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PARTNERSHIPS FOR RESTORATION:
Safe Harbors/Assurances to Implement the CALFED Bay-Delta Program

SUMMARY

Today, the federal agencies participating in the CALFED Bay-Delta Program (the "Federal Agencies") announce a Safe Harbors/Assurances Program (the "Program") that is intended to encourage voluntary participation by landowners, local agencies, and other private interests ("Local Participants") in the effort to restore the environment in and upstream of the San Francisco Bay-Sacramento/San Joaquin River Delta Estuary (the "Bay-Delta Estuary") in California. The type of regional solution to problems facing the Bay-Delta Estuary exemplified in the Program provides incentives to Local Participants in and upstream of the Bay-Delta Estuary (in areas identified as the CALFED Solution Area) to restore, enhance, or maintain habitat for listed or candidate species on private lands by protecting Local Participants' (and their neighbors') privacy and property rights. In this way, the Program uses the opportunities created by the CALFED Bay-Delta Program's focus on resolving California's water problems to create an innovative approach to resolving the problems facing California's endangered species, thus effectuating the intent of Congress. 16 U.S.C. § 1531(c)(2).

The voluntary and enthusiastic collaboration by Local Participants in ecosystem restoration efforts is of critical importance to the success of the CALFED Bay-Delta Program. Much of the habitat for listed and candidate species in the CALFED Solution Area is found on private lands; accordingly, the Federal Agencies believe that the active participation of the Local Participants is essential if the CALFED Bay-Delta Program is to be able to achieve its ecosystem restoration goals. Comments received on the CALFED Bay-Delta Program's Revised Draft Programmatic Environmental Impact Statement/Environmental Impact Report (EIS/EIR) and through the Bay-Delta Advisory Committee process indicate that many Local Participants in the CALFED Solution Area are willing voluntarily to participate in ecosystem restoration efforts. These Local Participants, however, will only participate in ecosystem restoration efforts on condition that they and their neighbors receive certain assurances regarding the manner in which the Federal Agencies will implement the federal Endangered Species Act and other applicable laws. The Program is intended to provide the needed assurances to encourage such voluntary participation in ecosystem restoration efforts.

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The Program envisions that the Federal Agencies and a Local Participant will enter into an agreement under which the Local Participant will take specified actions to contribute to the restoration of the Bay-Delta ecosystem that further the Federal Agencies' conservation goals. The agreement will provide the Local Participant with assurances that: (i) describe the manner in which the Federal Agencies will implement applicable law, (ii) protect Local Participants' privacy interests, (iii) preserve Local Participants' property rights, and (iv) protect the privacy, property rights, and ability to farm of Local Participants' neighbors.

The Program is an unprecedented public/private partnership to achieve the restoration of the ecosystem in the CALFED Solution Area in a manner that benefits Local Participants. In this way, the Program refutes the common myth that ecosystem protection and restoration must come at the expense of the rights of Local Participants or economic development (or vice-versa). The Program both will encourage the restoration of thousands of acres of habitat in the CALFED Solution Area and will encourage farming, ranching, and other economically productive activities by providing regulatory certainty to Local Participants.

SUPPLEMENTARY INFORMATION

Background

The Bay-Delta Estuary is an intricate web of waterways located at the junction of San Francisco Bay and the Sacramento and San Joaquin Rivers in northern California. The Bay-Delta Estuary is the largest estuary on the west coast of North America and serves as an important component of the Pacific Flyway, providing habitat for hundreds of fish and wildlife species. The Bay-Delta Estuary is also the location of the two major water projects that provide water for hundreds of thousands of acres of irrigated farmland in the San Joaquin Valley and over 20 million people in southern California.

Populations of indicator aquatic species that reside in the Bay-Delta Estuary or that migrate through the Bay-Delta Estuary have declined substantially from abundance levels found in the 1960's. In response to these declining populations, the National Marine Fisheries Service (NMFS) listed the winter-run chinook salmon as threatened under the Endangered Species Act in 1990; the U.S. Fish & Wildlife Service (USFWS) listed the delta smelt as endangered in 1993. Since that time an additional __ species that rely upon the Bay-Delta Estuary or areas upstream of the Estuary have been listed under the federal and California endangered species acts.

In order to address the continuing decline of fish and wildlife populations, the United States and the State of California established the CALFED Bay-Delta Program in 1994. The CALFED Bay-Delta restoration effort is the largest such effort in the United States and, quite possibly, in human history. The purpose of the CALFED Bay-Delta Program is to reduce conflicts related to

the use of the Bay-Delta Estuary by simultaneously addressing issues relating to ecosystem restoration, water quality, water supply reliability, and levee system integrity. In achieving these goals, the CALFED Bay-Delta Program has committed itself to the important equitable principle of "no redirected impacts"; in other words, the CALFED Bay-Delta Program will not resolve problems in one geographic area by creating new problems in another area.

On June 9, 2000, the United States and the State of California issued: "California's Water Future: A Framework for Action," which describes the manner in which implementation of the CALFED Bay-Delta Program will proceed. The Framework for Action promises that the CALFED Bay-Delta Program will first look to public lands as the locus of conservation activities. The Framework for Action also recognizes that where public land is not available, mutually beneficial partnerships with Local Participants must be pursued in order to achieve the CALFED Bay-Delta Program's ecosystem restoration goals. The Program is intended to implement this concept and so develop partnerships not only between state and federal agencies, but also among those agencies and Local Participants. The Federal Agencies believe that only by the creation of such manifold partnerships can the CALFED Bay-Delta Program succeed, as intended by Congress, the California Legislature, and the state and federal Administrations.

The CALFED Bay-Delta Program issued a Final Programmatic Environmental Impact Statement/Report on _____, 2000 and the Federal Agencies issued a Record of Decision adopting the proposed implementation plan on _____, 2000.

Conservation Strategy

The "Framework for Action" issued by the United States and the State of California on June 9, 2000 recognizes that conservation efforts within the CALFED Solution Area should begin with public lands and should develop Conservation Projects on those lands whenever practicable. Such multiple-purpose use of federal land simply represents sound stewardship of public resources and maintains the economic benefits accruing to the Nation from private lands while providing the benefits of ecosystem restoration.

In many cases, though, the "Framework for Action" recognizes that ecosystem restoration actions will need to proceed on private lands. Much of the current and potential habitat for listed or candidate species in the Bay-Delta Estuary and the CALFED Solution Area is in private ownership. Moreover, much of the public land that contains current and potential habitat is adjacent to privately-owned land, and the cooperation of neighboring landowners is important to the success of a conservation program. For these reasons, it is critical that the CALFED Bay-Delta Program's conservation strategy develop measures that encourage Local Participants to develop partnerships with the CALFED Bay-Delta Program and become actively involved in the conservation of listed or candidate species. Such partnerships between the Federal Agencies and Local Participants can provide greater flexibility in implementing conservation measures and can tailor those measures more closely to the needs of Local Participants, their neighbors, and listed

species alike. Further, because the science of ecosystem restoration is still in its early stages, a variety of approaches to ecosystem restoration when combined with the analysis of results from these approaches can provide useful information in evaluating the most cost-effective means to restore ecosystems while not adversely affecting farming, ranching, or other activities. This concept, called "adaptive management" is central to the implementation of the CALFED Bay-Delta Program and it also occupies a central place in the implementation of the Program.

Many Local Participants are willing voluntarily to manage their property or activities to provide benefits to fish and wildlife species, provided that their willingness to provide these benefits is not used against them by federal or state agencies. Local Participants are fearful that, if they cooperate with state or federal agencies in undertaking ecosystem restoration activities, those state or federal agencies will impose significant new restrictions on their farming, ranching, irrigation, flood control, or other activities. Because of these fears, many potential Local Participants refuse to collaborate with the Federal Agencies in undertaking ecosystem restoration activities. The ultimate result is less habitat for fish and wildlife and a less-than-satisfactory implementation of the federal Endangered Species Act.

The Federal Agencies view the assurances contained in the Program as critical to overcoming the distrust and fear among Local Participants that involvement with ecosystem restoration activities sponsored and encouraged by the Federal Agencies necessarily means the destruction of Local Participants' current way of life. As acknowledged in the 1999 *Partners for Stewardship* report, "restoration requires partnerships which acknowledge that the fate of a watershed involves all of the people who live in it and benefit from it and share responsibility in deciding its future." In that report, the Department of the Interior recognized that the "key to this partnership approach" is the use of "flexible mechanisms to restore wildlife and habitat without destroying American livelihoods or stifling prosperity." Through this Program, the Federal Agencies seek to meet both of these goals by harnessing the energy, initiative, and resources of Local Participants to join with the state and federal governments to restore the many ecosystems found in the CALFED Solution Area.

Because the Program will bring the energy, initiative, and resources of Local Participants to bear in support of ecosystem restoration, the Federal Agencies believe that a collaborative approach to ecosystem restoration and the conservation of listed and candidate species that provides legal assurances to Local Participants and that enlists Local Participants as partners for good stewardship of our natural resources represents the most cost-effective approach to achieving the goals established by Congress in enacting the federal Endangered Species Act. This approach represents a positive step towards fulfilling the promise of the Endangered Species Act that: "encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants. 16 U.S.C. § 1531(a)(5). Further, this approach – and, indeed, the entire CALFED Bay-Delta

Program – fulfills Congress' direction that the Secretary of the Interior shall cooperate with states "to the maximum extent practicable." 16 U.S.C. § 1535. The Program's approach is consistent with the Safe Harbor Policy issued on June 17, 1999 by NMFS and USFWS. 64 Fed. Reg. 32706 (June 17, 1999). This approach also is consistent with the CALFED Bay-Delta Program's Ecosystem Restoration Program Plan and represents an expansion and elaboration on the Multi-Species Conservation Strategy that was described in the Revised Programmatic EIS/EIR.

Proposed Regulations

Part A: General Provisions

1. Purpose. The purpose of these regulations is to implement the provisions of the Endangered Species Act of 1973 (including the Safe Harbors Policy issued on June 17, 1999), the Migratory Bird Treaty Act of 1918, Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Federal Water Pollution Control Act, the National Environmental Policy Act of 1969, and other applicable law by promising parties who voluntarily engage in conservation activities under the terms of an Implementing Agreement that the Federal Government will not interfere with their Routine and Ongoing Agricultural Activities, irrigation, flood control or other activities and practices. The Program is to be liberally interpreted to avoid any interference by the Federal Government with the activities and practices of Local Participants or their neighbors, either before or after the execution of an Implementing Agreement.

2. Authority. This Program is promulgated by the Federal Agencies under the authority of the Endangered Species Act of 1973, the Migratory Bird Treaty Act of 1918, Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Federal Water Pollution Control Act, the National Environmental Policy Act of 1969, and other applicable law.

3. Definitions.

    1. Advisory Committee. The advisory committee chartered under the Federal Advisory Committee Act and described in section 5(b) below.

    2. CALFED Solution Area. The geographical area defined as the CALFED Solution Area by the CALFED Bay-Delta Program Draft Programmatic EIS/EIR § 1.3, at 1-10 to 1-13.

    3. Conservation Project. A voluntary action by a Local Participant under the auspices of the Program, taken in exchange for assurances from the Federal Agencies that protect the privacy and property rights of the Local Participant, that:

(i) restores, enhances, or maintains habitat for listed or candidate species in the CALFED Solution Area; (ii) implements provisions of the CALFED Ecosystem Restoration Program Plan, as it may be amended from time to time; or (iii) otherwise has a beneficial effect on the survival or recovery of one or more species listed as "candidate," "threatened," or "endangered" under the terms of the federal Endangered Species Act (e.g., the consolidation of water diversions for the purpose of constructing a fish screen, mitigation banking, or changes in levee maintenance practices). The terms of such activities and assurances will be memorialized in an Implementing Agreement and shall be consistent with these regulations.

4. Federal Agencies. All federal agencies participating in any way in the CALFED Bay-Delta Program including, but not limited to, the Departments of Agriculture, Commerce, Defense, and Interior; the Environmental Protection Agency; and the Western Area Power Administration.

5. Framework Commission. The Commission which succeeds to the governance of the CALFED Bay-Delta Program, as described in the document "California's Water Future: A Framework for Action" dated June 9, 2000.

6. Implementing Agreement. A voluntary agreement between one or more Local Participant(s), the Federal Agencies, and/or the State of California to implement a Conservation Project under the auspices of the Program. An Implementing Agreement may be programmatic in nature and contemplate sub-agreements between the signatory Local Participant(s) and other individuals, public agencies, or private entities. Programmatic Implementing Agreements (for instance, between the Federal Agencies, the State of California, and one or more water districts) are encouraged. Sub-agreements shall not be inconsistent with the terms of the applicable programmatic Implementing Agreement. All Implementing Agreements shall be consistent with the provisions of these regulations.

7. Local Participant. A Local Participant may include, but is not limited to, any of the following:

    1. Landowners (or their tenants) who: (i) allow Conservation Projects on lands that they own, lease, or serve; (ii) own, lease or serve lands that are within a reasonable radius (depending on species) of the location of a Conservation Project; or (iii) own, lease, or serve lands within a watershed for which one or more Federal Agencies are implementing a Conservation Project.

2. Local public agencies (including, but not limited to counties, cities, and special districts) with Conservation Projects located within their boundaries or located where activities connected with a Conservation Project could affect the operations of the local public agencies.

3. Mutual water companies, private individuals, or other private organizations that might wish to participate in Conservation Projects or whose activities might be affected by the implementation of Conservation Projects.

8. Program. The Partnerships for Restoration program described in these regulations.

9. Routine and Ongoing Agricultural Activities. Routine and Ongoing Agricultural Activities are all activities or practices undertaken on a farm or ranch for the purpose of producing or marketing any plant or animal product for commercial purposes. These activities include those uses recognized as compatible uses pursuant to the Williamson Act (California Government Code sections 512000 et seq.) provided the activities are consistent with the economics of agricultural operations. Routine and Ongoing Agricultural Activities do not include conversion of agricultural land to a nonagricultural use or timber harvesting activities governed by the California State Board of Forestry.

4. Application of Assurances. The assurances described in Part B of these regulations apply to all Local Participants.

5. Implementation Program.

1. Implementing Agreements. The Program will be implemented by a series of Implementing Agreements. All proposed Implementing Agreements will be subject to review by the advisory committee described below.

2. Advisory Committee. In order to facilitate implementation of the Program, the Federal Agencies will establish an advisory committee (the "Advisory Committee") chartered under the auspices of the Federal Advisory Committee Act that is composed of representatives of local public agencies, water suppliers, landowners, local watershed groups, and other interested parties. The members of this advisory committee shall be appointed by the county boards of supervisors in the CALFED Solution Area, with each county being eligible to make one appointment from among qualified individuals. This committee shall look to local bodies for advice and recommendations, including, for example, those established under California's S.B. 1086 or the Delta Protection Commission.

The Advisory Committee shall prepare a biennial report to the Secretary of the Interior and the California Secretary of Resources describing any recommendations for changes in the manner in which the Program is being implemented. The Framework Commission will provide staff to the Advisory Committee.

3. Streamlined Permitting. Within one year from the date on which final regulations implementing the Program are issued, the Federal Agencies shall, after consulting with the Advisory Committee, design and implement a consolidated permit review program that will enable Local Participants to obtain all Federal permits necessary to implement a Conservation Project. To the extent practicable, the Federal Agencies shall coordinate this permit review program with State and local permitting agencies to create a "one-stop shop" for all permits needed to implement a Conservation Project. This "one-stop shop" permitting program shall minimize delay and increase certainty for Local Participants and shall be designed to be as "user-friendly" as possible. Local Participants shall only need to submit a single permit for each Implementing Agreement. The Federal Agencies shall establish procedures to facilitate simultaneous review of a permit application by multiple agencies under multiple regulatory schemes. The terms of all permits issued under the auspices of the Program shall be coordinated so as to preclude any inconsistencies, shall be consistent with these regulations, and shall be consistent with the terms of the proposed Implementing Agreement. The Federal Agencies shall also develop standard permits to address repetitive situations (e.g., repair of water diversion works after storm damage). Permit review and processing shall be governed by the following schedule:

   1. Within 30 calendar days after the Federal Agencies receive an application for the permit(s) needed for the implementation of a Conservation Project, the Federal Agencies shall determine, in writing, whether the application is complete and shall immediately transmit that determination to the Local Participant. If a written determination is not made within 30 days after receipt of the application, the application shall be deemed complete and the permit(s) applied for shall be automatically granted.

   2. If, within 30 calendar days of the submittal of the permit application, one or more Federal Agencies determines that additional information is needed to complete the application, that agency will immediately notify the Local Participant in writing of specifically what additional information is needed to complete the application. The Federal Agencies shall use all reasonable efforts to minimize the amount and detail of the information needed to complete a permit application. In no case shall any federal agency require the Local Participant to submit information beyond the specific

information required by section (6)(c) of this Program. In no case shall any federal agency require the Local Participant to prepare an application which exceeds the level of detail necessary for a categorical exclusion under the National Environmental Policy Act. 40 C.F.R. § 1508.4. A Local Participant may protest the need for requested information and the burden shall be upon the Federal Agency(ies) requesting the information to prove a compelling need for the requested information.

3. In the event that federal law provides for public notice and comment on permit applications, the Federal Agencies shall require any person or entity who requests an opportunity to review and comment on a permit application to submit such comments within 30 calendar days of the date the application is determined to be complete. The permitting Federal Agency(ies) shall approve or deny a permit within 15 calendar days after the close of this comment period.

4. In the event that one or more Federal Agencies deny a permit for the implementation of a Conservation Project, the Federal Agency(ies) shall have the burden of proving, by a preponderance of the evidence, that such denial is warranted.

4. Voluntary Participation by Local Participants. Participation in the Program shall be strictly voluntary. Local Participants who execute an Implementing Agreement may withdraw at any time and shall not suffer any penalty or disincentive for withdrawing from the Program. Local Participants shall not be required to mitigate for the effects of their withdrawal from the Program or be deemed to have taken a member of a listed species, as defined in the federal Endangered Species Act, as a result of their withdrawal from the Program.

5. Net Conservation Benefit. Implementation of the Program shall be based on the concept of a net conservation benefit. The Program is based on encouraging potential Local Participants to join with the Federal Agencies to modify practices so as to improve conditions for candidate, threatened or endangered species. In order to provide an incentive for Local Participants to engage in Conservation Projects, Local Participants shall not be subject to minimization and/or mitigation requirements used to implement the federal Endangered Species Act for any of their activities and practices as long as a Conservation Project, when considered in conjunction with the Local Participant's other activities and practices, provides a net conservation benefit to one or more species.

6. Environmental Review. Based on the vision and principles established in the historic 1994 Bay-Delta Accord, the United States and the State of California

have painstakingly crafted a consensus solution to the problems of the Bay-Delta Estuary. This solution has been carefully designed to benefit a variety of interests which are often perceived as mutually exclusive. Ecosystem restoration plays an integral role within this balanced approach to addressing Bay-Delta issues.

The Federal Agencies reviewed the programmatic and cumulative impacts of implementing large-scale ecosystem restoration activities in the CALFED Solution Area in the Revised Programmatic EIS/EIR for the Ecosystem Restoration Program Plan (the "ERPP"). The ERPP expresses, in elaborate detail, the Federal Agencies' vision for ecosystem restoration within the CALFED Solution Area. The ERPP has been subjected to an unprecedented level of public scrutiny and agency review as part of the Revised Programmatic IS/EIR. That review reveals that the palette of ecosystem restoration activities envisioned in the ERPP will significantly increase the quality of habitat available to listed and candidate species within the CALFED Solution Area by increasing habitat contiguity, increasing total habitat area, and otherwise maintaining, restoring, or enhancing those ecosystem features that contribute to the conservation of these species.

In enacting the National Environmental Policy Act, Congress sought to preserve the environment by requiring federal agencies to: (i) consider the environmental effects of their decisions and (ii) inform the public of the potential environmental effects of an action. As described above, the Federal Agencies and a large number of public and private stakeholders have considered the effects on the environment of the implementation of ecosystem restoration projects in the CALFED Solution Area. Under these circumstances, no further environmental review of individual Conservation Projects (or Implementing Agreements associated with those projects) is required in order to comply with the National Environmental Policy Act. Similarly, no further consultation is required under the provisions of the Endangered Species Act for the development and implementation of this Program (including, without limitation, execution of Implementing Agreements).

7. Parallel California Regulations. These regulations implement federal law and provide assurances under the regulatory authority of federal agencies. Simultaneous with the issuance of these regulations, the State of California intends to issue parallel regulations that will govern California agencies under California law.

8. Contingency Fund. Subject to the availability of appropriations, the Federal Agencies shall, within the first five years of implementation of the Program, allocate sufficient resources to a self-insurance fund (the "Contingency Fund") to

finance one-half (½) of expected losses, if any, that may occur, in whole or in part, as a result of the activities authorized by this Program. Examples of such losses could include damage to levees or fish screens as a result of Conservation Projects along the Sacramento River or the types of liability identified in section 6(f) below. The remainder of the Contingency Fund will be funded by the State of California. Losses entirely attributable to intentional wrongdoing or gross negligence on the part of a Local Participant or third parties are excluded from coverage. The Framework Commission will act as manager and trustee of the Contingency Fund.

9. Ombudsperson/Grievance Procedure. The Federal Agencies shall establish and fill the office of Ombudsperson within three months of the commencement of the Program in order to provide impartial oversight of the day-to-day implementation of the Program. The Ombudsperson shall have substantial experience as a landowner or as a representative of local public agencies, water suppliers, or local watershed groups. Prior to appointing the Ombudsperson, the Federal Agencies shall consult with the Advisory Committee regarding potential appointees. Any Local Participant (or potential Local Participant) who believes that a Federal Agency has acted in a manner inconsistent with the intent of this Program may file a complaint with the Ombudsperson, which complaint shall be the subject of a written determination by the Ombudsperson within sixty days of the date of the complaint. The Ombudsperson shall be entitled to hire and fire staff and the operation of the office of the Ombudsperson shall be funded by the Framework Commission.

Part B Assurances Program

6. General Assurances to Local Participants.

1. Costs of Participation. All incremental costs to Local Participants related to participation in this Program shall be borne by the CALFED agencies. Incremental costs include, without limitation, all costs associated with implementing a Conservation Project.

2. Private Property Rights. All parties will fully respect private property rights of Local Participants, as well as neighbors of Local Participants. Agency personnel will not enter upon private lands without the express permission of the landowner or manager, save in cases of bona fide emergencies.

3. Right to Privacy/Information Collection. A Local Participant shall inform the CALFED Agencies of the Local Participant's habitat restoration goal prior to embarking on a habitat restoration effort. The Local Participant shall provide the

CALFED agencies with information specifying: (i) the number of acres of habitat that will be created, maintained, or restored; and (ii) the type or types of habitat that will be created, maintained, or restored. No further information shall be required for participation in the Program. In particular, Local Participants shall not be required to provide baseline data for lands other than those that will be the subject of habitat restoration efforts. A Local Participant shall collect sufficient data in order to verify the success of the Local Participant's habitat restoration efforts, which data shall be subject to inspection during reasonable business hours by Agency personnel. Verification of results shall occur in the manner that is least intrusive to the Local Participant. A Local Participant may undertake self-reporting of progress, may retain his/her own biologists to perform such work, may permit agency personnel to conduct monitoring or site-specific surveys, or may work with the agencies to develop a reasonable monitoring program or site-specific surveys.

4. Ongoing Right to Farm/Ranch.

   1. General. Nothing in the Program shall be understood to prevent Local Participants and neighboring landowners from modifying their cultural practices (including changing cropping patterns) freely, as long as they are engaged in Routine and Ongoing Agricultural Activities. In the case of disputes regarding whether a landowner is engaged in such practices, the Program will be guided by the consensus of a panel of experts composed of technical personnel from the U.C. Cooperative Extension, the California Farm Bureau, the California Farm Service Agency, Natural Resources Conservation Service, and the local Farm Bureau.

   2. No Criminal or Civil Penalties. The United States and the State of California will not seek criminal or civil remedies against Local Participants (or their neighbors) for Routine and Ongoing Agricultural Activities, for activities and practices that are authorized by the Program, or for Local Participants' routine and ongoing activities and practices, even if those activities and practices result in the take of a member of a listed species.

5. Incidental Take Authorization. Local Participants (and their neighbors) are hereby authorized to engage in the incidental take of listed species under the federal Endangered Species Act, provided that the take is the result of Routine and Ongoing Agricultural Activities or the result of inadvertent or ordinary negligent acts that occur on a farm or ranch in the course of Routine and Ongoing Agricultural Activities. In the case of other Local Participants (or their

neighbors), incidental take authority will extend to the routine and ongoing activities and practices of that agency, individual, or company.

6. Liability Protection. The United States and the State of California will fully indemnify, defend, and hold Local Participants and their neighbors harmless for any losses that may occur as a result of a Local Participant implementing Conservation Projects. Included within this liability protection is any liability that may accrue to Local Participant or their neighbors, including local flood control, levee maintenance, or water supply agencies, due to: (1) recreational activities (e.g., injuries to waterskiers or due to jet skis) made possible by Program activities; (2) impacts on channel capacity or channel roughness associated with streambank restoration; (3) damage to fish screens during storm events and related to restoration activities; and (4) erosion due to plantings.

7. In-Lieu Fees. The Federal Agencies recognize that local governments depend upon property taxes, special assessments, property fees, water charges, and other similar financing mechanisms to provide operating revenues. In connection with any lands that are acquired for restoration purposes, CALFED and its member agencies agree to pay in-lieu fees to local public agencies (including cities, counties and special districts) that are equal to the payments made by the private landowner prior to public acquisition.

7. General Assurances to Federal Agencies. In implementing the Program, and consistent with the assurances provided in sections 6(d), 8(a) and 8(b), Local Participants will not interfere with restoration activities on their lands, on neighboring lands, or on lands within their jurisdiction. Landowners will, to the extent reasonably practicable and consistent with other use(s) of their property, facilitate restoration activities on their lands. Local public agencies and other private interests will, to the extent reasonably practicable and consistent with their other activities and practices, facilitate restoration activities on lands within their jurisdiction.

8. Assurances for Specified Circumstances

1. Assurance to Encourage Flood Management. This special assurance applies to: (i) local flood control districts (reclamation districts, levee districts, special act districts, and others) that operate and maintain flood control works; and (ii) the State of California when it undertakes to operate or maintain levees in the Central Valley or elsewhere in the CALFED Solution Area. Local public agencies charged with responsibility for flood protection (or the State of California) will be able to engage in all activities they believe to be reasonably necessary for the proper operation and maintenance of flood control facilities and so fulfill their responsibilities to protect public safety. These local public agencies will be

eligible for long-term permits under the Program that recognize their longevity and important contributions to public safety. In particular, the Federal Agencies will exercise the authority granted the U.S. Army Corps of Engineers under Public Law 84-99 to ensure that all flood control works damaged by storm events are restored or rehabilitated to a flood protection level equivalent to the standard that would be required if those works were to be constructed today.

2. Assurances for Fish Screens. These special assurances apply to water diverters who might install fish screens to protect listed species in the Central Valley and elsewhere in the CALFED Solution Area.

   1. No Change in Diversions. Diverters participating in the Program will not be required to change the magnitude, location or timing of diversions. The construction of a fish screen shall be accomplished in the manner that minimizes impacts on the diverter. CALFED will, if necessary, construct temporary diversion works to permit undiminished diversions during construction of a fish screen.

   2. No Surprises. In the event that changes may be required in the fish screen after construction due to new listed species or new information about covered species, the diverter shall be protected from being required to make any changes to the fish screen under the "no surprises" policy. 63 Fed. Reg. 8859 (February 23, 1998).

   3. Agreement to Screen Diversions. At such time as CALFED deems appropriate, CALFED will undertake to screen the diversion at its own cost.

   4. Participation in Screening. Diverters will, to the extent reasonably practicable and consistent with their other activities, facilitate screening activities on lands within their service area or boundaries.