Fire Protection's Fire and Resource Assessment Program (FRAP) data (available on-line at <http://frap.cdf.ca.gov/>).

the inventory area. Assuming the HCP/NCCP Preserve System will incorporate approximately 55% of the wildfire-prone lands within the inventory area, 10–11 wildfires, burning approximately 7,000 acres within the Preserve System, can be anticipated. Wildfire events that are outside the variance of this range would be considered unforeseen.

For the purposes of this Plan, a single wildfire greater than 2,100 acres in size (three times the average size) would be considered an unforeseen event. Unforeseen circumstances would also occur if the total area burned within the Preserve System during the permit term exceeds 14,000 acres, or approximately twice the expected amount. Prescribed fires would not be included in the calculation of changed or unforeseen circumstances.

Fires that occur too frequently in the same area may result in “type conversion” of natural communities. For example, frequent fires in chaparral can convert the area to annual grassland. The historic fire frequency for any given site in the inventory area has been estimated by CDF at 5-10 years but likely varies substantially among land cover types and topography. Fires in consecutive years in the same area would be unlikely because of the time needed to develop fuels. Therefore, for the purposes of changed circumstances, repeated fires in the same area within less than 3 years are considered unforeseen.

## **Invasion by New Exotic Species or Disease**

Nonnative, or exotic, species currently inhabit the inventory area and will be present in the Preserve System. The conservation strategy includes measures to reduce and prevent infestations of exotic species (Conservation Measure 1.4, Chapter 5), and nonnative plants and animals will be monitored and mapped as described in Chapter 7. However, it is possible that a new and aggressive exotic species could invade the Preserve System. Similarly, infestations of a new disease that affects covered or dominant species in the inventory area (e.g., similar to Sudden Oak Death outside of the inventory area) could have dramatic effects on the Preserve System.

Large infestations (e.g., affecting greater than 25% of the Preserve System) of a new or existing disease, exotic plant, or exotic animal can become extremely expensive to control and could heavily tax the operating budget of the HCP/NCCP. For the purposes of this Plan, infestations of new diseases or invasive exotic species, or spread of existing invasive species beyond 25% of baseline condition within the Preserve System are considered unforeseen circumstances. The monitoring program will identify existing exotic species in the Preserve System so that new exotic species can be identified quickly and removed.

Diseases that may affect or threaten covered species in the inventory area include chytrid fungus (California red-legged frog and California tiger salamander; U.S. Fish and Wildlife Service 2002a, 2004b) and possibly ranaviruses (California tiger salamander; U.S. Fish and Wildlife Service 2004b). It is unknown whether

these diseases are a problem for populations in the inventory area due to a lack of surveys. In general, the effects of diseases on the survival and reproduction of covered species is poorly known. The method of measurement of the extent of new diseases will be different for each disease (e.g., number of trees affected, proportion of species' range, number of populations). When a new disease is detected, the Implementing Entity will contact CDFG and USFWS to collaborate on determining the best method of measurement, monitoring, and eradicating or controlling the disease before it spreads beyond the 25% threshold of unforeseen circumstances. Planned responses to invasion by exotic species or disease entail the following actions.

- Determine the best method for measurement and tracking extent.
- Prepare a damage-assessment report.
- Recommend and plan actions to address the threat.
- Respond through the Adaptive Management Program in ways consistent with existing funding and permit obligations and with the consent of CDFG and USFWS.

If the disease or exotic species results in substantial impacts on natural communities such that it cannot be addressed under the existing operating budget, the Implementing Entity shall prepare a report identifying the problem and include a cost analysis for funding a control program. This report shall be submitted to CDFG and USFWS for approval. The Implementing Entity will seek additional outside funding and partnerships from sources other than development fees to fund and implement the program to control or eradicate the exotic species or to control the disease. The feasibility of such programs will depend on the success of additional fundraising.

The occurrence of Sudden Oak Death (SOD) in the Preserve System was considered as a changed circumstance. However, as described in Chapter 5 (see Conservation 2.6, *Manage Oak Woodland and Oak Savanna*), there have been no documented cases of SOD in the inventory area, possibly due to the drier climatic condition east of Mount Diablo than found to the west where SOD is more common. A statewide assessment of SOD risk identified the entire inventory area as being at low risk for SOD<sup>2</sup>. The occurrence of SOD in the inventory area is therefore not reasonably anticipated and considered an unforeseen circumstance.

## **Pond or Wetland Control Structures Fail**

Many of the ponds and wetlands in the inventory area are maintained by artificial structures such as dams, weirs, or other water control structures. These structures can periodically fail due to poor maintenance, large storms, or shifting ground

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<sup>2</sup> Low = rank of 4 on a risk scale of 1 to 5 with 1 being the highest risk; see [http://kellylab.berkeley.edu/SODmonitoring/maps/PDF/state\\_risk\\_05a\\_avg.pdf](http://kellylab.berkeley.edu/SODmonitoring/maps/PDF/state_risk_05a_avg.pdf)

(e.g., earthquake, slope failure). As much as feasible, failed structures will be repaired or replaced within 1 year of the failure so the wetland or pond can be reestablished and habitat for covered species restored. If structures cannot be repaired or replaced sufficiently to maintain functions and values provided by the affected wetland or pond, additional ponds or wetlands will be enhanced, created, or restored to replace the functions and values associated with the affected pond or wetland. Any failure of a pond or wetland control structure for a pond or wetland that supports the goals and objectives of the Plan (i.e., supports covered species) is considered a changed circumstance requiring remedial action.

## **Flooding Destroys Riparian Plantings**

Flooding is a natural event within stream systems of the inventory area. However, extreme floods along stream channels with new riparian plantings could destroy restoration sites and require substantial remediation. A 100-year event has a 26% chance of occurring during the 30-year permit term. All storms at or below the 100-year event on a given stream are considered a changed circumstance, and remedial actions are funded by the Plan. Storms at or below the 100-year event are reasonably likely within the 30-year permit term. Damage caused by flooding larger than a 100-year event is considered unforeseen.

Following the flood event, the site will be evaluated to determine appropriate corrective actions necessary to restore the habitat through active management or natural processes. Corrective actions will be implemented within 1 year of the failure.

## **Natural Communities are Lost to Drought**

The Bay Area has a Mediterranean climate with roughly 95% of the total annual rainfall occurring from October through April. Summer convective storms in this area are very few in number and usually mild in character. Mean annual precipitation in the inventory area ranges from 10 inches in the Old River area, to 17–20 inches in the upper Marsh Creek watershed, to 25 inches at the top of Mt. Diablo.

Drought is a natural part of a Mediterranean climate system to which species and natural communities have adapted. However, a prolonged drought could cause serious damage to the Preserve System, especially to new restoration plantings that have yet to become established. The following analysis was conducted to define droughts and estimate their expected frequency of occurrence in the inventory area. Droughts that occur within this expected frequency are considered a changed circumstance; droughts outside this frequency are considered unforeseen.

Thirty-two (32) rain gages within or near the inventory area with annual rainfall records ranging from 18 to 150 years (in the water year of July 1 to June 30)

were reviewed to estimate how many drought years might be expected during the permit term<sup>3</sup>. A drought is defined as two or more successive water years with 75% or less of the average rainfall (mean seasonal precipitation or MSP). These data show that, on average, droughts of 2 years or more occurred 1.6 times over any 30-year period, and droughts of 3 years or more occurred less than once (0.7 times) over the same time interval. Therefore, during the 30-year permit term, a drought of 3 or more years in length has an approximately 70% chance of occurring. Droughts that occur with relatively high frequency (i.e., more than three droughts of 2 or more years in duration) or any drought for more than 4 successive years are considered an unforeseen circumstance.

The HCP/NCCP preserve management plans will include drought monitoring and protection measures that will minimize the risk of losing mitigation plantings and restored habitats due to drought. Preventative measures include the following actions.

- Monitoring County rain data in the inventory area and gages established in the Preserve System to determine if the seasonal rainfall at the end of March and April indicate a drought (near 75% of MSP).
- Closely monitoring mitigation sites that are beyond their establishment periods (i.e., no longer sustained by irrigation) for stress due to low soil moisture or high evapotranspiration rates.

The Implementing Entity will assess the damage and initiate the following actions.

- Prepare damage assessment report.
- Recommend actions to improve effects on covered species (e.g., provision of temporary artificial water sources).
- Recommend actions to improve effects on restored habitat (e.g., supplemental irrigation).
- Implement measures through the Adaptive Management Program in ways consistent with existing funding and permit obligations and with the consent of the Implementing Entity.

## **Vandalism of Preserves**

Structures in the Preserve System such as gates, fences, signs, recreational facilities, or administrative buildings could be vandalized during the permit term. Such damage is considered reasonably likely to occur during the permit term and is therefore considered a changed circumstance. Remedial measures funded in this Plan include the repair or replacement of structure or facilities damaged by vandalism.

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<sup>3</sup> Data source: Contra Costa County Flood Control and Water Conservation District, Martinez.

## 10.2.2 Unforeseen Circumstances

Unforeseen circumstances are defined by federal regulation (17 CFR §17.3) as:

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

The NCCPA (California Fish and Game Code Section 2805(j)) defines unforeseen circumstances as:

...changes affecting one or more species, habitat, natural community, or the geographic area covered by a conservation plan that could not reasonably have been anticipated at the time of plan development, and that result in a substantial adverse change in the status of one or more covered species.

In the event of unforeseen circumstances during the permit term, amendments to the HCP/NCCP may be proposed by either the Governing Board or USFWS and/or CDFG to address these circumstances. USFWS, CDFG, and the Governing Board would work together to identify opportunities to redirect resources to address unforeseen circumstances. However, it is intended that USFWS and CDFG will not:

- require the commitment of additional land, water, or financial compensation by the Permittees other than those agreed to elsewhere in the HCP/NCCP; or
- impose additional restrictions on the use of land, water, or natural resources otherwise available for use by the Permittees under the original terms of the HCP/NCCP to mitigate the effects of the covered activities.

As described in the No Surprises Regulation, it is USFWS's responsibility to demonstrate the existence of unforeseen circumstances using the best scientific and commercial data available.

## 10.2.3 Federal No Surprises

The federal *No Surprises Regulation* was established by the Secretary of the Interior on March 25, 1998. It provides assurances to Section 10 permit holders that no additional money, commitments, or restrictions of land or water will be required should unforeseen circumstances requiring additional mitigation arise once the permit is in place. The No Surprises Regulation states that if a Permittee is properly implementing an HCP that has been approved by USFWS and/or NOAA Fisheries, no additional commitment of resources, beyond that already specified in the plan, will be required.

The Permittees request regulatory assurances (No Surprises) for all covered species in the Plan. In accordance with No Surprises, the Permittees will be responsible for implementing remedial measures in response to any changed circumstances as described in this chapter. The Permittees will not be responsible for addressing unforeseen circumstances.

## 10.2.4 Federal Section 7 Consultations

An important goal of the Plan is to provide a framework for ESA compliance for the covered species for all covered activities in the inventory area. Whether a covered activity occurs under Section 7 or 10 of the federal ESA, the HCP will provide the framework for future Section-7 consultations.

Projects that fall under Section 7 of the ESA are evaluated under different standards than projects subject to Section 10 of the Act. Non-federal projects must obtain a permit for take of listed species, while federal agencies must consult with USFWS or NOAA-Fisheries whenever their actions have the potential to affect a listed species. For example, the definition of “affect” differs slightly from that of “take” and may be applied differently, depending on the species and the project.

The HCP/NCCP is not intended to alter the obligation of a federal agency to consult USFWS pursuant to Section 7 of the ESA. Unless otherwise required by law or regulation, USFWS will ensure that the biological opinion for the proposed project covered by the Plan is consistent with the biological opinion issued for the HCP/NCCP and the federal permit. Section 7 consultations only apply to federally-listed species, so only those covered species that are federally-listed at the time of the consultation need be included in the consultation. Unless otherwise required by law or regulation, USFWS will not impose measures on applicants for coverage under the HCP/NCCP in excess of those that have been or will be required by the Implementing Agreement, the HCP/NCCP, and the permits. Before completing a Section 7 consultation for a covered activity in which the USFWS proposes to require a measure in excess of the requirements of the Implementing Agreement, the HCP/NCCP, or the permits, the USFWS will meet and confer with the Permittee with jurisdiction over the affected project and the existing or prospective Third Party Participant<sup>4</sup> to discuss alternatives to the imposition of the measures that would meet the applicable legal or regulatory requirements.

USFWS will process subsequent ESA consultations for covered activities in accordance with the established regulatory process and deadlines (50 CFR Section 402.14). Many of the Section 7 consultations will occur as a result of impacts on jurisdictional waters of the United States and the need to obtain a permit from USACE. If a regional general permit is obtained from USACE for the inventory area, as planned, the linkage between the Section 7 consultation and the HCP/NCCP will be tighter. USFWS anticipates developing a

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<sup>4</sup> See the Implementing Agreement for a definition of Third Party Participant.

programmatic biological opinion for the regional general permit that will provide streamlined ESA compliance for USACE for activities covered by the HCP/NCCP.

## 10.2.5 Federal Section 7 Critical Habitat Designations

USFWS acknowledges that this Plan provides a comprehensive, habitat-based approach to the protection of covered species by focusing on the lands essential for the long-term conservation of the covered species and appropriate management for those lands. This approach is consistent with the overall purposes of the federal ESA to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved. ESA regulations specify that the criteria to be used in designating critical habitat include “those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection.” (50 C.F.R. § 424.12(b).)

The HCP/NCCP provides for the protection of “those physical and biological features essential to the conservation” of the covered species in a manner consistent with USFWS regulations concerning the designation of critical habitat.

Critical habitat is currently designated in the inventory area for three species: vernal pool fairy shrimp, longhorn fairy shrimp, and Contra Costa goldfields. The two fairy shrimp species are covered species, and Contra Costa goldfields is a no-take species under the Plan. Critical habitat for longhorn fairy shrimp is limited to approximately 750 acres wholly within Vasco Caves Regional Preserve (U.S. Fish and Wildlife Service 2003). Critical habitat for vernal pool fairy shrimp is found in the inventory area in 140 acres south of Brentwood and 450 acres surrounding the Byron Airport. Critical habitat for Contra Costa goldfields is found in 148 acres surrounding the Byron Airport. Almost all the lands designated as critical habitat are either already preserved or are proposed for preservation under the Plan and will be managed to support and enhance these species.

Critical habitat has been proposed for two covered species: California red-legged frog and California tiger salamander. Critical habitat for California red-legged frog that was proposed in April 2004 includes nearly all the grassland, oak woodland, and chaparral in the inventory area (U.S. Fish and Wildlife Service 2004a). In August 2004, USFWS proposed critical habitat for California tiger salamander (U.S. Fish and Wildlife Service 2004b) following the official listing of the species as threatened throughout its range that took effect on September 1, 2004. Critical habitat was proposed in 20 counties in California encompassing 382,666 acres. Approximately 39,500 acres of critical habitat are proposed in the inventory area (10% of the total), in four separate units, listed below.

- Mulligan Hill Unit in the northwest corner of the inventory area (Unit 14—approximately 80% in the inventory area, or 4,700 acres).
- Deer Valley Unit centered on Deer Valley (Unit 15—7,353 acres).
- Marsh Creek Unit bounded by Curry Canyon, Deer Valley, Round Valley, and the Marsh Creek Reservoir (Unit 16—13,502 acres).
- Bethany Reservoir Unit; the portion of this unit in the inventory area occurs between Vasco Road, Bryon Highway, and the Alameda County line (Unit 17—approximately 50% in the inventory area, or 14,000 acres).

Provided that the Permittees have complied with their obligations under the Implementing Agreement, the HCP/NCCP, and the federal permit, USFWS will ensure that, to the maximum extent allowable after public review and comment, lands within the inventory area of the HCP/NCCP will not be designated as critical habitat for any covered species that is federally listed, including but not limited to California red-legged frog, California tiger salamander, and Alameda whipsnake. Subject to available funding, USFWS agrees, unless otherwise required by law after public review and comment, to reassess and revise the boundaries of any existing designated critical habitat of covered species to exclude the HCP/NCCP inventory area, within agency funding limits, including but not limited to critical habitat designated for vernal pool fairy shrimp, longhorn fairy shrimp, and Contra Costa goldfields. Because neither potential development on lands within the City of Antioch nor potential expansion of the Los Vaqueros Reservoir are covered activities under the HCP/NCCP, the Permittees understand that the exemption may not apply to these areas.

## 10.2.6 State NCCP Assurances

The NCCPA (Section 2820(f)) includes provisions ensuring that “if there are unforeseen circumstances, additional land, water or financial compensation or restrictions on the use of land, water, or other natural resources shall not be required without the consent of the plan participants...” The NCCPA specifies that assurances for plan participants may be provided commensurate with long-term conservation assurances and associated implementation measures provided in the Plan. CDFG’s determination of the level of assurances and the time limits specified in the Implementing Agreement will be based on the overall knowledge of the species and natural communities, the strength of the conservation strategy, and the size and duration of the Plan (Sections 2820[f][1][A–H]).

## 10.2.7 Conservation Contributions by State and Federal Agencies

As described in Chapter 8, implementation of the mitigation portion of the Plan will be the responsibility of the Permittees. In addition to the Permittees, it is anticipated that state and federal agencies, including USFWS and CDFG, will

contribute to the conservation portion. The Permittees recognize that state and federal funds cannot be guaranteed in advance of the approval of yearly budgets, nor can they be guaranteed by agency staff who do not have the authority to commit these funds. However, the Permittees seek assurance that USFWS and CDFG will make every effort to assist the Implementing Entity in securing the funding outlined in Chapter 9 to contribute to species recovery and to help implement the conservation portion of the HCP/NCCP.

## **10.2.8 Staffing Contributions by State and Federal Agencies**

Successful implementation of the HCP/NCCP relies on the continued participation and feedback of representatives of CDFG and USFWS. As described in Chapter 8, CDFG and USFWS staff are expected to participate in HCP/NCCP Governing Board meetings and subcommittees as needed to evaluate and provide advice on Plan implementation. In particular, CDFG and USFWS staff participation is critical to the success of the adaptive management and monitoring program. To ensure this participation, the Permittees request assurances that CDFG and USFWS will provide staff to serve on all appropriate committees and will ensure, to the extent possible, staff participation in discussions and meetings to ensure that the implementation of the Plan is consistent with any findings upon which the permits are based.

## **10.2.9 Assurances to Private Landowners**

### **Take Authorization Assurances**

Any covered activity may participate in the HCP/NCCP and receive take authorization according to the procedures and requirements described in the Plan (see Chapter 6, Section 6.2 and Chapter 8, Section 8.7). For projects conducted by a Third Party Participant (see Chapter 8), once the take authorization has been provided, it will remain in effect for that covered activity, even if the permits issued by CDFG and USFWS to the Permittees are suspended or revoked, as long as the Third Party Participant fully complies with the conditions of the Plan, the Implementing Agreement, the permits issued by CDFG and USFWS to the Permittees, and the conditions imposed on the covered activity when take authorization was granted (see Chapter 6, Section 6.2). However, if one or both of the permits issued by CDFG and USFWS to the Permittees are suspended or revoked, the USFWS or CDFG may suspend or revoke the extension of take authorization to the Third Party Participant if the USFWS or CDFG determines that implementation of the covered activity would likely jeopardize the continued existence of a covered species. Before making such a determination, the USFWS and CDFG will meet and confer with the Third Party Participant and the Permittee to discuss the threat of jeopardy and possible ways to avoid it short of

suspending or revoking the extension of take authorization to the covered activity.

## Neighboring Landowner Assurances

This Plan calls for the acquisition of land and coordinated management of a Preserve System for the benefit of covered species. As a result of the conservation strategy described in the Plan, some populations of listed species are expected to increase in the preserves and elsewhere. Landowners adjacent to or near preserves may be concerned that populations of state- or federally listed species in the preserves may expand and colonize or use their lands, potentially restricting their land use activities.

Active private ranches, cropland, pasture, orchards, or vineyards are the lands that would most likely be adjacent to HCP/NCCP Preserves. Moreover, these land uses would be the most likely to be affected by the presence of new covered species or increasing populations of covered species. For these reasons, Neighboring Landowner Assurances will apply only to agricultural lands, as defined below. Other land uses (e.g., urban development) are excluded from Neighboring Landowner Protections because ongoing take of covered species is not expected to occur within these areas. If take occurs, events are expected to be limited and geographically restricted to the immediate boundary with HCP/NCCP preserves.

By providing Neighboring Landowner Assurances, this Plan acknowledges that successful implementation of the conservation strategy may cause listed species to use nearby agricultural lands. Take coverage afforded by Neighboring Landowner Assurances could result in a diminution of the benefits of the conservation strategy in instances where species expand or increase their populations within the permit area. Neighboring Landowner Assurances do not provide for take of existing populations and occupied habitat of covered species; accordingly, this program would not reduce these populations or habitat from current conditions.

Neighboring Landowner Assurances provide incidental take permit coverage on an “opt-in” basis for all agricultural lands within 1.0 mile of the boundary of any land or property acquired or placed under easement by the HCP/NCCP Implementing Entity or by another organization in partnership with the HCP/NCCP Implementing Entity (i.e., the land becomes part of the HCP/NCCP Preserve System). This opt-in approach allows for landowners to willingly participate in the Plan. The approach is required by USFWS to allow an affirmative statement be made by willing landowners to participate in the Plan. Those landowners that do not seek to participate would not be required to do so but would also not receive coverage for incidental take for their ongoing activities.

The neighboring landowner protections listed below will be offered under the Plan.

- Agricultural lands within 1.0 mile of preserve boundaries may be covered for incidental take of all covered species authorized for take under the Plan's associated Section 10(a)(1)(B) and NCCP permits, should any such lands support increased use or become inhabited by covered species *after* establishment of a preserve parcel within 1.0 mile. Take coverage will not be provided for individuals or populations of covered species that inhabit the neighboring lands prior to the establishment of a preserve parcel, as identified in a baseline survey (see below).
- Coverage under the take permits will be offered to neighboring lands actively being used for agricultural purposes at the time that the HCP/NCCP preserve is established within 1.0 mile. For purposes of this Plan, *agricultural* means normal agricultural practices including but not limited to crop planting and production, soil tilling, crop harvesting, livestock grazing, forage production, animal production and husbandry, fence construction and maintenance, vehicle or horse use, and construction and maintenance of typical farm outbuildings.
- *Actively being used for* means lands on which usual and customary agricultural practices are occurring, including normal crop rotation practices, at the time the neighboring HCP/NCCP preserve is established. For example, if agricultural lands that are used for crop production lie fallow in accordance with normal crop-rotation practices at the time the neighboring preserve is established, those lands would be considered to be actively used for agricultural purposes. Such coverage shall continue, subject to the terms and conditions of the Plan, the Implementing Agreement, and the take permits, for as long as the neighboring lands are actively being used for agricultural purposes and the permits remain in effect.
- Coverage will not be offered to neighboring lands devoted to non-agricultural purposes at the time the nearby HCP/NCCP Preserve is established. Take coverage does not include conversion of agriculture to other uses.
- A change in land cover as defined by the land cover types in this Plan (e.g., cropland to vineyard) would require landowners reapplying to the Implementing Entity for Neighboring Landowner Assurances in order to determine the new baseline condition of covered species on the affected property.
- Conversion from grazing land to vineyards or other cultivated agriculture is not a covered activity under this Plan (see Chapter 2) and is not eligible for Neighboring Landowner Assurances.
- At least annually, the Implementing Entity will send a letter to each neighboring landowner whose lands are actively used for agricultural purposes and are within 1.0 mile of the new preserve boundary. The letter will explain the ECCC HCP/NCCP and the landowner's eligibility for coverage under the Plan's take permits. Landowners who are interested in receiving this coverage must affirmatively respond to the Implementing Entity. Prior to receiving coverage under the Plan, the environmental baseline must be determined. Landowners will have the option of either

allowing biologists with the Implementing Entity to survey their property at no cost or hiring and paying for their own consultants to do so. Reports prepared by landowner consultants will be reviewed by the Implementing Entity for adequacy.

- The survey report will address the areas proposed for neighboring landowner protections and will include, at a minimum, a description of habitat for covered species (extent and quality), existing records of covered species within 1 mile of the parcel proposed for coverage, and the results of surveys for covered species on the parcel proposed for coverage. Upon receipt of a biological report approved by the Implementing Entity and a *Certificate of Inclusion* signed by the landowner, the Implementing Entity will grant take coverage to the landowner under this program.
- A change in ownership of land enrolled in the neighboring land program requires the new landowner to notify the Implementing Entity in order to continue coverage. This notification allows the Implementing Entity to verify that the new landowner wishes to continue to be enrolled in the program. No new surveys are required to continue coverage under the program.
- The Implementing Entity will maintain a record of all correspondence and certificates of inclusion sent to neighboring landowners subject to these protections, as well as signed certificates of inclusion returned by landowners. The Implementing Entity will notify USFWS and CDFG annually of the number, location, and size of neighboring lands entered into the program. Copies of the certificates will be provided to USFWS and CDFG upon request. The location of all neighboring lands enrolled in the program will be mapped in the Implementing Entity's GIS database.

## **Public Access to Conservation Easements Held by Private Landowners**

It is not the intent of the Implementing Entity to allow general public access on conservation easements that are part of the HCP/NCCP Preserve System. Public access on private lands managed under the HCP/NCCP could conflict with ongoing agricultural operations and could pose a safety risk to the public. Public access to lands under conservation easements could also pose a risk of unwanted trespass onto adjacent privately held lands. Generally, the Implementing Entity will leave decisions regarding public access up to the landowner but will restrict access through the conservation easement where that access may conflict with the conservation goals of the site. All conservation easements will provide for access for the Implementing Entity's biologists to conduct management and biological monitoring necessary for compliance with the Plan's adaptive management and biological monitoring program.

## 10.3 Modifications to the Plan

The HCP/NCCP or incidental take permit can be modified in accordance with USFWS regulations and the terms of the Implementing Agreement. HCP/NCCP modifications are not anticipated on a regular basis. Modifications can be requested by a Permittee or by the permitting agencies. The categories of modification that are recognized, in order of significance, are administrative changes, minor modifications, and major amendments.

### 10.3.1 Administrative Changes

Administrative changes are internal changes or corrections to the Plan that do not require preauthorization from USFWS or CDFG. Administrative changes will be made in writing and documented by the Implementing Entity. USFWS and CDFG will be provided a summary of administrative changes in an annual report. Examples of administrative changes are listed below.

- Corrections of errors in the Plan that do not change the intended meaning or obligations.
- Minor changes to survey or monitoring protocols that are not proposed in response to adaptive management<sup>5</sup>.
- Day-to-day implementation decisions, such as modifying irrigation schedules for created/restored habitats on the basis of observed water needs of planted vegetation.
- Modifying the design of existing research or implementing new research.
- Conducting additional monitoring surveys.
- Modifying HCP/NCCP monitoring protocols to align with USFWS and CDFG monitoring protocols as they may be modified in the future.
- Adopting new monitoring protocols that may be promulgated by USFWS and CDFG in the future.
- Annual adjustments to the HCP/NCCP Mitigation Fee to keep pace with the inflation of land values.
- Changes to the membership of the Governing Board, the Science Advisors, or any advisory committees to the Board without changing the representation of the Permittees, agencies, or organizations.

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<sup>5</sup> Such changes are subject to federal No Surprises regulations, state assurances, and local assurance provisions found in the Implementing Agreement.

## 10.3.2 Minor Modifications

Minor modifications are changes that do not affect the impact assessment or conservation strategy described in the Plan and do not affect the ability of the Implementing Entity to achieve the biological goals and objectives of the HCP/NCCP. Minor modifications do not require an amendment to the permits or the Implementing Agreement, but they do require preapproval by USFWS and CDFG before being implemented. Examples of minor modifications are listed below.

- Updates to the land cover map or to species occurrence data that are consistent with the predications and expectations of the Plan.
- Minor changes to the biological goals or objectives in response to adaptive management.
- Modification of monitoring protocols for Plan effectiveness not in response to changes in standardized monitoring protocols from USFWS or CDFG.
- Modification of existing or adoption of additional conservation measures that improve the likelihood of achieving HCP/NCCP species objectives.
- Discontinuing implementation of conservation measures if they are ineffective.
- Modification of existing or adoption of new performance indicators or standards if results of monitoring and research, or new information developed by others, indicate that the initial performance indicators or standards are inappropriate measures of success of the applicable conservation measures.
- Modification of existing or adoption of additional covered species or natural community objectives where such changes are consistent with achieving covered species, natural community, and overall HCP/NCCP goals.
- Minor changes to the reporting protocol.
- Other changes that do not result in adverse effects to covered species beyond those analyzed in the HCP/NCCP and the associated biological opinion, and do not limit the ability of the Implementing Entity to achieve the biological goals and objectives of the HCP/NCCP.

Changes in the land acquisition configuration of the Plan (see Conservation Measure 1.1, Chapter 5) may be necessary to address changing land use patterns in the inventory area or a lack of willing sellers in key Acquisition Analysis Subzones. Changes in land acquisition requirements within a Zone or Subzone (whichever applies in Conservation Measure 1.1) that amount to less than 5% of the original acreage are considered minor modifications as long as:

1. the overall target-acquisition acreage of land cover type or habitat for covered species does not change within the inventory area (i.e., a decrease in land acquisition on one Subzone is balanced by an increase in land acquisition in another Subzone);

2. the changes between Zone or Subzone are biologically equivalent or biologically superior to the original Plan; and
3. the changes do not significantly affect the ability of the Implementing Entity to mitigate the impacts on covered species, contribute to the recovery of covered species, and meet the Plan's biological goals and objectives.

A minor change in land acquisition configuration may be needed, for example, to account for small differences in acreages of land cover type across Subzones due to parcel boundary changes or overlap between Subzones. Any change in land acquisition requirements that exceeds 5% of the original acreage requirement or that is inconsistent with the criteria above is considered a major amendment.

A change in the HCP/NCCP permit area (either a decrease or an increase) in response to a change in the ULL or city limit is also considered a minor modification, as long as the change:

- is compatible with the conservation goals and preserve system configuration of the Plan,
- is consistent with the urban development areas covered by the Plan and defined in Chapter 2,
- is consistent with the impact analysis of the Plan, and
- addresses activities that are already covered by the Plan.

All minor modifications must first be approved by the Implementing Entity Governing Board in a public meeting, and are subject to final approval by USFWS and CDFG. To modify the Plan without amending the permits, the HCP/NCCP Governing Board will submit to USFWS and CDFG a written description of the proposed change and an explanation of why its effects are not believed to be significantly different from those described in the original Plan. If USFWS and CDFG concur with the proposal, they will authorize the HCP/NCCP modification in writing, and the modification shall be considered effective on the date of USFWS and CDFG's written authorization.

### **10.3.3 Major Amendments**

A major amendment is a change in the Plan that may affect the impact analysis or conservation strategy in the Plan. Major amendments require amending the HCP/NCCP and the incidental take permit through the same formal review process as the original Plan and permit, including NEPA/CEQA review, a Federal Register notice, an internal Section 7 consultation with USFWS, and formal findings by CDFG. The HCP/NCCP Governing Board will submit a major amendment to USFWS and CDFG in a report that includes a description of the need for the amendment, an assessment of its impacts, and any alternatives by which the objectives of the proposal might be achieved.

Examples of changes that would require a major amendment include but are not limited to those listed below.

- Revisions of the permit area boundary that do not qualify for a minor modification.
- Addition of species to the covered species list.
- Increasing the allowable take limit of existing covered activities or adding new covered activities to the Plan.
- Modifications of any important action or component of the conservation strategy under the HCP/NCCP, including funding, that may substantially affect levels of authorized take, effects of the covered activities, or the nature or scope of the conservation program.
- A major change in performance standards if monitoring or research indicates that performance standards are not attainable because technologies to attain them are either unavailable or infeasible.
- Extending the permit term beyond 30 years.

## **Amending the Section 10(a)(1)(B) Permit**

To amend the Section 10(a)(1)(B) permit, the HCP/NCCP Governing Board will submit a formal application to USFWS. This application must include a revised HCP/NCCP, a permit application form, any required fees, a revised Implementing Agreement, and the required compliance document under NEPA. The appropriate NEPA compliance process and document will depend on the nature of the amendment being proposed. Upon submission of a completed application package, USFWS will publish a notice of the proposed application in the Federal Register, initiating the NEPA and HCP review process. After public comment, USFWS may approve or deny the permit amendment application.

## **Amending the NCCP Permit**

Procedures for amending the NCCP permit shall be included in the Implementing Agreement and processed in accordance with applicable NCCPA requirements. The NCCP permit amendment will be subject to the requirements of CEQA.