IMPLEMENTING AGREEMENT

by and among

THE CITY OF CARLSBAD, THE CALIFORNIA DEPARTMENT OF FISH AND GAME,

and the

U.S. FISH AND WILDLIFE SERVICE

TO ESTABLISH THE HABITAT MANAGEMENT PLAN FOR THE CONSERVATION OF THREATENED, ENDANGERED AND OTHER SPECIES IN THE CITY OF CARLSBAD, CALIFORNIA

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1.0 RECITALS

This Implementing Agreement ("Agreement"), made and entered into as of _____ _____, 2004 (the "Effective Date") by and among The City of Carlsbad, California ("Carlsbad"), the California Department of Fish and Game, a subdivision of the California Resources Agency ("CDFG"), and the U.S. Fish and Wildlife Service, an agency of the United States Department of the Interior ("USFWS"), hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of actions that will be undertaken to provide for the conservation and management of the species covered under the HMP and minimize and mitigate the effects on the species and their habitats in future land development and habitat management in Carlsbad.

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

1.1 Carlsbad's interest in preserving sensitive habitat dates back to its adoption of an Open Space and Conservation Element of its General Plan in the mid-1970's. Carlsbad appointed a Citizens Committee to review Carlsbad's Open Space Plan in the late 1980's, and a primary recommendation of the Committee was to make the protection of wildlife habitats and sensitive species an open space priority.

1.2 In November, 1990 the Carlsbad City Council authorized the first technical studies for a habitat conservation component for the Open Space and Conservation Element of Carlsbad's General Plan.

1.3 The State of California first adopted the Natural Community Conservation Planning Act ("NCCP Act") in 1991. Carlsbad signed a Memorandum of Agreement with CDFG and USFWS in 1991, and an NCCP Enrollment Agreement with CDFG in 1992. In these, Carlsbad expressed its intent to prepare and implement a Habitat Management Plan ("HMP").

1.4 In 1993, the USFWS listed the coastal California gnatcatcher as a threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, as amended ("ESA"), and adopted a Section 4(d) Special Rule. The gnatcatcher resides in portions of Carlsbad.

1.5 Carlsbad has developed the HMP to meet the requirements of the ESA and the NCCP Act. Consistent with the NCCP Act, the HMP is a broad-based habitat planning effort intended to provide for effective conservation and management of wildlife and targeted natural communities while continuing to allow compatible development in accordance with Carlsbad's Growth Management Plan ("GMP"). Such planning is intended to be an effective tool to protect Carlsbad's and the region's biodiversity while reducing conflicts between protection of wildlife and plants and the reasonable use of land for economic development. The HMP has been developed through a cooperative effort involving the public through the USFWS, CDFG, local government agencies, property owners, development interests, and environmental groups.

1.6 The HMP describes a cooperative federal, state and local program of conservation for 43 species of plants and animals, as listed in Exhibit A. The HMP is a product

of numerous studies and lengthy negotiations by the Parties and other interested persons/entities, and represents coordination of private and public development and conservation interests with federal, state and local governments.

1.7 Goals of the HMP are to conserve biodiversity in the HMP Area, including federally listed species, and to achieve certainty in the land development process for both private and public sector land development projects.

1.8 The HMP is a comprehensive, long-term plan for the conservation and management of natural biological diversity. It addresses the needs of 43 species through the preservation of natural vegetation communities in a configuration that contributes to their long-term survival. The HMP also addresses the potential impacts of urban growth, natural habitat loss, habitat management, and species endangerment and creates a plan to minimize and mitigate for the potential loss of HMP Covered Species and their habitat resulting from the direct and indirect impacts of future development of both private and public lands within Carlsbad.

1.9 The HMP as implemented through this Agreement establishes the conditions under which Carlsbad, for the benefit of itself and of public and private landowners and other land development project proponents within its boundaries, will receive from the USFWS and the CDFG certain long-term Take Authorization / Permit (and an acknowledgment that the HMP satisfies the conditions established in the Section 4(d) Special Rule for the coastal California gnatcatcher) for HMP Covered Species covered by the HMP which is incidental to land development and other lawful land uses authorized by Carlsbad except as provided in Section 10.5.E. of this Agreement.

1.10 The Take Authorization / Permit will authorize the Incidental Take of all HMP Covered Species in accordance with the HMP including those which are not presently listed as threatened, endangered or candidate species under the ESA or CESA, except as provided in Section 10.5E of this Agreement. Conserving unlisted HMP Covered Species (the "taking" of which is not unlawful under the ESA) the same as listed HMP Covered Species (the taking of which is unlawful in the absence of a Take Authorization / Permit) equally in the HMP and this Agreement may prevent such species from ever being in danger of becoming extinct and will provide certainty regarding how the subsequent listing of such species under the ESA and CESA will affect permitting and mitigation requirements for future land development within Carlsbad. The HMP will conserve several plant species, the take of which is not prohibited under the ESA. In recognition of the conservation provided in the HMP for these plant species, the City of Carlsbad will receive the benefit of the USFWS's "no surprises" rule.

1.11 Implementation of the HMP will allow Carlsbad to maintain development flexibility by proactively planning a local preserve system which can meet future development project mitigation needs.

1.12 Preservation of natural vegetation communities and wildlife will significantly enhance the quality of life in Carlsbad and set aside lands for the future use and enjoyment of the citizens of Carlsbad, the state and the nation.

1.13 Carlsbad has submitted the 10(a)(1)(B) permit and HMP to the USFWS and CDFG in support of, respectively, an application for a Section 10(a) Permit and an NCCP Permit.

1.14 The HMP is also a component of the North County Multiple Habitat Conservation Plan (MHCP) approved by the San Diego Association of Governments on March 28, 2003. The MHCP is a cooperative effort of seven cities to contribute collectively to the conservation of sensitive plant and animal species and their habitat on a subregional basis in northwestern San Diego County. The seven cities will implement their respective portions of the MHCP plan through citywide "subarea" plans. The HMP is one of the subarea plans and was included in the approved MHCP and the joint EIR/EIS, which addressed the environmental effects associated with implementation of the Plan.

1.15 The HMP was reviewed by the California Coastal Commission on June 12, 2003 for consistency with the California Coastal Act and Coastal Management Program pursuant to the request for Consistency Review granted by the federal Office of Ocean and Coastal Resource Management (OCRM) in August, 2000. The Coastal Commission has determined that based on the conservation standards contained in the HMP and the additional standards for coastal properties contained in Addendum #2 to the HMP, the HMP is consistent with the California Coastal Act and Coastal Management Program.

1.16 The parties acknowledge that they have met and conferred in good faith regarding Carlsbad's proposed Golf Course and the Golf Course is depicted as a proposed Hardline Area in Figure 8 revised, shown in Addendum #2 of the HMP. Approval of the HMP and this Implementing Agreement will allow Carlsbad to obtain the Take Authorization / Permit necessary to allow construction of projects, including but not limited to the Golf Course.

2.0 PURPOSE

The purposes of this Agreement are:

2.1 To ensure implementation of the HMP;

2.2 To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,

2.3 To provide assurances to Carlsbad that as long as the terms of the HMP and the Permits issued pursuant to the HMP and this Agreement are fully and faithfully performed, no additional compensation for the incidental take of HMP covered species will be required except as provided for in this Agreement or required by law.

3.0 DEFINITIONS

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

3.1 The term "Agreement" means this Implementing Agreement.

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

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

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

3.5 The term "Changed Circumstances" means changes in circumstances affecting a species or geographic area covered by the HMP that can reasonably be anticipated by the Parties and that can be planned for as part of the HMP. Changed Circumstances are identified in Section 10.3 of this Agreement.

3.6 The term "Core" means a component of the preserve system established under the HMP, consisting of large blocks of conserved habitat capable of sustaining HMP Covered Species in perpetuity.

3.7 The term "Conserved Habitat Areas" means the Existing Hardline Areas, Proposed Hardline Areas, Standards Areas, Conserved Parcels in the MHCP Core Areas and Special Resource Areas as depicted on Figures 4, 5, 6, 27 and discussed in Sections D(2)(I), D(3)(A), and D(3)(B) and Addendum #2 of the HMP and conserved as described under the HMP.

3.8 The term "Covered Activities" means land development and habitat management activities undertaken by Carlsbad or by third parties who obtain development permits from Carlsbad consistent with the Carlsbad General Plan and Growth Management Plan as amended to be consistent with the HMP and the HMP Preserve Management as described in Section G and management activities on Conserved Habitat Acres.

3.9 The term "Covered Lands" means the lands upon which the Take Authorization / Permit authorize incidental take of HMP Covered Species and the lands to which the HMP's conservation and mitigation measures apply. These lands are identified on Figure 1 in the HMP.

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

3.11 The term "Existing Hardline Areas" means areas, which were conserved and committed to habitat conservation prior to the Effective Date as a result of existing open space regulations, past development approvals or other actions. These areas are depicted on Figure 5 of the HMP.

3.12 The term "Focused Planning Area Map" means the map included as Figure 4 of the HMP, which depicts the lands of high biological value that will be considered for conservation or development as part of the HMP.

3.13 "Habitat Conservation Plan" and "HCP" mean the Habitat Management Plan ("HMP") prepared by Carlsbad pursuant to Section 10(a)(2)(A) of the ESA, (16 U.S.C. § 1539(a)(2)(A, dated December, 1999 with Addendum #1 dated December, 1999 and Addendum #2 dated June, 2003).

3.14 The term "HMP" means the Carlsbad Habitat Management Plan and Addendum #1 and 2.

3.15 The term "HMP Core" means an area within the Focus Planning Area Map which consists of blocks of habitat that are sufficiently large to reliably support breeding populations of species, or that are large and intact enough to form ecologically functional areas for preserve design as shown in Figure 4 of the HMP .

3.16 The term "HMP Covered Species" means those species identified in lists 1, 2, and 3 Exhibit "A" to this agreement. The HMP addresses the species identified in list 1 in a manner sufficient to meet all of the criteria for issuing an incidental take permit under the ESA and NCCP Act.

Take authorization for the species on list 2 and 3 is contingent on other MHCP Subarea Plans being permitted and/or funding for management of conserved areas.

3.17 The term "Incidental Take" means the taking of an HMP Covered Species incidental to and not the purpose of carrying out otherwise lawful activities.

3.18 The term "Linkage" means a component of the preserve system established under the HMP, consisting of conserved habitat that provides connectivity between Cores and to natural communities within the region.

3.19 "Local Facilities Management Zone" ("LFMZ") means those 25 areas defined in Carlsbad's Growth Management Program for planning purposes.

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

3.21 The term "MHCP" means the Multiple Habitat Conservation Plan, a comprehensive subregional plan, adopted in March, 2003, which addresses multiple species' habitat needs and the preservation of native vegetation in a 175 square mile area in northwestern San Diego County, California.

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

3.23 The term "NCCP Permit" means the authorization issued in accordance with this agreement by CDFG under the NCCP Act, to permit the Take of an HMP Covered Species including such species that are listed under CESA as threatened or endangered, or of a species which is a candidate for such a listing, or that are non-listed species.

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

3.25 The term "NPPA" means the Native Plant Protection Act (Cal. Public Resources Code §§ 1900 et seq.), including all regulations promulgated pursuant to that Act.

3.26 "No Surprises Rule" means the rule promulgated by USFWS and currently codified at 50 C.F.R 17.3, 1722(b)(5) and 17.32(b)(5) that extends certain assurances regarding future mitigation obligations to permittees obtaining incidental take permits under Section 10(a) of the Federal ESA.

3.27 The term "Operating Conservation Program" means the conservation and management measures provided under the HMP and/or this Agreement to minimize, mitigate and monitor the impacts of Take of the HMP Covered Species as described in Sections C, D, E, F, and Appendix C of the HMP and including those measures described in Exhibit B to the IA and in Section G of the HMP to respond to Changed Circumstances. The Operating Conservation Program also includes Carlsbad's regulatory commitments set forth at Section 12 of this Agreement and reporting obligations under the Take Authorization / Permit.

3.28 The terms "Party" and "Parties" mean the signatories to this Agreement, namely the United States Fish and Wildlife Service, the California Department of Fish and Game, and Carlsbad.

3.29 The term "Proposed Hardline Area" means a property whose conservation and development areas have been planned as part of the HMP, as discussed in Section D(3)(b) and as depicted in Figure 6 and Addendum #2 of the HMP.

3.30 The term "Public Lands" means property owned by Carlsbad, as depicted in Figure 31 and as illustrated in Figures 3 and 4 of the HMP.

3.31 The term "Section 4(d) Special Rule" means the regulation concerning the coastal California gnatcatcher, published by the USFWS on December 10, 1993 (58 Federal Register 65088) and codified at 50 C.F .R. § 17.41 (b), which defines the conditions under which

the Incidental Take of the coastal California gnatcatcher in the course of certain land use activities is lawful.

3.32 The term "Section 10(a) Permit" means the permit issued by the USFWS to Carlsbad under section 10(a)(l)(B) of the ESA (16 U.S.C. § 1539(a)(l)(B)) to allow the Incidental Take of HMP Covered Species.

3.33 The term "Special Resource Area" or "SRA" means a component of the Focus Planning Areas consisting of conserved habitat outside of HMP Cores and Linkages as described in Section D(2)(I) of the HMP.

3.34 The term "Standards" means special land use regulations to be adopted by Carlsbad to implement the HMP, as described in Sections D and E.

3.35 The term "Standards Areas" means lands designated and depicted in Figure 26 of the HMP, which, must be designed, permitted and developed in accordance with the Standards stated in Section D of the HMP.

3.36 The terms "Take" and "Taking" shall have the meanings provided by the ESA and the California Fish and Game Code and shall apply to both listed and unlisted HMP Covered Species. Sections 7(b)(4) and 7(o)(2) of the ESA generally do not apply to listed plant species. However, protection of listed plants is provided to the extent that the ESA prohibits the removal and reduction to possession of Federally listed endangered plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of endangered plants on non-Federal areas in violation of State Law or regulation or in the course of any violation of a State criminal trespass law.

3.37 The term "Take Authorization / Permit" means the Section 10(a) Permit, and/or the NCCP Permit.

3.38 The term "Unforeseen Circumstances" means changes in circumstances affecting the Plan Species or the Permit Area that could not reasonably have been anticipated by Carlsbad, CDFG or USFWS as of the Effective Date, and that result in a substantial and adverse change in the status of a HMP Covered Species as described in Section 10.3 of this agreement.

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

3.40 "Wetlands" means generally those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. For purposes of the Carlsbad HMP, wetlands are those lands which contain one or more of the naturally occurring wetland communities listed in Appendix A of the HMP and further described in Section D.7-6 (Addendum #2) for the Coastal Zone. Wetlands also include areas lacking wetland communities due to non-permitted filling of previously existing wetlands.

4.0 HABITAT CONSERVATION PLAN/NCCP PLAN

Pursuant to Section 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)), Carlsbad has prepared a Habitat Conservation Plan known as the "Habitat Management Plan" or "HMP." The HMP qualifies as an NCCP Plan under the NCCP Act. The HMP proposes a program of conservation for the HMP Covered Species and protection of their habitat in perpetuity through land use regulation, acquisition and management. Carlsbad has submitted the HMP to the USFWS and the CDFG, and Carlsbad has requested that the USFWS issue a Section 10(a) Permit and that the CDFG issue an NCCP Permit, each of which actions will allow the Incidental Take within the HMP Area of those HMP Covered Species determined by USFWS and CDFG to be adequately conserved by the HMP in accordance with this Agreement. The HMP proposes a mitigation program for the HMP Covered Species and their habitats. Carlsbad has also requested that the USFWS acknowledge that the HMP satisfies the conditions under the Section 4(d) Special Rule to allow the Incidental Take of the coastal California gnatcatcher within HMP Area.

5.0 INCORPORATION OF HMP

The HMP and each of its provisions are intended to be and by this reference are incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement will control. In all other cases, the terms of this Agreement and the terms of the HCP will be interpreted to be supplementary to each other. The HMP and this Agreement are intended to be harmonious and a complete expression of the agreement between the Parties, and thereby supersede all other HMP-related drafts, position papers, working documents and other documents.

6.0 LEGAL AUTHORITY OF THE USFWS

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

> The Committee intends that the Secretary [of the Interior] may utilize this provision [on habitat conservation plans] to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the

> conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act. It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances.

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

7.0 LEGAL AUTHORITY OF THE CDFG

The CDFG enters into this Agreement pursuant to its authority under the NCCP Act. CDFG may authorize the take of HMP Covered Species, including species listed under CESA, pursuant to Fish and Game Code section 2835 if the HMP provides for the conservation and management of those species.

8.0 COOPERATIVE EFFORT

In order that each of the legal requirements of this Agreement are fulfilled, each of the Parties to this Agreement must perform certain specific tasks as set forth in the HMP. The HMP thus describes a cooperative program by Federal, State and local agencies to conserve HMP Covered Species.

9.0 TERM

9.1 This Agreement, and the HMP, will become effective with respect to USFWS on the date USFWS issues the Section 10(a)(I)(B) permit and with respect to CDFG on the date CDFG issues the NCCP Permit. This Agreement, the HMP, and the Take Authorization / Permit will remain in effect for a period of 50 years from the issuance of the original Take Authorization / Permit , except as otherwise provided in this Agreement or in section G of the HMP.

9.2 Upon agreement of the Parties and compliance with all applicable laws, the Take Authorization / Permit may be extended beyond their initial term under regulations of USFWS and CDFG in force on the date of such extension. If Carlsbad desires to extend the permit, it will so notify the USFWS and CDFG at least 180 days before the then-current term is scheduled to expire. Extension of the permit constitutes an extension of the HMP and this Agreement for the same amount of time, subject to any modifications the USFWS and/or CDFG may require at the time of extension.

9.3 Notwithstanding the Stated Term indicated above, the Parties agree and recognize that once the HMP Covered Species have been incidentally taken and their habitat modified pursuant to the HMP, such take and habitat modification will be permanent. It is

therefore the intention of the Parties that the provisions of the HMP and of this Agreement regarding the preservation and management of habitat provided for under this Agreement shall likewise, to the extent permitted by law, be permanent and extend beyond the terms of this Agreement.

10.0 MUTUAL ASSURANCES

10.1 Compliance with Applicable Laws. Compliance with the terms of this Agreement, the HMP, and the Take Authorization / Permit and compliance with all applicable land use regulation, mitigation, compensation and habitat management obligations contained in this Agreement and/or imposed by Carlsbad on its own land development projects and the proponents of land development projects within the HMP Area in accordance with the HMP, this Agreement, the Take Authorization / Permit, and governing federal and state laws and regulations, including 50 C.F.R. Parts 13 and 17 and 14 C.C.R. sections 783.0-783.8, constitute compliance with the Incidental Take and related provisions of the ESA, the NCCP Act, and the California Native Plant Protection Act ("NPPA") (California Fish and Game Code § 1900, et seq.).

10.2 Conservation of HMP Covered Species. Implementation of the HMP and this Agreement is intended to, and based on the best available scientific information about the HMP Covered Species and the biological analyses performed by USFWS and CDFG of the HMP Covered Species, will adequately provide for the conservation and protection of the HMP Covered Species and their habitats in the HMP Area in perpetuity sufficient to enable the USFWS and CDFG to authorize take of the HMP Covered Species in the manner described in the HMP and set forth in the Take Authorization / Permit. The list of HMP Covered Species is attached to this agreement as Exhibit "A."

10.3 Assurances of USFWS and CDFG

A. Unforeseen Circumstances. As provided in 50 C.F.R. 17.3, the term "Unforeseen Circumstances" shall mean changes in circumstances affecting a species or geographic area covered by the HMP that could not reasonably have been anticipated by the plan developers, USFWS, and CDFG at the time of the Plan's negotiation and development, and that results in a substantial and adverse change in the status of a Covered Species.

(1) "No Surprises" Assurances. Pursuant to the No Surprises Rule at 50 C.F.R. Sections 17.3, 17.22(b)(5) and 17.32.(b)(5), and provided that Carlsbad is properly implementing the HMP, USFWS shall not require Carlsbad 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 HMP, this Agreement and the Section 10(a)(1)(B) Permit with respect to Covered Activities without the consent of Carlsbad. Adaptive Management modifications and plan responses to Changed Circumstances are provided for under the HMP and therefore are not subject to the restrictions on additional mitigation contained in the No Surprises Rule. If USFWS makes a finding of unforeseen circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, Carlsbad will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species and will exercise its enforcement authorities as

provided by law as to third persons under Carlsbad's jurisdiction and control that are carrying out Covered Activities, to avoid such third persons contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

(2) CDFG Assurances. Except as otherwise provided in this subsection or required by law, CDFG shall not require Carlsbad to provide, without its consent, additional land, water or financial compensation, or additional restrictions on the use of land, water, or other natural resources, for the purpose of conserving HMP Covered Species with respect to Covered Activities in the event of Unforeseen Circumstances, provided Carlsbad is properly implementing this Agreement and the HMP. The provisions of this Agreement and the HMP that address adaptive management and the Changed Circumstances, including changes to the legal status of fully protected species and non-covered species, are not Unforeseen Circumstances and therefore are not subject to these assurances.

(3) Unforeseen Circumstances Finding. In the event that USFWS, CDFG or Carlsbad believes that Unforeseen Circumstances may exist, it shall immediately notify the other Parties. Within 30 days of such notice, if USFWS believes an Unforeseen Circumstance exists, it shall provide written notice of its proposed finding of Unforeseen Circumstances to the other Parties. USFWS shall clearly document the basis for the proposed finding regarding the existence of Unforeseen Circumstances pursuant to the requirements of 50 CFR § 17.22(b)(5)(iii)(C) and 17.32(b)(5)(iii)(C). Within fifteen (15) days of receiving such notice, Carlsbad, USFWS and CDFG shall meet or confer to consider the facts cited in the notice and potential changes to the HMP or management and operation of the Preserve lands. Pursuant to 50 C.F.R 17.22(b)(5)(iii)(C) and 50 C.F.R. 17.32(b)(5)(iii)(C) USFWS shall make an Unforeseen Circumstances finding based on the best scientific evidence available, after considering any responses submitted by Carlsbad pursuant to this section, and USFWS and/or CDFG shall have the burden of demonstrating that Unforeseen Circumstances exist.

(4) Effect of Unforeseen Circumstances Finding. Pursuant to 50 C.F.R. 17.22(b)(5) and 17.32(b)(5), in the event that USFWS makes a finding of Unforeseen Circumstances and additional conservation and mitigation measures are deemed necessary to respond to such Unforeseen Circumstances, USFWS may require Additional Conservation Measures from Carlsbad where the HMP is being properly implemented, but only if such measures are limited to modifications within the Preserve lands while maintaining the original terms of the HMP to the maximum extent possible. Additional conservation and mitigation measures shall not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water or other natural resources without the consent of Carlsbad.

(5) Interim Obligations Upon a Finding of Unforeseen Circumstances. If USFWS makes a finding of Unforeseen Circumstances, during the period necessary to determine the nature and extent of additional measures required and available, if any, to address the unforeseen circumstances, Carlsbad will avoid appreciably reducing the likelihood of the survival and recovery of the affected species and will exercise its enforcement authorities as provided by law as to third persons under Carlsbad's jurisdiction and control that are carrying out Covered Activities, to avoid such third persons contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

B. Changed Circumstances.

(1) Changed Circumstances Defined. As provided in 50 C.F.R. 17.3, the term "Changed Circumstances, means changes in circumstances affecting a species or the geographic area covered by the HMP that can reasonably be anticipated by Carlsbad, USFWS, and CDFG and that can be planned for through the HMP and the Preserve Management and Monitoring Plan presently being prepared pursuant to Section 12.3 of this Agreement and Exhibit B to this Agreement.[1] The major examples of changed circumstances, which impact or threaten the protected species and their habitats include fire, flooding, drought and invasive plants and pests.

(2) Carlsbad – Initiated Response to Changed Circumstances. Carlsbad will immediately notify USFWS and CDFG upon learning that any of the Changed Circumstances listed above and in the required Preserve Management and Monitoring Plan has occurred, and shall provide written notice within seven (7) days. Within 30 days, Carlsbad shall modify its activities and shall require affected third persons under its direct control to modify their activities, as appropriate to the extent necessary to minimize and mitigate the effects of the Changed Circumstances. Changed Circumstances and planned responses to those circumstances are described in Exhibit "B" to this agreement. In addition, the identification of other measures to respond to Changed Circumstances may be provided for in the Preserve Management and Monitoring Plan presently being prepared as required by Section 12.3of this agreement, which will then be incorporated into the HMP by reference.[1] Carlsbad shall report to USFWS and CDFG on its actions. Such modifications will be initiated without awaiting notice from USFWS or CDFG. Such modifications are provided for in the HMP and Exhibit "B" to this agreement and do not constitute Unforeseen Circumstances or require amendment of the Section 10(a)(1)(B) Permit, NCCP Permit, or the HMP.

(3) USFWS-Initiated or CDFG-Initiated Response to Changed Circumstances. If USFWS or CDFG determines that Changed Circumstances have occurred and that Carlsbad has not responded, the USFWS or CDFG will so notify Carlsbad and, as appropriate, direct Carlsbad to make the required changes. Within thirty (30) days after receiving such notice, Carlsbad, will make the required changes and report to USFWS and CDFG on its action. Such changes are provided for in the HMP and Exhibit "B" to this agreement, and do not constitute Unforeseen Circumstances or require amendment of the Section 10(a)(1)(B) Permit, NCCP Permit, or the HMP. The USFWS or CDFG may extend the period of time in which to implement Carlsbad's planned responses upon Carlsbad's showing of good cause as determined by the Wildlife Agencies, which extension will not be unreasonably withheld.

[1] The Preserve Management and Monitoring Plan is different from the Mitigation Monitoring and Reporting Program (MMRP) that is associated with the NCCP permit. The MMRP will be finalized prior to approval of the NCCP permit and singing of the IA.

C. Judicial Limitation.

On June 10, 2004, the court in Spirit of the Sage Council v. Norton, Civil Action No. 98-1873 (D.D.C.) ordered that, until the Service completes a rulemaking on revocation standards for incidental take permits, the Service may not approve new incidental take permits or related documents containing No Surprises assurances. The order specifically allows for the Service to issue incidental take permits that do not contain No Surprises assurances. Therefore, the "No Surprises" assurances contained in Sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, and section G of the HMP (with Addendum 1) are currently unenforceable and ineffective with respect to this Permit. The remainder of the Permit, the IA, and the HCP shall remain in full force and effect to the maximum extent permitted by law. In addition, in the event that any future judicial decision or determination holds that the "No Surprises" assurances rule (or similar successive rule) is vacated, held unenforceable or enjoined for any reason or to any extent, Sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, and section G of the HMP (with Addendum 1) shall be enforceable only to the degree allowed by any such decision or determination; provided that the remainder of the Permit, the IA, and the HCP shall remain in full force and effect to the maximum extent permitted by law. In the event that the "No Surprises" assurances rule is vacated, held unenforceable or enjoined by a judicial decision or determination, including the June 10, 2004, order described above, but is later reinstated or otherwise authorized, the assurances provided under the revised rule shall automatically apply to the HCP, IA, and Permit in place of Sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, and section G of the HMP (with Addendum 1). If, in response to any judicial decision or determination, the "No Surprises" assurances rule is revised, Sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, and section G of the HMP (with Addendum 1) shall be automatically amended in a manner consistent with the revised rule so as to afford the maximum protection to the Permittees consistent with the revised rule. Pursuant to the June 10, 2004, order in Spirit of the Sage Council v. Norton, Civil Action No. 98-1873 (D.D.C.) until the Service adopts new revocation rules specifically applicable to incidental take permits, all incidental take permits issued by the Service shall be subject to the general revocation standard in 50 C.F.R. § 13.28(a)(5). Additionally, notwithstanding anything to the contrary in the IA and the HCP, the Service retains statutory authority, under both sections 7 and 10 of the ESA, to revoke incidental take permits that are found likely to jeopardize the continued existence of a listed species.

10. 4 Future Listings.

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

B. Non-HMP Covered Species. If a species which is not an HMP Covered Species is subsequently proposed for listing as threatened or endangered under the ESA or CESA or is accepted by the California Fish and Game Commission as a candidate for listing after the Effective Date, and it is determined by the USFWS or CDFG based on reliable scientific evidence that such species occupies the HMP Area, the USFWS or CDFG shall agree to so notify Carlsbad. If Carlsbad provides written notification to USFWS and CDFG of its intent to add the species to the Take Authorization / Permit, then the parties will: (1) identify the conservation measures, if any, which are necessary to adequately protect the species, and (2) determine whether such conservation measures are beyond those prescribed by the HMP and MHCP. Although such conservation measures may be identified after such species is proposed for listing, Carlsbad may choose not to approve and implement such measures until the species is added to the permit with the exception of those measures identified pursuant to Section 10.4 of this Agreement. Upon application by Carlsbad meeting the requirements of the ESA and NCCP Act, and following compliance with applicable procedures under those Acts, Incidental Take of such species shall be authorized, provided the legal standards for such authorization have been met.

1. Adequate Conservation Measures Already in HMP and MHCP. If the conservation measures already contained in the HMP and MHCP are adequate to fulfill the conservation measures identified pursuant to subsection B above, as determined by USFWS and CDFG, then upon application by Carlsbad for Take Authorization / Permit for such species and following satisfaction of applicable review and approval procedures as required by the ESA and NCCP Act, the Parties will amend the HMP and this Agreement to add such species to the HMP Covered Species and be issued Take Authorization/Permit, effective for the remaining term of the Take Authorization / Permit.

2. Inadequate Conservation Measures in the HMP.

a. Additional Conservation Measure Priorities. If the conservation measures already contained in the HMP and MHCP do not adequately fulfill the conservation measures identified pursuant to subsection B above, then upon written request by Carlsbad, the USFWS and CDFG will work with Carlsbad to identify and implement the additional conservation measures necessary to add such species to the HMP consistent with section E.3 of the HMP and the Take Authorization / Permit. Such additional conservation measures are not subject to or limited by the No Surprises regulatory or CDFG assurances. In developing a set of additional conservation measures, the Parties will look to habitat management practices and enhancement opportunities within the HMP Conserved Habitat Areas using existing management resources, provided the redirection of such resources does not adversely affect any HMP Covered Species.

b. Developing Additional Conservation Measures. If the foregoing options are not adequate to fulfill the conservation measures identified pursuant to subsection A above, then the USFWS and CDFG will determine, consistent with the ESA and the NCCP Act, those additional conservation measures necessary to add such species to the list of HMP Covered Species, including measures beyond those required by the HMP. Among equally effective conservation measures, preference will be given by the USFWS and CDFG to conservation

measures that do not require additional dedications of land. Although the additional conservation measures necessary to add such species to the list of HMP Covered Species may be identified at or after the species is proposed for listing subject to Section 10.4 of this Agreement, Carlsbad will not be required to approve or implement these additional conservation measures until such time as the species is listed and Take Authorization / Permit is obtained.

c. Application for Take Authorization / Permit. Carlsbad makes no representation or commitment to pursue a Take Authorization / Permit for such non-HMP Covered Species, and in the absence of any such Take Authorization / Permit, Carlsbad will comply with the Changed Circumstances provisions of the HMP. The Take of such species will be governed by applicable state and federal law.

10. 5 Other Regulatory Permitting.

A. Other Permits. Impacts to wetlands and wetland-dependent HMP Covered Species shall be fully mitigated based on ratios determined as part of separate permit processes. The Parties acknowledge that proponents of land development projects in the HMP Area may be subject to permit requirements of agencies not party to this Agreement, and to separate permit requirements which may be recommended or imposed by the USFWS or the CDFG, such as under California Fish and Game Code sections 1601 and 1603 or Clean Water Act Sections 404 and 401. With regard to impacts to jurisdictional waters of the United States, impacts to wetlands shall be fully mitigated based on ratios determined as part of the separate 404 and 401 federal permit processes. In addition, Carlsbad shall apply through the project review and approval process avoidance standards and mitigation ratios sufficient to ensure no net loss of wetland functions and values consistent with Section D.6 of the HMP and the CDFG "No Net Loss" of wetlands policy.

B. Section 7 Consultations. To the maximum lawful extent consistent with 50 CFR Part 402, in any consultation under Section 7 of the ESA with regard to an HMP Covered Species, the rights and obligations of Carlsbad under the HMP and this agreement will be considered in any consultation. The USFWS shall ensure that the biological opinion issued in connection with the proposed project, which is the subject of the consultation is consistent with the biological opinion issued in connection with the HMP, provided that the proposed project is consistent with the HMP.

C. Consultations by CDFG. Due to the comprehensive nature of the HMP, to the maximum lawful extent for projects and/or project impacts subject to the HMP, CDFG shall not recommend or otherwise seek to impose through consultation with other public agencies any mitigation, compensation or habitat enhancement requirements regarding the Take of HMP Covered Species other than the requirements prescribed in and pursuant to the HMP and this Agreement.

D. Migratory Bird Treaty Act. The Section 10(a) Permit issued pursuant to this Agreement also constitutes a Special Purpose Permit under 50 C.F .R. § 21.27 for the Take of those HMP Covered Species which are listed as threatened or endangered under the ESA and which are also protected by the Migratory Bird Treaty Act. The Take of such species in

conjunction with any public or private land development project authorized and approved by Carlsbad in accordance with the HMP, this Agreement and the Take Authorization / Permit will not be in violation of the MBTA. Such Special Purpose Permit shall be valid for a period of three years from the Effective Date, provided the Section 10(a) Permit remains in effect for such period. Such Special Purpose Permit shall be renewed upon written request to USFWS, provided that Carlsbad continues to fulfill its obligations under the HMP, this Agreement and the Take Authorization / Permit. Each such renewal shall be valid for the maximum period of time allowed by 50 C.F.R. § 21.27 or its successor at the time of renewal.

E. State Fully Protected Species. Although fully protected species are included in the list of Covered Species, Take of these species is not authorized in the NCCP Permit and is prohibited except in limited circumstances by the California Fish and Game Code. The following species in the HMP are fully protected under the California Fish and Game Code: 1) California brown pelican; 2) American peregrine falcon; 3) Light-footed clapper rail; and 4) California least tern. CDFG acknowledges and agrees that if the measures set forth in the HMP are fully complied with, the Covered Activities are not likely to result in Take of these species. If CDFG determines that such measures are not adequate to prevent Take of one of the fully protected species, CDFG shall notify Carlsbad in writing of such discovery and propose new, additional, or different conservation measures that it believes are necessary to avoid Take of these species. Carlsbad shall implement the measures proposed by CDFG or other measures agreed to by the Parties as adequate to avoid Take of fully protected species.

If at any time there is a change in state law such that CDFG may issue a Section 2081(b) Permit, other permit, or authorization allowing the Incidental Take[2] of any species subject to California Fish and Game Code, sections 3511, 4700, 4800, 5050 or 5515, Carlsbad may request an amendment of the HMP and NCCP Permit or for a new permit for such species. In processing any such application CDFG shall give good faith consideration to Take avoidance and mitigation measures already provided in the HMP and shall issue the amendment or Permit under the same terms and conditions as the existing NCCP Permit, to the extent permitted by law.

F. Future Environmental Documentation. In issuing any permits or other approvals pertaining to Covered Activities within Carlsbad that affect HMP Covered Species, and absent a finding of Unforeseen Circumstances under Section 10.3 of this Agreement, and subject to the requirements of NEPA, the USFWS shall rely on and shall utilize the NEPA document prepared in conjunction with the MHCP and HMP as the NEPA environmental document for such permits and approvals. The parties understand and intend that the EIR / EIS prepared in conjunction with the MHCP will operate as a "program" EIS and EIR to the extent such use is consistent with applicable provisions of the NEPA and CEQA, including the Council on Environmental Quality's NEPA regulations (40 C.F.R. §1500 et seq.) and the CEQA Guidelines (14 C.C.R. §15000 et seq.) To the maximum extent possible under CEQA, CDFG shall rely on and shall utilize the EIR / EIS prepared in conjunction with the MHCP Subregional Plan and the HMP as appropriate CEQA documentation for any future approvals regarding potential impacts to HMP Covered Species related to land development and habitat management within the Subarea. Subsequent activities will be examined in light of the program EIR / EIS to determine whether additional environmental documentation is required under NEPA or CEQA.

10. 6 Special Rules Under Section 4(d) In the event that the USFWS promulgates a new special rule for a HMP Covered Species pursuant to Section 4(d) of the ESA (16 U.S.C. I § 1533(d), as implemented by 50 C.F.R. § 17.31(c)), the USFWS shall consider the HMP in developing the special rule, so that the special rule will not affect the validity or alter the terms of any Take Authorization / Permit for HMP Covered Species.

10. 7 Mitigation Bank. As described in Section D.3.B of the HMP, the HMP proposes a mitigation bank for City Capital Improvement projects (Appendix B) in Carlsbad using Carlsbad's Lake Calavera property. The bank consists of 206.1 total acres. The mitigation bank will be available to mitigate public projects undertaken by Carlsbad upon completion of a Bank Agreement. Carlsbad will work with the USFWS and CDFG to finalize a Bank Agreement, which is consistent with the new FWS guidance on conservation banks, signed by the Director on May 2, 2003, titled "Guidance for the Establishment, Use, and Operation of Conservation Banks", and which is consistent with the State of California Official Policy on Conservation Banks, adopted April 1995, and all policies and practices for approving mitigation/conservation banks established by CDFG. The Bank Agreement will identify the total number of credits existing in the bank which can be used to mitigate city projects on an acre for acre basis for all impacts to HMP Covered Species and their habitats except impacts to coastal sage scrub occupied by the gnatcatcher, southern maritime chaparral, maritime succulent scrub and wetlands. When a Bank Agreement is approved, Carlsbad shall ensure conservation of the Lake Calavera property by granting a conservation easement to CDFG or an acceptable third party.

10. 8 Growth Inducing Impacts. Because the MHCP Subregional Plan as implemented through the HMP is designed to mitigate for the direct, indirect and cumulative impacts of development within the MHCP Subregional Plan Area, including within the Subarea, neither Carlsbad, nor any proponent of a land development project approved by Carlsbad pursuant to the HMP, shall be required to provide any additional mitigation beyond that required under the HMP for any growth inducing impacts that such project may have on an HMP Covered Species.

10. 9 Critical Habitat. The USFWS agrees that it will consider the HMP in its preparation of any proposed designation of critical habitat concerning any HMP Covered Species, and further agrees that consistent with 50 C.F.R. § 424.12, the HMP incorporates special management actions necessary to manage the HMP Covered Species and their habitats in a manner that will provide for the conservation of the HMP Covered Species. Except as otherwise provided in this Agreement, and consistent with the assurances provided under Section 10 of this Agreement, USFWS agrees that if critical habitat is designated for any HMP Covered Species, and if Carlsbad is properly implementing the HMP, then the USFWS shall not require through the ESA Section 7 (16 U.S.C. § 1536) consultation process that Carlsbad or the proponent of any land development project approved by Carlsbad commit additional land, additional land restrictions, or additional financial compensation beyond that provided for under the HMP and pursuant to this Agreement.

[2] Recent revisions to the Fish and Game Code provisions related to fully protected species allow CDFG to authorize take for scientific purposes, including efforts to recover fully protected species. However, currently CDFG does not have statutory authority to authorize "incidental take" of fully protected species.

10.10 Duty to Enforce. Carlsbad agrees to take all actions within its authority to enforce the terms of the Take Authorization / Permit, the HMP, and this Agreement as to itself and to all persons or entities subject to the requirements established by this Agreement, specifically including the development of permitting and approval requirements set forth in Section 11 of this agreement. Furthermore, consistent with this Agreement Carlsbad shall exercise the full extent of its legal authority to ensure that its local share of lands identified for preservation under the HMP is conserved in perpetuity. Notwithstanding the term of this Agreement, if at any time following the end of the term of this Agreement Carlsbad proposes to exercise its discretionary authority to modify the regulatory protections or legal encumbrances provided for such lands under the HMP, the proposed modifications shall be consistent with Carlsbad's obligation to conserve such lands in perpetuity and must be accomplished through a public process in which the public, the USFWS and CDFG receive advance notice and the opportunity to comment, and must be consistent with the HMP such that there is no net loss of habitat value or acreage for the HMP Covered Species. Carlsbad must promptly notify USFWS and CDFG or their respective successor agencies of such proposed modifications in advance, and explain how they achieve such consistency.

10.11 Severability from MHCP. As a result of the conservation measures contained in the HMP which are not dependent on any regional or subarea plans or regional funding, and because of Carlsbad's contribution to the MHCP Core area as described in Section D.5 of the HMP, the Take Authorization / Permit for the list 1 species in Appendix A issued to Carlsbad pursuant to the HMP and this Agreement are independent of and severable from other subarea plans and Take Authorizations / Permits which will be issued to other cities participating in the MHCP. However, Carlsbad's NCCP Permit and § 10(a)(1)(B) Permit take authorization for the Covered Species in list 2 and 3 in Appendix A depends on other MHCP subarea plans being permitted and/or funding for the management of conserved areas. Such take authorization will not become effective until these conditions are met.

11.0 OBLIGATIONS OF CARLSBAD

Carlsbad will fully and faithfully perform all obligations assigned to it under this Agreement, the HMP, the MHCP, and the Take Authorization / Permit.

11.1 Preserve System. As of the Effective Date, there are approximately 8,758 acres of HMP Covered Species habitat remaining in the HMP Area. In order to obtain and maintain its Take Authorization / Permit, Carlsbad agrees to comply with and implement the HMP and this Agreement. Specifically, as provided in the HMP, Carlsbad shall ensure the establishment and management in perpetuity of a 6,757-acre preserve system, consisting of Existing Hardline Areas, Proposed Hardline Areas, Standards Areas, Special Resource areas and the covered parcels in the MHCP Core area. Carlsbad agrees to adopt and implement those amendments to the General Plan, Open Space Ordinance and Municipal Code described at Section 11.1 A and B and 11.3 of this Agreement to fully implement the HMP. Carlsbad shall notify USFWS and CDFG in writing and provide an opportunity to comment on any proposed changes or amendments to the General Plan, Open Space Ordinance or Municipal Code that would affect implementation of the HMP as amended pursuant to Section 11.3 of this Agreement. Carlsbad shall prepare an analysis of the effect of the proposed change or

Amendment on the HMP on Carlsbad's ability to implement and achieve the conservation goals of the HMP. Carlsbad acknowledges that any change or amendment to the General Plan, Open Space Ordinance or Municipal Code that would adversely affect Carlsbad's ability to implement the HMP or achieve the conservation goals of the HMP would be grounds for a reevaluation of Carlsbad's Take Authorization / Permit under Section 18 of this Agreement.

A. Existing Hardline Areas. Existing Hardline Areas are areas which were conserved and committed to habitat conservation prior to the Effective Date as a result of existing open space regulations, past development approvals, existing incidental take permits and associated agreements, or other actions. These areas, which total approximately 4,459 acres, are described in Section D.3.A and depicted in Figure 5 of the HMP. Most of these areas are already designated as open space and are subject to open space easements. Existing Hardline Areas will continue to be preserved in perpetuity, and Carlsbad will amend its General Plan within 12 months of the Effective Date to designate them as biological open space if they are not already so designated. Once designated as open space, the provisions of the Open Space and Conservation Element of the General Plan shall apply which prohibits the removal of an open space designation on areas so previously designated.

B. Proposed Hardline Areas.

1. Concept. Proposed Hardline Areas are areas where conservation and development have been planned as part of the HMP in connection with specific public and private projects. Upon approval by USFWS and CDFG of the HMP and execution of this Agreement, Proposed Hardline Areas will obtain the same permanent conservation status as Existing Hardline Areas through amendment of the Carlsbad General Plan to designate them as Open Space. Appropriate open space and/or conservation easements shall also be placed on these areas. Once designated as open space, the provisions of the Open Space and Conservation Element of the General Plan shall apply which prohibits the removal of an open space designation on areas so previously designated.

2. Specific Areas. The specific Proposed Hardline Areas consist of: Carlsbad Municipal Golf Course, Lake Calavera, Veteran's Memorial Park, the Zone 19 park, Manzanita Properties, Hub Park/SDG&E south shore properties, Bressi Ranch, Carlsbad Oaks North Business Park, Holly Springs, Kelly Ranch, South Coast, the Raceway Property, Hieatt, Fox-Miller, Calavera Heights, and the Shelley property. Carlsbad's Lake Calavera property will be a public project mitigation bank. These Proposed Hardline Areas, which total approximately 1,437 acres of conserved habitat, are described in Section D.3.B of the HMP. Additional Hardline areas (the Summit property, the Mandana property, Aura Circle, the Roesch property, and Promenade) are contained in Addendum #2 to the HMP.

C. Standards Areas. For some key properties which are not included in either Existing Hardline Areas or Proposed Hardline Areas, the HMP specifies conservation goals and standards which will apply to future development proposals. Such goals and standards are described in Section D.3.C of the HMP, and are organized according to individual Local Facilities Management Zones and will be incorporated into the Carlsbad Municipal Code as

provided in Section 11.1 of this Agreement. Carlsbad will apply the standards specified in the HMP at Section D(3)(C) of the Plan at the time of application for development entitlements, as described in the HMP.

11.2 Project Mitigation Measures. In addition to assembling the preserve system as described above, Carlsbad will enforce on all future land development projects in the HMP Area additional measures to avoid, minimize, and mitigate impacts to HMP Covered Species. Such measures are described in Table 9 and Appendix C of the HMP with mitigation requirements specified in Table 11 of the HMP.

11.3 Regulatory Implementation Measures. Upon approval of the HMP and execution by the Parties of this Agreement, Carlsbad will use its land-use authority to fully implement the HMP as follows:

A. Immediately upon approval of the HMP and execution by the Parties of this Agreement, Carlsbad will adopt an urgency ordinance pursuant to Government Code § 65858 to require compliance with the HMP while permanent regulatory measures are drafted and approved. The urgency ordinance is attached to this agreement as Exhibit "C". No take shall be allowed under the Take Authorization / Permit until the urgency ordinance is enacted.

B. Carlsbad will amend the Open Space and Conservation Element of its General Plan to incorporate the HMP by reference within 12 months of the Effective Date.

C. Carlsbad will amend its Open Space Ordinance (Carlsbad Municipal Code § 21.53.230) to add Conserved Habitat Areas as undevelopable open space lands preserved exclusively and in perpetuity for conservation purposes consistent with the HMP.

D. Carlsbad will amend its Municipal Code to add a new section to require lands located within the Standards Areas to comply with the specific conservation standards contained in Section D of the HMP within 12 months of the Effective Date.

E. Carlsbad will amend its General Plan to make the conservation of habitat as identified in the HMP a priority use for the 15% of otherwise developable land which the GMP already requires be set aside for open space purposes.

F. Wetlands Protection Program. For Wetlands, impacts will be avoided to the maximum extent practicable as set forth in Section D.6 of the HMP and in Sections D.7-6 and D.7-7 (Addendum #2 for the Coastal Zone.) Impacts that cannot be avoided shall be minimized and mitigated in accordance with the wetland mitigation ratios set forth on Table 11 of the HMP. Mitigation consistent with the HMP will be identified through environmental review documents prepared pursuant to CEQA and associated mitigation monitoring and reporting programs, and required by Carlsbad as legally enforceable conditions of approval.

11.4 Additional Implementation Measures. As a Subarea Plan of the North San Diego County Multiple Habitat Conservation Plan (MHCP), the HMP incorporates by reference the conservation measures included in Volumes I, II, and III of the MHCP. With respect to

covered habitats and species, the City shall implement the applicable conservation measures in approval of development projects and management of the preserve system.

11.5 Participation in Regional Conservation Efforts. Biological analyses associated with the preparation of the MHCP have determined that a large (approximately 500 acre) biological core area primarily for gnatcatcher habitat is needed in the southern, central portion of the MHCP including the unincorporated area to the southeast of Carlsbad. In complete satisfaction of its participation obligations concerning the MHCP Core area Carlsbad will effectuate the conservation and conveyance to a qualified conservation management entity of 307.6 acres of land generally within the MHCP Core area as described in Sections D.5 and E.6.A of the HMP.

11.6 Cooperative Regional Implementation. Carlsbad will participate in the MHCP Elected Officials Committee which will be formed to coordinate subarea plan policies, subregional managing and monitoring of preserve lands and regional funding. The Committee will be formed once two or more MHCP cities have entered into implementing agreements with USFWS and CDFG.

12.0 MONITORING AND REPORTING

12.1 Record Keeping. So long as this Agreement and the Take Authorization / Permit remain in effect, Carlsbad will continually account, by project and cumulatively, for the amount and location of habitat acreage (by habitat type) lost and preserved within the HMP Area, including acres conserved and acres committed to land development and incidental take of HMP Covered Species. Habitat conservation under the HMP must proceed concurrently and in rough step with development. Carlsbad will also maintain its database of biological resources, updating it periodically (at least once a year) and providing USFWS and CDFG with such updated information at least once a year or more frequently, at USFWS's and CDFG's request. The accounting system known as "Habitrak" will be used for this record keeping.

12.2 Annual Reporting and Meeting. The Parties will meet annually to monitor HMP implementation, discuss pertinent issues, and coordinate activities relating to overall preserve system monitoring, maintenance and planning. This meeting will be open to the public. Prior to the meeting, Carlsbad shall prepare a report addressing the above terms and submit it to the USFWS and CDFG. The report shall be submitted not later than December 1st of each year.

[3]The Preserve Management and Monitoring Plan is different from the Mitigation Monitoring and Reporting Program (MMRP) that is associated with the NCCP permit. The MMRP will be finalized prior to approval of the NCCP permit and signing of the IA.

12.3 Preserve Management and Monitoring Plan. As described in Section E. 5.B of the HMP, Carlsbad is preparing a Preserve Management and Monitoring Plan which will address in detail the implementation of the preserve management and monitoring recommendations identified in Section F of the HMP[3]. The Plan shall be completed within one year of the Effective Date of this Agreement. The plan shall be submitted to the USFWS and CDFG for review and concurrence that the plan conforms to the HMP's conservation objectives. Promptly thereafter, Carlsbad shall implement the plan, or if the entire plan does not receive concurrence, those portions of the plan concurred in by USFWS and CDFG. Funding sources for preserve management are identified in Section 14 of the Agreement.

1. Carlsbad-initiated adaptive management. Carlsbad will implement the adaptive management provisions in Section F and Appendix C of the HMP, when changes in management practices are necessary to achieve the HMP's biological objectives, or to respond to monitoring results or new scientific information. Carlsbad will make such changes without awaiting notice from the USFWS or CDFG, and will report to the USFWS or CDFG on any actions taken pursuant to this section.

2. USFWS or CDFG initiated adaptive management. If USFWS or CDFG determines that one or more of the adaptive management provisions in the HMP are required and that Carlsbad has not changed its management practices in accordance with Section F and Appendix C of the HMP, USFWS or CDFG will so notify Carlsbad and will direct Carlsbad to make the required changes. Within 30 days after receiving such notice, Carlsbad will make the required changes and report to the USFWS and CDFG on its actions. Such changes are provided for in the HMP.

12.4 Other Reports. Carlsbad will provide, within 30 days of being requested by the USFWS or CDFG, any additional information in its possession or control related to implementation of the HMP that is requested by USFWS or CDFG for the purpose of assessing whether the terms and conditions of the Take Authorization / Permit and the HMP, including the HMP's Preserve Management and Monitoring Plan to be developed within one year, are being fully implemented.

12.5 Certification of Reports. All reports will include the following certification from a responsible Carlsbad official who supervised or directed preparation of the report:

> I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete.

12.6 Monitoring by USFWS and CDFG. The USFWS or CDFG may conduct inspection and monitoring in connection with the permit in accordance with their regulations.

13.0 ADAPTIVE MANAGEMENT

13.1 Reductions in mitigation. Carlsbad will not implement adaptive management changes that may result in less mitigation than provided for the HMP Covered

Species under the original terms of the HMP, unless USFWS and CDFG first provide written approval. Carlsbad may propose any such adaptive management changes by notice to USFWS and CDFG, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on HMP Covered Species, and other environmental impacts. Within 120 days of receiving such a notice, USFWS and CDFG will either approve the proposed adaptive management changes, approve them as modified by the USFWS and CDFG, or notify Carlsbad that the proposed changes constitute permit amendments that must be reviewed under Section 20.2 of this Agreement.

13.2 No increase in take. This section does not authorize any modifications that would result in an increase in the amount and nature of take, or increase the impacts of take, of HMP Covered Species beyond that analyzed under the original HMP and any amendments thereto. Any such modification must be reviewed as a permit amendment under Section 20.2 of this agreement.

14.0 FUNDING

Carlsbad warrants that it has, and will, expend such funds as may be necessary to fulfill its obligations under the HMP, including permanent management of the covered habitat areas. Carlsbad will notify USFWS and CDFG of a material change in its ability to meet those obligations. Funding associated with implementation of the HMP will be assured as follows:

14.1 MHCP Core Area Participation. As described in Section E.6.A of the HMP, Carlsbad will effectuate the conservation and conveyance of 307.6 acres of land in the MHCP Core area. Funding for this land acquisition and perpetual management will be provided from the following sources: the Villages of La Costa project, as a requirement of the Fieldstone HCP, required offsite mitigation for Carlsbad's Municipal Golf Course, previously purchased mitigation for several approved land development projects and the adopted Habitat In-Lieu Mitigation fee as described in Section E.6 of the HMP.

14.2 Preserve Management and Monitoring Plan. Carlsbad is preparing a Preserve Management and Monitoring Plan, described in Section12.3, above. The City Council has already-funded the preparation of the Plan. The cost is $100,000.

14.3 Management of the Habitat at the Lake Calavera Mitigation Bank and other City-owned public lands. Carlsbad's cost for management of public lands at Lake Calavera and other City-owned public lands in the preserve system (approximately 604 acres) is estimated to cost approximately $181,200 per year in 2004 dollars; this will be adjusted as necessary for inflation. Carlsbad will fund management of the Lake Calavera Mitigation Bank and other City habitat lands consistent with Section F of the HMP in perpetuity. This cost will be paid for using city funds.

14.4 Management of Private Lands in the Habitat Preserve. Carlsbad has conditioned all private development projects to fully fund the perpetual management of preserved habitat land located within the projects. All projects approved since the HMP was first drafted have been required to fund endowments for ongoing management and, for all large

parcels of habitat, to contract with a conservation entity to perform ongoing management, maintenance and monitoring in perpetuity.

14.5 Management of Existing Habitat Preserve Areas. At this time, there are several other entities that own lands that have already been preserved for their habitat value, including the State of California and Homeowners Associations. Some of these entities have already funded management activities and others have yet to participate. The Preserve Management and Monitoring Plan presently being prepared by Carlsbad will identify the level of management funding for these existing lands and potential funding sources if there are any gaps. In order to receive take authorization for two species on list 2 and all species on list 3, Carlsbad will provide funding adequate for management and monitoring of these unfunded lands to make up any funding gaps in the interim period until a regional funding source is established which covers these costs.

14.6 Program Administration. Carlsbad's administration of the HMP is estimated to cost approximately $79,750 per year in 2004 dollars and will be adjusted as necessary for inflation and as otherwise necessary to properly implement the HMP. This cost will be paid for using city funds, which will either be in the form of an endowment or similar mechanism. The City has also incorporated a 10 percent contingency fund in their PAR analysis to fund changed circumstances as necessary.

14.7 Habitat In-Lieu Mitigation Fee. To provide funding for the conveyance and management of land in the MHCP Core area, Carlsbad has adopted a Habitat In-Lieu Mitigation Fee consistent with Section E.6 of the HMP. The methodology used in determining the fee is attached to this agreement as Exhibit "D." The In-Lieu Fee will be adjusted upon the effective date of this agreement and will be adjusted in the future, if necessary, based on the methodology in the attachment.

14.8 Limits on Funding. Carlsbad is not required to make any public acquisition of privately owned habitat lands within Carlsbad beyond the acquisitions identified in Section D.5 of the HMP provided that all publicly funded projects must be mitigated in accordance with Table 11 and Section E of the HMP, unless Carlsbad chooses to acquire land or mitigation credits to provide additional mitigation for public facility projects or to purchase additional open space land as authorized by local proposition C, approved in November, 2002.

15.0 OBLIGATIONS OF USFWS AND CDFG

15.1 Obligations of USFWS. Upon execution of this Agreement by all parties and satisfaction of all other applicable legal requirements, USFWS will issue Carlsbad a permit under Section 10(a)(1)(B) of the ESA, authorizing incidental take by Carlsbad of the HMP Covered Species resulting from covered activities on the covered lands. USFWS shall provide staff to serve on appropriate committees and shall ensure the availability of staff for discussions and meetings with the other Parties, to the extent consistent with its legal authorities. In the event that USFWS is unable to meet any of its obligations, USFWS will meet and confer with the other Parties to this Agreement.

15.2 Obligations of CDFG. Upon execution of this Agreement by all parties and satisfaction of all other applicable legal requirements, CDFG will issue Carlsbad an NCCP Permit for take by Carlsbad of HMP Covered Species resulting from covered activities on the covered lands. CDFG shall provide staff to serve on appropriate committees and shall ensure the availability of staff for discussions and meetings with the other Parties. To the extent consistent with its legal authorities, CDFG shall cooperate with the Permittee in obtaining additional funding from various sources. Subject to available funding, in consultation with USFWS, CDFG shall prepare and implement a management plan for those portions of habitat areas under its jurisdiction and control. The management plan shall be consistent with Section F of the HMP. In the event that CDFG is unable to meet any of its obligations, CDFG will meet and confer with the other Parties to this Agreement.

16.0 ENVIRONMENTAL REVIEW

16.1 Federal Law - NEPA. Issuance of a Section 10(a) Permit to Carlsbad by USFWS is an action subject to NEPA. USFWS is a lead agency under NEPA. An Environmental Assessment has been prepared pursuant to NEPA; in addition, the HMP has been evaluated pursuant to NEPA as a Subarea Plan under the MHCP Subregional Plan Final EIR/EIS (March, 2003).

16.2 State Law - CEQA. Implementation of the HMP is an action subject to CEQA. Carlsbad is a lead agency for the project and has prepared an Environmental Checklist and Mitigated Negative Declaration in accordance with CEQA requirements. In addition, the HMP was evaluated pursuant to CEQA as a Subarea Plan under the MHCP Subregional Plan Final EIR/EIS (March 2003) and an Addendum was prepared for final revisions to the HMP. CDFG is a responsible agency for purposes of approving the HMP under the NCCP Act.

17.0 REMEDIES AND ENFORCEMENT

17.1 Remedies In General. Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HMP.

A. No Monetary Damages. No Party shall be liable in damages to any other Party or other person 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.

1. Land Owner Liability. All Parties shall retain whatever liability they possess as an owner of interests in land and for its present and future acts or failure to act without the existence of this agreement.

2. Responsibility of the United States. Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

3. Responsibility of the State of California. Nothing contained in this Agreement is intended to limit the authority of the State of California to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under CESA, the NCCP Act, the NPPA, or other provisions of the California Fish and Game Code.

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

18.0 PERMIT REMEDIES

18.1 The NCCP Permit.

1. Suspension.

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

b. Reinstatement of Suspended Permit. In the event the CDFG suspends the NCCP Permit in whole or in part, as soon as possible but no later than ten (10) days after such suspension, the CDFG shall confer with Carlsbad concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, the CDFG shall identify reasonable specific actions necessary to effectively redress the violation or breach. In making this determination the CDFG shall consider the requirements of the NCCP Act, regulations issued there under, the conservation needs of the Covered Species, the terms of the NCCP Permit and of this Agreement and any comments or recommendations received during the meet confer process. As soon as possible, but no later than thirty (30) days after the conference, the CDFG shall send Carlsbad written notice of the reasonable actions necessary to effectively redress the violation or breach. Upon full or substantial performance of such necessary actions, the CDFG shall immediately reinstate the NCCP Permit. It is the intent of the Parties that in the event of any suspension of the NCCP Permit all parties shall act expeditiously and cooperatively to reinstate the NCCP Permit.

2. Permit Revocation or Termination.

a. The CDFG may only revoke or terminate the NCCP Permit for a violation of the NCCP Permit or material breach of this Agreement by Carlsbad, and only if the CDFG determines in writing that (a) such violation or breach cannot be effectively redressed by other remedies or enforcement action, or (b) revocation or termination is required to avoid

jeopardizing the continued existence of an HMP Covered species and/or to fulfill a legal obligation of the CDFG under the NCCP Act.

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

18.2 Section 10(a) Permit.

1. Suspension

a. Consistent with 50 C.F.R section 13.27, USFWS may suspend the Section 10(a) Permit for cause in accordance with the laws and regulations in force at the time of such suspension. Such suspension may apply to the entire permit, or only to specified HMP Covered Species, covered lands or covered activities. In the event of suspension, Carlsbad's obligations under this agreement and the HMP will continue until the USFWS determines that all take of HMP Covered Species that occurred under the permit has been fully mitigated in accordance with the HMP. Except where the USFWS determines that emergency action is necessary to protect HMP Covered Species, it will not suspend the Section 10(a) Permit without first:

1. Requesting Carlsbad to take appropriate remedial, enforcement, or management actions; and

2. Providing Carlsbad notice in writing of the facts or conduct, which may warrant the suspension and a reasonable opportunity for Carlsbad to demonstrate or achieve compliance with the Section 10(a) Permit or this Agreement.

b. Reinstatement Following Suspension. In the event the Section 10(a) Permit is suspended, in whole or in part, as soon as possible, but no later than ten (10) working days after any suspension, the USFWS shall consult with Carlsbad concerning actions to be taken to effectively redress the violation that necessitated the suspension. At the conclusion of such consultation, the USFWS shall make a determination of the actions necessary to effectively redress the violation. In making this determination the USFWS shall consider the requirements of the ESA, regulations issued hereunder, the conservation needs of the HMP Covered Species, the terms of the Section 10(a) Permit and of this Agreement, and any comments or recommendations received during the consultations. As soon as possible, but not later than thirty (30) days after the conclusion of the consultations, the USFWS shall transmit to Carlsbad written notice of the actions necessary to effectively redress the violation. Upon full performance of the necessary actions specified by the USFWS in its written notice, the USFWS shall immediately reinstate the Section 10(a) Permit or the suspended portion thereof. It is the intent of the Parties that in the event of any total or partial suspension of the Section 10(a) Permit all Parties shall act expeditiously to cooperate to resolve the suspension.

2. 10(a) Revocation. Consistent with 50 CFR Section 13.28, the Service may revoke the section 10(a) permit, in whole or in part, for cause in accordance with the laws and regulations in force at the time of the revocation. The Service may revoke the permit based on a determination that the continuation of the permitted activity would be likely to jeopardize the continued existence of the covered species.

3. In the event of suspension or revocation of the Section 10(a) permit, Carlsbad will remain obligated to fulfill its mitigation, enforcement and management obligations and its other HMP obligations in accordance with this Agreement and the HMP until USFWS determines that all take of HMP Covered Species that occurred under the permit has been fully mitigated in accordance with the HMP. For purposes of this paragraph, unlisted HMP Covered Species will be treated as though they were listed species in determining the amount of take and the mitigation required.

19.0 TERMINATION

19.1 Upon 90 days written notice to USFWS and CDFG, Carlsbad may unilaterally withdraw from this Agreement provided:

A. Carlsbad has complied with all mitigation obligations incurred under the Take Authorization / Permit in full compliance with the HMP and this Agreement up to the date of withdrawal, and Carlsbad provides written evidence of such compliance to USFWS and CDFG;
and

B. Carlsbad shall remain obligated to carry out all of its long term management and monitoring obligations assumed under the HMP and this Agreement with respect to habitat conserved, or required to be conserved, under the HMP prior to Carlsbad's withdrawal from the Agreement.

19.2 Carlsbad's withdrawal from this Agreement will result in termination of the Take Authorization / Permit as to all projects or activities not yet approved by Carlsbad and not yet mitigated for at the time of withdrawal.

19.3 Carlsbad's withdrawal from this Agreement shall not affect the obligations of Carlsbad with respect to mitigation lands or other lands owned or controlled by Carlsbad and conserved or required to be conserved, under the HMP.

19.4 Any Incidental Take associated with land development projects approved by Carlsbad for which mitigation has been assured as provided in Section D of the HMP shall continue to be authorized under the terms of the Take Authorization / Permit provided Carlsbad continues to carry out its obligations under this Agreement with respect to such Take as provided in Section 18.2.3 and this Section 19 of this Agreement.

19.5 Carlsbad's withdrawal from this Agreement shall not affect the obligations of the Parties with respect to mitigation lands or other lands owned or controlled by Carlsbad and

conserved or required to be conserved, under the HMP, provided that Carlsbad shall be entitled to full credit against all public projects intended to be benefited by such mitigation lands.

20.0 PLAN AMENDMENTS

20.1 Minor Amendments. Any party may propose minor amendments to the HMP or this Agreement pursuant to Section E-3 of the HMP by providing notice to all other parties. Such notice shall include a statement of their reason for the proposed amendment and an analysis of its environmental effects, including its effects on operations under the HMP and on the HMP Covered Species. With the exception of equivalency findings which are addressed separately in paragraph (4) of this section, proposed modifications will become effective upon all other parties' written approvals. If, for any reason, a receiving party objects to a proposed minor amendment, it must be processed as a major amendment of the permit in accordance with this section. The USFWS and CDFG will not propose or approve minor amendments to the HMP or this Agreement if the USFWS and CDFG determine that such amendments would result in operations under the HMP that are significantly different from those analyzed in connection with the original HMP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HMP, or additional take not analyzed in connection with the original HMP. Minor amendments to the HMP and this Agreement processed pursuant to this subsection may include but are not limited to the following:

(1) corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning;

(2) correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the Take Authorization / Permit or HMP;

(3) minor changes to survey, monitoring or reporting protocols;

(4) Equivalency findings as described in Section E.3 of the HMP, which are minor changes to HMP maps to show actual precise boundaries of conserved habitat, and which do not reduce the acreage or quality of the habitat. Carlsbad will provide written notice of the Equivalency Findings to USFWS and CDFG, and unless USFWS and CDFG object within 30 days after notification, the change will be considered approved. If objections are raised, Carlsbad will meet with the agencies to resolve the issue; and written approval of the resulting change will be required;

20.2 Major Amendments. The Take Authorization / Permit may be amended in accordance with all legal requirements, including but not limited to ESA, NEPA, the NCCP Act and CEQA, and the USFWS and CDFG's permit regulations. Removal of lands from conserved areas, or reconfiguration of Hardline Areas resulting in a decrease of acreage or quality of habitat, shall constitute a Major Amendment. As additional biological analysis and information becomes available, additions to the HMP Covered Species list contained in Exhibit "A" of this Agreement shall also require a Major Amendment to the Plan. Major Amendments shall require environmental review and will be subject to the amendment process described in Section E.3(D) of the HMP.

20.3 Standards Areas. The habitat conservation planning for any properties located in the Standards Areas and the conversion of such properties to Proposed Hardline Areas, shall be processed through a Consistency Finding as described in Section E.3.B of the HMP.

20.4 City Projects. Certain Carlsbad projects are covered by Proposed Hardlines, and are automatically permitted under the Take Authorization / Permit as of the Effective Date provided all conservation-associated mitigation is assured. All other Carlsbad projects shall be considered and processed through Consistency Findings as described in Section E.3.B of the HMP.

21.0 MISCELLANEOUS PROVISIONS.

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

21.2 Successors and Assigns. This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the Permit shall be governed by USFWS's and CDFG's applicable regulations. Carlsbad may only assign its rights and obligations under this Agreement with the approval of the USFWS and CDFG, which approval shall not be unreasonably withheld.

21.3 Notice. Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested, and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail Notices shall be transmitted so that they are received within the specified deadlines.

City: City Manager

CDFG: South Coast Regional Manager

USFWS: Field Supervisor

21.4 Entire Agreement. This Agreement, together with the HMP, MHCP, and the Take Authorization / Permit, constitutes the entire agreement among the Parties. It supersedes any and all other agreements, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

21.5 Elected Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

21.6 Availability of Funds. Implementation of this Agreement and the HMP and the assurances provided therein, by the USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the USFWS will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing. Implementation of this Agreement and the HMP and the assurances provided therein, by CDFG 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 form the Treasury of the State of California. The Parties acknowledge that CDFG will not be required under this agreement to expend any State of California agency's appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

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

21.8 Governing Law. The terms of this Agreement shall be governed by and construed consistent with the statutory and regulatory authority of USFWS under ESA, its implementing regulations and other applicable laws and of CDFG under the NCCP Act and other applicable state laws and regulations. In particular nothing in this Agreement is intended to limit the authority of the USFWS to seek penalties or otherwise fulfill its responsibilities under the ESA or CDFG under the NCCP Act or other applicable law. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the USFWS as an agency of the Federal government or of CDFG as an agency of the State of California.

21.9 Reference to Regulations. Any reference in this Agreement, the HMP, or the Permit to any regulation or rule of USFWS shall be deemed to be a reference to such regulation or rule in existence at the time the action is taken. Any reference in this Agreement, the HMP, or the State permit to any regulation or rule of CDFG shall be deemed to be in reference to such regulation or rule in existence at the time the action is taken.

21.10 Applicable Laws. All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable State and Federal laws and regulations.

21.11 No Third Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to the ESA, the NCCP Act or other federal or state law, this agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this agreement to maintain a

suit at law or equity pursuant to the provisions of this agreement. The duties, obligations, and responsibilities of the parties to this agreement with respect to third parties shall remain as imposed under existing law.

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

21.13 Due Authorization. Each Party warrants that the signatory is authorized to execute this Agreement on behalf of that Party.

IN WITNESS WHEREOF, THE PARTIES have executed this Implementing Agreement to be in effect as of the Effective Date.

Date: NOVEMBER 9, 2004.

CARLSBAD

By _____
Mayor

Date: NOV 15, 2004.

California Department of Fish and Game

By _____
Title: Acting Deputy Director Habitat Conservation Division

11/15/04 Approved as to form:
_____ for MEV
Deputy General Counsel, DFG

Date: Nov. 12, 2004.

California/Nevada Operations Office
United States Fish and Wildlife Service

By _____
Acting Deputy Manager

List 1: Species Proposed for Coverage under the Carlsbad Subarea Plan

Scientific Name	Common Name	Status [1]	MHCP Subregional Plan Vol. II Page Ref.
Plants			
Chorizanthe orcuttiana	Orcutt's spineflower	FE/CE/NE	4-56
Dudleya blochmaniae ssp. blochmaniae	Blochman's dudleya	FSC	4-74
Euphorbia misera	Cliff spurge	None	4-101
Hazardia orcuttii	Orcutt's hazardia	FSC/CT/NE	4-111
Quercus dumosa	Nuttall's scrub oak	FSC	4-159
Invertebrates			
Panoquina errans	Salt marsh skipper	FSC/OW	4-202
Euphyes vestris harbisoni	Harbison's Dun Skipper	FSC/NE	4-196
Birds			
Pelecanus occidentalis californicus	California brown pelican	FE/CE/FP/OW	4-251
Plegadis chihi	White-faced ibis	FSC/SSC/OW	4-256
Accipiter cooperii	Cooper's hawk	SSC	4-264
Pandion haliaetus	Osprey	SSC/OW	4-269
Falco peregrinus anatum	American peregrine falcon	CE/FP	4-280
Rallus longirostris levipes	Light-footed clapper rail	FE/CE/FP/OW	4-285
Charadrius alexandrinus nivosus	Western snowy plover	FT/SSC/OW	4-291
Sterna elegans	Elegant tern	FSC/SSC/OW	4-299
Sterna antillarum browni	California least tern	FE/CE/FP	4-304
Empidonax traillii extimus	Southwestern willow flycatcher	FE/CE/OW	4-314
Vireo bellii pusillus	Least Bell's vireo	FE/CE/OW	4-321
Polioptila californica californica	Coastal California gnatcatcher	FT/SSC	4-333
Icteria virens	Yellow-breasted chat	SSC/OW	4-360
Aimophila ruficeps canescens	California rufous-crowned sparrow	FSC/SSC	4-366
Passerculus sandwichensis beldingi	Belding's savannah sparrow	FSC/CE/OW	4-371
Passerculus sanwichensis rostratus	Large-billed savannah sparrow	FSC/SSC/OW	4-377
Reptiles			
Cnemidophorus hyperythrus beldingi	Orange-throated whiptail	SSC	4-245

1 See the "Key to Legal and Management Status" that follows List 3.

List 2: Species Coverage Contingent on Other MHCP Subarea Plans being Permitted

Scientific Name	Common Name	Status [1]	MHCP Subregional Plan Vol. II Page Ref.
Plants			
Acanthomintha ilicifolia	San Diego thornmint [2]	FT/CE/NE	4-9
Ambrosia pumila	San Diego ambrosia	FE/NE	4-16
Ceanothus verrucosus	Wart-stemmed ceanothus [2]	FSC	4-50
Dudleya viscida	Sticky dudleya	FSC	4-89
Ferocactus viridescens	San Diego barrel cactus	FSC	4-106
Quercus engelmannii	Engelmann oak	None	4-165

1 See the "Key to Legal and Management Status" that follows List 3.

2 Coverage for this species is also contingent on funding for management of conserved areas.

List 3: Species Coverage Contingent on Funding for Management of Conserved Areas

Scientific Name	Common Name	Status [1]	MHCP Subregional Plan Vol. II Page Ref.
Plants			
Arctostaphylos glandulosa ssp. *crassifolia*	Del Mar manzanita	FE/NE	4-26
Baccharis vanessae	Encinitas baccharis	FT/CE/NE	4-32
Brodiaea filifolia	Thread-leaved brodiaea	FT/CE/NE	4-37
Comarostaphylis diversifolia ssp diverifolia	Summer holly	FSC	4-63
Corethrogyne filaginifolia var. *linifolia*	Del Mar sand aster	FSC/NE	4-68
Eryngium aristulatum var. *parishii*	San Diego button-celery [3]	FE/CE/NE/OW	4-94
Iva Hayesiana	San Diego marsh elder [4]	FSC	4-116
Myosurus minimus ssp. Apus	Little mousetail [3]	FSC/NE/OW	4-133
Navarretia fossalis	Spreading navarretia [3]	FT/NE/OW	4-140
Orcuttia californica	California Orcutt grass [3]	FE/CE/NE/OW	4-147
Pinus torreyana ssp. *torreyana*	Torrey pine	FSC	4-154
Invertebrates			
Streptocephalus woottoni	Riverside fairy shrimp [3]	FE/NE/OW	4-178
Branchinecta sandiegonensis	San Diego fairy shrimp [3]	FE/NE/OW	4-184

1 See the "Key to Legal and Management Status"below.

3 Coverage for this species is also contingent on the City of Carlsbad receiving legal control over the protection, management, and monitoring of the vernal pools adjacent to the Poinsettia Train Station in Carlsbad.

4 Coverage for this species is also contingent on other MHCP subarea plans being permitted.

Key to Legal and Management Status of Species in Lists 1 - 3

FE	Federally Endangered		
FT	Federally Threatened		
BEPA	Bald Eagle Protection Act		
FSC	Federal Species of Concern (former Category 2 Candidate)		
CE	State Endangered		
CT	State Threatened	SPM	State Special Protected Mammal
FP	State Fully Protected species	SSC	State Species of Special Concern
RGS	State Regulated Game Species	None	No Federal, State, or City status
OW	Obligate Wetland Species in the MHCP		
NE	Narrow Endemic Species in the MHCP (Narrow Endemic standards apply to all proposed hardline, standards areas, etc. as described in section 3.7 of MHCP Volume 1		

DESCRIPTION OF HOW THE CITY OF CARLSBAD WILL RESPOND TO CHANGED CIRCUMSTANCES

Changed circumstances are defined by regulation as "changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the USFWS and that can be planned for." Changed Circumstances to be addressed by the Carlsbad Habitat Management Plan (HMP) as described in this Implementing Agreement (IA) include the following:

1. Fire, occurring in the same location as a previous fire no sooner than three years following nor longer than ten years subsequent to an initial fire, and damaging up to 5 acres of Preserve habitat.
2. Flood events occurring within the Preserve Floodplains associated with the Encinitas, San Marcos, Agua Hedionda, Encinas and Buena Vista Creeks and their associated tributaries, at less than 50-year levels, as determined by the Carlsbad Department of Public Works.
3. Climatic drought up to three years in length, as declared by the California State Department of Water Resources and/or the San Diego County Water Authority.
4. An increase of invasive species within the Preserve to the extent that, as determined by the City in consultation with the Wildlife Agencies, such increase is of sufficient magnitude to significantly, adversely affect any Covered Species.
5. Disease, including West Nile Virus.
6. Listing of Non-Covered Species.

The USFWS and the City agree that the Changed Circumstances defined by this Exhibit to the Implementing Agreement represent all Changed Circumstances to be addressed by Carlsbad. These Changed Circumstances provisions reflect changes in circumstances that can reasonably be anticipated to occur to Covered Species or within dedicated Preserve areas. These Changed Circumstances provisions are not intended to cover the same or similar circumstances outside City jurisdiction nor if they occur within the Carlsbad HMP but outside of the Preserve and where the City has no legal authority to carry out the Planned Responses, nor if they occur within the proposed hard-line Conservation Areas depicted on Figure 6 of the HMP but before the land is lawfully dedicated or conveyed to the Preserve.

Except for the future Listing of a non covered species, each of the defined Changed Circumstances includes an assessment of risk, a description of preventative measures, and a summary of Planned Responses (measures to be undertaken in the case of Changed Circumstances). Preventative measures are those measures that are or will be undertaken by the City to reduce the potential for occurrence of the Changed Circumstances, and/or that reduce the potential for damage to the Preserve resulting from a Changed Circumstance event. Planned Responses are the specific responses that will be undertaken in the event of a Changed Circumstance. Planned Responses will not include any actions beyond those expressly identified in this Exhibit, nor for any event not specifically identified as a Changed Circumstance. Planned Responses will be implemented to the extent that it is possible to do so and remain consistent with the primary goal to prevent harm to the public health, safety and welfare. Planned Responses will be implemented by using the funding sources described in Section 14 of the IA

for each of the Changed Circumstances, and only to the extent provided by the identified funding sources.

1. Repetitive Fire

For the purpose of defining Changed Circumstance, Repetitive Fire is defined as fire, occurring in the same location as a previous fire no sooner than three years following nor longer than ten years subsequent to an initial fire, and damaging up to 5 acres of Preserve habitat.

1.1 Risk Assessment

Because fire is a natural feature within the chaparral and coastal sage scrub vegetation communities, under normal circumstances natural re-growth of habitat is expected. However, the Wildlife Agencies have indicated that certain Repetitive Fires within the same location of the Carlsbad Preserve may adversely affect the Covered Species conserved by the HMP as a result of habitat type conversion from existing habitat(s) to invasive or non-native weeds.

USFWS has indicated that if the habitat types prevalent in this Preserve, including coastal sage scrub, maritime succulent scrub and riparian habitat, burn within the same footprint within ten years of the original burn, the fires can adversely hamper natural re-growth and interrupt the ability of the habitat to rejuvenate. After twenty years, habitat types prevalent in the Preserve are expected to be fully re-established and capable of natural regeneration. A "Repetitive Fire" (a fire anticipated to occur and to create the potential for type conversion) is therefore considered a fire incident which occurs in the same location as a previous fire incident (initial fire) no more than ten years subsequent to the initial fire.

In addition, Carlsbad Fire Department (CFD) officials note that vegetation that has been burned requires approximately five years to grow before becoming a potentially hazardous fuel load. It is therefore not anticipated that Repetitive Fire, if it were to occur, would occur in the same location for at least three-to-five years subsequent to an initial fire. For the purpose of defining Changed Circumstances, the City has determined that a Repetitive Fire occurring within the first three years subsequent to an initial fire is therefore not reasonably anticipated.

The Carlsbad Fire Department has responded to 80 incidents involving fire in brush or wildland areas within the City.

1999	54 fires	Acres burned 16.3	Average 0.3
2000	18 fires	Acres burned 26.7	Average 1.5
2001	4 fires	Acres burned 6.1	Average 1.5
2002	3 fires	Acres burned 1.2	Average 0.4
2003	1 fire	Acres burned 0.5	Average 0.5

As the City has developed much of the wildland interface, the number of fires has been dramatically reduced as reflected in these statistics.

As Carlsbad experiences higher humidity than inland cities, fog and cooler temperatures, the moisture content tends to be higher and temperatures less severe. Higher moisture content and cooler temperatures make large fire incidents greater than 5 acres, rare. In addition, Carlsbad is flanked on all sides by urban development and has built out much of the open space replacing such with commercial and residential development thus also reducing the likelihood of a fire occurring greater than 5 acres in size. Thus, the scope of fire incidents within the Preserve is expected to be much smaller than that of wildland fires in less urban situations.

Because implementation of the HMP will result in larger areas of undeveloped, protected habitat than previously existed within City boundaries, the Carlsbad Fire Chief assessed the potential that future repetitive fire incidents may burn areas greater than five acres before containment, during the life of the permit.

All of the Management Units are primarily surrounded by and often times broken up by urban, residential, and commercial development, limiting the ability of fire to easily spread from area to area. The Calavera, Poinsettia/Aviara and Villages of La Costa Management Units will be the largest contiguous areas of habitat within the City. The Villages of La Costa unit is adjacent to County Preserve land to the east and is the area most vulnerable to fire originating from outside the City with the potential to burn a large area.

Cores 4 and 8 include Agua Hedionda and Batiquitos Lagoons respectively and associated riparian habitats. Moist marsh and riparian vegetation does not represent high-risk fire fuel loads and, in fact, will serve to hinder fire activity in these areas.

Based on review of available data, knowledge of existing fire fuel loads, fire suppression experience and anecdotal information, the Carlsbad Fire Chief has determined that fire damage from Repetitive Fire within the Preserve up to 5 acres is foreseeable during the life of the permit. Damage greater than 5 acres due to Repetitive Fire is not foreseeable and would be considered an Unforeseen Circumstance.

1.2 Preventative Measures

Preventative measures to reduce the likelihood of, or harm from a single fire in the Preserve are included in the adaptive management provisions as specified in the draft Open Space Management Plan and will be more specifically identified in the Fire Management Plans for each Management Unit.

Proximity of Fire Services to Preserve Areas

The Carlsbad Preserve is primarily an urban Preserve that is almost entirely surrounded by urban uses. Although the presence of urban uses may increase the potential for fire incidents, it greatly decreases the potential for large, non-contained fires due to the proximate location of buildings. Additionally, urbanization causes fire department responders to be located closer to the Preserve areas facilitating a rapid response. Rapid response leads to fewer acres burned. The average response time to fire incidents within the City is approximately five minutes.

Brush Abatement Program

In order to further reduce the risk of fire, the City has instituted a weed abatement urban-wildland-interface management program. This program focuses predominately on areas interfacing urban and open space Preserve lands. Through this Preserve urban-wildland-interface fire risk management program, interface areas are inspected annually for fire load and fire risk. Areas determined to be at risk for the spread of fire from open space to structures are ordered abated. Using this program, the City is able to annually implement its urban-wildland-interface management program as it relates to proximity to structures to reduce fire risk in the areas between development and the Preserve.

Fire Management Plan

The City will update its Fire Management Plans (Section 3.1.4 of the Open Space Management Plan) to identify the procedures the City will implement both prior to and during any single fire in the Preserve. The Fire Management Plans will provide that the City will coordinate an emergency notification and response system that will strive to protect the Covered Species and the Preserve, to the extent that it is possible to do so and remain consistent with the primary goal of containing and extinguishing the fire to prevent harm to the public health, safety and welfare. The Fire Management Plans will provide for a triage system that includes notification of the Wildlife Agencies as soon as feasible after the onset of the fire. The Fire Management Plans will also provide for restricted public access to portions of the Preserve in times of severe drought, or whenever the Fire Department determines that a fire hazard may be high.

1.3 Planned Responses to Repetitive Fires

Upon the occurrence of a Repetitive Fire Changed Circumstance as defined by this Exhibit, the City will notify the Wildlife Agencies pursuant to the protocol which will be established by the City's Fire Management Plans. Within 30 days of the Repetitive Fire incident, the City will assess the damage cause by the Repetitive Fire within the Preserve. Depending upon the extent and severity of the fire damage, and as determined by the City, with concurrence of the Wildlife Agencies, the City will take the following action:

> Develop and implement a monitoring program to monitor natural re-growth within the damaged area for a period of up to 2 years. The monitoring program will provide for site visits on a regular basis, as determined by the City and the Wildlife Agencies to be appropriate to the scope and severity of the burn. Management of the burned area will emphasize removal of weeds and preventing infestation by invasive species. Should monitoring observations indicate that invasive species control efforts have not been effective and there is an unacceptable level of invasion by exotic species an/or increased potential for type conversion, the Preserve management program in effect at the time will be modified to eliminate the infestation and reduce the potential for such invasion and/or type conversion.

2. Flood

For the purpose of defining Changed Circumstance, Flood is defined as natural rain runoff events occurring within and causing damage to Preserve floodplains associated with the City's four watersheds, Batiquitos, Agua Hedionda, Encinas and Buena Vista, and their associated creeks and tributaries, at less than 50-year levels, as determined by the Carlsbad City Engineer. Damage to the Preserve due to Flood at greater than a 50-year level is defined as Unforeseen.

2.1 Risk Assessment

The Federal Emergency Management Agency (FEMA) provides local jurisdictions with mapping that defines the areas that may be affected, or inundated, by flood. FEMA typically addresses the 100-year flood event and its consequences for people and structures. A 100-year flood, as defined by FEMA, produces a magnitude of inundation that has a one percent chance of occurring in any given year. A 50-year event is not specifically addressed by FEMA but is often referred to by hydrologists as an intermediary scale of event. The 50-year storm has a 2% chance of occurring in any given year. Both the 100 year and 50 year events are capable of causing significant damage to property through inundation, erosion, and mud flows. However, flooding is a natural event and is not anticipated to cause damage sufficiently severe to prevent natural regeneration of existing habitats within the Preserve.

Information on flooding potentials is available from several sources. FEMA maps on file with the City of Carlsbad Engineering Department identify the 100-year flood zones located within the Preserve. Areas that would be subject to flooding in a 50-year event are not mapped by FEMA but can be generally inferred. These areas primarily follow the creeks which form the watersheds named above, and are essentially confined to natural drainage channels and riparian areas, where water has historically been known to occur.

Information is also available from the County of San Diego's Hydrology Manual dated June 2003, which examines flooding potentials on a regional basis. The City of Carlsbad has a Flood Plain Ordinance (Chapter 21.110 of the Municipal Code), which outlines the requirements for development within floodplains.

With the exception of Encinas Creek, the watersheds within Carlsbad terminate in coastal lagoons or estuaries which are themselves part of the preserve. The City's three lagoons – Buena Vista, Agua Hedionda, and Batiquitos – have direct connections with the Pacific Ocean. Batiquitos and Agua Hedionda Lagoons have permanent openings to the ocean and are therefore primarily saltwater ecosystems. Buena Vista Lagoon has a weir near its mouth, which regulates water level and produces a primarily freshwater ecosystem. Encinas Creek flows directly to the ocean.

These lagoons have significant capacity for receiving floodwaters and transferring them to the ocean without impacts to the lagoon ecosystems. This analysis will therefore look at possible effects upstream from the lagoons. The upstream conditions of the four watersheds differ in several respects, and each is discussed below.

Buena Vista Watershed – Buena Vista Creek is the primary drainage within this basin. It originates in Vista and flows through highly urbanized and disturbed areas before entering Carlsbad. Within Carlsbad it flows through a longstanding rock and gravel processing facility, passing into a largely undeveloped floodplain valley with a well-developed willow riparian corridor. The creek again enters an urbanized zone before entering the Buena Vista Lagoon. The creek receives some runoff from adjacent Highway 78. Portions of the creek are lined or channelized. Major bridge structures exist at El Camino Real, I-5, Carlsbad Boulevard, and the railroad trestle. Culverts exist at other road crossings. Although the topography of the creek valley is relatively gentle, the creek does develop significant flows quantities and velocities during storm events.

Agua Hedionda Watershed – The sources of this basin are Calavera Creek and Agua Hedionda Creek. Calavera Creek originates in Oceanside and enters Carlsbad at Lake Calavera, a man-made reservoir. From the lake, the creek descends steeply to currently agricultural land before entering Agua Hedionda Lagoon. None of Calavera Creek is presently lined or channelized. Agua Hedionda Creek originates in Vista and enters Carlsbad at the Dawson-Los Monos Reserve. There is one tributary known as Little Encinas Creek. The creeks descend steeply through agricultural land until they reach El Camino Real where they merge and enter the lagoon. The portion of Agua Hedionda Creek passing through Rancho Carlsbad is channelized and a portion of Little Encinas Creek is riprap lined. Major bridge structures are at I-5, the railroad trestle, and Carlsbad Boulevard. Culverts exist at other road crossings. Flood quantities and velocities can be high.

Encina Watershed – This is the smallest basin, originating in Carlsbad near El Camino Real and Palomar Airport Road. Nearly the entire length is urbanized, although some portions support small stands of native riparian vegetation. Portions are channelized. There is significant infestation of Pampas Grass at the western end. Flood quantities and velocities are relatively low. There are no major bridges. The creek outlets to the ocean through a small bridge on Carlsbad Boulevard.

Batiquitos Watershed – San Marcos Creek and Encinitas Creek are the major flows into Batiquitos Lagoon. The watershed of San Marcos Creek is large and originates well outside of Carlsbad. For current purposes we will begin at Lake San Marcos. The creek flows through a very steep, rock walled canyon. Quantities and velocities can be very high. At the bottom of the canyon the creek passes through the La Costa Golf Course before entering the lagoon. Major bridge structures exist at Rancho Santa Fe Road and at El Camino Real. Encinitas Creek originates in the southeastern corner of Carlsbad. It flows through partially developed areas of both Carlsbad and Encinitas. A well-developed willow riparian corridor exists in the Green Valley area, just before the creek enters the lagoon. There are no major bridge structures. Quantities and velocities are moderate.

For purposes of new development, City land use policies require construction of lined channels, storm drains, detention basins, and other improvements to accommodate floods up to and including a magnitude of 100-year, and require that drainage facilities manage flows into tributary streams to approximate natural flows. This is intended to enable floodplains to function in their natural capacity, permitting unobstructed flows through natural riparian courses during

flood events. However, the actual behavior of floods in natural stream courses is difficult to predict or control. Vegetated streams that are not lined or armored may respond to flood waters very differently from urbanized storm drain facilities, particularly in very large storm events. Thus, for purposes of habitat conservation planning, the 50-year event is used as the definition of Changed Circumstance because it is the magnitude of event that can be reasonably anticipated and planned for.

2.2 Preventative Measures

Preventative measures to reduce the likelihood of or harm from flooding in the Preserve are included in the adaptive management provisions as specified in Section 1.1 of the Open Space Management Plan. City land use policies ensure that public and private improvements accommodate flood events that approximate the rate, magnitude and duration of natural flood flows.

All development projects approved by the City will also include implementation of Best Management Practices for storm water and surface runoff pursuant to the standards promulgated by the California Regional Water Quality Control Board (RWQCB). For all discretionary projects approved by the City, the City will include mitigation measures or other conditions, as appropriate, to reduce the likelihood that a flood would adversely impact Covered Species and the Preserve. As a co-permittee of the RWQCB National Pollution Discharge Elimination System (NPDES) Permit, the City is required to adopt a Standard Urban Storm Water Mitigation Plan (SUSMP). The large majority of new development projects and significant redevelopment projects must meet SUSMP requirements to reduce pollution and runoff flows. The City's SUSMP will include a list of recommended source control and structural treatment Best Management Practices (BMPs).

2.3 Planned Responses for Flood

Upon the occurrence of a Changed Circumstance Flood as defined by this Exhibit, the City will notify the Wildlife Agencies pursuant to the protocol established by the City's Open Space Management Plan. Within 30 days of the Flood incident, the City will assess the damage caused by the Flood within the affected drainages to determine, with concurrence of the Wildlife Agencies, if a monitoring program is required. Damage would typically be expected to consist of erosion to the main channel or bank, possibly with loss of riparian vegetation.

Should the extent and severity of the Flood damage indicate a need for monitoring, the City will develop and implement a monitoring program for a period of up to two years, to monitor natural re-growth within the damaged area. The monitoring program will provide for site visits on a regular basis, as determined by the City and the Wildlife Agencies to be appropriate to the scope and severity of the Flood damage.

At any time during the monitoring program, should monitoring observations indicate that allowing habitat to re-grow without interference is resulting in increased opportunity for invasion by exotic species and/or increased potential for type conversion, as determined by the City, the Preserve management program, in effect at the time, will be modified to reduce the potential for

such invasion and/or type conversion, consistent with the Open Space Management Plan and the terms of the IA. One or more of the following management activities will be incorporated into the modified management program, as appropriate for the circumstance:

- Bank stabilization
- Removal of sediment and/or debris; and/or
- Controlling non-native weeds and other invasive species through approved techniques.

3. Drought

For the purpose of defining Changed Circumstance, Drought is defined as climatic drought for three consecutive years in length, as formally declared by the California State Department of Water Resources and/or the San Diego County Water Authority (CWA).

3.1 Risk Assessment

Drought is a cyclical weather phenomenon that is beyond human control. Drought is not uncommon in Southern California, and it is a phenomenon to which local natural habitats and species have of necessity adapted over time. Drought occurs slowly over a multi-year period, differing from the catastrophic events of fire and flood, which occur rapidly and afford little time for preparing for disaster response. Drought conditions may adversely affect the Covered Species and the conserved vegetation communities, if the species and/or habitats are unable to adapt to the changing conditions.

The potential for drought to impact the Preserve increases with the length of a drought. As Preserve species and habitats begin to react to a prolonged reduction in rainfall, carry-over supplies in reservoirs are depleted and water levels in groundwater basins also decline, making imported water resources less available for non-potable uses. Both San Diego County and the City rely heavily on imported water. However, according to the California Department of Water Resources (DWR) in their document "Droughts in California," droughts exceeding three years are rare in Northern California, the area of California that is the source of much of the State's developed water supply and of imported water for Southern California. A drought period of over three years in length, which restricts availability of water for Preserve purposes, is therefore not foreseeable, and would be considered an Unforeseen Circumstance.

3.2 Preventative Measures

The HMP does not contain measures to prevent climatic drought because drought is not preventable by human intervention.

The City of Carlsbad is served by the Carlsbad Municipal Water District (CMWD), which is a member of, and purchases imported water from, the San Diego CWA. In order to reduce reliance upon imported water, CMWD is developing a recycled water plant adjacent to the Encina Wastewater Treatment Plant. Recycled water distribution lines are planned for construction throughout the City, including areas adjacent to the Preserve in all Management Units. Recycled water is used for non-potable water requirements such as landscape and park

maintenance. In the event of drought, recycled water would be used to supply any supplemental water for Preserve maintenance, greatly reducing the risk of impact from drought on Preserve species and habitats.

To prepare for a potential diminished water supply, the City will assess its use of recycled water Citywide, and will consider directing recycled water to Preserve areas undergoing active restoration where water is needed, and where it is possible to do so. It is acknowledged that it may not be feasible to use recycled water for active restoration areas in times of drought or diminished water supply. However, to the extent that it is able, the City will work with responsible water agencies to determine whether adequate recycled water supplies would be available to serve restoration areas in the Preserve.

3.3 Planned Responses to Drought

Upon the occurrence of a drought Changed Circumstance as defined in this exhibit, the City and the Wildlife Agencies will assess the condition of the Preserve to determine, if a monitoring program is required for all or portions of the preserve.

Based upon the extent and severity of the Drought, the Wildlife Agencies will develop and implement an assessment of the condition of the Preserve to determine whether target species are being affected or whether there is the potential for damage to the Preserve. Based on the results of the assessment, the Wildlife Agencies will implement a monitoring program to monitor natural re-growth within the damaged area for a period of up to two years. The monitoring program will provide for site visits on a regular basis, as determined by the City and the Wildlife Agencies to be appropriate to the drought situation.

At any time during the monitoring program, should monitoring observations indicate that allowing habitat to re-grow without interference is resulting in increased opportunity for invasion by exotic species and/or increased potential for type conversion, as determined by the City in consultation with the Wildlife Agencies, the Preserve management program in effect at the time will be modified to reduce the potential for such invasion and/or type conversion, consistent with the terms of the IA. One or more of the following management activities will be incorporated into the modified management program, as appropriate for the circumstance:

(i) Providing temporary irrigation to strategic areas of the Preserve; and/or
(ii) Controlling non-native weeds and other invasive species through approved techniques.

4. Invasion of Exotic Species

For the purpose of defining Change Circumstance, invasion of exotic species is defined as an increase of invasive species within the Preserve to the extent that, as determined by the City in consultation with the Wildlife Agencies, such increase is of sufficient magnitude to significantly, adversely affect any Covered Species. For the purpose of implementing the actions specified by this Exhibit, species to be considered potentially invasive are those included in Section 3.1.5 of the Open Space Management Plan.

4.1 Risk Assessment

Although invasive, exotic, or pest species of plants and/or animals may currently be present within the Preserve, an unexpected and/or sudden increase in certain invasive species may create the potential for impacts to one or more of the Covered Species within the Preserve. Opportunities for increases in invasive species could occur as urban development expands in areas surrounding the Preserve. The occurrence of a catastrophic event, including Changed Circumstances defined above, may precipitate sudden increases of invasive species. Planned Resources to the Changed Circumstances, however, include measures to reduce the opportunity for invasion by exotic species.

4.2 Preventative Measures

Establishment of the Preserve and the management actions that will be undertaken as part of the implementation of the HMP will reduce the probability of sudden increases in invasive species. Section 3.1.5 of the Open Space Management Plan contains measures specifically designed to prevent invasive species from threatening the Preserve. These measures include restrictions on the use of invasive plant species in landscape palettes, visitor/resident invasive species education, and working with adjacent properties to prevent runoff into the Preserve. Through implementation of the Open Space Management Plan and Area Specific Management Directives associated with the HMP, invasive species will, under normal circumstances, be discovered prior to becoming a threat to Covered Species. When invasive species are discovered, the Preserve management program is designed to be tailored to reduce and/or eliminate such species.

4.3 Planned Responses

If, as determined by the City in consultation with the Wildlife Agencies, an increase in invasive species has occurred within the Preserve at a magnitude sufficient to present a significant adverse affect to any Covered Species, the City will notify the Wildlife Agencies pursuant to the protocol established by the City's Open Space Management Plan described in Section 3.1.5. If the influx of invasive species involves a species included on the CalEPPC "List A" or the NBII list (Appendix N), within 30 days of such notice to the Wildlife Agencies the City will assess and implement changes to the adaptive management program in effect at that time, that may be necessary to control the invasive species. If the influx of invasive species involved a species listed on the CalEPPC "Red Alert" list (Appendix N), the City will also notify other relevant agencies as recommended by CalEPPC. Within 30 days of obtaining responses from the agencies contacted, the recommendations of the agencies will be used by the City with concurrence of the Wildlife Agencies to determine appropriate modifications to be made to the adaptive management program in effect at that time.

Modification of the adaptive management program to address an invasive species Changed Circumstance will include implementation of a monitoring program of up to two years, as determined by the City. The monitoring program will provide for site visits on a regular basis, as determined by the City and the Wildlife Agencies to be appropriate to the type, scope and location of the exotic species infestation.

5. Disease – West Nile Virus

West Nile Virus (WNV) is a mosquito-borne disease that infects both wild and domesticated bird species, livestock, humans, and various other species. The disease can be fatal. WNV was first detected in the United States in the State of New York in 1999. The illness has spread from East to West across the United States by birds and mosquitoes. WNV was first detected in California in Imperial County on August 20, 2003. In 2003, the virus has since been discovered in dead birds collected from Los Angeles County, Riverside County, Imperial County, Orange County, and San Diego County. WNV has shown positive in one horse and 5 dead birds in San Diego County in 2003. In 2004, additional WNV positive birds and positive sentinel chicken flocks have been found, including dead infected birds in Carlsbad.

WNV is a region-wide issue, not restricted to Carlsbad. It is addressed here as a Changed Circumstance because we are aware that there are infected birds in Carlsbad and throughout the region. It is not possible at this time to define with any precision a threshold between Changed Circumstances due to WNV and Unforeseen Circumstances. The following discussion is offered to describe what we currently understand about the disease and efforts to respond to it.

5.1 Risk Assessment

Thus far WNV has not killed large numbers of wild birds, but the overall extent of the infection in wildlife is not well understood. There is the potential for the disease to become a significant mortality factor to certain bird species. On the other hand, because the disease is a threat to human health, current prevention activities (as outlined below) are likely to reduce the threat to both humans and wildlife. Because public health officials use bird deaths to gauge the effectiveness of their WNV prevention programs, any significant increase in bird deaths is likely to produce public concern, leading to intensified efforts to halt spread of the disease.

5.2 Preventive Measures

Mosquito control is probably the single most important and effective element in inhibiting spread of WNV to all species. In San Diego County, mosquito abatement is carried out by the Vector Control Program of the County Department of Environmental Health. Concern about WNV and other mosquito-borne diseases has led Vector Control to expand its efforts to control mosquito populations. These activities have included aerial spraying/application of mosquito larvicide (Bacillus sphaericus (Bs) and Bacillus thuringiensis israelensis (Bti)) of large bodies of fresh water, spot spraying or hand broadcasting of bascillus (Bs and Bti) of smaller waterbodies, distribution of fish that eat mosquito larvae to property owners with ponds, and public education to encourage abatement of miscellaneous sources of standing water. These preventive measures have been largely effective as evidenced by the relatively low death rate from the disease.

A secondary preventive measure is the heightened public awareness of the fact that the disease can be fatal to birds. County Vector Control and other agencies have carried out an extensive educational campaign to inform the public that dead birds should be reported to them. Tests are performed on dead birds to determine whether the bird was infected with WNV. Although this

level of monitoring of bird deaths is far from complete, it provides the best information available about the extent and virulence of the disease in wild bird populations.

5.3 Planned Responses to WNV

Any indications of increase in human or animal mortality due to WNV would be treated as a very serious public health concern and would receive a high level of response. Mosquito abatement activities by County Vector Control would be intensified, as well as public information activities directed toward elimination of standing water and reporting of dead birds. Any chemical response to WNV other than application of Bacillus (Bs and Bti) larvicide would need consultation and approval by the Wildlife Agencies prior to such application to ensure impacts to other species covered by the MHCP would not be adversely affected beyond that currently analyzed.

Because of the potential risk to human health, normal budgetary limitations would not be allowed to constrain efforts to halt the disease. These activities will benefit bird species and well as people, so that it is not necessary to have programs directed solely toward addressing the disease in wildlife. In addition, planned responses to the disease are carried out on a regional basis. Carlsbad would not be alone in attempting to respond to a major outbreak.

6. Future Listings of Non-Covered Species

The City recognizes, as noted in the USFWS discussion of its "Habitat Conservation Plan Assurances ('No Surprise') Rule," (63 F.R. 8859; February 23, 1998), that the future listing of a species whose conservation was not provided for in the MHCP to a level sufficient to include the species as a Carlsbad Covered Species can be viewed as a Changed Circumstance. In the event that a species, which is not a Covered Species pursuant to this Plan and associated Take Authority is listed by USFWS subsequent to the issuance of Take Authority pursuant to the HMP, such listing will be considered a Changed Circumstance.

In the event of a non-covered species, the City and Wildlife Agencies will jointly identify measures that the City will follow to avoid take, jeopardy and/or adverse modification of any designated Critical Habitat within the Subarea, until and unless the City's permit is amended to include coverage for the newly-listed species as a Carlsbad Covered Species or the Wildlife Agencies notify the City that such measures are no longer required to avoid jeopardy, take or adverse modification of designated Critical Habitat of the newly-listed species. Among other measures, the City will require that prior to the City's issuance of any permit for land development, clearing and/or grubbing, applicants must obtain Take Authority for any listed, non-covered species through appropriate federal and/or state permit processes.

Changed Circumstances Not Provided for in the HMP

Pursuant to the "No Surprises" rule at 50 C.F.R. 17.22(b)(5)(ii), the USFWS may not require (1) any conservation or mitigation measures in addition to those provided for under Sections 5.8.1 – 5.8.4 in response to a Changed Circumstance; or (2) additional conservation or mitigation

measures for any Changed Circumstance that is not identified in Sections 5.8.1 – 5.8.4 without the consent of the City, provided the City is properly implementing the HMP.

As recognized in the "No Surprises" rule at 50 C.F.R. 17.22(b)(6) and 17.32(b)(6), the USFWS, any Federal, State or local agency, or a private entity may take additional actions at their own expense to protect or conserve a species covered under the HMP.

EXHIBIT "C"

ORDINANCE NO. _____

AN INTERIM ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARLSBAD, CALIFORNIA, ADOPTED AS AN URGENCY MEASURE ESTABLISHING TEMPORARY LAND USE CONTROLS TO PROTECT SENSITIVE BIOLOGICAL RESOURCES IN CONFORMANCE WITH THE RECENTLY APPROVED HABITAT MANAGEMENT PLAN PENDING PREPARATION AND CONSIDERATION OF ANY NECESSARY AMENDMENTS TO ORDINANCES, CODES AND POLICIES.

WHEREAS, the City Council of the City of Carlsbad, California, has adopted the Carlsbad Habitat Management Plan (HMP) which is a comprehensive plan for the conservation and management of natural habitats in order to preserve the wildlife and the other biological resources that occupy these areas; and

WHEREAS, the Carlsbad HMP has now been approved by the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDF&G) pursuant to the Federal Endangered Species Act and the California Natural Community Planning (NCCP) Act and the City has been issued an Authorization/Permit for the Incidental Take of HMP wildlife in accordance with the HMP; and

WHEREAS, the City has entered into an Implementing Agreement with USFWS and CDFG to fully implement and commence performing the terms and obligations of the HMP; and

WHEREAS, the City intends to immediately require all private and public development projects to fully comply with the HMP while any follow-up amendments to existing city regulatory documents are made; and

WHEREAS, the City intends to make all necessary amendments to existing land use ordinances, codes and policies to fully incorporate the standards, conditions, and requirements of the HMP and Implementing Agreement; and

WHEREAS, these amendments may include revisions to the city's General Plan, Zoning Ordinance, and other sections of the Municipal Code; and

WHEREAS, the California Coastal Commission has approved an amendment to the certified Local Coastal Program (LCP) to incorporate the HMP, and all biological resource protection provisions of the LCP are in full force and effect within the Coastal Zone; and

WHEREAS, California Governmental Code Section 65858 allows a city, without following the procedures otherwise required prior to the adoption of a zoning ordinance to adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with contemplated General Plan and Zoning amendments which the city intends to study and consider; and,

WHEREAS, the City Council believes that in order to preserve the health, safety and general welfare of its citizens and to immediately commence implementation of the HMP, it is necessary to adopt an Interim Ordinance as an Urgency Measure under the provisions of Government Code Section 65858.

NOW, THEREFORE, the City Council of the City of Carlsbad, California, does ordain as follows:

SECTION 1: That the above recitals are true and correct.

SECTION 2: That during the time to study, consider and approve any follow-up actions necessary to fully incorporate and implement the Carlsbad Habitat Management Plan, all standards, requirements, terms and obligations of the Plan shall be in full force and effect.

SECTION 3: That no application for any land use or development entitlement, including but not limited to a Master Plan, Specific Plan, Tentative Subdivision Map, Site Development Plan or Conditional Use Permit shall be approved unless it fully complies and is consistent with the Carlsbad Habitat Management Plan.

SECTION 4: That if there are any inconsistencies between the HMP and any existing Zoning Ordinance standard, requirement or provision, the HMP shall take precedence.

SECTION 5: That within the Coastal Zone, the LCP contains special standards and requirements. In the event of any inconsistency between the LCP and any other existing land use regulation, the LCP shall take precedence.

SECTION 6: That removal of any habitat, including but not limited to coastal sage scrub, chaparral, grassland, and wetlands, is prohibited unless authorized by the City pursuant to the HMP and this ordinance.

SECTION 7: That the City Council directs the Planning Department to immediately commence the processing of any necessary amendments to the General Plan, the Zoning Ordinance, the Municipal Code and any other documents containing standards, regulations or policies to incorporate and fully implement the HMP.

SECTION 8: Following the adoption of this ordinance, the City Council shall hold a public hearing within 45 days to consider extending this ordinance for up to 10 (ten) months and 15 (fifteen) days pursuant to Government Code Section 65858(a). The City Clerk is directed to notice the hearings as required by Government Code Section 65090.

DECLARATION OF URGENCY: This ordinance is hereby declared to be an emergency ordinance adopted as an urgency measure to protect the public health, safety and welfare and shall take effect immediately upon its adoption. The facts constituting the emergency are those set forth above. Ten days prior to the expiration or any extension, the staff shall provide the City Council with a report describing the measures taken to alleviate the condition which led to the adoption of this ordinance.

EFFECTIVE: This urgency ordinance shall be effective immediately upon passage and shall remain in force and effect as described in Section 8 above or until the City Council has received, considered and approved any land use regulatory documents necessary to fully incorporate and implement the Carlsbad Habitat Management Plan whichever occurs first.

SEVERABILITY: If any section, subsection, sentence, clause, phrase or part of this urgency ordinance is for any reason held to be invalid or unconstitutional by the final decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining parts of this urgency ordinance. The City Council hereby declares that it would have adopted this urgency ordinance and each section, subsection, sentence, clause, phrase or part

thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses, phrases or parts are declared invalid or unconstitutional.

Furthermore, if the entire Ordinance or its application is deemed invalid by a court of competent jurisdiction, any repeal of the Carlsbad Municipal Code by this Ordinance will be rendered void and cause such Carlsbad Municipal Code provision to remain in full force and effect for all purposes.

INTRODUCED, PASSED AND ADOPTED at a regular meeting of the Carlsbad City Council on the _____ day of _____, 2004, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

_____
CLAUDE A. LEWIS, Mayor

ATTEST:

_____
LORRAINE M. WOOD, City Clerk

(SEAL)

Fee Calculation Method

In calculating mitigation fees, acres of habitat impact are converted to proportionate units, using the mitigation ratios specified in the HMP or, in the case of Group F habitat, using the implicit mitigation ratio discussed above. Thus, one acre of impact to Group D, E and F habitats represents, respectively, 1.0, 0.5, and 0.1 units for calculating mitigation fees. Habitats which may be impacted under the HMP and subject to fees represent a total of 543.7 units, of which Group D, E and F habitats represent 26.67%, 43.59%, and 29.74% (Exhibit 4). Total funding requirement of $4,293,130 is allocated to these habitat groups according to these proportions, then divided by the estimated acres of impact, yielding mitigation fee per acre by habitat group (rounded to the next whole dollar). The fee is applied to acres of impact, without regard to the amount of habitat conserved on-site. Use of mitigation ratios establishes a direct relationship between the fees and acres of impact to habitat.

Recommended Fee Schedule

Recommended mitigation fees are as follows:

Group D Habitat	$7,897 per acre
Group E Habitat	$3,949 per acre
Group F Habitat	$790 per acre

It is also recommended that these fees be escalated annually at one-half the rate of increase in Consumer Price Index-All Urban Consumers for San Diego County, using as base the reported index of the last biennial period preceding the adoption of the Mitigation Fee Program and adjusted every 12 months thereafter.

Carlsbad HMP
Exhibit 1. MITIGATION RATIOS FOR IMPACTS TO HABITATS

Habitat Group and Type		Mitigation Ratio/Requirement by Type of Impacted Habitat
A.	Coastal salt marsh, alkali marsh, freshwater marsh, estuarine, salt pan/mudflats, riparian forest, riparian woodland, riparian scrub, vernal pools, disturbed wetlands, flood channel, fresh water, Engelmann oak woodland, coast live oak woodland [1]	No net loss goal (mitigation ratio varies by type of replacement habitat)
B.	Beach, southern coastal bluff scrub, maritime succulent scrub, southern maritime chaparral, native grass	3:1 [2]
C.	Gnatcatcher-occupied coastal sage scrub	2:1 [3]
D.	Unoccupied coastal sage scrub, coastal sage/chaparral mix, chaparral (excluding southern maritime chaparral)	1:1 [4]
E.	Annual (non-native) grassland	0.5:1 [4]
F.	Disturbed lands, eucalyptus, agricultural lands	Mitigation Fee [4]

Source: City of Carlsbad, *Habitat Management Plan* (December 1999), p. D-95, Table 11.

1. Group A habitats are associated with wetlands. Impacts to these habitat types are subject to review under Section 404 of the federal Clean Water Act or Section 1600 of the California Fish and Game Code.
2. It is assumed that all habitat types in Group B will be included in the proposed preserve system. Small, isolated patches of low quality southern maritime chaparral may be located outside a preserve area and maximum avoidance and onsite conservation is preferred.
3. Maximum avoidance and onsite conservation of Group C habitat is encouraged.
4. Offsite mitigation for habitat in this group which is not conserved onsite, shall pay a per acre in-lieu mitigation fee in an amount to be determined by the City Council.