

APPENDIX 4:

"Template" Implementing Agreement

"Template" Implementing Agreement

This template has been designed primarily for use with simple HCPs, but may also be used in other cases.

Important Notice:

U.S. Fish and Wildlife Service. The template may be used to develop Implementing Agreements by filling in project-specific information where indicated. When used in this manner, no Solicitor's Office review is necessary. However, when provisions in addition to those provided in the template are included, or if any provisions are deleted or the template is otherwise significantly modified, such agreements should be reviewed by the Solicitor's Office prior to approval by the appropriate FWS Regional Director. Attachments 1, if used to address habitat compensation measures in Implementing Agreements, should be reviewed by the Solicitor's Office prior to approval.

National Marine Fisheries Service. The template may also be used to develop Implementing Agreements for HCPs for marine species, anadromous species, and hatchery operations. However, it is NMFS policy that all Implementing Agreements will be reviewed by the National Oceanic and Atmospheric Administration's General Counsel's Office.

IMPLEMENTING AGREEMENT

by and between

[APPLICANT]

**U.S. FISH AND WILDLIFE SERVICE and/or
NATIONAL MARINE FISHERIES SERVICE**

and the

[STATE] DEPARTMENT OF FISH AND GAME [if applicable]

TO ESTABLISH A MITIGATION PROGRAM FOR ENDANGERED [THREATENED] SPECIES AT THE PROPOSED [APPLICANT] [PROJECT OR ACTIVITY SITE NAME] [SITE LOCATION, INCLUDING LEGAL DESCRIPTION, COUNTY, AND STATE].

This Implementing Agreement ("Agreement"), made and entered into as of the ___ day of _____, 199_, by and among [APPLICANT], the UNITED STATES FISH AND WILDLIFE SERVICE (FWS) and/or NATIONAL MARINE FISHERIES SERVICE (NMFS) (collectively, the Services), and the (STATE) DEPARTMENT OF FISH AND GAME (SDFG) [if applicable], hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the proposed [project or activity site name and location].

1.0 RECITALS

This Agreement is entered into with regard to the following facts:

WHEREAS, the proposed [project or activity name] site selected after environmental review has been determined to be habitat for the federally listed [species]; and,

WHEREAS, the proposed [project name] site also has been determined to be habitat for the [species], a Federal proposed or candidate species [if applicable], and the [species], a State listed species [if applicable] and the [species], a rare or declining species [if applicable]; and,

WHEREAS, [applicant], with technical assistance from the Service[s] and the SDFG, has developed a series of measures, described in the Habitat Conservation Plan, to minimize and mitigate the effects of the proposed [project or activity] upon the subject listed and unlisted species and their associated habitats; and,

THEREFORE, the Parties hereto do hereby understand and agree as follows:

2.0 DEFINITIONS

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

- 2.1** The term "Permit" shall mean an incidental take permit issued by the Service[s] to [applicant] pursuant to Section 10(a)(1)(B) of the Endangered Species Act (ESA).
- 2.2** The term "Permit Area" shall mean the [project or activity name] area consisting of approximately [x] acres in the [legal description] in [County and State] as depicted in Figure [x] of the [project or activity] Habitat Conservation Plan.
- 2.3** The term "Permittee" shall mean [applicant].
- 2.4** The term "Conservation Plan" shall mean the Habitat Conservation Plan prepared for the proposed [project or activity].
- 2.5** The term "Plan Species" shall mean species adequately covered in the HCP and identified in Section 1.0 of this Agreement.
- 2.6** [if applicable] The term "Compensation Lands" shall mean (a.) the [x] acres of land acquired by [applicant] and transferred to the Service[s] [if applicable], the SDFG [if applicable] or an approved third party for management pursuant to the terms of the Conservation Plan as habitat for the Plan Species pursuant to Section [x] of this Agreement [if applicable] or (b.) the [x] acres of land owned or controlled by [applicant] and reserved or set aside as habitat for the conservation of the Plan Species and to be managed pursuant to Section [x] of this Agreement and the terms of the Conservation Plan.
- 2.7** The term "unforeseen circumstances" means any significant, unanticipated adverse change in the status of species addressed under the HCP or in their habitats; or any significant unanticipated adverse change in impacts of the project or in other factors upon which the HCP is based. The term "unforeseen circumstances" as defined in this Agreement is intended to have the same meaning as "extraordinary circumstances" as used in the No Surprises policy.

3.0 HABITAT CONSERVATION PLAN

Pursuant to the provisions of Section 10(a)(1)(B) of the ESA and Section [x] of the [State] Endangered Species Act [if applicable], [applicant, hereinafter referred to as Permittee] has prepared a Habitat Conservation Plan (HCP) and submitted it to the Service[s] with a request that the Service[s] issue a Permit (Permit) to allow subject Plan species to be incidentally taken within the Permit Area as depicted and described in Figure [x] of the HCP. The HCP proposes a mitigation program for the subject Plan Species and their habitats.

4.0 INCORPORATION OF HCP

The HCP 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 shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be supplementary to each other.

5.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow the Service[s] to issue the Permit, the HCP sets forth measures that are intended to ensure that any take occurring within the Permit Area will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the Plan Species in the wild. It also includes measures that have been suggested by the Service[s] as being necessary or appropriate for purposes of the HCP.

6.0 COOPERATIVE EFFORT [This may not be applicable to all HCPs.]

In order that each of the legal requirements as set forth in Paragraph 5.0 hereof are fulfilled, each of the Parties to this Agreement must perform certain specific tasks as more particularly set forth in the HCP. The HCP thus describes a cooperative program by Federal and State agencies and private interests to mitigate the effects of the proposed [project or activity name] on the Plan Species.

7.0 TERMS USED

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

8.0 PURPOSES

The purposes of this Agreement are:

- 8.1** To ensure implementation of each of the terms of the HCP;
- 8.2** To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,
- 8.3** As stated in paragraph 12.3.a hereof, to provide assurances to the Permittee(s) and other non-Federal landowner(s) participating in the HCP [if applicable] that as long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional mitigation will be required except as provided for in this Agreement or required by law.

9.0 TERM

- 9.1** Stated Term. This Agreement shall become effective on the date that the Service[s] issue(s) the Permit requested in the HCP and shall remain in full force and effect for a period of [x] years or until termination of the Permit, whichever occurs sooner.
- 9.2** [For development HCPs with permanent habitat set-asides]: Notwithstanding the stated term as herein set forth, the Parties agree and recognize that once the Plan Species have been incidentally taken and their habitat modified pursuant to the HCP, the take and habitat modification will be permanent. It is therefore the intention of the Parties that the provisions

of the HCP and of this Agreement regarding the establishment and maintenance of habitat for the Plan Species shall likewise, to the extent permitted by law, be permanent and extend beyond the terms of this Agreement.

10.0 FUNDING

- 10.1** [Permittee] will provide such funds as may be necessary to carry out its obligations under the HCP. The Permittee should notify the Services, if the Permittee's funding resources have materially changed, including a discussion of the nature of the change, from the information provided in section [x] of the HCP.
- 10.2** [For long term Permits] The Permittee shall further ensure that funding is available to meet its obligations under this Agreement, the Permit and the HCP through an account solely designated for this purpose. The account may be a trust account, irrevocable letter of credit, insurance or surety bond. The account, letter of credit, surety or insurance must not be disapproved by the Service, shall be in the amount of no less than \$____, and shall be maintained for the life of the Permit. Funds from the account, insurance letter, or surety shall only be used if the Permittee is otherwise unable to meet its obligations under this Agreement, the Permit, or the HCP.
- 10.3** [if applicable] Prior to site disturbing activities, the Permittee will acquire and transfer to SDFG or the Service(s) [if applicable] or a third party approved by SDFG [if applicable] and the Service[s] offsite habitat compensation lands and associated enhancement and endowment funds [if applicable] as described in the HCP, or will guarantee performance of those duties through an irrevocable Letter of Credit, a trust account, insurance, or surety bond [if applicable] in favor of the Service[s], SDFG, or other third party approved by SDFG and the Service[s] and secured against [Permittee]. Such Letter of Credit, proof of trust account, insurance policy, or surety bond shall be delivered to the Service[s] [if applicable], SDFG or approved third party within [x] days of issuance of the Permit and prior to site disturbing activities [if applicable].

11.0 RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPLEMENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEE

- 11.1** Responsibilities of the Permittee.
- a. The HCP will be properly functioning if the terms of the Agreement have been or are being fully implemented.
 - b. The Permittee shall undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit, including adaptive management procedures described in subparagraph (c) below, if applicable.
 - c. Describe the adaptive management process agreed to by the parties to ensure the terms of the HCP are fully implemented, if applicable.
 - d. [if applicable] The Permittee shall submit an annual [or specify other reporting period] report describing its activities and an analysis of whether the terms of the

HCP were met for the reporting period. The report shall provide all reasonably available data regarding the incidental take, and where requested by the Service(s), changes to the overall population of Plan Species that occurred in the Permit area during the reporting period. In the case of a corporate Permittee, the report shall also include the following certification from a responsible company official who supervised or directed the preparation of the report: Under penalty of law, 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.

11.2 Responsibilities of the Service(s).

- a. The Service[s] shall cooperate and provide, to the extent funding is available, technical assistance to the Permittee as detailed in Section [x] of the HCP and [optionally] summarized below. Nothing in this Agreement shall require the Service(s) to act in a manner contrary to the requirements of the Anti-Deficiency Act.
- b. After issuance of the Permit, the Service[s] shall monitor the implementation thereof, including each of the terms of this Agreement and the HCP in order to ensure compliance with the Permit, the HCP and this Agreement.

11.3 Responsibilities of the SDFG (if applicable). The SDFG shall cooperate and provide, to the extent that adequate funding is available, technical assistance to the Permittee as detailed in Section [x] of the HCP and [optionally] summarized below.

12.0 **REMEDIES AND ENFORCEMENT**

12.1 **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 HCP, and to seek remedies for any breach hereof, subject to the following:

a. **NO MONETARY DAMAGES**

No Party shall be liable in damages to the 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. Notwithstanding the foregoing:

(1) **Retain Liability**

All Parties shall retain whatever liability they would possess for their present and future acts or failure to act without existence of this Agreement.

(2) **Land Owner Liability**

All Parties shall retain whatever liability they possess as an owner of interests in land.

(3) 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.

b. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the Plan 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.

12.2 THE PERMIT

a. SEVERABILITY

[For use in HCPs involving multiple Permittees]: The violation of the Permit by any Permittee with respect to any one or more particular parcels of land or portions thereof owned or controlled or within the jurisdiction of any such Permittee shall not adversely affect or be attributed to, nor shall it result in a loss or diminution of any right, privilege, or benefit hereunder, of any other Permittee.

b. PERMIT SUSPENSION OR REVOCATION

Except as otherwise provided for under the terms of the Agreement, the Permit shall be suspended or revoked in conformance with the provisions of 50 CFR 13.27 through 13.29 (1994), as the same exists as of the date hereof.

[NOTE: On September 5, 1995, the FWS published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The FWS is currently drafting additional language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future. Consequently, some information contained in this template may be outdated upon publication of a final rule. Users of this template should check the revised permit procedures when available.]

12.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

a. NO SURPRISES POLICY

Subject to the availability of appropriated funds as provided in Paragraph 14.6 hereof, and except as otherwise required by law, no further mitigation for the effects of the proposed [project or activity] upon the Plan Species may be required from a

Permittee who has otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional mitigation may not require additional land use restrictions or financial compensation from the Permittee without his/her written consent.

b. **PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES**
UNAFFECTED

Except as otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the rights of the Permittee to the use or development of those lands, or interests in lands, constituting the Permit Area; provided, that nothing in this Agreement shall absolve the Permittee from such other limitations as may apply to such lands, or interests in lands, under other laws of the United States and the State of [].

13.0 AMENDMENTS

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and with the written consent of each of the Parties hereto.

14.0 MISCELLANEOUS PROVISIONS

14.1 NO PARTNERSHIP

Except as otherwise expressly set forth herein, 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.

14.2 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 hereto and their respective successors and assigns.

[NOTE: On September 5, 1995, the FWS published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The FWS is currently drafting additional language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future.

Consequently, some information contained in this template may be outdated upon publication of a final rule. Users of this template should check the revised permit procedures when available.]

14.3 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:

Assistant Regional Director
United States Fish and Wildlife Service
[Street Address]
[City, State, Zip Code]

Assistant Regional Director [if applicable]
National Marine Fisheries Service
[Street Address]
[City, State, Zip Code]

Director [if applicable]
[State] Department of Fish and Game
[Street Address]
[City, State, Zip Code]

[Permittee's Name or Representative]
[Company or Agency Name]
[Street Address or Post Office Box]
[City, State, Zip Code]

14.4 ENTIRE AGREEMENT

This Agreement, together with the HCP and the Permit, constitutes the entire Agreement between 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.

14.5 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.

14.6 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.

14.7 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.

14.8 THIRD PARTY BENEFICIARIES

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), 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 property 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 Federal or State law.

14.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

14.10 REFERENCES TO REGULATIONS

Any reference in this Agreement, the HCP, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.11 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.

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

BY _____ Date _____
Regional Director
United States Fish and Wildlife Service
[City, State]

BY _____ Date _____
Regional Director [if applicable]
National Marine Fisheries Service
[City, State]

BY _____ Date _____
Director [if applicable]
[State] Department of Fish and Game
[City, State]
(With reference to Part [x] of this Agreement only [as applicable])

BY _____ Date _____
[Name], President [Director, etc.]
[Company, Organization, Agency]

ATTACHMENT 1:
Optional Provisions to be Used When the HCP Includes
Habitat "Compensation Credit" Requirements

Note: The material below is provided to aid Service staffs to develop suitable provisions when an HCP includes habitat "compensation credit" requirements. However, it should not be used in an Implementing Agreement without review by the Solicitor's Office (FWS) or General Counsel's Office (NMFS).

11.4 HABITAT COMPENSATION CREDITS

- a. As mutually agreed between the Service[s], SDFG [if applicable] and [Permittee], habitat compensation credits shall be established for a maximum of [x] acres of the habitat compensation lands acquired by [Permittee] pursuant to Part 11.1(a) of this Agreement. [Permittee] may sell habitat compensation credits to other project applicants whose projects require acquisition of habitat compensation lands, subject to the following conditions.
 - (1) A habitat compensation credit is defined as the equivalent of one acre of any parcel of habitat compensation lands which the Service[s] and SDFG [if applicable] have designated in writing to be available for sale to other project applicants. Other project applicants may purchase such compensation credits in lieu of acquiring habitat to satisfy habitat compensation requirements for certain projects as described in Paragraph 11.4(a)(2).
 - (2) [If applicable] The project of any applicant or other project proponent to which habitat compensation credits may be sold by [Permittee] shall be located outside the [acquisition area], as depicted in Attachment 1 of this Agreement, or any other reserve area designated by the Service[s] and/or SDFG [if applicable].
 - (3) Compensation lands utilized as habitat compensation credits by [Permittee] shall be acquired and deeded to the Service[s] [if applicable], SDFG [if applicable] or an approved third party [if applicable] prior to any compensation credit transaction, unless otherwise authorized in writing by the Service[s] and SDFG.
 - (4) All compensation credit transactions shall be approved in advance and in writing by the Service[s] and SDFG [if applicable].
 - (5) [Permittee] shall retain the right to determine the sales price of habitat compensation credits. [Permittee] is under no

obligation to sell habitat compensation credits and may choose to retain these credits indefinitely. [Permittee] shall bear all costs associated with mitigation credit transactions.

- b. [If applicable] [Permittee] may defer payment of habitat enhancement and endowment fees for the [x] acres of compensation lands designated as compensation credits until either the time of sale of such credits or 12 months from the date that compensation lands totaling [x] acres are transferred to the Service[s] [if applicable], SDFG [if applicable] or the approved third party [if applicable] in accordance with Section 11.1(a) of this Agreement. At the time of each sale of compensation credits, either [Permittee] or the purchaser of such credits shall be required to contribute habitat enhancement and endowment fees in the amount of [\$__] cash for each acre of habitat deeded to the Service[s] [if applicable], SDFG [if applicable] or the approved third party. If [Permittee] does not sell all or a portion of the designated habitat compensation lands totaling [x] acres to the Service[s] [if applicable], SDFG [if applicable] or the approved third party, [Permittee] shall immediately pay in cash to the Service[s] [if applicable], SDFG [if applicable] or the approved third party all remaining habitat enhancement and endowment fees allocated to the unsold credits.

- c. Upon documentary evidence of sale of habitat compensation credits and deposit of cash fees for habitat enhancement and endowment, [Permittee] may request that the Service[s] [if applicable] and/or SDFG [if applicable], as the beneficiary of the Letter of Credit, join with [Permittee] to request from the issuer an equitable reduction of the Principal Sum of the Letter of Credit. However, the Principal Sum of the Letter of Credit shall not be reduced below an amount determined by the Service[s] [if applicable] and/or SDFG [if applicable] to be reasonably necessary to cure any potential future default by [Permittee].