

IMPLEMENTING AGREEMENT

by and between

**SAN LUIS OBISPO FLOOD CONTROL
AND WATER CONSERVATION DISTRICT ZONE 3,**

**THE U.S. FISH AND WILDLIFE SERVICE and
THE NATIONAL MARINE FISHERIES SERVICE,**

and

THE CALIFORNIA DEPARTMENT OF FISH AND GAME

**TO ESTABLISH A MITIGATION PROGRAM FOR
STEELHEAD AND CALIFORNIA RED-LEGGED FROGS AND
THEIR ASSOCIATED HABITATS
AT ARROYO GRANDE CREEK,
DOWNSTREAM OF LOPEZ DAM OF THE LOPEZ PROJECT,
SAN LUIS OBISPO COUNTY, CALIFORNIA.**

This Implementing Agreement (“Agreement”), made and entered into as of the ____ day of _____, 2004, by and among SAN LUIS OBISPO FLOOD CONTROL AND WATER CONSERVATION DISTRICT ZONE 3 (“the District”), the UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”) and the NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, FISHERIES SERVICE (“NOAAF”) (collectively, “the Services”), and the CALIFORNIA DEPARTMENT OF FISH AND GAME (“DFG”), 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 species and their associated habitats at Arroyo Grande Creek, downstream of Lopez Dam, in San Luis Obispo County, California.

1.0 RECITALS

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

WHEREAS, the operation of the Lopez Project, as described in Section 1.0 of the “Arroyo Grande Habitat Conservation Plan (HCP) and Environmental Assessment/ Initial Study (EA/IS) For the Protection of Steelhead and California Red-Legged Frogs” (“the HCP”), has been determined to affect the quality and availability of habitat in Arroyo Grande Creek downstream of Lopez Dam, for the federally-listed anadromous steelhead (*Oncorhynchus mykiss*) and California red-legged frogs (*Rana aurora draytonii*); and,

WHEREAS, neither steelhead nor California red-legged frogs are currently listed for protection under the California Endangered Species Act, but are identified as species of special concern and may be listed by the DFG in the future; and,

WHEREAS, because of the overlap and concurrent jurisdiction of the Services and the

DFG over the subject species, the District lacks assurances that compliance with requirements imposed by any one of the regulatory agencies will be timely and will satisfy requirements that may be imposed by any other agency; and,

WHEREAS, the District seeks assurances from the Services and the DFG that, as long as the terms of the HCP and any incidental take permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional conservation and mitigation measures will be required except as provided for in this Agreement or as may be required by law; and,

WHEREAS, the District has developed a series of measures described in the HCP, to minimize and mitigate the effects of the operation of the Lopez Project upon the subject 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,” or “Permits,” shall mean such incidental take permit(s) respectively issued by the Services to the District pursuant to Section 10(a)(1)(B) of the Endangered Species Act (“ESA”), and by DFG pursuant to Section 2081 of the California Endangered Species Act (“CESA”).
- 2.2** The term “Permit Area” shall mean the approximately 13-mile reach of Arroyo Grande Creek downstream from Lopez Dam to its confluence with the Pacific Ocean, in San Luis Obispo County, California; including the riparian lands along Arroyo Grande Creek that support ecological processes associated with habitat for the subject steelhead and red-legged frogs, and that have been designated as critical habitat by NOAAF for steelhead and by FWS for California red-legged frogs in the Arroyo Grande Creek watershed. The Permit Area is depicted in Figure 1-1 of the HCP.
- 2.3** The term “Permittee” shall mean the District.
- 2.4** The term “Conservation Plan” shall mean the HCP prepared in connection with the proposed (preferred) action described at Section 4.0 of the HCP.
- 2.5** The term “Plan Species” shall mean the species adequately covered in the HCP and identified in Section 1.0 of this Agreement. The term “adequately covered,” as used herein, is defined by 50 CFR § 17.3 (2003) to mean, “with respect to species listed pursuant to Section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under Section 10(a)(2)(B) of the ESA for the species covered by the plan, and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under Section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species covered by the plan were actually listed.”
- 2.6** [Intentionally omitted.]
- 2.7** The term “unforeseen circumstances” means any significant, unanticipated adverse change in the status of the Plan Species 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 FWS “No Surprises” policy.

3.0 HABITAT CONSERVATION PLAN

Pursuant to the provisions of Section 10(a)(1)(B) of the ESA and Section 2081 of the CESA, the Permittee has prepared a HCP and submitted it to the Services and DFG, with a request that the Services and DFG respectively issue a Permit to allow the Plan Species to be incidentally taken within the Permit Area as depicted and described in Figure 1-1 of the HCP. The HCP proposes a mitigation program for the 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 Services and DFG to respectively issue Permits to the District, 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 (with respect to a Permit issued by the Services) and the Plan Species’ capability to survive and reproduce (with respect to a Permit issued by DFG).

6.0 COOPERATIVE EFFORT

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, State and County agencies to mitigate the effects of the Lopez Project operations on the Plan Species.

7.0 TERMS USED

Terms defined and utilized in the HCP, the ESA and the CESA 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 further the conservation of the Plan Species and their associated habitats

during implementation of the HCP;

- 8.3 To contractually bind each Party to fulfill and faithfully perform the obligations, responsibilities, and tasks assigned to it under the terms of the HCP and this Agreement;
- 8.4 To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,
- 8.5 As stated in Paragraph 12.3.a. hereof, to provide assurances to the Permittee 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 conservation and mitigation measures will be required except as provided for in this Agreement or as may be required by subsequently enacted statute.

9.0 **TERM**

- 9. **Stated Term.** This Agreement shall become effective on the date that the Services and the DFG issue the Permits requested in the HCP and shall remain in full force and effect for a period of 20 years, or until termination of the Permit, whichever occurs sooner. **The 20-year permit period will not begin until final approval of the HCP and issuance of the Permits.**

10.0 **FUNDING**

- 10.1 The Permittee will provide direct funding, or equivalent in-kind services, for habitat improvement under the HCP, in accordance with Section 7.0 of the HCP. The Permittee should notify the Services and the DFG if the Permittee's funding resources have materially changed, including a discussion of the nature of the change, from the information provided in Section 7.0 of the HCP.
- 10.2 The Permittee shall further ensure that funding is available to meet its obligations under this Agreement, the Permits and the HCP, through designated accounts described in Sections 7.1 (Monitoring Account), 7.2 (Conservation Account), and 7.3 (Changed Circumstances Account) of the HCP. The designated accounts shall be solely designated for their respective purposes, and shall be in the amounts specified in HCP, and shall be maintained for the 20-year duration of the HCP.
 - a. **Monitoring Account.** The District will commit \$50,000 per year, or the equivalent value of in-kind services, over the 20-year duration of the HCP, for monitoring and performance evaluation in Arroyo Grande Creek. The HCP monitoring will be reviewed on an annual basis by the Technical Committee, as described in Section 6.3.2 of the HCP, consisting of representatives from FWS, NOAAF (Southwest Region), DFG, and the District ("the Technical Committee"), and summarized in annual monitoring reports for use in evaluating priorities and refinements in the program.
 - b. **Conservation Account.** Conservation Account funds will be placed in an interest-bearing account specifically designated for implementation of the HCP. Cumulative total financial commitment by the District to the Conservation Account will not exceed \$1,000,000. Funds allocated to the Conservation Account by the District will be \$50,000 per year for 20

years, less the value of the District's in-kind services. The Technical Committee will identify and evaluate protective measures and habitat enhancement as part of the HCP. The Technical Committee shall consider biological benefits of the proposed action relative to its costs. Priority shall be given to activities producing the greatest net positive environmental benefit for available funding from the local cost-share allocated by the District, in combination with funding augmentation through State and/or Federal sources. Technical Committee members will help develop grant applications and proposals and provide letters of support to assist the District in securing additional funding for activities conducted under the HCP. Any grant funds will be used to augment the District's financial commitment to the HCP and will not reduce or modify responsibility of the District to the actions outlined in the HCP. The Conservation Account principal of \$1,000,000 and all interest accrued by the account will be available for allocation to conservation measures under the HCP. If funds are not fully appropriated for conservation measures at completion of the 20-year HCP period, the funds will be allocated toward future conservation projects by consent of the parties, or the HCP will be amended to extend the termination date. The cost for operation and maintenance of habitat improvements implemented under the HCP shall be part of the allocation of funds from the Conservation Account.

- c. Changed Circumstances Account. The funding obligation for changed circumstances, as described in Section 7.3 of the HCP, shall be limited to a maximum \$100,000 per event. If money is allocated from the account to address changed circumstances adversely affecting the biological performance of the HCP, the District will replenish the revolving Changed Circumstances Account to the \$100,000 limit. The \$100,000 Changed Circumstances Account will be maintained throughout the duration of the HCP. At completion of the HCP period, the principal and all accrued interest from the Changed Circumstances Account will revert to the District. Cost for repairs to Lopez dam or any element of the HCP resulting from catastrophic damage exceeding the \$100,000 limit are considered unforeseen circumstances, as discussed in Section 8 of the HCP.

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.
- c. As set forth in Section 6.3 of the HCP, the HCP uses adaptive management to account for new information from biological monitoring conducted under the HCP and information collected in the region by other investigators. The adaptive management strategy includes priorities and

program adjustments to respond to new information on risk of adverse effects on the Plan Species, uncertainty, and alternative methods to avoid, minimize, or mitigate adverse effects on the Plan Species. A Technical Committee, as described in Section 6.3.2 of the HCP, consisting of representatives from FWS, NOAAF (Southwest Region), DFG, and the District, will provide scientific guidance in evaluating, monitoring, reviewing and revising priorities, identifying actions to protect the Plan Species, and improve and enhance habitat conditions in Arroyo Grande Creek and the adjacent watershed, and provide recommendations to the District regarding funding of management actions under the HCP.

- d. The Permittee shall prepare and submit an annual report documenting the annual review and recommendations by the Technical Committee on funding priorities and allocations from the designated accounts described in Paragraph 10 above, and the current status of account contributions and expenditures. The annual report will be submitted to each participating State and Federal resource agency, and will include biological monitoring results obtained as part of the HCP and relevant results from other organizations describing changes in population abundance or geographic distribution of the Plan Species, or other scientific information relevant to adaptive management of the HCP; a summary of key issues, conclusions, and recommendations of the Technical Committee on funding allocations, including discussion of agreement and disagreement on funding priorities among Technical Committee members; status of design, construction, and performance monitoring of projects implemented under the HCP; recommended modifications or refinements to the HCP based on performance monitoring, compliance with operational criteria, incidental take, or changed and unforeseen circumstances; a summary of District contributions to the HCP account and expenditures including allocations for approved projects, services-in-kind, commitments, and expenditures of grant funds secured from cost-sharing programs, and annual and cumulative contributions and expenditures; and a status report on grant applications and proposals for funding augmentation.

The Permittee will distribute the final annual report to State and Federal agencies, and other interested parties, by March 15 of each year.

- e. Environmental Review. Operation of the Lopez Project in accordance with the proposed (preferred) action as described in Section 4 of the HCP is an action subject to CEQA review. The District has completed in an Initial Study addressing the proposed (preferred) action pursuant to CEQA guidelines, that accompanies the HCP.

11.2 Responsibilities of the Services.

- a. The Services shall cooperate and provide, to the extent funding is available, technical assistance to the Permittee and other assistance as may otherwise be necessary to assist the Permittee in undertaking all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit as set forth below. Nothing in this Agreement shall require the Services to act in a manner contrary to the requirements of the Anti-Deficiency Act.

- 1) The Services shall assist the Permittee and DFG in the establishment of appropriate methods for surveying, trapping, releasing, monitoring,

and/or implementing other actions necessary to minimize any adverse impacts to the Plan Species and their associated habitats, as described in Section 5.1 of the HCP;

2) The Services shall assist the Permittee with processing any permits necessary to authorize designated project biologist(s) to undertake live trapping, collection, handling, marking, monitoring, and/or other necessary actions specified in Section 5.1 of the HCP;

3) The Services shall maintain open communication with the Permittee to assist in the implementation of and compliance with the HCP;

4) The Services shall review and provide timely comments on all reports required to be submitted to the Services under the HCP and this Agreement.

5) The Services shall fulfill responsibilities and provide assistance as Technical Committee members, as more particularly described in the HCP, including assisting with developing grant applications and proposals, and providing letters of support to assist the District in securing additional funding for activities conducted under the HCP.

b. After issuance of a Permit under the ESA, the Services 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.

c. Environmental Review. Issuance of a Section 10(a)(1)(B) Permit to the Permittee by the Services is an action subject to NEPA review. **[The Services are the co-lead agencies under NEPA and have prepared an environmental assessment addressing the Section 10(a)(1)(B) Permit that accompanies the HCP.]**

11.3 Responsibilities of the DFG.

a. The DFG shall cooperate and provide, to the extent funding is available, technical assistance to the Permittee and other assistance as may otherwise be necessary to assist the Permittee in undertaking all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit as set forth below.

1) The DFG shall assist the Permittee and the Services in the establishment of appropriate methods for surveying, trapping, releasing, monitoring, and/or implementing other actions necessary to minimize any adverse impacts to the Plan Species and their associated habitats, as described in Section 5.1 of the HCP;

2) The DFG shall assist the Permittee with processing any permits necessary to authorize designated project biologist(s) to undertake live trapping, collection, handling, marking, monitoring, and/or other necessary actions specified in Section 5.1 of the HCP;

3) The DFG shall maintain open communication with the Permittee to assist in the implementation of and compliance with the HCP;

4) The DFG shall review and provide timely comments on all reports required to be submitted to the DFG under the HCP and this Agreement.

5) The DFG shall fulfill responsibilities and provide assistance as Technical Committee members, as more particularly described in the HCP, including assisting with developing grant applications and proposals, and providing letters of support to assist the District in securing additional funding for activities conducted under the HCP.

- b. After issuance of a Permit under CESA, the DFG 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.

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 monetary damages to any other Party 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

Except as provided by the Permits issued in connection with the HCP, each Party shall retain whatever liability it would otherwise possess for its present and future acts or failure to act in the absence of this Agreement.

(2) Responsibility of the United States

Except as provided by the Permits issued in connection with this HCP, 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, in the event of breach of this Agreement, injunctive and temporary relief may be appropriate to ensure compliance with the terms of the HCP.

12.2 THE PERMIT

- a. [Intentionally omitted.]
- b. PERMIT SUSPENSION OR REVOCATION

Except as otherwise provided for under the terms of the Agreement, the relevant Permits respectively shall be suspended or revoked in conformance with the provisions of 50 CFR 13.27 through 13.29 (2002), or with the provisions of Cal. Code. Regs., tit.14, § 783.7 (2003), as the same exists as of the date hereof.

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 operation of the Lopez Project upon the Plan Species will be required from the Permittee who has otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional mitigation will not require additional land use restrictions or financial compensation from the Permittee without his/her written consent, as provided for under 50 CFR §§ 17.32(b)(5)(ii), -(iii)(B) (2002).

- 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 California.

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.

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
National Oceanic and Atmospheric Administration - Fisheries
[Street Address]
[City, State, Zip Code]

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

San Luis Obispo County Flood Control & Water Conservation District
Attn: County Engineer
County Government Center, Room ____
1035 Palm Street
San Luis Obispo, CA 93408

14.4 ENTIRE AGREEMENT

This Agreement, together with the HCP and the Permit(s), 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, except as provided in the Permits issued in connection with the HCP, 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 Oceanic and Atmospheric Administration -- Fisheries
[City, State]

BY _____ Date _____
Director [if applicable]
California Department of Fish and Game
[City, State]

BY _____ Date _____
Chair, Board of Directors
San Luis Obispo County Flood Control
& Water Conservation District