

DRAFT
IMPLEMENTING AGREEMENT

for the

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

for

AQUATIC LANDS HABITAT CONSERVATION PLAN

August 2014

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1.0 PARTIES

The parties to this Implementing Agreement are the Washington State Department of Natural Resources (“DNR” or “Permittee”); the United States Fish and Wildlife Service (FWS); and the National Marine Fisheries Service (NMFS). In this agreement, FWS and NMFS are collectively referred to as the “Services.” DNR and the Services are collectively referred to as the “the Parties.”

2.0 RECITALS AND PURPOSES

2.1 Recitals. The Parties have entered into this agreement in consideration of the following facts:

(a) The state-owned aquatic lands managed by Permittee provide, or have the potential to provide, habitat for the species listed in Section 3.6 of this Agreement, which identifies the status of the species under the ESA.

(b) Permittee has developed a series of measures, described in the habitat conservation plan (HCP), to minimize and mitigate to the maximum extent practicable the effects of take of covered species incidental to Permittee's covered activities.

2.2 Purposes. The purposes of this Agreement are to:

- (a) Ensure implementation of the HCP;
- (b) Describe the remedies available to the Parties; and
- (c) Provide the Permittee with assurances that no additional mitigation will be required with respect to Covered Species except as provided for in this Agreement or required by law, provided that the terms of the HCP, the Permits, and the Agreement are properly implemented..

3.0 DEFINITIONS

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

3.1 Terms defined in Endangered Species Act. Terms used in this Agreement and specifically defined in the Endangered Species Act (ESA), or in regulations adopted by the Services under the ESA, have the same meaning as in the ESA and those implementing regulations, unless this Agreement expressly provides otherwise.

3.2 “Adaptive Management” means a flexible approach to the long-term implementation of conservation measures in the HCP, by providing for modification of the conservation measures based on the results of ongoing monitoring activities and other information, and the Services’ agreement to the modifications. Implementation of Adaptive Management is provided for in Section 10. **3.3 “Agreement”** means this Implementing Agreement, which accompanies the HCP and Permits, and incorporates them by reference.

3.4 “Changed Circumstances” means changes in circumstances affecting a Covered Species or the geographic area covered by the HCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the HCP (e.g. the listing of a new species, or a fire or other natural catastrophic event in areas prone to such event.) Changed Circumstances

and the planned responses to those circumstances are described in Section 1-2.4 of the HCP. Changed Circumstances are not Unforeseen Circumstances.

3.5 “Covered Activities” means activities covered under the Permit as defined in Section 3 of the HCP.

3.6 “Covered Species” means the following species, each of which the HCP addresses in a manner sufficient to meet all of the criteria for issuing an incidental take permit under ESA Section 10(a)(1)(B)

| Species | Listing Status | WA Natural Heritage Rank ¹ |
|---|--------------------------------------|---------------------------------------|
| Amphibians and Reptile | | |
| Columbia spotted frog (<i>Rana luteiventris</i>) | State Candidate | G4, S4 |
| Northern leopard frog (<i>Rana pipiens</i>) | Federal Concern; State Endangered | G5, S1 |
| Oregon spotted frog (<i>Rana pretiosa</i>) | Federal Candidate; State Endangered | G2, S1 |
| Western toad (<i>Bufo boreas</i>) | Federal Concern; State Candidate | G4, S3 |
| Pacific pond turtle (<i>Actinemys marmorata</i>) | Federal Concern; State Endangered | G3G4, S1 |
| Birds | | |
| Black tern (<i>Chlidonias niger</i>) | State Monitored | G4, S4B |
| Common loon (<i>Gavia immer</i>) | State Sensitive | G5, S2B, S4N |
| Harlequin duck (<i>Histrionicus histrionicus</i>) | Not listed | G4, S2B, S3N |
| Marbled murrelet (<i>Brachyramphus marmoratus</i>) | Federal and State Threatened | G3G4, S3 |
| Western snowy plover (<i>Charadrius alexandrinus nivosus</i>) | Federal Threatened; State Endangered | G4, S1 |
| Forage Fish | | |
| Eulachon/ Pacific smelt (<i>Thaleichthys pacificus</i>) | Federal Threatened; State Candidate | G5, S4 |
| Pacific herring (<i>Clupea pallasii</i>) | Federal Concern; State Candidate | GNR, SNR |
| Pacific sand lance (<i>Ammodytes hexapterus</i>) | Not listed | |
| Surf smelt (<i>Hypomesus pretiosus</i>) | Not listed | G5, SNR |

¹ Natural Heritage program ranks: G = Global; S = State; B = Breeding populations; N = Non-breeding populations; 1 = Critically imperiled; 2 = Imperiled; 3 = Rare locally or with a restricted range; 4 = Apparently secure; 5 = Demonstrably secure.

| Species | Listing Status | WA Natural Heritage Rank ¹ |
|---|---|---------------------------------------|
| Lamprey | | |
| Pacific lamprey (<i>Lampetra tridentata</i>) | Federal Species of Concern | G5, S3S4 |
| Rockfish | | |
| Bocaccio (<i>Sebastes paucispinis</i>) | Federal Endangered, State Candidate | G4, SNR |
| Canary rockfish (<i>Sebastes pinniger</i>) | Federal Threatened; State Candidate | GNR, SNR |
| Yelloweye rockfish (<i>Sebastes ruberrimus</i>) | Federal Threatened; State Candidate | GNR, SNR |
| Salmonids | | |
| Bull trout (<i>Salvelinus confluentus</i>) | Federal Threatened; State Candidate | G3, S3 |
| Chinook salmon (<i>Oncorhynchus tshawytscha</i>) | Federal Threatened; State Candidate | G5, SNR |
| Chum salmon (<i>Oncorhynchus keta</i>) | Federal Threatened; State Candidate | G5, SNR |
| Coastal cutthroat trout (<i>Oncorhynchus clarki clarki</i>) | Not Listed | G4, S4 |
| Coho salmon (<i>Oncorhynchus kisutch</i>) | Federal Threatened (Lower Columbia), Candidate (Puget Sound) | G4, SNR |
| Pink salmon (<i>Oncorhynchus gorbuscha</i>) | Not Listed | G5, S2 |
| Sockeye/Kokanee salmon (<i>Oncorhynchus nerka</i>) | Federal Threatened or Endangered, State Candidate (sockeye); Not listed (kokanee) | G5, SNR |
| Steelhead trout (<i>Oncorhynchus mykiss</i>) | Federal Threatened; State Candidate | G5, SNR |
| Sturgeon | | |
| Green sturgeon (<i>Acipenser medirostris</i>) | Federal Threatened (Southern DPS) | G3, S2N |
| White sturgeon (<i>Acipenser transmontanus</i>) | Not Listed | G4, S3B, S4N |
| Marine Mammal | | |
| Southern resident orca (<i>Orcinus orca</i>) | Federal and State Endangered | G4G5, SNR |

3.7 “Covered Lands” means lands directly owned by the state of Washington and managed by Washington DNR that underlie navigable freshwater, marine, and estuarine waters within the state of Washington, including tidelands, shorelands, and bedlands as defined in RCW 79.105.060. These lands are described in more detail in Section 1-3 of the HCP.

3.8 “HCP” means the Habitat Conservation Plan prepared by the Permittee for state owned aquatic lands as defined in RCW 79.105.060(20) that are managed by Permittee.

3.9 “Listed Species” means a species (including a subspecies, a distinct population segment, or an evolutionarily significant unit of a vertebrate species) that is listed as endangered or threatened under the ESA.

3.10 “Permits” means the incidental take permits issued by the Services to Permittee pursuant to Section 10(a)(1)(B) of the ESA for take incidental to covered activities on state owned aquatic lands managed by DNR.

3.11 “Permittee” means the Washington State Department of Natural Resources.

3.12 “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed or unlisted Covered Species. Harm means an act that actually kills or injures a member of a Covered Species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a Covered Species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

3.13 “Unforeseen Circumstances” means changes in circumstances affecting a Covered Species or geographic area covered by the HCP that could not reasonably have been anticipated by the Parties at the time of the HCP’s development, and that result in a substantial and adverse change in the status of the Covered Species.

3.14 “Unlisted Species” means a species (including a subspecies, or a distinct population segment of a species) that is not listed as endangered or threatened under the ESA.

4.0 OBLIGATIONS OF THE PARTIES

4.1 Obligations of Permittee. Upon issuance of the Permits, Permittee will fully and faithfully perform all obligations assigned to it under this Agreement, the Permits, and the HCP.

4.1.1 Fulfill all obligations undertaken by the DNR in the HCP, the Permits, and this IA.

4.1.2 Promptly notify the Services if, for any reason (including lack of sufficient appropriated funds or court decisions), the DNR has become or is likely to become unable to fulfill any obligation undertaken by it in the HCP, the Permits, or this IA.

4.1.3 Promptly respond to all notices and inquiries received from the Services under the HCP, the Permits, or this IA.

4.1.4 Use its best efforts to help resolve any disputes that may arise among the Services, any agency, local government entity, state or local officials, or private parties with respect to the application and interpretation of the HCP, the Permits, or this IA using the dispute resolution processes specified in this IA or other dispute resolution processes that may be agreed to with respect to a particular dispute.

4.1.5 Promptly notify the Services of any lawsuits filed against the WDNR, or any formal written notices of intent to file such suits, to challenge the validity of the Permits or any

decisions made by the State in connection with the HCP, the Permits, or this IA.

4.2 Obligations of the Services.

4.2.1 Permit Issuance. Upon approval of the HCP by the Services, execution of this Agreement by all Parties, and satisfaction of all other applicable legal requirements, the Services will issue Permittee, Incidental Take Permits under Section 10(a)(1)(B) of the ESA, authorizing incidental take by Permittee of each Covered Species resulting from Covered Activities.

4.2.2 Permit coverage. The Permits will identify all covered species. The permit will take effect for listed covered species at the time the permit is issued. Subject to compliance with all other terms of this agreement, the permit will take effect for an unlisted covered species upon the listing of such species.

4.2.3 “No surprises” assurances. Provided that Permittee has complied with its obligations under the HCP, this Agreement, and the Permits, including any provisions for Changed Circumstances and adaptive management in the HCP, the Services can require the Permittee to provide mitigation beyond that provided for in the HCP only in accordance with the ESA “No Surprises” regulations at 50 C.F.R. §§ 17.22(b)(5) 17.32(b)(5), and 222.307(g). If the governing regulations should be modified from those codified in 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) and 222.307(g), as of the effective date of this Agreement, the modified regulations shall not apply, unless reliance on the regulations in effect as of the effective date of this Agreement is prohibited by statute or court order.

4.3 Interim obligations of Permittee upon a finding of Unforeseen Circumstances

If the Services demonstrate the existence of Unforeseen Circumstances, then during the period necessary to determine the nature and location of any additional or modified mitigation permitted under Section 4.2.3, Permittee will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

5.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. The terms of this Agreement, the HCP and the Permit shall be interpreted to be consistent and supplementary to each other. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement shall control. In the event of any contradiction between the terms of the HCP and the terms of the Permit, the terms of the Permit shall control.

6.0 TERM

6.1 Effective date and term. This Agreement and the HCP shall become effective on the date that Services issue the Permits under the ESA. This Agreement, the HCP, and the Permits will remain in effect for fifty (50) years from the issuance of the Permits, except as otherwise provided below.

6.2 Surrender of the Permit. Permittee may voluntarily surrender the Permit in accordance with applicable statutes or regulations in force on the date of such surrender. (These

regulations are currently codified at 50 C.F.R. § 13.26 and 222.306(d)) In the event Permittee elects to surrender the Permit, Permittee will provide notice to Services of its intent to surrender at least 120 days prior to the date of surrender identified in the notice. Upon receipt of the notice, Services will review all relevant data to determine whether the Services agree that the Permittee has substantially complied with the terms of the Permit. In response to concerns about the surrender notice raised by Services, Permittee may voluntarily withdraw the notice of surrender, extend the surrender date identified in the notice, or surrender the Permit. In the event of Permit surrender, if the Services demonstrate that Permittee has not substantially complied with the terms of the Permit such that mitigation required under the HCP has not occurred, the Services may require the continuation of specified HCP activities until such time as the Permittee has substantially completed its mitigation obligations as of the date of surrender of the Permit.

To resolve concerns about the surrender notice raised by the Services, either party may choose to initiate the informal dispute resolution procedures described in section 13.6.1 of this Agreement. The surrender date identified in the Permittee's surrender notice shall be extended during the period of such dispute resolution proceedings. All obligations of the Parties under the HCP, the Permits, and this Agreement shall terminate as of the surrender date identified in the notice or, if such date is extended as provided in this Section, the surrender date as extended unless prior to such surrender date Permittee agrees to withdraw the notice or Services obtain relief requiring such obligations to continue as provided in Section 13.

7.0 FUNDING

7.1 State Funding. The State will use its best efforts to obtain such funds as may be needed for the DNR to fully implement the HCP. The appropriations of State funding shall be within the sole discretion of the State Legislature. DNR will submit to the Washington State Legislature, on at least a biennial basis, an agency operating and capital budget that includes the funding proposal to implement and enforce the HCP, and fulfill DNR's obligations under the Permit and the Agreement. DNR acknowledges that failure to maintain adequate funding shall be grounds for suspension or partial suspension of the Permit, if the lack of funds means that DNR cannot fulfill its obligations under the HCP, ITP, and IA. To the maximum extent possible, the Permittee will cooperate fully with the Services to minimize the adverse effects of decreased funding on implementation of the HCP, ITPs and IA.

7.2 Federal Funding. The Services shall include in their annual budget requests sufficient funds to fulfill their respective obligations under the HCP, the Permits, and this Agreement.

7.3 Cooperation. All Parties will support efficient and effective use of available funds to accomplish the purposes of the HCP, the Permits, and this IA. If requested by any Party, all Parties will meet and confer regarding ways to most effectively use the funds available to accomplish the purposes of the HCP, the Permits, and this IA to the maximum extent practicable.

7.4 Limitations. Implementation of the HCP, Permits, and this Agreement by the Services is subject to requirements of the federal Anti-Deficiency Act, and implementation by the State is subject to analogous provisions of the state constitution, state laws, and the availability of

appropriated state and federal funds. Nothing in this Agreement will be construed to require the unlawful obligation, appropriation, or expenditure of any money from the U.S. Treasury or any State funds. However, lack of funds sufficient to carry out the requirements of the HCP may be cause for suspension or revocation of the permits. The Parties will not be required under this agreement to expend any federal or state agency's appropriated funds unless and until an authorized official of such agency affirmatively acts to commit to such expenditures as evidenced in writing.

8.0 MONITORING AND REPORTING

8.1 Planned periodic reports. As required in the HCP, Permittee will submit periodic reports describing its activities and results of the monitoring program provided for in the HCP.

8.2 Other Information. If requested by the either or both of the Services for the purpose of assessing whether the terms and conditions of the HCP are being fully implemented, then Permittee will provide existing information not previously provided under Section 8.1 that is in its possession or control and related to implementation of the HCP. Permittee will provide all the requested information that it is not prohibited from disclosure by law within 30 days of the request, or such additional time as may be reasonably necessary to locate and provide such existing information.

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

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

8.4 Monitoring by Services. The Services may conduct inspections and monitoring in connection with the federal Permits in accordance with the ESA and its implementing regulations (see, e.g., 50 CFR §13.47), and any other applicable law. DNR will cooperate with the Services' oversight and monitoring of activities carried out to implement the HCP, including permitting the Services entry onto lands controlled by DNR for purposes of performing inspections. Except where the Services determine that doing so would be inconsistent with fulfilling their enforcement responsibilities, the Services shall give DNR reasonable advance notice of such inspections, and shall allow DNR representatives to accompany Service personnel during such inspections.

9.0 CHANGED CIRCUMSTANCES

9.1 Changed Circumstances Provided for in the HCP. If additional conservation measures are necessary to respond to changed circumstances, and were provided in the HCP, then the permittee will implement the measures. Section 1-2.4 of the HCP contains the complete list of Changed Circumstances and describes those specific conservation and mitigation measures that DNR agrees to implement where, pursuant to the HCP they are deemed necessary to respond to Changed Circumstances.

9.2 Changed Circumstances Not Provided for in the Plan. If additional conservation and mitigation measures beyond those provided for in the Plan are necessary to

respond to Changed Circumstances, the Services may not require any such additional conservation and mitigation measures without DNR's consent, provided DNR is properly implementing the HCP.

9.3 Listing of species that are not Covered Species. In the event that a non-Covered Species that may be affected by Covered Activities becomes listed under the ESA, or critical habitat for such a species is designated in Covered Lands, during the term of this Agreement, the HCP and the Permits, Permittee will either refrain from conducting Covered Activities which will result in Take of, or jeopardy to, the species or adverse modification of critical habitat; or Permittee will implement measures identified by the Services to avoid take until the Permits are amended to include such species, or until the Services notify Permittee that such measures are no longer needed to avoid jeopardy to, Take of, or adverse modification of the critical habitat of, the non-Covered Species.

10.0 ADAPTIVE MANAGEMENT

10.1 Permittee- implementation of adaptive management. Permittee will implement the adaptive management provisions in section 5-4 and Appendix H of the HCP when changes in management practices are necessary to achieve the HCP's biological objectives or to respond to monitoring results or new scientific information. As soon as practicable upon determining that adaptive management changes are necessary or appropriate, Permittee will give notice to the Services. Such notice shall specify the proposed adaptive management changes and include a statement of the reason for the proposed change and an analysis of its environmental effects, including its effects on operations under the HCP and on Covered Species. The Services will use their best efforts to respond to this notice within thirty (30) days. The response shall either (1) concur with the Permittee's proposed adaptive management changes; (2) request changes in Permittee's proposal consistent with Section 5.4 and Exhibit F of the HCP; (3) identify additional information necessary to enable the Services to evaluate Permittee's proposed adaptive management changes; (4) disapprove the proposed changes, specifying the reason for the disapproval; or (5) indicate that the changes should be processed pursuant to Section 11 because they may result in a reduction in mitigation or additional take not analyzed in connection with the original HCP or any amendments thereto. As soon as practicable after receiving concurrence from the Services, but no later than thirty (30) calendar days after receiving concurrence, Permittee shall begin implementing the approved adaptive management measures. Changes that result from adaptive management are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendments to the HCP or the Permit.

10.2 Services-initiated adaptive management. If the Services determine that the adaptive management provisions in the HCP have not been met by the Permittee, and that the Permittee has not changed its management practices in accordance with Section 5.4 of the HCP and Section 10.1 of this Agreement, the Services will so notify Permittee. Such changes are required in the HCP, and hence do not constitute Unforeseen Circumstances or require amendments to the HCP or the Permit. If the Parties disagree with respect to whether the adaptive management provisions have been followed or the adaptive management practices to be implemented, either Party may initiate dispute resolution as provided in Section 13.6 or seek any other available remedy.

10.3 Reductions in mitigation. Permittee will not implement adaptive management changes that may result in less mitigation than provided for covered species under the original terms of the HCP, unless the Services first provide written approval. Permittee may propose any

such adaptive management changes by notice to the Services, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on covered species, and other environmental impacts. Within 120 days of receiving such a notice, the Services will approve the proposed adaptive management changes, approve them as modified by the Services, or notify Permittee that the proposed changes constitute permit amendments that must be reviewed under Section 12.2 of this agreement.

10.4 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 Covered Species beyond that analyzed under the original HCP and any amendments thereto. Any such modification must be reviewed as a Standard Amendment under Section 12.2.0 of this Agreement.

11.0 LAND TRANSACTIONS.

The HCP provides for the continuation of DNR's management program for state owned aquatic lands. DNR may sell, acquire, or exchange aquatic lands during the term of the HCP. Acquisition and conveyance of land is a Changed Circumstance addressed in Section 1-2.4 of the HCP which describes the specific conservation and mitigation measures that DNR agrees to implement where, pursuant to the HCP they are deemed necessary to respond to Changed Circumstances. As set forth in Section 1-2.4 of the HCP, DNR will not transfer to others aquatic lands ascertained to be a conservation priority under the HCP's land planning process described in Section 5-2.2 of the HCP unless the entity to which the lands are transferred commits to continued management in conformance with the HCP, or unless DNR otherwise offsets the conservation value likely to be lost as a result of such transfer. DNR will apply the appropriate HCP standards, strategies, and measures to the newly acquired lands and the Permits shall apply to such newly acquired lands.

12.0 AMENDMENTS

12.1 Minor Amendments.

(a) Minor Amendments include revisions that do not significantly modify the scope or nature of activities or actions covered by the incidental take Permits in terms of their effect on the Covered Species. Any Party may propose minor amendments to the HCP, the Permit, or this Agreement by providing notice to all other Parties. Such notice shall include a statement of the reason for the proposed amendment and an analysis of its environmental effects, including its effects on operations under the HCP and on Covered Species. The other Parties shall each use their best efforts to respond in writing to the proposal within sixty (60) calendar days of receipt of the request. The response shall either (1) concur with the proposed Amendment; (2) concur with the proposed Amendment with requested changes; (3) identify additional information necessary to enable evaluation of the proposed Amendment, or (4) disapprove the proposed Amendment, stating reasons for the disapproval. All Parties must agree in writing to any Minor Amendment, including the schedule for implementation, before implementation of such Amendment. Any proposed Minor Amendment that is disapproved by one of the Parties may be resubmitted as a proposed Standard Amendment pursuant to Section 12.2 of this Agreement.

(b) Minor Amendments to the HCP, the Permit, or the Agreement may

include, but are not limited to, the following:

- (1) Correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes;
- (2) Modifying existing or establishing new measures to further minimize or avoid take of the Covered Species;
- (3) Modifying reporting protocols for Annual Reports;
- (4) Minor changes to monitoring or reporting protocols;
- (5) Minor changes to reduce the amount of authorized take based on the results of monitoring;
- (6) Minor changes to the HCP that do not diminish the conservation value of the HCP to covered species;
- (7) Revising Covered Species habitat enhancement and management techniques based on new information and/or analyses;
- (8) Actions by Permittee to delegate (while retaining full responsibility for compliance with) any of its duties under this HCP to a third party under its direct control; or
- (9) Any other modifications that are consistent with the biological goals and objectives described in the HCP and that meet the criteria set forth in paragraph (c) below.

(c) The Services will not propose or approve a Minor Amendment if the Services determine that such amendment would result in operations that are significantly different from those analyzed in connection with the original HCP, adverse effects on the environment that are new or significantly different from those analyzed, or additional Take not analyzed in connection with the original HCP.

12.2 Standard Amendments.

Modifications to the HCP, Permit, or Agreement other than those made under Section 12.1 are Standard Amendments. A Standard Amendment requires implementation of all permit processing procedures applicable to an original incidental take Permit. The specific documentation required to comply with the ESA and the National Environmental Policy Act may vary based on the nature of the Amendment.

13.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION

13.1 In general. Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permits, and the HCP.

13.2 No monetary damages. No Party shall be liable for 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.

13.3 Injunctive and temporary relief. The Parties acknowledge that the Covered

Species are unique and that their loss as species would result in irreparable damage to the environment, and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

13.4 Enforcement authority of the United States. Nothing contained in this Agreement is intended to limit the authority of the United States to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA or other applicable law.

13.5 Permit Suspension. The Services may suspend or revoke the Permit, in whole or in part, only in accordance with federal law and this Agreement. Any termination of the Permit in whole or in part automatically terminates the relevant commitments of the HCP and this Agreement. If federal regulations codified at 50 C.F.R, §§ 13.27 -13.29, 222.306; 15 C.F.R. Part 904 are modified after the effective date of this Agreement, such modifications will apply only to the extent required by statute or court order, or upon agreement of the Parties. The Services will use dispute resolution when possible prior to termination or suspension.

13.6 Dispute resolution. The parties recognize that disputes concerning implementation of, compliance with, or termination of this agreement, the HCP, and the permit may arise from time to time. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the parties may later agree. However, if at any time any party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.

13.6.1 Informal dispute resolution process. Unless the parties agree upon another dispute resolution process, or unless an aggrieved party has initiated administrative proceedings or suit in federal court as provided in this section, the parties may use the following process to attempt to resolve disputes:

(a) The aggrieved party will notify the other parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.

(b) The party alleged to be in violation will have 30 days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.

(c) Within 30 days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

14.0 CONSULTATIONS WITH OTHER PUBLIC AGENCIES

Nothing in this Agreement is intended to alter the obligation of a federal agency to consult with the Services pursuant to Section 7 of the ESA (16 U.S.C. 1536(a)). To the maximum extent appropriate in any consultation on any Covered Activity with respect to the Covered Species under Section 7(a) of the ESA and regulations issued thereunder, the Services shall ensure that the biological opinion issued in formal consultation, or views expressed by the Services in informal consultation, in connection with the proposed activity are consistent with the biological opinion prepared on the Permit and HCP, provided that the Covered Activity as proposed in the consultation is consistent, and will be implemented in accordance with, the HCP, this Agreement, and the Permit. Any reasonable and prudent measures and terms and conditions in the biological opinion, or views expressed by the Services in informal consultation, on the proposed activity shall, to the maximum extent appropriate, be consistent with and not in excess of the measures included in the HCP, this Agreement, and the Permit.

15.0 MISCELLANEOUS PROVISIONS

15.1 Temporary prevention of performance. In the event that Permittee is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Permittee, including, but not limited to third party actions, sudden actions of the elements not identified as Changed Circumstances, or actions of a non-participating federal agency, state agencies or local jurisdictions, Permittee shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, provided that nothing in this section shall be deemed to authorize any Party to violate the ESA, and provided further that:

(a) The suspension of performance is of no greater scope and no longer duration than is required by the unforeseeable cause;

(b) Within fifteen (15) days after the occurrence of the unforeseeable cause Permittee shall give the Services written notice describing the condition, an estimate of how long Permittee expects it to persist, and how Permittee plans to remedy the effects of the temporary suspension of performance;

(c) Permittee shall use its best efforts to remedy its inability to perform; and

(d) When Permittee is able to resume performance of its obligations, Permittee shall give the Services written notice to that effect.

15.2 No partnership. Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

15.3 Notices. Any notice permitted or required by this Agreement shall be in writing, delivered personally, or by overnight mail, to the persons listed below, or shall

be deemed given five (5) business 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 overnight or certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

15.4 Availability of funds. Implementation of this Agreement and the HCP by the Services 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 Services 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.

15.5 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.

15.6 No third-party beneficiaries. Without limiting the applicability of rights granted to the public pursuant to the ESA 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 for personal injuries or damages 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.

15.7 Relationship to the ESA and other authorities. The terms of this Agreement shall be governed by and construed in accordance with the ESA and applicable federal and state law. In particular, nothing in this Agreement is intended to limit the authority of the Services to seek penalties or otherwise fulfill their responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Services as agencies of the federal government. Nothing in this Agreement will limit the right or obligation of any federal agency to engage in consultation required under Section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of Permittee under the HCP and this Agreement will be considered in any consultation affecting Permittee or its Covered Activities.

15.8 References to regulations. Except as otherwise provided in this Agreement, any reference in this Agreement, the HCP, or the Permits to any regulation or rule of the Services shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

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

15.10 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 either of the Permits shall be governed by the Services' regulations in force at the time.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date the Permits are issued.

BY _____ Date _____
Deputy Regional Director
United States Fish and Wildlife Service, Region 1
Portland, Oregon

BY _____ Date _____
Regional Administrator
National Marine Fisheries Service
Seattle, Washington

BY _____ Date _____
Commissioner of Public Lands
Washington Department of Natural Resources
Olympia, Washington